

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/STOP PRESS: CHILD MAINTENANCE AND OTHER PAYMENTS ACT 2008

## **CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS**

### **STOP PRESS:**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission, amends the law relating to child support, and makes provision about lump sum payments to or in respect of persons with diffuse mesothelioma. The Act received the royal assent on 5 June 2008 and the following provisions came into force on that day: ss 55, 59 (in part), 61-63. Section 35 came into force on 6 June 2008. The following provisions came into force on 10 June 2008: ss 56, 57 (in part), 59, 60 (in part) (SI 2008/1476). Further provisions came into force on 10 June 2008 for certain purposes only: ss 1, 46 (in part), 47 (in part), 48 (in part), 49 (in part), 50 (in part), 53, 54, Sch 1 (SI 2008/1476). The following provisions came into force on 14 July 2008: ss 15, 45, Sch 7 (in part), Sch 8 (in part) (SI 2008/1476). Further provisions came into force on 24 July 2008: ss 1, 2, 3 (in part), 4-12 (SI 2008/2033). Section 43 came into force on 5 August 2008: SI 2008/2033. Further provisions came into force on 1 October 2008: ss 46-54 (SI 2008/1476). Further provisions came into force on 6 April 2010: s 24, Sch 7 para 3 (SI 2010/697). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-12) The Child Maintenance and Enforcement Commission***

Section 1, Sch 1 provide that there will be a new body corporate called the Child Maintenance and Enforcement Commission and set out how the Commission will be structured. Section 2 sets out the main objective of the Commission, which is to maximise the number of effective child maintenance arrangements in place, and also sets out two subsidiary objectives, which are to encourage and support parents to make and keep their own maintenance arrangements, and to support the making of applications for child support maintenance under the Child Support Act 1991 and to enforce maintenance arrangements made under that Act where appropriate. The 2008 Act s 3 sets out that the Commission has functions relating to child support transferred to it from the Secretary of State, and any other functions conferred under this Act or other legislation. By virtue of s 4, the Commission is under a duty to take such steps as it considers appropriate to raise awareness among parents of the importance of taking responsibility for the maintenance of their children and if they live apart, making appropriate maintenance arrangements. Section 5 places a duty on the Commission to provide relevant information and guidance to help establish effective and appropriate maintenance arrangements for children who live apart from one or both of their parents. Under s 6, the Secretary of State has regulation-making powers to enable the Commission to charge fees in connection with the exercise of its functions. The Commission may make arrangements with a government department or prescribed public body, for the functions of one of them to be exercised on their behalf by the other, or for one to provide administrative, professional or technical services to the other: s 7. By virtue of s 8, the Commission may contract out any of its functions to another person or organisation. Section 9 requires the Commission to produce a

report for each financial year, which must deal with the activities of the Commission in the financial year for which it is prepared, and include the report prepared by the non-executive functions committee. Under s 10, the Secretary of State may give written guidance and directions to the Commission regarding the exercise of its functions. Section 11 sets out that the Secretary of State must review the status of the Commission as a Crown body, as soon as is reasonably practicable after the end of an initial three-year period, and may review any other time after that if he considers it appropriate. Section 12 sets out the definition of 'child' for these purposes and makes provision for the Secretary of State to make regulations about when a child is to be regarded as living apart from a parent.

### ***Part 2 (ss 13, 14) Transfer of child support functions etc to the Commission***

Section 13, Schs 2, 3 transfer most of the functions under the Child Support Act 1991 from the Secretary of State to the Commission, including functions relating to calculation, collection and enforcement. By virtue of the 2008 Act s 14, the Secretary of State may make one or more schemes to transfer property, rights and liabilities which he is entitled or subject, in connection with the transferred functions, or under arrangements entered into in preparation for the coming into force of the Commission's functions.

### ***Part 3 (ss 15-45) Child support etc***

Section 15 repeals the Child Support Act 1991 ss 6, 46. The 2008 Act s 16, Sch 4 amend legislation regarding how maintenance calculations are performed. Section 17 provides a regulation-making power to the Secretary of State in relation to the supersession of decisions. By virtue of s 18, the Commission must, on receipt of an application from a person with care to vary a maintenance calculation, consider any information or evidence that is available to it or take steps to obtain further information or evidence, if it appears that further information would affect a decision to vary a maintenance calculation. Section 19, Sch 5 make provision for the movement of existing cases onto the new calculation rules and provide that the Commission may require the parties in existing cases to choose whether to remain in the statutory scheme under the new calculation rules or to leave the scheme as far as future liability is concerned. Section 20 makes it clear that regulations as to the method by which payments of child support maintenance are to be made can include deduction from earnings orders as an initial method of collection. What will be considered as 'earnings' for the purpose of deduction from earnings orders is defined by s 21. Section 22 enables the Commission to deduct child support maintenance from the non-resident parent's account. Provision made by s 23 relates to lump sum deduction orders, which enable the Commission to collect payments from a non-resident parent's account held with a deposit-taker, or from money due or accruing to them from a third party; such orders may be used only to collect arrears and not ongoing maintenance. By virtue of s 24, the Commission may apply to a court to prevent a non-resident parent who has failed to pay maintenance from disposing of or transferring property, if it is being done to avoid paying child support maintenance. Section 25 introduces a new liability order which will be made administratively by the Commission and which will certify the amount owed by the non-resident parent, and will be the first step to enforcement action. Section 26 removes the requirement that an order from a county court needs to be obtained before an application for a charging order or a third party debt order can be made; such an application can now be made where an administrative liability order has been made. Under s 27, the Commission has the power to apply to a court to disqualify a non-resident parent for holding or obtaining a travel authorisation. The Commission also has the power to apply to a magistrates' court for a curfew order to be made against a non-resident parent who fails to pay maintenance: s 28. By virtue of s 29, the Commission may make a separate application to a magistrates' court to commit a non-resident parent to prison for failure to pay child support maintenance. Section 30 enables the Commission to make a separate application to a magistrates' court to disqualify a non-

resident parent for holding or obtaining a driving licence if they fail to pay child support maintenance. Section 31 provides the Secretary of State with regulation-making powers enabling the Commission to offset liabilities to pay child support maintenance, including arrears, in prescribed circumstances. Under ss 32, 33, the Commission may accept partial payments of maintenance arrears from a non-resident parent in final settlement of the whole arrears, and may write off arrears in certain circumstances. Section 34 provides regulation-making power to the Secretary of State, to enable the Commission to enter into arrangements with other persons or organisations under which liability in respect of arrears of child support maintenance becomes debt due to such a person or organisation. Section 35 applies in relation to Scotland and relates to registered maintenance agreements. Provision dealing with offences relating to the provision of information is made by s 36. Section 37 allows for the offset of maintenance liabilities where two parents of the same children each have care for one or more of those children. By virtue of s 38, the Secretary of State has the power to make regulations to enable arrears of child support maintenance to be recovered from the estate of a deceased non-resident parent. Section 39 enables a party to family proceedings to disclose information relating to those proceedings to the Commission or to a person providing services to the Commission without such a disclosure being a contempt of court, unless a court dealing with the proceedings directs that the section does not apply. Provision made by s 40 relates to the disclosure of information to credit reference agencies. Section 41 enables the power to pilot any regulation-making power under the 1991 Act. The definition of 'child' in the 1991 Act is substituted by the 2008 Act s 42. Section 43 provides for the write off of outstanding liability in respect of interest and fees. Information sharing gateways are set out by s 44, Sch 6. Section 45 amends the provisions concerning liable relatives and the exclusion of the parental duty to maintain contained in the Social Security Administration Act 1992.

#### ***Part 4 (ss 46-54) Lump sum payments: mesothelioma etc***

Section 46 provides for the Secretary of State to make a lump sum payment to either a person with diffuse mesothelioma, or to their dependant if the person with diffuse mesothelioma is deceased. The conditions that must be satisfied by persons with mesothelioma, and by a dependant of a person who, immediately before their death, suffered from mesothelioma in order for a lump sum payment to be made are set out by s 47. Section 48 sets out how a claim for a lump sum payment is to be made. By virtue of s 49, the Secretary of State may reconsider a decision not to make a lump sum payment where there is a change in circumstances that may affect the claim since the decision was taken, or a decision to make or not to make a lump sum payment if the original decision was made in ignorance or based on error about the facts of the case. A person who has made a claim for a payment under s 46, will have a right of appeal to an appeal tribunal against a decision made by the Secretary of State on the claim, or a decision made following a reconsideration: s 50. Section 51 provides a right of appeal to a Social Security Commissioner against any decision of an appeal tribunal under s 50, on the ground that the decision was wrong in law. Section 52 concerns how lump sum payments are to be made to a person under the age of 18, or a person who lacks capacity within the meaning of the Mental Capacity Act 2005 in relation to financial matters. By virtue of the 2008 Act s 53, the Secretary of State has the power to make regulations by statutory instrument, which includes power to make such incidental, supplementary or transitional power as the Secretary of State thinks fit. The Social Security (Recovery of Benefits) Act 1997 is amended by the 2008 Act s 54 so as to provide the Secretary of State with powers to make regulations providing for the recovery of lump sum payments made under the Pneumoconiosis etc (Workers' Compensation) Act 1979, the new scheme or those made on an extra-statutory basis following the rejection of a claim made under that Act.

#### ***Part 5 (ss 55-63) General***

Section 55 provides that, where the Secretary of State is empowered to make regulations, these are to be made by statutory instrument. Section 56 deals with interpretation, and s 57, Sch 7 contain minor and consequential amendments. Repeals are dealt with by s 58, Sch 8, and s 59 makes transitional provision. Financial provision is made by s 60. Section 61 deals with extent, s 62 makes provision for commencement, and s 63 specifies the short title.

***Amendments, repeals and revocations***

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that this list is not exhaustive.

Specific provisions of the Child Support Act 1991 are repealed: ss 4(9), (11), 6, 11(3)-(5), 33, 34, 37, 39A, 46, 47, 50(5), Sch 2. The following provisions are added to the 1991 Act: ss 32A-32N, 39B-39Q, 41C-41E, 43A, 49A, 49B-49D, 51A.



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## **STOP PRESS: CHILD POVERTY ACT 2010**

The Child Poverty Act 2010 sets targets relating to the eradication of child poverty and makes other provision about child poverty. The Act received the royal assent on 25 March 2010 and ss 1-18, 27-32 came into force on that day. Sections 19-26 came into force on 25 May 2010.

### ***Part 1 (ss 1-18) National targets, strategies and reports***

Section 1 places a duty on the Secretary of State to lay before Parliament a report on whether the 2010 target has been met. By virtue of s 2, there is a duty on the Secretary of State to ensure that the targets relating to relative low income, combined low income and material deprivation, absolute low income and persistent poverty, are met in relation to the target year. Section 3 sets the relative low income target. The combined low income and material deprivation target is set by s 4. Section 5 sets the absolute low income target. The persistent poverty target is set by s 6. Section 7 enables provision to be made for a number of technical terms underpinning the child poverty targets in Pt 1 to be defined in regulations. Section 8 establishes the Child Poverty Commission ('the Commission') and introduces Sch 1, which sets out details about the Commission. By virtue of s 9, a duty is placed on the Secretary of State to publish and lay before Parliament a United Kingdom child poverty strategy, within 12 months of royal assent. Section 10 sets out the role of the Commission in providing advice to the government and specifies who the Secretary of State must consult in preparing United Kingdom strategies. Sections 11-13 deal with Scotland and Northern Ireland. Section 14 imposes a duty on the Secretary of State to produce and lay before Parliament annual reports and includes other provision relating to those reports. The Secretary of State is required by s 15 to include a statement in the report which must describe whether the targets in ss 3-6 have been met. Under s 16, economic circumstances and the likely impact of any measure on the economy, and the fiscal circumstances and the likely impact of implementing any proposed measure on taxation, public spending and public borrowing are required to be taken into account by the Secretary of State when preparing a United Kingdom strategy, and by the Commission when considering any advice to be given to the Secretary of State or the devolved administration. Section 17 introduces Schedule 2, which contains provision regarding the continuing effect of the targets after the target year. Section 18 deals with interpretation.

### ***Part 2 (ss 19-25) Duties of local authorities and other bodies in England***

Section 19 sets out which local authorities will be 'responsible local authorities' for the purposes of Pt 2. Section 20 lists public bodies and persons who will be 'partner authorities' in relation to responsible local authorities for the purposes of Pt 2. A duty is imposed by s 21 on each responsible local authority to make arrangements to promote co-operation between the authority, each of its partner authorities, and such other persons or bodies as the authority considers appropriate. Under s 22, a responsible local authority is required to prepare and publish an assessment of the needs of children living in poverty in its area. Section 23 requires the arrangements to co-operate made by a responsible local authority to include arrangements to prepare a joint child poverty strategy in relation to the authority's area to modify it in accordance with specified provisions. Section 24 amends the Local Government Act 2000 s 4, with the effect that the local authorities are required to take account of the local child poverty needs assessment, the joint child poverty strategy and other arrangements they have made to

tackle child poverty in their area when preparing their sustainable community strategy. The 2010 Act s 25 defines 'child poverty' for the purposes of Pt 2.

***Part 3 (ss 26-32) Miscellaneous and general***

Section 26 concerns the provision of free school lunches and milk. Section 27 deals with interpretation. Section 28 makes provision in respect of the exercise of powers to make regulations and orders. Section 29 makes financial provision. Section 30 deals with extent, s 31 with commencement and s 32 with the short title.

***Amendments, repeals and revocations***

Subscribers should note that the list below mentions amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that this list is not exhaustive.

Specific provision of a number of Acts are amended. These include: Education Act 1996 s 512ZB(4); and Local Government Act 2000 s 4.

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## **STOP PRESS:**

The Children and Young Persons Act 2008 makes provision about the delivery of local authority social work services for children and young persons, the functions of local authorities and others in relation to children and young persons, the enforcement of care standards in relation to certain establishments or agencies connected with children, and the independent review of determinations relating to adoption. The Act received the royal assent on 13 November 2008 and the following provisions came into force on that date: ss 7, 39-41, 43-45, Sch 3 paras 1-3, 5-28. The remaining provisions come into force on a day or days to be appointed.

### ***Part 1 (ss 1-6) Delivery of social work services for children and young persons***

Section 1 enables a local authority to enter into arrangements with a body corporate for the discharge by that body of some or all of the authority's social services functions in relation to individual children who are looked after by the authority and such functions in relation to care leavers. By virtue of s 2, restrictions are placed on the functions that may be the subject of arrangements. Under s 3, any acts or omissions of a provider of social work services or its employees are to be treated as the acts and omissions of a local authority. Section 4 provides for the regulation of providers of social work services. By virtue of s 5, the power to enter into an arrangement with a provider of social work services is a social services function. Section 6 enables the piloting of arrangements for a period of up to five years.

### ***Part 2 (ss 7-33) Functions in relation to children and young persons***

Section 7 imposes a general duty on the Secretary of State to promote the well-being of children in England. Section 8, Schs 1, 2 re-enact the duties on local authorities to provide accommodation for children who are in their care and to maintain all looked after children in other respects apart from the provision of accommodation. A general duty is placed on a local authority by s 9 to take steps to secure sufficient accommodation that is appropriate for the needs of children looked after by the authority within its authority area. Sections 10-14 make provision in respect of independent reviewing officers. By virtue of s 15, local authorities are required to ensure that all looked after children and children who were looked after, but ceased to be looked after as a result of prescribed circumstances, are visited by a representative of the local authority and that appropriate advice, support and assistance is made available to them. Section 16 extends the group of looked after children for whom an independent person must be appointed to visit, befriend and advise to include all those for whom an appointment would be in their interests. Section 17 ensures that, when accommodation is provided for a child for at least three months or the provision of accommodation for a child ceases, notification is sent to the local authority's director of children's services or lead director for children and young people's services. A duty is placed on a responsible authority by s 18 to make arrangements for the children of whom it is notified to be visited. Section 19 provides that services provided to children in need and their families must include such services as a local authority considers appropriate with respect to accommodated children. By virtue of s 20, the governing body of a maintained school is required to designate a member of staff as having responsibility for promoting the educational achievement of looked after children who are registered pupils at the school. Section 21 adds to the duties owed by local authorities to former relevant children by requiring the authorities to pay a fixed sum to those who go on to pursue a course of higher

education. Section 22 extends the duties of local authorities to appoint a personal adviser to include a former relevant child who informs the responsible authority that he is pursuing or intends to pursue a programme of education or training but to whom the local authority would otherwise owe no duty because the young person is over 21 years of age and has completed the programme set out in his original pathway plan. Under s 23, the upper age range in respect of which the appointment of a personal adviser may be required is extended to persons who are under the age of 25. By virtue of s 24, the restrictions on the making of cash payments by local authorities to children in need are lifted by removing the requirement that such payments can only be made in exceptional circumstances. Under s 25, a duty is imposed on local authorities to provide breaks from caring to assist parents and others who provide care for disabled children. Sections 26-29 amend the Care Standards Act 2000 to confer additional powers and duties on the registration authority in relation to standards in children's social care settings. The 2008 Act s 30 ensures that provisions for the discharge of emergency protection orders are compatible with the European Convention on Human Rights arts 6 and 8. Under the 2008 Act s 31, a duty is placed on registrars to provide local safeguarding children boards in their sub-district with certain information in relation to deceased children. Section 32 enables the Registrar General to provide, to the Secretary of State and to Welsh Ministers, information about a deceased person who may have been a child at the time of death. By virtue of s 33, the Secretary of State and local authorities are provided with a statutory power to conduct research into the functions of local safeguarding children boards.

### ***Part 3 (ss 34-35) Adoption and fostering***

Section 34 amends the Adoption and Children Act 2002 s 12 to ensure that the provisions are aligned with new provisions that relate to the independent review of qualifying determinations in relation to local authority foster carers. By virtue of the 2008 Act s 35, the period allowed for making regulations under the Children Act 2004 ss 45 or 46 is extended to seven years.

### ***Part 4 (ss 36-38) Orders under Part 2 of the 1989 Act***

The 2008 Act s 36 provides that an application for a residence order may be made by a relative, without first seeking the permission of the court, in circumstances where a child has been living with the relative for one year immediately prior to the application. By virtue of s 37, a residence order lasts until a child reaches the age of 18 unless the court directs that the order should end earlier or another order is made prior to that date discharging the residence order. Section 38 makes provision in respect of a relative's entitlement to apply for a special guardianship order.

### ***Part 5 (ss 39-45) Supplementary, general and final provisions***

Section 39, Sch 3 make supplementary amendments to the Children Act 1989. Section 40 makes provision in respect of the exercise of powers to make orders and regulations. Section 41 deals with interpretation. Section 42, Sch 4 deal with repeals, 43 with extent, s 44 with commencement and s 45 with the short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the lists below mention repeals which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. This information may also be found in the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet. Please also note that this list is not exhaustive.

Specific provisions of a number of Acts are amended or repealed. These include: Children Act 1989 ss 10, 23, 25, 26, 45(9), 83, 85, 86; Care Standards Act 2000 ss 21, 22; Adoption and Children Act 2002 s 12; Children Act 2004 s 47.

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## **STOP PRESS:**

The Welfare Reform Act 2009 amends the law relating to social security, enables disabled people to be given greater control over the way in which certain public services are provided for them, amends the law relating to child support, and makes provision regarding the registration of births. The Act received the royal assent on 12 November 2009 and the following provisions came into force on that day: ss 11, 2, 8, 11, 23, 27, 29, 37, 57, 59-62, Sch 3. Sections 15, 24 (for certain purposes), 34, 38-50, 58(2), (3), Sch 4 (for certain purposes) and Sch 7 Pt 2 (in part) came into force on 12 January 2010: s 61; SI 2010/45. The following provisions came into force on 14 January 2010: s 55(1) (for certain purposes), s 55(3) (SI 2010/45). The following provisions came into force on 10 February 2010: ss 10, 33 (for certain purposes) and 35 (SI 2010/293). The following provisions came into force on 22 March 2010: s 26 and Sch 7 Pt 3 (in part) (SI 2010/293). The following provisions came into force on 1 April 2010: s 24 (so far as not already in force), Sch 4 (so far as not already in force), Sch 7 Pt 3 (SI 2010/45; SI 2010/293). The following provisions came into force on 6 April 2010: s 33 (SI 2010/293). The following provisions came into force on 11 April 2010: s 14 (for certain purposes) (SI 2010/293). The following provisions come into force on 15 October 2010: s 14 (for certain purposes) (SI 2010/293). The following provisions come into force on 11 April 2011: s 14 (for remaining purposes) (SI 2010/293). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-37) Social security***

Section 1 enables the Secretary of State to impose a requirement on claimants of jobseeker's allowance to participate in schemes designed to assist them to obtain employment, and in particular to require claimants to undertake work as part of a 'work for your benefit' scheme. Under s 2, the Secretary of State may require lone parents in receipt of income support to undertake work-related activity in certain circumstances as a condition of continuing to receive the full amount of benefit. Section 2 also requires the Secretary of State to provide persons in receipt of specified benefits who are required to attend work-focused interviews with an action plan. Section 3 makes provision exempting specified categories of lone parents from the requirement to attend work-focused interviews and undertake work-related activity. Section 4, Sch 1 deal with the entitlement of certain claimants to jobseeker's allowance without seeking employment, and s 5 removes entitlement to income support and income-related employment and support allowance for couples where one member is capable of work. Section 6 enables the Secretary of State to permit persons in receipt of statutory sick pay to claim income-related employment and support allowance instead of income support. Section 7 makes transitional provision and s 8 deals with the Parliamentary procedure for regulations imposing work-related activity requirements on lone parents of children under seven. Provision is made for income support to be abolished when there are no longer any groups of people that require it: s 9, Sch 2. By virtue of s 10, the Secretary of State may specify a work-related activity which a claimant of employment and support allowance in the work-related activity group must undertake as a condition of continuing to be entitled to the full amount of his allowance. Section 11, Sch 3 provide for claimants of jobseeker's allowance and employment support allowance who are dependent on drugs, and ss 12, 13 amend the contribution conditions for jobseeker's allowance and contributory employment and support allowance. The entitlement conditions for the higher

rate mobility component of disability living allowance are amended by s 14 so as to entitle persons with a prescribed severe visual impairment, and s 15 abolishes the payment of adult dependency increases for all new claims for maternity allowance and carer's allowance. Under s 16, the Secretary of State may make arrangements with external providers to make loans to individuals who are receiving prescribed benefits or have prescribed needs ('external provider social loans'), and under s 17 he has power to restrict the availability of social fund loans in areas where external provider social loans are available. Section 18 deals with the supply of information in connection with external provider social loans. Sections 19, 20 provide that where goods and services covered by a community care grant are provided under arrangements that the Secretary of State has made with a supplier, he may require the grant to relate to specified goods or services and the payment of the grant to be made to that supplier. Section 21 provides for Parliamentary control of regulations relating to unauthorised disclosure of information in relation to external provider social loans or community care grants. By virtue of s 22, the Secretary of State may extend the range of situations in which payments of benefits on account can be made, and s 23 enables him to up-rate benefits for the tax year 2009-2010 even if the general level of prices has not increased. Section 24, Sch 4 extend the provisions relating to the loss of benefit where a claimant is convicted of benefit fraud, and s 25 introduces new benefit sanctions against claimants of jobseeker's allowance who are convicted of violent conduct in connection with their claim. A pilot scheme under which benefit sanctions have been applied to certain offenders who are in breach of specified community orders is brought to an end by s 26, and provision is made by s 27 for new pilot schemes for the calculation and payment of state pension credit to increase the number of eligible persons receiving the benefit. Section 28 extends the time limits for certain pilot schemes relating to working-age benefits, and s 29 provides for the exemption of victims of domestic violence from the jobseeking conditions of jobseeker's allowance for a prescribed period. Section 30 provides that where regulation-making powers in specified provisions enable circumstances to be prescribed that constitute good cause for failing to undertake mandatory activities, the regulations must always include the availability of childcare and the claimant's physical or mental health in the list of circumstances that must be taken into account. The well-being of children must be taken into account when agreeing the activities that a parent will undertake as part of a jobseeker's agreement or action plan for recipients of employment and support allowance: s 31. By virtue of s 32, specified functions of the Secretary of State under the Jobseeker's Act 1995 may be contracted out. Section 33 provides for the continuation of entitlement to jobseeker's allowance where a claimant fails to attend a mandatory interview without showing good cause for the failure to attend, subject to a delay in payment for a fixed period. Section 34 expands the scope of the sharing of social security and employment training information, and s 35 makes provision regarding the age at which persons will be required to attend work-focused interviews to reflect the equalisation of the state pension age for men and women. Section 36 requires the renaming of council tax benefit as council tax rebate, and s 37 makes minor legislative amendments.

### ***Part 2 (ss 38-50) Disabled people: right to control provision of services***

Section 38 states the purpose of the 2009 Act Pt 2 as being to enable disabled people to have a greater choice and control over the way in which relevant services are provided for them by defined public authorities. 'Relevant services' are defined in s 39 and public authorities are defined in s 40. Section 41 provides a general power for an appropriate authority to make regulations for the purpose of Pt 2, while s 45 defines 'appropriate authority' for these purposes, s 46 makes supplementary provision, and s 47 requires consultation on any proposed regulations. Section 42 sets out the provisions that may be included in regulations dealing with direct payments to disabled people. Section 43 provides for the making of regulations for the exercise of the rights to control the provision of services on behalf of persons who lack capacity within the meaning of the Mental Capacity Act 2005. Section 44 deals with the establishment of pilot schemes, and s 48 empowers the Secretary of State to

repeal the exclusion of community care services from the definition of relevant services. Section 49 deals with the control of regulations and orders by Parliament, and s 50 deals with interpretation.

### ***Part 3 (ss 51-55) Child maintenance***

Section 51, Sch 5 permit the Child Maintenance and Enforcement Commission ('the Commission') to order the disqualification of a person who has arrears of child maintenance from holding a driving licence or travel authorisation without applying to the court, and makes provision for appeals to the court against such disqualification orders. Sections 52, 53 provide for the Commission to pilot the powers of disqualification for two years and require the Secretary of State to report to Parliament on the operation of the pilot schemes. By virtue of s 54, the Commission may specify the intervals at which child support maintenance payments are made, having regard to the preferences indicated by the parent who does not reside with the children concerned. Section 55 extends the scope of offences relating to the provision of information.

### ***Part 4 (s 56) Birth registration***

Section 56, Sch 6 make provision for the joint registration of births where the parents of a child are neither married to each other nor civil partners of each other so as to increase the ways in which an unmarried father may register jointly with the child's mother, and confer additional rights and duties on both unmarried parents to enable unmarried fathers' details to be entered on the birth register in as many cases as possible.

### ***Part 5 (ss 57-62) General***

Section 57 empowers the Secretary of State to make consequential amendments and revocations of subordinate legislation, and repeals and revocations are made by s 58, Sch 7. Sections 59-62 deal with financial provisions, extent, commencement and short title.

### ***Amendments, repeals and revocations***

The list below, which is not exhaustive, mentions amendments which are or will be effective when the Act is fully in force.

Specific provisions of a number of Acts are substituted, added or repealed. These include: Births and Deaths Registration Act 1953 ss 1, 2, 2A-2E, 6, 10, 10A-10C, 39A; Child Support Act 1991 ss 39B, 39CA, 39CB, 39DA, 39F, 39G, 40B; Social Security Administration Act 1992 ss 2B, 2D-2H, 78A, 108, 122G, 122H; Social Security Contributions and Benefits Act 1992 ss 124, 126, 127, 140ZA-140ZC; Jobseeker's Act 1995 ss 1A, 1B, 11A-11C, 15B, 17A-17C, 18A-18D, 19, 20, 20A-20E, Sch A1; Welfare Reform and Pensions Act 1999 s 60; Child Support, Pensions and Social Security Act 2000 ss 62-66; Social Security Fraud Act 2001 ss 6A-6C; State Pension Credit Act 2002 s 18A; Welfare Reform Act 2007 s 15A, Sch 1A; Child Maintenance and Other Payments Act 2008 s 30.



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## **1. CHILDHOOD AND LEGAL RELATIONSHIPS**

### **(1) CHILDHOOD**

#### **(i) Terminology**

##### **1. Attainment of full age.**

A person attains full age on attaining the age of 18<sup>1</sup>. This provision applies for the purposes of any rule of law, and, in the absence of a definition or of any indication of a contrary intention, for the construction of 'full age', 'infant', 'infancy', 'minor', 'minority' and similar expressions in any statutory provision<sup>2</sup>, whether passed or made before, on or after 1 January 1970<sup>3</sup>, and in any deed, will<sup>4</sup> or other instrument of whatever nature (not being a statutory provision) made on or after that date<sup>5</sup>.

1 Family Law Reform Act 1969 s 1(1). Prior to 1 January 1970 (ie the date on which that provision came into force) the age of majority was 21, but a person attained full age on 1 January 1970 if he had then already attained the age of 18 but not the age of 21: s 1(1). As to the time at which a person attains a particular age see para 2 post. There are transitional provisions and savings in relation to: (1) funds in court; (2) wardship and custody orders; (3) adoption orders; (4) a trustee's power to apply income for the maintenance of a minor; (5) a personal representative's powers during the minority of a beneficiary; (6) accumulation periods; (7) limitation of actions; and (8) statutory provisions incorporated in deeds, wills and other instruments: see s 1(4), Sch 3.

2 'Statutory provision' means any enactment (including, except where the context otherwise requires, the Family Law Reform Act 1969) and any order, rule, regulation, byelaw or other instrument made in the exercise of a power conferred by any enactment: s 1(6).

3 Ibid s 1(2)(a). This does not affect the construction of 'full age', 'infant', 'minor' and any similar expression in the Regency Acts 1937 to 1953 (ie the Regency Act 1937, the Regency Act 1943 and the Regency Act 1953) (see CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 13): Family Law Reform Act 1969 s 1(4), Sch 2 paras 1, 2 (amended by the Representation of the People Act 1983 s 206, Sch 9; the Statute Law (Repeals) Act 1993; and the Electoral Administration Act 2006 ss 61(7), 74(2), Sch 1 Pt 7 para 103, Sch 2).

4 Notwithstanding any rule of law, a will or codicil executed before 1 January 1970 must not be treated for the purposes of the Family Law Reform Act 1969 s 1 as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date: s 1(7). As to the execution of wills and codicils see WILLS vol 50 (2005 Reissue) para 348 et seq.

5 Ibid s 1(2)(b). By order made by statutory instrument, the Lord Chancellor may amend any provision in any local enactment passed on or before 1 January 1970 (not being a provision described in note 3 supra) by substituting a reference to the age of 18 years for any reference therein to the age of 21 years; and any statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 1(5). At the date at which this volume states the law no such order had been made.

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## **2. When a person attains full age.**

The time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of his birth<sup>1</sup>. This applies only where the relevant anniversary falls on a date after 1 January 1970, and, in relation to any enactment, deed, will or other instrument, has effect subject to any provision in it<sup>2</sup>.

A person may be declared to be of full age before he attains the age of 18 by Act of Parliament, but not in any other way<sup>3</sup>; nor can he alter it by adopting a proceeding which would be valid if he were of full age<sup>4</sup>.

The general rule as to the attainment of full age at 18 years has one exception: in law the Sovereign is never a minor, although a regent is usually appointed when the Sovereign is of tender years<sup>5</sup>.

1 Family Law Reform Act 1969 s 9(1).

2 Ibid s 9(2). As to the time of attainment of full age before 1 January 1970 see *Re Shurey, Savory v Shurey* [1918] 1 Ch 263; *Sir Robert Howard's Case* (1699) 2 Salk 625; *Lester v Garland* (1808) 15 Ves 248 at 257 per Sir William Grant MR; *R v Cox* [1898] 1 QB 179, CCR.

3 4 Co Inst 36.

4 See *Re Jones, ex p Jones* (1881) 18 ChD 109 at 122-123, CA, per Jessel MR, where an infant filed a petition in bankruptcy, but there was no legally enforceable debt to sustain it.

5 See CROWN AND ROYAL FAMILY vol 12(1) (Reissue) paras 12-13. As to the construction of the Regency Acts 1937 to 1953 see para 1 note 3 ante.

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### **3. Meanings of 'minor' and 'child'.**

The Family Law Reform Act 1969 provides that a person who is not of full age<sup>1</sup> may be described as a minor instead of as an infant<sup>2</sup>, and that term has been used in a number of statutes passed between 1969 and 1989. However, in the Children Act 1989 the term 'child' is used throughout, and is defined as a person under the age of 18<sup>3</sup>. Much of the earlier legislation has been repealed by the Children Act 1989, and this title therefore adopts the usage 'child' to refer to a person under the age of 18 unless there is special reason to the contrary.

However, it should be noted that, in the Children and Young Persons Acts 1933 to 1969, 'child' generally means a person under the age of 14 years<sup>4</sup> and that for certain purposes those Acts refer to a person who has attained the age of 14 and is under the age of 18 years as a 'young person'<sup>5</sup>. Moreover, the various offences commonly known as cruelty to children are in most cases offences in connection with children and young persons under the age of 16 years<sup>6</sup>.

1 As to the attainment of full age see para 1 ante.

2 Family Law Reform Act 1969 s 12.

3 Children Act 1989 s 105(1). The definition of 'child' is subject to the provisions of Sch 1 para 16 (as amended), which extends the definition of 'child' to a person who has reached the age of 18 when application is made for financial relief in certain circumstances: see para 553 post.

4 See the Children and Young Persons Act 1933 s 107(1); Children and Young Persons Act 1969 s 70(1).

5 See the Children and Young Persons Act 1933 s 107(1) (definition substituted by the Criminal Justice Act 1991 s 68, Sch 8 para 1); and the Children and Young Persons Act 1969 s 70(1) (definition substituted by the Criminal Justice Act 1991 Sch 8 para 4(2)). Prior to these amendments, 'young person' meant a person who had attained the age of 14 and was under the age of 17 (see the Children and Young Persons Act 1933 s 107(1) (as originally enacted); and the Children and Young Persons Act 1969 s 70(1) (as originally enacted)), and this is still the definition for certain purposes (see eg s 23(12) (as substituted); and para 1247 note 2 post).

6 See para 611 post.

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## **(ii) Capacity of Children**

### **A. IN GENERAL**

#### **4. Legal consequences of childhood.**

At common law a child is under a general incapacity<sup>1</sup> to exercise the rights of citizenship<sup>2</sup> or perform civil duties<sup>3</sup> or to hold public or private offices or perform the duties incidental to them<sup>4</sup>. It was thought that a child lacked legal capacity to give a valid consent, or carry out any other legally effective act, and that capacity to act in the child's behalf was in general vested in the child's parent or guardian<sup>5</sup>. Until a child attained majority, there was vested in the father<sup>6</sup> a right to custody<sup>7</sup>, although latterly the court would not enforce that right against a child who had attained the so-called age of discretion<sup>8</sup>.

The modern position is that parental rights exist only so long as they are needed for the protection of the person and property of the child<sup>9</sup>, and that it can no longer be accepted that children remain under parental control until a particular specified age. Parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding to be capable of making up his own mind on the matter requiring decision<sup>10</sup>. It is a question of fact whether a child has sufficient understanding and intelligence to be so capable<sup>11</sup>. However, in many cases (notably in relation to the giving of consent to medical treatment<sup>12</sup>, the right to make a will<sup>13</sup>, the right to marry<sup>14</sup>, and the capacity to enter into an enforceable contract<sup>15</sup>), the age below which a person lacks legal capacity for the particular purpose involved is prescribed by statute. In addition, in the exercise of its wardship jurisdiction, the court may override the wishes of a child, notwithstanding the fact that the child would have capacity<sup>16</sup> to take the decision himself<sup>17</sup>.

The Children Act 1989 has to a large extent curtailed the power of the High Court to exercise its inherent jurisdiction by restricting the circumstances in which a local authority may apply for the exercise of the High Court's inherent jurisdiction with respect to children, and by providing, for certain purposes, that no court may exercise the High Court's inherent jurisdiction with respect to children<sup>18</sup>.

1 This incapacity is apparently unaffected by the decision in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL.

2 As to the nationality of a child see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 1 et seq; and as to his domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq.

3 *Grange v Tiving* (1665) O Bridg 107 at 117.

4 See paras 5-8 post.

5 As to the scope and nature of parental rights at common law see *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, CA.

6 I.e. assuming the child to be legitimate. If he were illegitimate the child was regarded as legally *filius nullius* (see *Barnardo v McHugh* [1891] AC 388 at 399, HL, per Lord Herschell) until it was accepted that the mother had a legal right to custody of her illegitimate child up to the age of 16 (*Barnardo v McHugh* supra). Cf *R v Nash, Re Carey* (1883) 10 QBD 454 at 456, CA, per Jessel MR; *Re Lloyd* (1841) 3 Man & G 547.

The Guardianship Act 1973 s 1 (repealed) provided that a mother should have the same rights and authority in relation to the custody of a minor and in relation to the administration of property or the application of income as the law allowed to a father, and that the rights and authority of mother and father should be equal and exercisable by either without the other. However, this provision did not apply in relation to a minor who was illegitimate: s 1(7) (repealed). This has now been replaced by the concept of 'parental authority' under the Children Act 1989: see generally paras 133-143 post.

7 'Custody' is used in a wide sense to embrace a 'bundle' of rights or powers including 'both the personal power physically to control the infant . . . and the right . . . to apply to the courts to exercise the powers of the Crown as *parens patriae*' in the wardship jurisdiction: see *Hewer v Bryant* [1970] 1 QB 357 at 373, [1969] 3 All ER 578 at 585-586, CA, per Sachs LJ; *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, CA; and see *Re K D (a minor) (ward: termination of access)* [1988] AC 806, [1988] 1 All ER 577, HL.

Statutory provisions (notably the Guardianship of Infants Act 1925) referred to the child's welfare as the determinative factor (*J v C* [1970] AC 668, [1969] 1 All ER 788, HL), and the parent's legal right to custody of a child was a dwindling right which the courts would hesitate the more to enforce against the wishes of the child, the older he was. Such a right started with a right of control, and ended with little more than advice: *Hewer v Bryant* [1970] 1 QB 357 at 369, [1969] 3 All ER 578 at 582, CA, per Lord Denning MR.

8 The age of discretion was judicially set at 14 for boys and 16 for girls: see *Re Agar-Ellis, Agar-Ellis v Lascelles* (1883) 24 ChD 317 at 326, CA, per Brett MR; *Thomasset v Thomasset* [1894] P 295 at 298, CA, per Lindley LJ; *R v Howes, ex p Barford* (1860) 3 E & E 332; *Re Lloyd* (1841) 3 Man & G 547 at 548 per Tindal CJ. For the history of parental rights see *R v Gyngall* [1893] 2 QB 232, CA; *J v C* [1970] AC 668, [1969] 1 All ER 788, HL; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL. See also *R v D* [1984] AC 778, [1984] 2 All ER 449, HL.

9 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 183-184, [1985] 3 All ER 402 at 420, HL, per Lord Scarman. See *Re L (medical treatment: Gillick competency)* [1999] 2 FCR 524, [1998] 2 FLR 810 (child aged 14 who had led sheltered life, influenced by Jehovah's Witnesses, held not to be *Gillick* competent).

10 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 188-189, [1985] 3 All ER 402 at 423, HL, per Lord Scarman. See *Re L (medical treatment: Gillick competency)* [1999] 2 FCR 524, [1998] 2 FLR 810; and notes 9 *supra*, 17 *infra*. See also *Re S (a minor) (change of name)* [1999] 1 FCR 304, [1999] 1 FLR 672, CA; and para 276 post.

11 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 188-189, [1985] 3 All ER 402 at 423-424, HL, per Lord Scarman. See also *R v D* [1984] AC 778 at 806, [1984] 2 All ER 449 at 457, HL, per Lord Brandon of Oakbrook; *Re L (medical treatment: Gillick competency)* [1999] 2 FCR 524, [1998] 2 FLR 810; and notes 9 *supra*, 17 *infra*.

12 It is provided that the consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, is as effective as it would be if he were of full age; and where a minor has by virtue of this rule given an effective consent to any treatment it is not necessary to obtain any consent for it from his parent or guardian: Family Law Reform Act 1969 s 8(1). 'Surgical, medical or dental treatment' includes any procedure undertaken for the purpose of diagnosis, and also applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment: s 8(2). However, no minor, of whatever age, can by refusing consent override a consent given by a person with parental authority or by the court, though such refusal will be relevant to the court or parent in deciding whether to give or withhold consent: *Re R (a minor) (wardship: consent to treatment)* [1992] Fam 11, [1991] 4 All ER 177, CA; *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64 at 81, [1992] 4 All ER 627 at 637, CA, where Lord Donaldson of Lynton MR suggested that the wishes of a minor would be of reduced significance where the capacity to make a proper decision was diminished by the disease which required treatment. As to the procedure on applications for leave to perform a sterilisation operation on a child see *Practice Note (Official Solicitor: sterilisation)* [1996] 3 FCR 95, sub nom *Practice Note* [1996] 2 FLR 111. Where the medical evidence is clear that the best interests of a terminally ill child would not be served by the continuation of a course of treatment, the court ought not to authorise it, despite the parents' refusal of consent to its withdrawal: *Re C (a minor) (medical treatment)* [1998] 1 FCR 1, [1998] 1 FLR 384. The views of parents ought to be carefully considered but do not override the court's view of the child's best interests: *A National Health Service Trust v D* [2000] 2 FCR 577, [2000] 2 FLR 677 (decision not to resuscitate terminally ill child in event of cardiac failure did not breach child's right to life under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)). See also the Children Act 1989 ss 38(6), 43(8), 44(7), Sch 3 paras 4, 5 (as amended); and paras 283, 292, 580, 586 post. The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 122 et seq.

Where doctors override a mother's objection to her child's treatment, in the absence of authorisation from a court, there is a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms art 8: Application 61827/00 *Glass v United Kingdom* [2004] 1 FCR 553, [2004] 1 FLR 1019, ECtHR. See *Portsmouth NHS Trust v Wyatt* [2004] EWHC 2247 (Fam), [2005] 1 FLR 21 (hospital granted declaration authorising it to refrain from giving seriously ill baby further aggressive treatment); *Wyatt v Portsmouth NHS Trust (No 3)* [2005] EWCA Civ 1181, [2005] 1 WLR 3995, [2006] 1 FLR 554 (remained in best interest of child not to attempt aggressive treatment despite improvement in condition); *Re Wyatt (a child) (medical treatment: continuation of order)* [2005] EWHC 2293 (Fam), [2005] 4 All ER 1325, 87 BMLR 183 (further improvement so that parental wishes were to be accommodated, but only as far as professional judgment and conscience would permit). See also *Re L (medical treatment: benefit)* [2004] EWHC 2713 (Fam), [2005] 1 FLR 491 ('best interests' test relevant test for deciding whether to treat seriously ill baby).

13 Capacity to make a will is governed by the Wills Act 1837 which provides that no will made by any person under the age of 18 years is valid: see s 7 (amended by the Statute Law Revision (No 2) Act 1888; and the Family Law Reform Act 1969 s 3(1)(a)); para 53 post; and WILLS vol 50 (2005 Reissue) para 323 et seq. However, a person who is under that age being a soldier in actual military service or a mariner or seaman at sea may validly dispose of property by will: see the Wills Act 1837 s 11 (amended by the Statute Law Revision (No 2) Act 1888); the Wills (Soldiers and Sailors) Act 1918 ss 1, 2 (s 1 amended by the Family Law Reform Act 1969 s 3(1)(b)); and WILLS vol 50 (2005 Reissue) paras 371-373.

14 A marriage is void if either party is under the age of 16: see the Marriage Act 1949 s 2; and the Matrimonial Causes Act 1973 s 11(a)(ii). Where the marriage of a child (not being a widower or widow) is intended to be solemnised on the authority of a superintendent registrar's certificate, the consent of certain persons must be obtained: see the Marriage Act 1949 s 3(1) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 9; the Children Act 1989 s 108(4), (7), Sch 12 para 5, Sch 15; the Immigration and Asylum Act 1999 s 169(1), Sch 14 paras 3, 4, Sch 16; and the Adoption and Children Act 2002 s 139(1), Sch 3 paras 1-4). There are also comparable restrictions on marriages intended to be solemnised on the authority of a common licence and marriage after the publication of banns of matrimony: see the Marriage Act 1949 s 3(2)-(4) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 9; and the Adoption and Children Act 2002 Sch 3 paras 1, 5). A civil partnership is also void where either party is under 16: see the Civil Partnership Act 2004 ss 3(1), 49(a); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72(2009) PARAS 32, 327.

15 See the Minors' Contracts Act 1987; and para 14 post.

16 See under the tests approved in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL. See further *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA.

17 *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64 at 81, [1992] 4 All ER 627 at 644, CA, per Balcombe LJ. See *Re R (a minor) (wardship: consent to treatment)* [1992] Fam 11 at 23-24, [1991] 4 All ER 177 at 184-185, CA, where the view expressed obiter by Lord Donaldson of Lymington MR that the parents of a child, although lacking the right to determine where medical treatment should be given, retain the right to give a consent effective to protect the doctor or others concerned from liability in trespass etc was adopted as part of the ratio in *Re J (a minor) (child in care: medical treatment)* [1993] Fam 15, sub nom *Re J (a minor) (wardship: medical treatment)* [1992] 4 All ER 614, CA (court would not direct treatment contrary to doctor's clinical judgment; consent did not imply an obligation to give treatment). See also *Re E (a minor) (wardship: medical treatment)* [1992] 2 FCR 219, [1993] 1 FLR 386 (Jehovah's Witness aged 15 and 10 months refused consent to treatment for leukaemia involving blood transfusions; Ward J held that the child's views had been strongly influenced by his beliefs and that his veto was not binding); *Re R (a minor)* [1993] 2 FCR 544, 15 BMLR 72 (ten month old child of Jehovah's Witnesses; court overriding parents' wishes and granting authority for treatment with blood products); *Re L (medical treatment: Gillick competency)* [1999] 2 FCR 524, [1998] 2 FLR 810 (in an extreme case it may be appropriate to authorise treatment without a child's consent even if he is Gillick competent); *Re M (child: refusal of medical treatment)* [1999] 2 FCR 577, [1999] 2 FLR 1097 (court authorised heart transplant surgery on a child aged 15 who had refused to consent to the operation). The invoking of the wardship jurisdiction has been specifically approved with regard to a 17-year-old rather than guardianship under the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 470): *Re F (Mental Health Act: wardship)* [2000] 1 FCR 11, [2000] 1 FLR 192, CA.

18 See the Children Act 1989 s 100 (as amended); and para 201 post. For proceedings under the inherent jurisdiction of the High Court see para 200 post.

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## **B. PARTICULAR CAPACITIES AND INCAPACITIES**

### **5. Particular incapacities in public law.**

With certain exceptions<sup>1</sup> a child may not hold an office or post of public and pecuniary trust<sup>2</sup>. Accordingly he may not act as the clerk of a court where it is a part of the duties to receive money<sup>3</sup>, nor as a bailiff<sup>4</sup> or receiver<sup>5</sup>. If a peer, he may not sit or vote in the House of Lords<sup>6</sup>, nor is a child eligible for the House of Commons<sup>7</sup>. A person is qualified to be elected and to be a member of a local authority or is qualified to be elected and to be an elected mayor if on the relevant day<sup>8</sup> he has attained the age of 18 years<sup>9</sup>. For the purposes of the Representation of the People Acts a person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he is of voting age (that is 18 years or over); and, if otherwise qualified, a person who is of voting age on the date of the poll at a parliamentary or local government election is entitled to vote as an elector, whether or not he is of voting age on the qualifying date<sup>10</sup>.

A child is not qualified to serve on a jury<sup>11</sup>.

1 See paras 7-8 post.

2 *Claridge v Evelyn* (1821) 5 B & Ald 81 at 86 per Abbott CJ; *Cuckson v Winter* (1828) 2 Man & Ry KB 313; and see generally TRUSTS.

3 *Claridge v Evelyn* (1821) 5 B & Ald 81.

4 *Cuckson v Winter* (1828) 2 Man & Ry KB 313. As to the appointment and the nature of the office of bailiffs see SHERIFFS vol 42 (Reissue) para 1119.

5 Co Litt 171b, 172a; Com Dig, Infant (C 1). As to the eligibility for appointment as receiver see RECEIVERS vol 39(2) (Reissue) para 350.

6 4 Co Inst 46; and see PARLIAMENT vol 78 (2010) PARAS 834-843.

7 See the Electoral Administration Act 2006 s 17; and ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) para 231.

8 'Relevant day' means the day of nomination as a candidate and, in certain cases, the day of the election: see the Local Government Act 1972 s 79(2); and LOCAL GOVERNMENT vol 69 (2009) PARA 117.

9 See *ibid* s 79(1) (amended by the Electoral Administration Act 2006 s 17(4); the Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Other Provisions) (England) Order 2001, SI 2001/2237, arts 2(1), 2(a), 4; and the Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Other Provisions) (Wales) Order 2002, SI 2002/808, arts 2(a), 4); and LOCAL GOVERNMENT vol 69 (2009) PARA 117.

10 See the Representation of the People Act 1983 s 1(1) (substituted by the Representation of the People Act 2000 s 1(1)); and ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) para 110.

11 See the Juries Act 1974 s 1(a) (substituted by the Criminal Justice Act 2003 s 321, Sch 33 paras 1, 2); and JURIES vol 61 (2010) PARA 804. As to coroners' juries see CORONERS vol 9(2) (2006 Reissue) para 978 et seq.

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## 6. Sovereign and peers.

A child can succeed to the throne, and in law there is no such thing as incapacity from infancy in the case of the Sovereign<sup>1</sup>. In the case of a Sovereign under the age of 18, however, provision is made for the exercise of the royal functions by a regent<sup>2</sup>.

A child can succeed to a peerage, and if a peerage is conferred on him during infancy he cannot waive or refuse the dignity<sup>3</sup>. However, a child born as a result of artificial insemination involving a third party is excluded from acceding to titles of honour or dignities as the child is not a blood relative<sup>4</sup>.

A child can do homage<sup>5</sup> and, after the age of 12 years, can take the oath of allegiance<sup>6</sup>.

1 *Duchy of Lancaster Case* (1561) 1 Plowd 212; Co Litt 43a, 43b; 1 Roll Abr Enfants, A; 1 Bl Com (14th Edn) 247-248; and see CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 12.

2 See CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 13.

3 *Duke of Queensberry's Case* (1719) 1 P Wms 582 at 592, HL, per Lord Hardwicke LC, cited in *Buckhurst Peerage Case* (1876) 2 App Cas 1, HL. See also PEERAGES AND DIGNITIES vol 79 (2008) PARA 820.

4 See the Family Law Reform Act 1987 s 27(3); *Re Moynihan* [2000] 1 FLR 113, [2000] Fam Law 21, HL; and para 105 post. See also the Human Fertilisation and Embryology Act 1990 s 49(4).

5 Co Litt 65b; Com Dig, Infant (B 6).

6 Co Litt 68b, 78b, 172b; 1 Bl Com (14th Edn) 463; Bac Abr, Infancy and Age (A). As to oaths of allegiance see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 79.



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## **7. Officer who can appoint a deputy.**

A child may be a sheriff<sup>1</sup> or a gaoler<sup>2</sup> and may hold any other office for which he can appoint a deputy<sup>3</sup> or which is ministerial and does not involve discretion<sup>4</sup>.

1 *Young v Fowler* (1640) Cro Car 555; *Claridge v Evelyn* (1821) 5 B & Ald 81 at 86 Abbott CJ. As to qualification for the office of sheriff see SHERIFFS vol 42 (Reissue) paras 1101-1110.

2 2 Co Inst 382; Com Dig Officer (B 3); *Whittingham's Case* (1603) 8 Co Rep 42b at 44b per Coke CJ; *Young v Fowler* (1640) Cro Car 555; *Claridge v Evelyn* (1821) 5 B & Ald 81 at 86 per Abbott CJ.

3 *Young v Stoell* (1632) Cro Car 279; *Young v Fowler* (1640) Cro Car 555; *Claridge v Evelyn* (1821) 5 B & Ald 81 at 86 per Abbott CJ.

4 Bac Abr, Infancy and Age (E); Com Dig Officer (B 3); *Crosbie v Huxley* (1833) Alc & N 431 at 440 per Bushe CJ. As to public officers see generally ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 6 et seq.

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## **8. Lord of the manor.**

A child can be lord of a manor and perform the functions of the office, for his actions are only instrumental and for the advantage of the tenants of the manor<sup>1</sup>. A child could also be steward of a manor<sup>2</sup>, and even act as deputy steward<sup>3</sup>. Where the office of parker or steward or any similar office was held in fee, it could descend to a child<sup>4</sup>.

1 *Swayne's Case* (1608) 8 Co Rep 63a at 63b per Coke CJ; 1 Watkins on Copyholds (7th Edn) 24. Copyhold tenure has been abolished but certain rights of the lord of the manor were preserved: see CUSTOM AND USAGE vol 12(1) (Reissue) paras 705-707.

2 Coke's Complete Copy-Holder (1673) ss 45, 46; Com Dig, Copyhold (R 5), Officer (B 3).

3 *Eddleston v Collins* (1852) 10 Hare 99 at 105 et seq per Turner V-C; on appeal (1853) 3 De GM & G 1 at 14 per Lord Cranworth LC.

4 Coke's Complete Copy-Holder (1673) ss 45, 46; *Whittingham's Case* (1603) 8 Co Rep 42b; *Claridge v Evelyn* (1821) 5 B & Ald 81. As to officers of the manor see CUSTOM AND USAGE vol 12(1) (Reissue) paras 705-707.

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## **9. Liability to income tax.**

If a person chargeable to income tax is a child, then his parent, guardian or tutor is liable for the tax in default of payment by the child<sup>1</sup>. If there is no trustee, parent, guardian or tutor who has the direction, control or management of a child's property so as to be assessable and chargeable to income tax<sup>2</sup>, the child is personally assessable and chargeable<sup>3</sup>.

1 Taxes Management Act 1970 s 73(a).

2 Ie by virtue of *ibid* ss 72, 73: see INCOME TAXATION vol 23(2) (Reissue) para 1243.

3 *R v Newmarket Income Tax Comrs, ex p Huxley* [1916] 1 KB 788, CA, where an assessment upon an infant jockey in respect of his personal earnings was held to be valid. See further INCOME TAXATION. See also the Child Trust Funds Regulations 2004, SI 2004/1450, reg 29; and para 565 post.

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## **10. Bankruptcy of child or petition presented by child.**

A child may be made bankrupt, if the petition is based on an enforceable debt<sup>1</sup>. If he contracts an unenforceable debt during infancy by a fraudulent representation that he is of full age, and becomes bankrupt after attaining full age, the person defrauded may prove in the bankruptcy for the amount of the equitable liability resulting from the fraud<sup>2</sup>. A child may not be convicted of an offence against the bankruptcy laws unless he can be made bankrupt in the particular case<sup>3</sup>. Where a child is a member of a firm, a bankruptcy order may not be made against the firm as a whole, but bankruptcy orders may be made against the other members of the firm individually, or against the firm exclusive of the child partner<sup>4</sup>.

A child may present a bankruptcy petition by a litigation friend<sup>5</sup>, but may not be appointed a proxy to vote at a meeting of creditors under a bankruptcy<sup>6</sup>.

<sup>1</sup> *Re Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA; *Re A and M* [1926] Ch 274; *Re Davenport, ex p The Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850, [1963] 1 WLR 817, CA. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 12.

<sup>2</sup> *Ex p Watson* (1809) 16 Ves 264; *Re Lees and Smith, ex p Lees, ex p Heatherley* (1836) 1 Deac 705; *Re Bates, ex p Bates* (1841) 2 Mont D & De G 337; *Re King, ex p Unity Joint Stock Mutual Banking Association* (1858) 3 De G & J 63; *Maclean v Dummett* (1870) 22 LT 710 at 711-712, PC; *Re Jones, ex p Jones* (1881) 18 ChD 109 at 120, CA, per Jessel MR. The mere fact of trading is not in itself such a representation: *Re Jones, ex p Jones* supra at 120-121, 123 per Jessel MR.

<sup>3</sup> See *R v Wilson* (1879) 5 QBD 28, CCR. As to criminal bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 844 et seq.

<sup>4</sup> *Lovell and Christmas v Beauchamp* [1894] AC 607 at 613, HL, per Lord Herschell LC. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 12.

<sup>5</sup> *Re Brocklebank, ex p Brocklebank* (1877) 6 ChD 358, CA. A debt owing to a child may be proved by his guardian or, possibly, the child himself: *Re Brocklebank, ex p Brocklebank* supra.

<sup>6</sup> See the Insolvency Rules 1986, SI 1986/1925, r 8.1(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 278.

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## **11. Vehicles and aircraft.**

A person is disqualified for holding or obtaining a licence<sup>1</sup> to drive<sup>2</sup> an invalid carriage<sup>3</sup> and a moped<sup>4</sup> if he is under 16 years of age<sup>5</sup>, a motor bicycle<sup>6</sup>, an agricultural or forestry tractor<sup>7</sup>, and a small vehicle<sup>8</sup> if he is under 17 years of age<sup>9</sup>, and a medium-sized goods vehicle<sup>10</sup> if he is under 18 years of age<sup>11</sup>. There is power by regulations for the Secretary of State to alter these minimum ages<sup>12</sup>.

Children below the age at which it ceases to be unlawful for them to be employed<sup>13</sup> are prohibited by regulations from riding on or driving vehicles or machines of prescribed classes while in use for agricultural operations, or going to or from the site of such operations, or from riding on agricultural implements of prescribed classes while they are being towed or propelled by vehicles, machines or animals<sup>14</sup>.

A person under the age of 16 years may not act as a pilot in command of a glider<sup>15</sup>; and a person under the age of 16 years may not act as pilot in command of an aircraft for the purpose of becoming qualified for the grant or renewal of a pilot's licence or the inclusion or variation of any rating in a pilot's licence<sup>16</sup>.

1 For the meaning of 'licence' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 443 note 6.

2 For the meaning of 'drive' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 207.

3 For the meaning of 'invalid carriage' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 215.

4 For the meaning of 'moped' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 447 note 12.

5 See the Road Traffic Act 1988 s 101(1), Table, Items 1, 2 (as substituted); and ROAD TRAFFIC vol 40(1) (2007 Reissue) para 478.

6 For the meaning of 'motor bicycle' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 447 note 11.

7 For the meaning of 'agricultural or forestry tractor' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 353 note 7.

8 For the meaning of 'small vehicle' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 447 note 10.

9 See the Road Traffic Act 1988 s 101(1), Table items 3, 4, 5 (Table substituted by the Driving Licences (Community Driving Licence) Regulations 1996, SI 1996/1974, reg 2, Sch 2, para 15); and ROAD TRAFFIC vol 40(1) (2007 Reissue) para 478.

10 For the meaning of 'medium-sized goods vehicle' see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 474 note 4.

11 See the Road Traffic Act 1988 s 101(1), Table items 6, 7 (as substituted: see note 9 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) para 478.

12 See *ibid* s 101(2); and ROAD TRAFFIC vol 40(1) (2007 Reissue) para 479. As to the regulations that have been made under s 101(2) see the Motor Vehicles (Driving Licences) Regulations 1999, SI 1999/2864 (amended by SI 2001/937; SI 2002/2641; SI 2003/166; SI 2003/2003; SI 2004/265; SI 2004/1519; SI 2004/3028; SI 2005/1975; SI 2005/2727; SI 2005/2929; SI 2006/524).

13 See para 746 et seq post.

14 See further AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 1246-1249.

15 See the Air Navigation Order 2005, SI 2005/1970, art 37; and AIR LAW vol 2 (2008) PARA 438.

16 See ibid art 26(2)(b)(i). As to flight crew licences and the relevant minimum age requirements see Sch 8; and AIR LAW vol 2 (2008) PARA 438.

## **UPDATE**

### **11 Vehicles and aircraft**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 12--SI 1999/2864 further amended: SI 2007/698, SI 2008/508, SI 2008/1435, SI 2008/2508, SI 2009/788, SI 2009/2362.

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## **(2) CAPACITY OF CHILDREN IN CONTRACT, TORT, CRIME AND PROPERTY**

### **(i) Contract**

#### **12. Position at common law.**

In accordance with the principle that a child is of immature intelligence and discretion<sup>1</sup>, a child's contract<sup>2</sup> is at common law generally voidable<sup>3</sup> at the instance of the child, although it is binding upon the other party<sup>4</sup>. Exceptions to this rule are contracts for necessities<sup>5</sup> and certain other contracts such as contracts of service<sup>6</sup> and apprenticeship<sup>7</sup>, if they are clearly for the child's benefit<sup>8</sup>; such contracts are valid and binding upon a child<sup>9</sup>. In such cases the question to be judged is whether the contract is or is not on the whole beneficial at the date when it is made<sup>10</sup>.

Contracts which are obviously prejudicial to a child are wholly void<sup>11</sup>; thus a child cannot contract a loan or give a penal bond<sup>12</sup>, and a warrant of attorney to confess judgment given by a child was void<sup>13</sup>. A child cannot be bound as a party to a bill of exchange even for necessities<sup>14</sup>. He cannot grant a rentcharge or annuity<sup>15</sup>, or surrender a term of years<sup>16</sup>. In general, a child cannot give a valid receipt or a valid release of a legal claim<sup>17</sup>, but a married child or a child who has formed a civil partnership has power to give valid receipts for all income, including statutory accumulations during the minority, to which he is entitled in like manner as if he were of full age<sup>18</sup>.

1 2 Co Inst 291; 3 Co Inst 4; 1 Roll Abr, Enfants; 4 Bac Abr, Infancy and Age (G); *Slator v Trimble* (1861) 14 ICLR 342 at 356 per Hayes J. The term 'infant' was traditionally used, and for a time legislation favoured 'minor': see para 3 ante.

2 As to the capacity to contract see para 14 post; and CONTRACT vol 9(1) (Reissue) para 630.

3 *Bruce v Warwick* (1815) 6 Taunt 118 at 120, Ex Ch, per Gibbs CJ (affg the decision of the Court of King's Bench, sub nom *Wrawick v Bruce* (1813) 2 M & S 205 at 210 per Dampier J); *Martin v Gale* (1876) 4 ChD 428 at 431 per Jessel MR; *Duncan v Dixon* (1890) 44 ChD 211 at 213 per Kekewich J; *Stephens v Dudbridge Ironworks Co Ltd* [1904] 2 KB 225 at 229, CA, per Collins MR; *Nash v Inman* [1908] 2 KB 1 at 11-12, CA, per Buckley LJ. The above, it is apprehended, is a correct statement of the common law. It has, however, frequently been stated that the contracts of infants were at common law void: see Bac Abr, Infancy and Age (I); Com Dig, Infant (C 2), (C 3); *Keane v Boycott* (1795) 2 Hy Bl 511 at 514-515; *Baylis v Dineley* (1815) 3 M & S 477; *Thornton v Illingworth* (1824) 2 B & C 824. See also *R v Lord* (1848) 12 QB 757 at 765 per Lord Denman CJ, where 'void' appears to be used synonymously with 'voidable'.

4 Com Dig, Infant (C 2), (C 3); Bac Abr, Infancy and Age (I) 4; *Holt v Ward Clarencieux* (1732) 2 Stra 937; *Warwick v Bruce* (1813) 2 M & S 205 at 209 per Lord Ellenborough CJ. As to contracts of partnership concerning minors see paras 88-89 post; and PARTNERSHIP vol 79 (2008) PARA 33. As to contracts to take shares see para 90 post. As to contracts to buy or sell land concerning minors see para 30 et seq post; and SALE OF LAND vol 42 (Reissue) para 71. As to bonds binding or given by minors see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 106-107. As to the contract between minors and banks see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 818, 820. As to bills of exchange and minors see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1471.

5 See paras 18-19 post.

6 See para 22 post; and EMPLOYMENT vol 39 (2009) PARA 16.

7 See para 22 post; and EMPLOYMENT vol 39 (2009) PARA 16.

8 Bac Abr, Infancy and Age (I); *De Francesco v Barnum* (1890) 45 ChD 430 at 439 per Fry LJ; *Clements v London and North Western Rly Co* [1894] 2 QB 482 at 489, CA, per Lord Esher MR, and at 491 per Kay LJ; *Mackinlay v Bathurst* (1919) 36 TLR 31, CA; *Huntman v Burton* (1955) Times, 2 April.

9 Com Dig, Infant (B 5); *Roberts v Gray* [1913] 1 KB 520, CA; and see note 8 supra. As to marriage settlements see paras 82-85 post.

10 See *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 at 95, [1965] 3 All ER 764 at 773, CA, per Danckwerts LJ ('It cannot be right to enable a contract made in good faith to be avoided because it turns out at a later date that the benefits are not as great as the parties anticipated').

11 Com Dig, Infant (C 2); 1 Shep Touch (8th Edn) 57 note (7); *Grange v Tiving* (1665) O Bridg 107 at 115; *Harvey v Ashley* (1748) 3 Atk 607 at 610 per Lord Hardwicke LC; *Compton v Collinson* (1788) 2 Bro CC 377 at 387 per Buller J; *Keane v Boycott* (1795) 2 Hy Bl 511 at 515 per Lord Eyre CJ; *Cooper v Simmons* (1862) 7 H & N 707 at 719 per Martin B; *Slator v Brady* (1863) 14 ICLR 61 at 64-65 per Fitzgerald B.

12 Co Litt 172a; Com Dig, Infant (C 2); *Ayliff v Archdale* (1603) Cro Eliz 920; *Delavel v Clare* (1625) Noy 85; *Darby v Boucher* (1693) 1 Salk 279; *Ellis v Ellis* (1698) 5 Mod Rep 368; *Earle v Peale* (1711) 1 Salk 386; *Fisher v Mowbray* (1807) 8 East 330; *Baylis v Dineley* (1815) 3 M & S 477; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 106. A child's contracts made by deed are in the same position as his simple contracts, ie voidable but not void: see *Martin v Gale* (1876) 4 ChD 428 at 431 per Jessel MR; Co Litt 172a; *Whelpdale's Case* (1604) 5 Co Rep 119a at 119b; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1804 per Lord Mansfield.

13 *Saunderson v Marr* (1788) 1 Hy Bl 75; and see para 86 post. Warrants of attorney have been abolished.

14 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1471.

15 Com Dig, Infant (C 2); *Thompson v Leach* (1690-98) 3 Mod Rep 301 at 310 per Holt CJ.

16 1 Roll Abr, Enfants; *Lloyd v Gregory* (1638) Cro Car 501.

17 Co Litt 264b; Shep Touch (7th Edn) 334n; *Overton v Banister* (1844) 3 Hare 503 at 506 per Wigram V-C. As to a release by a child who pretends that he is of age see para 23 post. A release or acquittance by a person immediately after attaining full age without the assistance of independent advice is liable to be set aside: *Hicks v Hicks* (1744) 3 Atk 274 at 275 per Lord Hardwicke LC; *Steadman v Palling* (1746) 3 Atk 423; *Revett v Harvey* (1823) 1 Sim & St 502; *Kilbee v Sneyd* (1828) 2 Mol 186 at 233 per Lord Hart LC.

18 Law of Property Act 1925 s 21; Administration of Estates Act 1925 s 47(1)(ii) (amended by the Civil Partnership Act 2004 s 71, Sch 4 Pt 2 para 8(1), (4)). See para 63 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 605. As to the statutory power of a child who is married to give receipts for accumulations see para 40 post.



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### **13. Prejudicial contracts.**

Even a contract which from its nature would be binding on a child may be incapable of being enforced against him if its particular terms are prejudicial to his interests<sup>1</sup> or onerous to him<sup>2</sup>. In that case the question whether the contract is enforceable depends upon whether the prejudicial stipulations in it do or do not outweigh the general benefit which the contract is regarded as conferring upon him<sup>3</sup>.

<sup>1</sup> *Ayliff v Archdale* (1603) Cro Eliz 920; *Shears v Mendeloff* (1914) 30 TLR 342; and see EMPLOYMENT vol 39 (2009) PARA 16.

<sup>2</sup> *Fawcett v Smethurst* (1914) 84 LJB 473.

<sup>3</sup> *Flower v London and North Western Ry Co* [1894] 2 QB 65, CA; *Clements v London and North Western Ry Co* [1894] 2 QB 482 at 489, CA, per Lord Esher MR, and at 495 per AL Smith LJ; *Roberts v Gray* [1913] 1 KB 520, CA; *Mackinlay v Bathurst* (1919) 36 TLR 31, CA. See also *Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 at 95, [1965] 3 All ER 764 at 773, CA, per Danckwerts LJ (cases in which contracts enabling an infant to earn his living were held to be binding on him); and para 20 post.

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#### **14. Contracts and guarantees.**

Formerly the Infants Relief Act 1874 provided that certain contracts entered into by infants were 'absolutely void'<sup>1</sup>. Moreover, no action could be brought to enforce a promise or ratification made on attaining full age to pay a debt contracted or upon a contract made during infancy<sup>2</sup>. However, the Infants Relief Act 1874<sup>3</sup> was repealed by the Minors' Contracts Act 1987<sup>4</sup> and therefore does not apply to any contract made by a minor after 9 June 1987<sup>5</sup>. The contractual incapacity of minors was much reduced by the Minors' Contracts Act 1987.

Where a guarantee is given in respect of an obligation of a party to a contract made after 9 June 1987 and the obligation is unenforceable against him (or he repudiates the contract) because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor<sup>6</sup>. Prior to this, a guarantee<sup>7</sup> of a contract rendered absolutely void by the Infants Relief Act 1874 was unenforceable<sup>8</sup>.

1 Infants Relief Act 1874 s 1 (repealed). The contracts in question were all contracts, whether by speciality or simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, other than contracts for necessities (see para 18 post), and all accounts stated with infants; provided that the Act did not invalidate contracts which might be entered into by infants under another rule of law. As to the definitions of the terms 'infant' and 'minor' see para 3 ante.

2 Ibid s 2 (repealed).

3 See also the Betting and Loans (Infants) Act 1892 s 5 (repealed), which invalidated contracts to repay loans advanced during minority.

4 Minors' Contracts Act 1987 s 4.

5 Ibid s 1(a). This provision came into force on 9 June 1987: s 5. Consequently, ratification after that date of an affected contract made prior to it is unenforceable. Contracts of the type mentioned in note 1 supra made after that date are subject to the general rules governing contracts with children: see para 15 et seq post.

6 Ibid s 2.

7 Ie as distinct from an agreement to indemnify.

8 *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207.

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### **15. Passing of property.**

It seems that where goods are delivered to a child under a contract of sale the property passes to him, notwithstanding the fact that the contract does not bind the child<sup>1</sup>. It also appears that property can pass from a child under a contract which is not binding on him<sup>2</sup>.

1 *Stocks v Wilson* [1913] 2 KB 235 at 246 per Lush J. Note the Minors' Contracts Act 1987 s 3(1), which refers to property 'acquired' by a minor under a contract which does not bind him: see para 24 post; and RESTITUTION vol 40(1) (2007 Reissue) para 181. As to the capacity to contract see CONTRACT vol 9(1) (Reissue) para 630; and para 14 ante.

2 *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA.

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## **16. Liability of adult contracting with child.**

Where an adult contracts with a child and the child elects to enforce the contract, the adult is bound by it even though the child is not himself liable<sup>1</sup>; and a claim may be brought upon the contract, either on behalf of the child during his infancy<sup>2</sup> or by the child himself after he attains full age<sup>3</sup>. On the ground of want of mutuality, however, a child cannot claim specific performance of a contract made with him<sup>4</sup>.

1 *Davies v Manington* (1658) 2 Sid 109; *Coan v Bowles* (1691) 1 Show 165 at 171 per Holt CJ; *Clayton v Ashdown* (1714) 9 Vin Abr 393; *Holt v Ward Clarendieux* (1732) 2 Stra 937 at 939 per Lord Raymond CJ; *Shannon v Bradstreet* (1803) 1 Sch & Lef 52 at 58 per Lord Redesdale LC; *Warwick v Bruce* (1813) 2 M & S 205 (on appeal sub nom *Bruce v Warwick* (1815) 6 Taunt 118, Ex Ch); *Re Smith's Trusts* (1890) 25 LR Ir 439 at 443 per Chatterton V-C. As to a child's banking account see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 818, 820. As to the capacity to contract see para 14 ante; and CONTRACT vol 9(1) (Reissue) para 630.

2 *Forrester's Case* (1661) 1 Sid 41; *Farnham v Atkins* (1670) 1 Sid 446; *Bruce v Warwick* (1815) 6 Taunt 118, Ex Ch; *Holliday v Atkinson* (1826) 5 B & C 501.

3 *Holt v Ward Clarendieux* (1732) 2 Stra 937; *Re Smith's Trusts* (1890) 25 LR Ir 439.

4 *Flight v Bolland* (1828) 4 Russ 298; *Lumley v Ravenscroft* [1895] 1 QB 683, CA; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 809.

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## **17. Liability of co-contractor.**

Where an adult and a child enter jointly into a contract which does not bind the child, the adult is not bound by it if it can only be performed by them jointly<sup>1</sup>. If it can be performed by the adult without the child, then, whether it is absolutely void or only voidable as regards the child, the adult is liable under it<sup>2</sup>. In the case of a contract which is only voidable on the part of the child, however, the joint contractor may be sued alone only on proof that the child has avoided the contract<sup>3</sup>.

Where specific performance of a contract cannot be ordered against a child, it will not be ordered against an adult co-contractor with him<sup>4</sup>; but where a bill of exchange is drawn or indorsed by a child, the holder is entitled to receive payment of the bill, and to enforce it against any other party to it<sup>5</sup>.

1 *Gill v Russell* (1673) Freem KB 62 at 63 per Vaughan CJ. As to the adult and child as joint promisors see CONTRACT vol 9(1) (Reissue) para 1080.

2 *Salmon v Smith* (1669) 1 Wms Saund 202 at 207a-207b, note (i); *Gill v Russell* (1673) Freem KB 62; *Chandler v Parkes* (1800) 3 Esp 76; *Jaffray v Frebain* (1803) 5 Esp 47; *Haw v Ogle* (1811) 4 Taunt 10; *Burgess v Merrill* (1812) 4 Taunt 468; *Gillow v Lillie* (1835) 1 Bing NC 695; *Boyle v Webster* (1852) 17 QB 950. See also *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 at 98, [1965] 3 All ER 764 at 775, CA, per Winn LJ (applying *Pirie v Richardson* [1927] 1 KB 448, CA).

3 *Gibbs v Merrill* (1810) 3 Taunt 307 at 313 per Mansfield CJ.

4 *Lumley v Ravenscroft* [1895] 1 QB 683, CA (distinguished in *Basma v Weekes* [1950] AC 441 at 456-457, [1950] 2 All ER 146 at 153-154, PC).

5 Bills of Exchange Act 1882 s 22(2); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1471.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(2) CAPACITY OF CHILDREN IN CONTRACT, TORT, CRIME AND PROPERTY/(i) Contract/18. Liability for necessities.

## 18. Liability for necessities.

The law considers it to be clearly for the benefit of a child that he should be capable of binding himself to pay for the supply of the necessities of life to himself and members of his household<sup>1</sup>. In order to maintain a claim against a child in respect of necessities it must be shown that they were of a nature suitable to his condition in life and actually required by him at the time and that he was not at the time otherwise sufficiently provided with them<sup>2</sup>. The burden of proof is on the claimant<sup>3</sup>, and the claimant's absence of knowledge as to the child's existing supplies is irrelevant<sup>4</sup>.

Where necessities are sold and delivered to a child, he must pay a reasonable price for them<sup>5</sup>. The fact of his having a sufficient allowance does not preclude him from contracting for necessities on credit<sup>6</sup>.

1 Co Litt 172a; Bac Abr, Infancy and Age (I) 1; Com Dig, Enfant (B 5); *Whittingham v Hill* (1618) Cro Jac 494; *Rainsford v Fenwick* (1670) Cart 215; *Turner v Trisby* (1719) 1 Stra 168; *Hands v Slaney* (1800) 8 Term Rep 578; *Chapple v Cooper* (1844) 13 M & W 252. A claim against a child for necessities is usually spoken of as a case of enforcing a contract against the child. It has been said, however, that the basis of the claim is hardly contract; and that the real foundation of the claim is an obligation which the law imposes on the child to make a fair payment in respect of needs satisfied, in other words, an obligation arising re and not consensu: *Nash v Inman* [1908] 2 KB 1 at 8, CA, per Fletcher Moulton LJ; and see *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94 at 105-107, CA, per Cotton LJ. See also *Re J (a person of unsound mind)* [1909] 1 Ch 574, CA.

2 *Bainbridge v Pickering* (1779) 2 Wm Bl 1325; *Ford v Fothergill* (1794) 1 Esp 211; *Hands v Slaney* (1800) 8 Term Rep 578; *Cook v Deaton* (1827) 3 C & P 114; *Story v Pery* (1831) 4 C & P 526; *Burghart v Angerstein* (1834) 6 C & P 690; *Dalton v Gib* (1839) 5 Bing NC 198; *Peters v Fleming* (1840) 6 M & W 42 at 46 per Parke B; *Foster v Redgrave* (1867) LR 4 Exch 35, note (8); *Barnes & Co v Toye* (1884) 13 QBD 410; *Johnstone v Marks* (1887) 19 QBD 509; *Nash v Inman* [1908] 2 KB 1. Substantially all the goods included in the contract must be necessities: *Stocks v Wilson* [1913] 2 KB 235 at 241-242 per Lush J.

Where there is a trial by jury, now a most rare occurrence in ordinary civil actions, the question whether or not the goods can be necessities is a question of law for the judge, and the question whether or not they are necessities is a question of fact for the jury; it is, however, a question of law whether there is any evidence upon which the jury can find them to be necessities: see generally *Maddox v Miller* (1813) 1 M & S 738; *Harrison v Fane* (1840) 1 Man & G 550; *Brooker v Scott* (1843) 11 M & W 67; *Wharton v Mackenzie, Cripps v Hills* (1844) 5 QB 606; *Peters v Fleming* (1840) 6 M & W 42; *Barnes & Co v Toye* (1884) 13 QBD 410; *Ryder v Wombwell* (1868) LR 4 Exch 32; *Nash v Inman* [1908] 2 KB 1, CA.

3 *Nash v Inman* [1908] 2 KB 1 at 5-6 per Cozens-Hardy MR; and see *Shields v Rotton* (1848) 11 LTOS 132.

4 *Barnes & Co v Toye* (1884) 13 QBD 410; *Johnstone v Marks* (1887) 19 QBD 509.

5 Sale of Goods Act 1979 s 3(2). For the meaning of 'necessaries' see para 19 note 1 post. As to what constitutes necessities see para 19 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37. It is not clear whether an executory contract for the purchase of necessities is binding upon a child, but there is support for the view that such a contract is binding: see *Roberts v Gray* [1913] 1 KB 520 at 526, CA, per Cozens-Hardy MR, and at 530 per Hamilton LJ; and see also Treitel *The Law of Contract* (8th Edn, 1991) pp 484-485.

6 *Burghart v Hall* (1839) 4 M & W 727 (overruling *Mortara v Hall* (1834) 6 Sim 465); and see *Barnes & Co v Toye* (1884) 13 QBD 410 at 412 per Wills J.

## UPDATE

### 18-19 Liability for necessities, What are necessities?

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 19. What are necessities?

Certain things are clearly necessities, such as food, clothing, medicine<sup>1</sup> and lodging<sup>2</sup>. Articles suitable to and proper for a child's position in life, although not actually necessary to his existence, are recognised as necessities<sup>3</sup>. The cost of the funeral of a member of the child's family is a necessary expenditure<sup>4</sup>. Education suitable to the child's prospects in life is a necessary for which he can bind himself<sup>5</sup>. The protection of a child from legal proceedings and the protection of his interests by legal instruments or legal proceedings have been held to be necessities<sup>6</sup>. Articles which are mere luxuries, as distinguished from luxurious articles of utility<sup>7</sup>, are not recognised as necessities, even for a child in a position in which they are commonly enjoyed<sup>8</sup>.

1 Co Litt 172a; Com Dig, Infant (B 5); 1 Bl Com 466; *Dale v Copping* (1610) 1 Bulst 39; *Pickering v Gunning* (1628) Palm 528; *Huggins v Wiseman* (1690) Carth 110; *Keane v Boycott* (1795) 2 Hy Bl 511; *Turberville v Whitehouse* (1823) 12 Price 692. In the Sale of Goods Act 1979, 'necessaries' means goods suitable to the condition in life of the person to whom they are sold and delivered, and to his actual requirements at the time of the sale and delivery: s 3(3). As to what constitutes necessities see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37.

2 *Lowe v Griffith* (1835) 1 Scott 458 at 460 per Tindal CJ; cf *Crisp v Churchill* (1794) cited in 1 Bos & P 340 (infant prostitute).

3 *Peters v Fleming* (1840) 6 M & W 42; *Chapple v Cooper* (1844) 13 M & W 252 at 258 per Alderson B. The following articles have been allowed as necessities: livery for the servant of an infant army officer (*Hands v Slaney* (1800) 8 Term Rep 578); regimental uniform (*Coates v Wilson* (1804) 5 Esp 152); watch-chain, pins and rings (*Peters v Fleming* supra); presents to the infant's fiancée (*Jenner v Walker* (1868) 19 LT 398; but see *Hewlings v Graham* (1901) 70 LJCh 568); a racing bicycle (*Clyde Cycle Co v Hargreaves* (1898) 78 LT 296); an exhibition tour round the world for a professional billiards player (*Roberts v Gray* [1913] 1 KB 520, CA); the hire of a car to fetch a bag six miles away (*Fawcett v Smethurst* (1914) 84 LJB 473 at 475 per Atkin J); and engagement and wedding rings (*Elkington & Co Ltd v Amery* [1936] 2 All ER 86, CA).

4 *Chapple v Cooper* (1844) 13 M & W 252.

5 Co Litt 172a; Bac Abr, Infancy and Age (I); 1 Bl Com 466; *Pickering v Gunning* (1628) Palm 528; *Chapple v Cooper* (1844) 13 M & W 252 at 258 per Alderson B; *De Francesco v Barnum* (1890) 45 ChD 430 at 439 per Fry LJ; *Walter v Everard* [1891] 2 QB 369 at 374, CA, per Lord Esher MR; *Roberts v Gray* [1913] 1 KB 520, CA; *Mackinlay v Bathurst* (1919) 36 TLR 31, CA (where, however, a contract for singing lessons was dealt with not as a contract for necessities but as a contract for the infant's benefit); *Hamilton v Bennett* (1930) 94 JP Jo 136. See also the form of contract in respect of a child's education set out in *Practice Direction (minor: maintenance: school fees)* [1983] 2 All ER 679, [1983] 1 WLR 800; and see *Sherdley v Sherdley* [1988] AC 213, [1987] 2 All ER 54, HL.

6 *Clarke v Leslie* (1803) 5 Esp 28; *Ex p M'Key* (1810) 1 Ball & B 405; *Helps v Clayton* (1864) 17 CBNS 553; *Pritchard v Roberts* (1873) LR 17 Eq 222; *Re Jones (an infant)* (1883) 48 LT 188; *Prince v Haworth* (1904) 20 TLR 313, subsequent proceedings [1905] 2 KB 768.

7 *Chapple v Cooper* (1844) 13 M & W 252 at 258 per Alderson B.

8 *Chapple v Cooper* (1844) 13 M & W 252 at 258 per Alderson B; *Ryder v Wombwell* (1868) LR 4 Exch 32. The following items have been disallowed: goods for sale in the infant's shop (*Whywall v Champion* (1738) 2 Stra 1083); cockades for the soldiers in the company of an infant captain (*Hands v Slaney* (1800) 8 Term Rep 578); an expensive chronometer for a lieutenant in the navy (*Berolles v Ramsay* (1815) Holt NP 77); expensive and superfluous clothes (*Burghart v Angerstein* (1834) 6 C & P 690); hire and repair of a fancy carriage (*Charters v Bayntun* (1835) 7 C & P 52); hire of horses (*Harrison v Fane* (1840) 1 Man & G 550); dinners, confectionery and fruit for an infant undergraduate (*Brooker v Scott* (1843) 11 M & W 67; *Wharton v Mackenzie*,



*Cripps v Hills* (1844) 5 QB 606; *Shields v Rotton* (1848) 11 LTOS 132); cigars and tobacco (*Bryant v Richardson* (1866) LR 3 Exch 93, note (3)); expensive jewellery (*Ryder v Wombwell* supra); commission to a theatrical agent by an infant music hall performer for obtaining engagements (*Lofthouse v Brown* [1898] WN 52; but see *Mackinlay v Bathurst* (1919) 36 TLR 31, CA); a collection of curios (*Stocks v Wilson* [1913] 2 KB 235); commission to an agent by an infant professional boxer (*Shears v Mendeloff* (1914) 30 TLR 342); flying lessons for a law student (*Hamilton v Bennett* (1930) 94 JP Jo 136); a hunter for an infant cavalry officer whose income was £3 per week (*Re Mead* [1916] 2 IR 285, CA).

## **UPDATE**

### **18-19 Liability for necessities, What are necessities?**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 20. Liability for trade debts.

Trading contracts are not contracts for necessities<sup>1</sup>, and a child is not liable upon a contract for work and labour done to enable him to carry on trade<sup>2</sup>, although he may enforce such a contract<sup>3</sup>. A child is not liable for a debt incurred by him in the course of his trading<sup>4</sup>. If, however, he obtains credit for it by a fraudulent misrepresentation as to his age, he may be compelled to make restitution<sup>5</sup>, but the fact of his trading is not in itself a representation by him that he is of age<sup>6</sup>. Even if such a fraudulent misrepresentation is expressly made, it is doubtful whether it will render a child liable to be made bankrupt in respect of trade debts<sup>7</sup>. Where goods are purchased as stock but are used as necessities, the child is liable to that extent<sup>8</sup>.

1 *Cowern v Nield* [1912] 2 KB 419 at 422, DC, per Phillimore J, applied in *Mercantile Union Guarantee Corp'n Ltd v Ball* [1937] 2 KB 498, [1937] 3 All ER 1, CA (hire purchase of lorry); but cf *Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA (where a contract was held binding on the ground that it enabled a child to make professional earnings). See also *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA. A child cannot be charged for goods delivered as stock to trade with: *Whywall v Champion* (1738) 2 Stra 1083; but see the text to note 8 infra. As to contracts of service and apprenticeship see para 22 post. As to what constitutes necessities see para 19 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37.

2 *Re Jones, ex p Jones* (1881) 18 ChD 109, CA. There is, however, nothing illegal or improper in a child's carrying on a trade: *Re Jones, ex p Jones* supra at 121 per Jessel MR. See also *Lowe v Griffith* (1835) 1 Scott 458; *Turberville v Whitehouse* (1823) 1 C & P 94.

3 See para 13 ante.

4 *Whittingham v Hill* (1618) Cro Jac 494; *Whywall v Champion* (1738) 2 Stra 1083; *Hitchcock v Tyson* (1786) 2 Esp 481, note (a); *Dilk v Keighley* (1796) 2 Esp 480; *Thornton v Illingworth* (1824) 2 B & C 824; *Re Jones, ex p Jones* (1881) 18 ChD 109 at 124, CA, per Lush LJ; *Cowern v Nield* [1912] 2 KB 419, DC; *Shears v Mendeloff* (1914) 30 TLR 342.

5 *Stocks v Wilson* [1913] 2 KB 235; *R Leslie Ltd v Shiell* [1914] 3 KB 607, CA. Moreover, statute now confers on the court a power to order restitution: see the Minors' Contracts Act 1987 s 3; and para 24 post.

6 *Re Jones, ex p Jones* (1881) 18 ChD 109 at 121, CA, per Jessel MR; and see *Weaver v Stokes* (1836) 1 M & W 203. See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 721.

7 *Re Jones, ex p Jones* (1881) 18 ChD 109, CA; and see para 10 ante.

8 *Turberville v Whitehouse* (1823) 12 Price 692.

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## 21. Loans to provide necessities.

Whilst a child may make a binding contract to buy necessities<sup>1</sup>, the loan cannot be enforced at common law if he borrows money for that purpose<sup>2</sup>, and where a sum of money is advanced to a child to enable him to provide himself with necessities, he cannot give a binding security for it<sup>3</sup> nor draw nor accept a bill in respect of it<sup>4</sup>. The lender, however, stands in equity in the place of the supplier of the necessities and may accordingly maintain a claim for the money<sup>5</sup>; and his right in this respect is not prejudiced by the child's having given an invalid security for it<sup>6</sup>.

1 See para 18 ante. As to what constitutes necessities see para 19 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37.

2 *Earle v Peale* (1711) 10 Mod Rep 66; and see the cases cited in notes 3-6 infra. As to the court's power to order restitution under the Minors' Contracts Act 1987 see para 24 post.

3 *Ayliff v Archdale* (1603) Cro Eliz 920; *Rearsby and Cuffer's Case* (1613) Godb 219; *Probart v Knouth* (1783) 2 Esp 472n; *Martin v Gale* (1876) 4 ChD 428; *Walkden v Hartley and Cavell* (1886) 2 TLR 767; *Walter v Everard* [1891] 2 QB 369 at 372, CA, per Lord Esher MR. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 106.

4 *Russel v Lee* (1663) 1 Lev 86; *Earle v Peale* (1711) 10 Mod Rep 66; *Trueman v Hurst* (1785) 1 Term Rep 40; *Williamson v Watts* (1808) 1 Camp 552; *Bateman v Kingston* (1880) 6 LR Ir 328; *Re Soltykoff, ex p Margrett* [1891] 1 QB 413, CA. As to bills of exchange and minors see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1471.

5 *Marlow v Pitfeild* (1719) 1 P Wms 558; *Re National Permanent Benefit Building Society, ex p Williamson* (1869) 5 Ch App 309 at 313 per Giffard LJ; *Martin v Gale* (1876) 4 ChD 428; *Yorkshire Railway Wagon Co v Maclure* (1881) 19 ChD 478 at 487 per Kay J (on appeal (1882) 21 ChD 309, CA); *Lewis v Alleyne* (1888) 4 TLR 560, CA. However, he could not formerly have done so at law: *Darby v Boucher* (1693) 1 Salk 279. An infant who executed a mortgage in order to raise money for necessities and subsequently upon attaining full age charged the premises with a further advance and confirmed the earlier mortgage was not entitled to redeem without paying off the sum advanced during infancy: *Gardner v Wainfur* (1919) 89 LJCh 98. See also EQUITY vol 16(2) (Reissue) para 773.

6 *Cooper v Simmons* (1862) 7 H & N 707 at 719 per Martin B; *Martin v Gale* (1876) 4 ChD 428; *Walter v Everard* [1891] 2 QB 369, CA. Army agents advancing reasonable sums to an infant officer for regimental purposes were entitled to repay themselves out of money in their hands belonging to him: *Lawrie v Bankes* (1858) 4 K & J 142.

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## **22. Contracts of apprenticeship and service.**

In as much as it is for a child's benefit that he should fit himself for and employ himself in labour or business, he can bind himself by a contract of apprenticeship and of service generally<sup>1</sup>.

<sup>1</sup> 1 Burn's Justice of the Peace (30th Edn) 280b; 4 Burn's Justice of the Peace (30th Edn) 209 et seq; *Gylbert v Fletcher* (1629) Cro Car 179; *R v Evered* (1777) Cald Mag Cas 26 at 28; *R v Saltren* (1784) Cald Mag Cas 444; *R v Arundel Inhabitants* (1816) 5 M & S 257; *R v Arnesby Inhabitants* (1820) 3 B & Ald 584 at 586 per Bayley J; *R v Chillesford Inhabitants*, *R v Winslow Inhabitants* (1825) 4 B & C 94; *Wood v Fenwick* (1842) 10 M & W 195; *Wise v Wilson* (1845) 1 Car & Kir 662; *R v Lord* (1848) 12 QB 757 at 765 per Lord Denman CJ; *Cooper v Simmons* (1862) 7 H & N 707 at 721 per Wilde B; *De Francesco v Barnum* (1890) 45 ChD 430 at 439 per Fry LJ; *Clements v London and North Western Rly Co* [1894] 2 QB 482 at 491, CA, per Kay LJ, and at 495 per Smith LJ; *Mackinlay v Bathurst* (1919) 36 TLR 31, CA; *Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 722, [1968] 3 All ER 513 at 521, CA, per Salmon LJ (where the infancy of members of a pop group did not make contracts with their manager unenforceable); *IRC v Mills* [1975] AC 38, [1974] 1 All ER 722, HL. As to contracts of apprenticeship see EMPLOYMENT vol 39 (2009) PARA 9.

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### 23. Effect of misrepresentation.

Where a child has obtained an advantage by falsely stating himself to be of full age, he is bound in equity to restore property so acquired and to release persons whom he has deceived from obligations induced by the fraud<sup>1</sup>. The misrepresentation must be explicit, however, and will not arise from mere inferences suggested by or drawn from the child's conduct<sup>2</sup>; nor will it bind or prejudice the child if the person with whom he is dealing is in fact aware that he is a child<sup>3</sup>.

Thus, where goods have been obtained by a child upon a fraudulent misrepresentation, he may be compelled to restore them<sup>4</sup>, and a lease so obtained may be ordered to be cancelled<sup>5</sup>. Similarly, a trustee who has paid over funds to a child on his fraudulent representation that he is of age will not be liable to pay them again<sup>6</sup>, and a specific release given to a trustee by a child who represents himself to be of age will be binding on the child<sup>7</sup>.

Where a person under age has obtained a loan or incurred a debt by a fraudulent misrepresentation as to his being of age, he cannot be sued for it at law<sup>8</sup> but, in respect of his equitable liability, may be compelled to make restitution<sup>9</sup>, and proof of the debt will be admitted in his bankruptcy<sup>10</sup>. A mortgage granted by a child to secure a loan might be held valid on the same principle<sup>11</sup>. Such a fraud, however, will not affect a third person who claims under a disposition made after the child has attained full age without notice of an unenforceable prior charge made during infancy<sup>12</sup>.

The Minors' Contracts Act 1987 confers on the court a wide discretion to require a defendant to transfer to the claimant any property acquired by the defendant under a contract unenforceable against the defendant (or repudiated by him) because he was a minor when it was made<sup>13</sup>. Although this provision does not prejudice any other remedy available to the claimant<sup>14</sup>, it may be that the broad statutory remedy will be invoked in preference to the equitable power to order the restoration of benefits obtained under the contract.

1 *R Leslie Ltd v Sheill* [1914] 3 KB 607 at 618, CA, per Lord Sumner, and at 623-624 per Kennedy LJ; *Watts v Creswell* (1714) 9 Vin Abr 415; *Johnson v Pye* (1665) 1 Sid 258; *Evroy v Nicholas* (1733) 2 Eq Cas Abr 488; *Earl of Buckinghamshire v Drury* (1762) 2 Eden 60 at 72-73, HL, per Lord Mansfield; *Beckett v Cordley* (1784) 1 Bro CC 353; *Stocks v Wilson* [1913] 2 KB 235. See also ESTOPPEL vol 16(2) (Reissue) para 1053. As to misrepresentation generally see MISREPRESENTATION AND FRAUD.

2 *Stikeman v Dawson* (1847) 1 De G & Sm 90; *Maclean v Dummett* (1870) 22 LT 710, PC; *Miller v Blankley* (1878) 38 LT 527; *Re Jones, ex p Jones* (1881) 18 ChD 109 at 121, CA, per Jessel MR. See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 721.

3 *Nelson v Stocker* (1859) 4 De G & J 458 at 465 per Turner LJ; and see para 14 ante.

4 *Clarke v Copley* (1789) 2 Cox Eq Cas 173. In *Stocks v Wilson* [1913] 2 KB 235 at 242 it was held that an infant who thus obtains goods and sells them is accountable for the proceeds of the sale, but this is doubtful: see *R Leslie Ltd v Sheill* [1914] 3 KB 607 at 618-619, CA, per Lord Sumner.

5 *Lemprière v Lange* (1879) 12 ChD 675.

6 *Cory v Gertcken* (1816) 2 Madd 40; *Overton v Banister* (1844) 3 Hare 503.

7 *Wright v Snowe* (1848) 2 De G & Sm 321. A general release by a child has no effect in law: *Overton v Banister* (1844) 3 Hare 503 at 506 per Wigram V-C.

8 *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA; *Johnson v Pye* (1665) 1 Sid 258; *Price v Hewett* (1853) 8 Exch 146; *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch 422 at 430 per Pollock CB; *De Roo v Foster* (1862) 12 CBNS 272; *Inman v Inman* (1873) LR 15 Eq 260; *Levene v Brougham* (1909) 25 TLR 265, CA. As to a child's liability in tort see para 26 post.

9 *Stocks v Wilson* [1913] 2 KB 235; *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA. He will not, however, be compelled to repay money lent which he has spent: *R Leslie Ltd v Sheill* supra.

10 *Re King, ex p Unity Joint Stock Mutual Banking Association* (1858) 3 De G & J 63; *Maclean v Dummett* (1870) 22 LT 710, PC; *Re Jones, ex p Jones* (1881) 18 ChD 109 at 125, CA, per Lush LJ.

11 *Lord Teynham v Webb* (1751) 2 Ves Sen 198 at 212 per Lord Hardwicke LC; but see *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL.

12 *Inman v Inman* (1873) LR 15 Eq 260.

13 See the Minors' Contracts Act 1987 s 3; and para 24 post.

14 See *ibid* s 3(2); and para 24 post.

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## **24. Restitution.**

Where a person ('the claimant') has after 9 June 1987 entered into a contract with another ('the defendant') and the contract is unenforceable against the defendant (or he repudiates it) because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the claimant any property<sup>1</sup> acquired by the defendant under the contract, or any property representing it<sup>2</sup>. This is without prejudice to any other remedy which may be available to the claimant<sup>3</sup>.

1 'Property' is not defined for the purposes of the Minors Contracts Act 1987. It is therefore not certain whether the court can order a minor to restore a sum of money, or to pay a sum of money representing the proceeds of sale of property received by him under the contract. See, however, the Theft Act 1968 s 4(1), which provides that 'property' includes money: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 285. As to contracts and guarantees see para 14 ante.

2 Minors' Contracts Act 1987 s 3(1). As to restitution see further RESTITUTION.

3 Ibid s 3(2).

## **UPDATE**

## **24 Restitution**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **25. Repudiation of voidable contracts.**

In certain cases it is settled that a minor is bound by a contract, but can avoid liability by repudiating before majority or within a reasonable time thereafter. A child cannot hold a legal estate in land<sup>1</sup> but may be liable under a transaction taking effect as an agreement for a lease<sup>2</sup>. A child who agrees to purchase freehold land is bound unless he repudiates<sup>3</sup>. A child is liable for calls on shares<sup>4</sup>. A person is liable to some extent under a partnership agreement made during minority<sup>5</sup>. It also appears that a marriage settlement binds a child unless he repudiates<sup>6</sup>.

1 See the Law of Property Act 1925 s 1(6); and para 30 post.

2 *Ketsey's Case* (1613) Cro Jac 320, sub nom *Keteley's Case* (1613) 1 Brownl 120; *Davies v Beynon-Harris* (1931) 47 TLR 424.

3 *Whittingham v Murdy* (1889) 60 LT 956; *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1 at 9, CA, per Vaughan Williams LJ, and at 13 per Romer LJ; *Orakpo v Manson Investments Ltd* [1978] AC 95 at 106, [1977] 3 All ER 1 at 7, HL, per Lord Diplock, and at 113 and 14-15 per Lord Edmund-Davies.

4 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA.

5 *Goode v Harrison* (1821) 5 B & Ald 147 at 157 per Bayley J; *Lovell and Christmas v Beauchamp* [1894] AC 607, HL.

6 *Duncan v Dixon* (1890) 44 ChD 211; *Edwards v Carter* [1893] AC 360, HL.



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## (ii) Tort

### 26. General liability for torts.

A child of an age at which he is capable of distinguishing between right and wrong is liable for the consequences of his own wrongful acts. A child above the age of seven years<sup>1</sup> is not protected from the consequences of his own fraud<sup>2</sup>, and is generally liable for a tort committed by him if it is not directly founded upon a contract on which he cannot be sued<sup>3</sup>.

Accordingly, a child can be sued for the return of money which he has stolen<sup>4</sup>, for trespass<sup>5</sup>, for damage done by a dangerous animal kept by him<sup>6</sup>, for conversion<sup>7</sup>, for slander<sup>8</sup>, for fraudulently passing off spurious goods as being of the claimant's manufacture<sup>9</sup>, or for representing his business as being connected with the claimant's business<sup>10</sup>.

1 Bac Abr, Infancy and Age (A), (H). In Canada it has been held that a child aged five years is too young to be found guilty of negligence: *Walmsley v Humenick* [1954] 2 DLR 232. See NEGLIGENCE vol 78 (2010) PARAS 21-22, 78.

2 *Watts v Creswell* (1714) 9 Vin Abr 415; *Clere (Clare) v Earl of Bedford* (prior to 1690) cited in 9 Mod Rep 38, and in 13 Vin Abr 536; *Esron (Evroy) v Nicholas* (1733) 1 De G & Sm 118 at 119, 2 Eq Cas Abr 488 at 489 per Knight Bruce V-C; *Lord Teynham v Webb* (1751) 2 Ves Sen 198 at 212 per Lord Hardwicke LC; *Earl of Buckinghamshire v Drury* (1762) 2 Eden 60 at 72, HL, per Lord Mansfield; *Clarke v Copley* (1789) 2 Cox Eq Cas 173 at 174 per Kenyon MR; *Cory v Gertcken* (1816) 2 Madd 40. See also para 23 ante; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 721.

3 Bac Abr, Infancy and Age (H); *Bristow v Eastman* (1794) 1 Esp 172 at 173 per Lord Kenyon. As to torts founded on contract on which a child cannot be sued see para 27 post; and TORT vol 97 (2010) PARA 436.

4 *Bristow v Eastman* (1794) 1 Esp 172; *Re Seager*, *Seeley v Briggs* (1889) 60 LT 665; *Cowern v Nield* [1912] 2 KB 419 at 423-424, DC, per Phillimore J.

5 Bac Abr, Infancy and Age (H); *Johnson v Pye* (1665) 1 Sid 258; *O'Brien v McNamee* [1953] IR 86. As to trespass to the person see TORT vol 97 (2010) PARA 524 et seq.

6 *North v Wood* [1914] 1 KB 629.

7 *Mills v Graham* (1804) 1 Bos & PNR 140; *Burton v Levey* (1891) 7 TLR 248 (actions in detinue); *Ballett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA (minor bailee sued in detinue: see BAILMENT vol 3(1) (2005 Reissue) para 60). Actions in detinue have been abolished, and defaulting bailees may now be sued in conversion: see the Torts (Interference with Goods) Act 1977 s 2; and TORT vol 45(2) (Reissue) PARA 543.

8 *Defries v Davis* (1835) 1 Scott 594; *Hoddsman v Grissel* (1608) Noy 129. As to slander see generally LIBEL AND SLANDER.

9 *Chubb v Griffiths* (1865) 35 Beav 127.

10 *Woolf v Woolf* [1899] 1 Ch 343.

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## **27. Tort founded on contract.**

A child is not liable for a tort which is founded on a contract on which he cannot be sued<sup>1</sup>, as in the case of the warranty of goods<sup>2</sup>, or for a fraudulent misrepresentation as to his age which induces a party to contract with him<sup>3</sup>; but he is liable for any tort which, although connected with the subject matter of a contract, is a separate and independent act of a kind forbidden or not contemplated by the contract<sup>4</sup> or if the action in substance arises from the tort itself<sup>5</sup>.

1 *Manby v Scott* (1663) 1 Sid 109 at 129, Ex Ch, per Bridgman CJ; *Jennings v Rundall* (1799) 8 Term Rep 335 at 336 per Lord Kenyon CJ; *Cowern v Nield* [1912] 2 KB 419, DC; *R Leslie Ltd v Sheill* [1914] 3 KB 607 at 611-612, CA, per Lord Sumner. A claimant cannot convert an action founded on contract into an action in tort so as to charge a child: *Jennings v Rundall* supra; *Green v Greenbank* (1816) 2 Marsh 485; *Burnard v Haggis* (1863) 14 CBNS 45 at 53-54.

2 *Howlett v Haswell* (1814) 4 Camp 118 (horse); *Green v Greenbank* (1816) 2 Marsh 485.

3 *Cowern v Nield* [1912] 2 KB 419, DC; *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA; but see para 23 ante. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 721.

4 *Burnard v Haggis* (1863) 14 CBNS 45, where the defendant's action was 'an act of tort just as distinct from the contract as if the defendant had run a knife into [the mare] and killed her'; *Walley v Holt* (1876) 35 LT 631; *Fawcett v Smethurst* (1914) 84 LJB 473; *Ballett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA, where a child went completely outside the terms of a bailment by parting with possession of the goods bailed to him.

5 *Cowern v Nield* [1912] 2 KB 419 at 424, DC, per Phillimore J.

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## 28. Liability of parents and other persons.

Prima facie a parent is not liable for a tort committed by his child<sup>1</sup>. Where, however, a child causes injury to others the parent or any other person in charge of the child<sup>2</sup> may be liable if the parent or other person has control of a dangerous thing which causes the injury<sup>3</sup> or is negligent, either in permitting the child to use a thing which is dangerous in itself or known to be dangerous<sup>4</sup> or capable of causing danger to others<sup>5</sup> or in not exercising proper control and supervision of the child<sup>6</sup>. A parent may also become liable where he has previously authorised or subsequently ratified the child's act<sup>7</sup>.

Parents and other persons in charge of children may also be liable for injuries suffered by a third person arising from a perilous situation created by the innocent act of a child where this ought in the circumstances to have been reasonably anticipated<sup>8</sup>. The question in such cases is not unlike that which arises under the doctrine of allurements<sup>9</sup>.

1 *Donaldson v McNiven* [1952] 2 All ER 691 at 692, CA, per Lord Goddard CJ.

2 See *Dixon v Bell* (1816) 5 M & S 198.

3 *North v Wood* [1914] 1 KB 629 (dog known by father to be savage; daughter of sufficient age to exercise control over dog; father not responsible for damage done by dog). As to liability for injuries caused by animals in the possession of persons under 16 years of age see the Animals Act 1971 ss 2, 6(3); and ANIMALS vol 2 (2008) PARAS 747-748.

4 *Dixon v Bell* (1816) 5 M & S 198; cf *Burfitt v A and E Kille* [1939] 2 KB 743, [1939] 2 All ER 372. As to a parent's liability for negligence if he makes a gift to his child of a dangerous article with which the child causes injury to a third party see GIFTS vol 52 (2009) PARA 229.

5 *Brown v Fulton* (1881) 9 R 36, Ct of Sess; *Bebee v Sales* (1916) 32 TLR 413.

6 *Williams v Eady* (1893) 10 TLR 41, CA; *Camkin v Bishop* [1941] 2 All ER 713, CA; *Ricketts v Erith Borough Council* [1943] 2 All ER 629; *Donaldson v McNiven* [1952] 2 All ER 691, CA (no evidence of lack of supervision by father of boy aged 13 permitted to use air rifle), distinguished in *Newton v Edgerley* [1959] 3 All ER 337, [1959] 1 WLR 1031 (boy aged 12 allowed to have use of shotgun; father ordered him not to use it in presence of other children; order was one which father could not possibly see obeyed; father liable); *Gorely v Codd* [1966] 3 All ER 891, [1967] 1 WLR 19 (no lack of supervision); cf *Partington v Wandsworth London Borough Council* [1990] Fam Law 468 (local authority not liable for assault by person in its care; reasonable care taken).

7 *Moon v Towers* (1860) 8 CBNS 611.

8 *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL. For the purpose of the exception to the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, which exempts from liability a person who brings a dangerous thing on his land if it escapes owing to the act of a stranger (*Rickards v Lothian* [1913] AC 263, PC), it is immaterial whether or not the stranger was capable of conscious volition, and, accordingly, the owner may escape liability where injury to a third party results from the act of a child (*Perry v Kendrick's Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85, CA): see NUISANCE vol 78 (2010) PARA 147 et seq. As to the liability of school authorities and teachers in relation to injuries caused by children under their care see EDUCATION vol 15(2) (2006 Reissue) para 872.

9 *Flemington Trust Ltd v Brown and Lynn* 1953 SLT 13, Sh Ct, where cases on liability for damage resulting from children playing with unattended lorries are collected. See para 612 et seq post; and NEGLIGENCE vol 78 (2010) PARA 33.

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### **(iii) Crime**

#### **29. Liability for crimes.**

It is conclusively presumed that no child under the age of 10 years can be guilty of any criminal offence<sup>1</sup>. The rebuttable presumption of criminal law that a child between the ages of 10 and 14 years is incapable of committing an offence has been abolished<sup>2</sup>. A person over the age of 14 years is presumed to have a degree of reason sufficient to make him responsible for his crimes<sup>3</sup>. Special statutory provisions exist in relation to criminal proceedings involving juvenile offenders<sup>4</sup>.

The presumption of criminal law that a boy under the age of 14 is incapable of sexual intercourse, whether natural or unnatural, is abolished<sup>5</sup>.

1 Children and Young Persons Act 1933 s 50 (amended by the Children and Young Persons Act 1963 s 16(1)). As to the general principles relating to criminal proceedings against or involving children and young persons see para 1232 post.

2 Crime and Disorder Act 1998 s 34. This change in the law has no application to an act done before 30 September 1998 (ie the commencement date for s 34): see s 120(1), Sch 9 para 1; and the Crime and Disorder Act 1998 (Commencement No 2 and Transitional Provisions) Order 1998, SI 1998/2327 (amended by SI 1998/2412; SI 1998/2906; SI 2000/924). See *R v Secretary of State for the Home Department, ex p Venables, R v Secretary of State for the Home Department, ex p Thompson* (1996) 140 Sol Jo LB 127, (1996) Times, 7 May, DC; affd [1997] 1 All ER 327, [1997] 2 WLR 67, CA; revsd in part [1998] AC 407, [1997] 3 All ER 97, HL (two boys aged 10 years found guilty of murdering a 2-year-old child).

3 *R v Oxford* (1840) 9 C & P 525; *M'Naghten's Case* (1843) 10 Cl & Fin 200, HL.

4 See para 1232 et seq post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) paras 1702-1705; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 10-12.

5 Sexual Offences Act 1993 s 1. See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1375.

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#### **(iv) Property**

#### ***A. ACQUISITION AND HOLDING***

#### **30. Incapacity to hold legal estate.**

A legal estate in land cannot be held by a child<sup>1</sup>, nor can a child be a tenant for life or exercise the powers of a tenant for life of settled land<sup>2</sup>.

1 See the Law of Property Act 1925 s 1(6); and REAL PROPERTY vol 39(2) (Reissue) para 54.

2 See the Settled Land Act 1925 ss 19, 20 (as amended); and SETTLEMENTS vol 42 (Reissue) para 761 et seq.

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### **31. Effect of conveyance to child.**

Where, after 1 January 1997, a person purports to convey a legal estate in land to a minor, or two or more minors, alone, the conveyance is not effective to pass the legal estate, but operates as a declaration that the land is held in trust for the minor or minors (or if he purports to convey it to the minor or minors in trust for any persons, for those persons)<sup>1</sup>. Where, after that date, a person purports to convey a legal estate in land to a minor or two or more minors, and another person who is, or other persons who are, of full age, the conveyance operates to vest the land in the other person or persons in trust for the minor or minors and the other person or persons (or if he purports to convey it to them in trust for any persons, for those persons)<sup>2</sup>. Where, immediately before 1 January 1997, a conveyance is operating<sup>3</sup> as an agreement to execute a settlement in favour of a minor or minors, the agreement ceases to have effect on that date, and the conveyance subsequently operates instead as a declaration that the land is held in trust for the minor or minors<sup>4</sup>.

Where, after that date, a legal estate in land would, by reason of intestacy or in any other circumstances not already mentioned above, vest in a person who is a minor if he were a person of full age, the land is held in trust for the minor<sup>5</sup>.

If a child is party to an exchange of land, and after coming of age continues in possession of the land given to him in exchange, he is bound by the transaction<sup>6</sup>.

1 Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 1(1).

2 Ibid Sch 1 para 1(2).

3 Ie by virtue of the Settled Land Act 1925 s 27 (repealed).

4 Trusts of Land and Appointment of Trustees Act 1996 Sch 1 para 1(3).

5 Ibid Sch 1 para 2.

6 Co Litt 51b; Bac Abr, Infancy and Age (I) 8; *Cecil v Earl of Salisbury* (1691) 2 Vern 224 at 225 per Lord Commissioner Trevor.

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### **32. Land treated as settled land.**

Any deed, will, agreement for a settlement or other agreement, Act of Parliament or other instrument or any number of instruments, whenever made, under or by virtue of which a legal estate in land stands for the time being limited in trust for a child in possession, creates a settlement<sup>1</sup>, and the land is settled land<sup>2</sup>.

Where a child is beneficially entitled to a legal estate in land, and by reason of an intestacy or otherwise there is no instrument under which the child's interest arises or is acquired, a settlement is deemed to have been made by the intestate or by the person whose interest the child has acquired<sup>3</sup>.

1 See the Settled Land Act 1925 s 1(1)(ii)(d); and SETTLEMENTS vol 42 (Reissue) para 678. This replaced the Settled Land Act 1882 s 59 (repealed), which provided that where a person who was in his own right seised of or entitled in possession to land was an infant, the land was settled land and the child deemed tenant for life of it. For cases on the construction of s 59 see *Re Liddell, Liddell v Liddell* (1882) 52 LJCh 207; *Re Wells* (1883) 31 WR 764; *Re James' Settled Estates* (1884) 32 WR 898; *Re Horne's Settled Estate* (1888) 39 ChD 84, CA; *Re Sparrow's Settled Estate* [1892] 1 Ch 412. As to what constitutes a settlement of land see generally SETTLEMENTS vol 42 (Reissue) para 675 et seq.

2 Settled Land Act 1925 s 2.

3 See *ibid* s 1(2); and SETTLEMENTS vol 42 (Reissue) para 678. As to the statutory trusts for issue see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 603 et seq.

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### **33. Powers of personal representatives and trustees.**

Where a child is beneficially entitled in possession to a legal estate in land<sup>1</sup>, or would if of full age be a tenant for life<sup>2</sup> of or have the powers of a tenant for life over settled land, then, during the minority of the child<sup>3</sup>:

- 1 (1) if the settled land is vested in a personal representative<sup>4</sup>, the personal representative, until a principal vesting instrument has been executed pursuant to the provisions of the Settled Land Act 1925<sup>5</sup>; and
- 2 (2) in every other case, the trustees of the settlement<sup>6</sup>,

has or have, in reference to the settled land and capital money<sup>7</sup>, all the powers conferred by that Act and the settlement on a tenant for life and on the trustees of the settlement<sup>8</sup>.

This provision does not apply if a child is beneficially entitled in possession to the land jointly with a person of full age<sup>9</sup>; nor does it apply if a child would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age<sup>10</sup>. It does apply to two or more children entitled in possession to land until one of them attains full age, and also to two or more children who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life until one of them attains full age<sup>11</sup>. In any case the child's beneficial interest will not be affected prejudicially<sup>12</sup>.

1 For the meaning of 'land' see SETTLEMENTS vol 42 (Reissue) para 680.

2 For the meaning of 'tenant for life' see SETTLEMENTS vol 42 (Reissue) para 671.

3 Settled Land Act 1925 s 26(1). For the meaning of 'settled land' see SETTLEMENTS vol 42 (Reissue) para 680.

4 For the meaning of 'personal representative' see SETTLEMENTS vol 42 (Reissue) para 697. As to personal representatives as trustees see SETTLEMENTS vol 42 (Reissue) para 751.

5 Settled Land Act 1925 s 26(1)(a). As to principal vesting instruments see SETTLEMENTS vol 42 (Reissue) para 688 et seq.

6 Ibid s 26(1)(b). For the meaning of 'trustees of the settlement' see SETTLEMENTS vol 42 (Reissue) para 750. For the meaning of 'settlement' see SETTLEMENTS vol 42 (Reissue) para 678.

7 For the meaning of 'capital money' see SETTLEMENTS vol 42 (Reissue) para 795.

8 Settled Land Act 1925 s 26(1). If settled land is vested in a personal representative, the trustees of the settlement are entitled to require the legal estate to be vested in themselves, and in the meantime the personal representatives must give effect to the trustees' directions: see s 26(2). This applies whenever the child became entitled and has effect during successive minorities until a person of full age becomes entitled to require the settled land to be vested in him: s 26(3). As to the management powers of trustees during a minority see paras 54-57 post. See generally SETTLEMENTS vol 42 (Reissue) para 664 et seq.

9 Ibid s 26(4). See also para 35 post.

10 Ibid s 26(5). As to the case where a child, if of full age, would constitute the tenant for life with another person of full age see SETTLEMENTS vol 42 (Reissue) para 761.

11 Ibid s 26(4), (5).



12 Ibid s 26(6).

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### **34. Transitional provisions relating to a child entitled absolutely or for life.**

Where, on 1 January 1926, a child was beneficially entitled in possession to a legal estate in land<sup>1</sup>, or would, if of full age, have been a tenant for life<sup>2</sup> or had the powers of a tenant for life, the settled land<sup>3</sup> vested in the trustees of the settlement<sup>4</sup>. If there were no such trustees, then, pending their appointment, the land vested in the Public Trustee<sup>5</sup> upon the same trusts<sup>6</sup>, but he was not entitled to act in the trust until requested in writing on the child's behalf by the parents or parent or testamentary or other guardian in the order named<sup>7</sup>. After accepting the trust, the Public Trustee became the trustee of the settlement, and, except by an order of the court, no trustee might be appointed in his place without his consent<sup>8</sup>.

If there was no other person able and willing to appoint trustees, the child's parents or parent or testamentary or other guardian had power by deed to appoint trustees of the settlement in place of the Public Trustee as if the Public Trustee had refused to act in the trust; and in default of any such appointment, at any time during the minority the child by his next friend might apply to the court for the appointment of trustees<sup>9</sup>.

In the event of the Public Trustee not accepting the trust and no other trustee being appointed in his place, then, when the child attained the age of 21 years, the land vested in him<sup>10</sup>.

1 For the meaning of 'land' see SETTLEMENTS vol 42 (Reissue) para 680.

2 For the meaning of 'tenant for life' see SETTLEMENTS vol 42 (Reissue) para 671. As to who is a tenant for life see the Settled Land Act 1925 s 19; and SETTLEMENTS vol 42 (Reissue) para 761.

3 For the meaning of 'settled land' see SETTLEMENTS vol 42 (Reissue) para 680.

4 Settled Land Act 1925 s 37, Sch 2 para 3(1); Law of Property Act 1925 s 39 (as amended), Sch 1 Pt III para 1. For the meaning of 'settlement' see SETTLEMENTS vol 42 (Reissue) para 678; and for the meaning of 'trustees of the settlement' see SETTLEMENTS vol 42 (Reissue) para 750. As to settled land vested in personal representatives see the Settled Land Act 1925 Sch 2 paras 2, 3(2); and SETTLEMENTS vol 42 (Reissue) para 700.

5 As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) para 766 et seq.

6 Settled Land Act 1925 Sch 2 para 3(1) proviso (i).

7 Ibid Sch 2 para 3(1) proviso (ii).

8 Ibid Sch 2 para 3(1) proviso (iii).

9 Ibid Sch 2 para 3(1) proviso (iv). In favour of a purchaser, a statement in a deed of appointment that the father or mother or both are dead or unable or unwilling to make the appointment is conclusive evidence of the fact stated: Sch 2 para 3(1) proviso (iv).

10 Ibid Sch 2 para 3(1) proviso (v).

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### **35. Transitional provisions relating to a child joint tenant.**

The transitional vesting provisions<sup>1</sup> applied to the case of two or more children jointly<sup>2</sup> entitled to a legal estate in land<sup>3</sup>, and to the case of two or more children who would, if all of full age, have together constituted the tenant for life or had the powers of a tenant for life<sup>4</sup>.

Where a legal estate in land was vested immediately before 1 January 1926 in a child jointly with one or more other persons of full age beneficially, the legal estate vested in that other person or those other persons on the statutory trusts, but not so as to sever any joint tenancy<sup>5</sup>.

If a child or children would, if of full age, have constituted the tenant for life or have had the powers of a tenant for life together with another person or persons of full age, the person or persons of full age was or together constituted the tenant for life, and the legal estate in the settled land<sup>6</sup> vested in him or them, but without affecting the beneficial interests of the child or children<sup>7</sup>.

1    Ie the Settled Land Act 1925 s 37, Sch 2 para 3(1): see para 34 ante.

2    As to undivided shares see the Law of Property Act 1925 s 39, Sch 1 Pt IV (as amended); and REAL PROPERTY vol 39(2) (Reissue) paras 55-61.

3    Settled Land Act 1925 Sch 2 para 3(5). For the meaning of 'land' see SETTLEMENTS vol 42 (Reissue) para 680.

4    Ibid Sch 2 para 3(6). For the meaning of 'tenant for life' see SETTLEMENTS vol 42 (Reissue) para 671.

5    Ibid Sch 2 para 3(5); Law of Property Act 1925 Sch 1 Pt III para 2. As to the power of appointing additional trustees where there was only one see Sch 1 Pt III para 2 proviso.

6    For the meaning of 'settled land' see SETTLEMENTS vol 42 (Reissue) para 680.

7    See the Settled Land Act 1925 s 19(3), Sch 2 para 3(6); and the Law of Property Act 1925 Sch 1 Pt II para 6(c), Pt III para 1. When the child attained full age he was entitled to have the land conveyed to him and the other person or persons who constituted the tenant for life as joint tenants: see the Settled Land Act 1925 s 7(3).

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### **36. Transitional provisions relating to a child trustee or mortgagee.**

Where, immediately before 1 January 1926, a legal estate in land<sup>1</sup> was vested solely in a child as a personal representative, or a trustee of a settlement, or on trust for sale or any other trust, or by way of mortgage, or where immediately after that date a legal estate in land would have been so vested if the child had been of full age, the legal estate and the mortgage debt, if any, and interest thereon vested in the Public Trustee<sup>2</sup>, pending the appointment of trustees, upon such trusts as might be requisite for giving effect to the rights of the child or other persons beneficially interested therein<sup>3</sup>.

Where, immediately before 1 January 1926, a legal estate in land was vested in two or more persons jointly as personal representatives, trustees or mortgagees, and any one of them was a child, or where immediately after 31 December 1925 a legal estate in land would have been so vested if the child had been of full age, the legal estate in the land with the mortgage debt, if any, and the interest thereon vested in the other person or persons of full age<sup>4</sup>.

1 For the meaning of 'land' see REAL PROPERTY vol 39(2) (Reissue) para 77.

2 As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) para 766 et seq.

3 See the Law of Property Act 1925 s 39, Sch 1 Pt III paras 3, 5. The Public Trustee was not entitled to act in the trust until properly requested on the child's behalf but, before accepting the trust, he might convey to a person of full age who had become entitled: see Sch 1 Pt III para 3 proviso (i). After he had accepted the trust, no trustee might be appointed in his place without his consent, except by order of the court: Sch 1 Pt III para 3 proviso (ii). During the minority, any person interested might apply to the court for the appointment of trustees of the trust: see Sch 1 Pt III para 3 proviso (iii). Neither a purchaser of the land nor a transferee for money or money's worth of the mortgage is concerned with the trusts affecting the legal estate or the mortgage debt and interest thereon: Sch 1 Pt III para 3 proviso (iv). As to the effect of the vesting in the Public Trustee on directions previously given for payments of income or interest see Sch 1 Pt III para 3 proviso (v).

4 See *ibid* Sch 1 Pt III para 4. If the legal estate and mortgage debt, if any, became vested in a sole trustee, then, if no other person was able and willing to do so, the parents or parent, testamentary or other guardian of the child had power, and at the request of any person interested were bound, by writing to appoint a new trustee in place of the child: see Sch 1 Pt III para 4 proviso. 'Person interested' includes, if necessary, a trustee for a person beneficially interested: see *Re Cliff Contract* [1927] 2 Ch 94; *Re Hayward, Merson v Hayward* [1928] Ch 367; *Darlington v Darlington* (1926) 70 Sol Jo 775.

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### 37. Grant or assignment of lease to child.

At common law, a grant of a lease to a child is voidable by the lessee on attaining majority but is binding on him unless repudiated within a reasonable time after attaining his majority<sup>1</sup>. If the lessee elects to avoid it, it is strictly void ab initio so as to relieve the lessee from all liability under it<sup>2</sup>, but the lessee is liable for rent which accrued during the minority in respect of actual occupation<sup>3</sup>, at any rate if the occupation can be treated as necessary for the child<sup>4</sup>, and apparently the lessor can distrain against him for rent in arrear<sup>5</sup>. The lessee will be taken to have confirmed the lease if he continues to occupy the premises and does not give notice to avoid it within a reasonable time after the minority ceases<sup>6</sup>. In that case he became, at common law, liable to satisfy all the obligations of the lease<sup>7</sup>, including the payment of rent which accrued during his minority<sup>8</sup>. If, on attaining full age, the lessee avoids the lease, he cannot recover any money which he has paid under it<sup>9</sup>, unless he has received no benefit<sup>10</sup>.

It has been held that a minor could become a statutory tenant under the Rent Acts<sup>11</sup>.

1 *Davies v Beynon-Harris* (1931) 47 TLR 424.

2 *Bac Abr*, Infancy and Age (l) 8; *Ketsey's Case* (1613) Cro Jac 320, sub nom *Keteley's Case* (1613) 1 Brownl 120; *Mahon v O'Farrell* (1847) 10 ILR 527; *Blake v Concannon* (1870) IR 4 CL 323; *Lemprière v Lange* (1879) 12 ChD 675. The lessor can avoid the lease if the child obtained it on the representation that he was of full age; but this must be a complete avoidance of the transaction, and the lessor cannot at the same time recover for use and occupation: *Lemprière v Lange* supra.

3 *Blake v Concannon* (1870) IR 4 CL 323.

4 *Crisp v Churchill* (1794) cited in 1 Bos & P at 340; *Lowe v Griffith* (1835) 1 Scott 458.

5 In *Conny's Case* (1611) 9 Co Rep 84b it was laid down that a child who held a tenement of a manor subject to a rent could be distrained upon for the rent during his minority.

6 See *Carter v Silber*, *Carter v Hasluck* [1892] 2 Ch 278, CA (affd sub nom *Edwards v Carter* [1893] AC 360, HL); *Holmes v Blogg* (1817) 8 Taunt 35 at 39 per Dallas J (on appeal (1818) 8 Taunt 508); *Dublin and Wicklow Rly Co v Black* (1852) 8 Exch 181; cf *Doe d Bromfield v Smith* (1788) 2 Term Rep 436.

7 *North Western Rly Co v M'Michael*, *Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114 at 124 per Parke B. See *Ketsey's Case* (1613) Cro Jac 320, sub nom *Keteley's Case* (1613) 1 Brownl 120.

8 *Mahon v O'Farrell* (1847) 10 ILR 527; *Evelyn v Chichester* (1765) 3 Burr 1717.

9 *Holmes v Blogg* (1818) 8 Taunt 508; *Valentini v Canali* (1889) 24 QBD 166. See *Wilson v Kears* (1800) Peake Add Cas 196; *Re Burrows, ex p Taylor* (1856) 8 De GM & G 254.

10 *Corpe v Overton* (1833) 10 Bing 252; *Everett v Wilkins* (1874) 29 LT 846; *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589.

11 *Halford's Executors v Boden* (1953) 103 L Jo 768, Nottingham County Court. Statutory tenancies have been replaced with assured tenancies: see the Housing Act 1988; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1011 et seq.

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### **38. Renewal of lease.**

It is a principle of equity that a trustee or guardian<sup>1</sup> or any other person in a fiduciary position who takes a renewal in his own name of a lease in which the person to whom he stands in a fiduciary position is interested as lessee, holds the new lease in trust for that person<sup>2</sup>. This is enforced with special strictness where that person is a child<sup>3</sup>, even though the lessor refuses to renew the lease to the child himself<sup>4</sup>, and the person taking the renewal is himself jointly interested in the lease<sup>5</sup>. Where a lease is renewed to a person who is jointly interested in the lease with a child but does not stand in a fiduciary position to him, he holds the new lease for his own benefit to the exclusion of the child<sup>6</sup>; but where a tenant for life takes a renewal of a lease in his own name, he is deemed to renew it for the benefit of himself during his life and of the remaindermen after his death<sup>7</sup>.

1 As to a guardian's powers of management of a child's estate see para 149 post.

2 *Keech v Sandford* (1726) 2 Eq Cas Abr 741; *Lloyd-Jones v Clark-Lloyd* [1919] 1 Ch 424, CA; and see EQUITY vol 16(2) (Reissue) para 854; TRUSTS vol 48 (2007 Reissue) para 695.

3 *Walley v Walley* (1687) 1 Vern 484; *Blewett v Millett* (1774) 7 Bro Parl Cas 367, HL; *Killick v Flexney* (1792) 4 Bro CC 161; *Griffin v Griffin* (1804) 1 Sch & Lef 352 at 354 per Lord Redesdale LC; *Mulvany v Dillon* (1810) 1 Ball & B 409.

4 *Keech v Sandford* (1726) 2 Eq Cas Abr 741; *Ex p Bennett* (1805) 10 Ves 381 at 386 per Lord Eldon LC.

5 *Ex p Grace* (1799) 1 Bos & P 376.

6 *Re Biss, Biss v Biss* [1903] 2 Ch 40, CA.

7 *Taster v Marriott* (1768) Amb 668; *Rawe v Chichester* (1773) Amb 715; *Pickering v Vowles* (1783) 1 Bro CC 197; *James v Dean* (1808) 15 Ves 236.

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### **39. Acquisition of property other than legal estates.**

The acquisition of property being generally beneficial<sup>1</sup>, a child can take property other than a legal estate in land<sup>2</sup> in any manner whatever<sup>3</sup>, either under intestacy or by will<sup>4</sup>, or by purchase or gift or other assurance inter vivos<sup>5</sup>, except where it would be clearly to his prejudice to do so<sup>6</sup>.

In the case of onerous property taken under an intestacy or a will, on application the court will disclaim on behalf of the child in the same way as an adult can disclaim<sup>7</sup>.

1 Co Litt 2b; Bac Abr, Infancy and Age (F).

2 A child cannot hold a legal estate in land: see para 30 ante.

3 Bac Abr, Infancy and Age (F).

4 As to legacies to children see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 493-498. A gift may be made by will to a child en ventre sa mère (*Burdet v Hopegood* (1718) 1 P Wms 486; *Re Salaman, De Pass v Sonnenthal* [1908] 1 Ch 4, CA), or to an unborn child if born within the time permitted by the law against perpetuities (*Mogg v Mogg* (1815) 1 Mer 654 at 664; *Elliot v Lord Joicey* [1935] AC 209, HL). See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) para 1013; WILLS vol 50 (2005 Reissue) para 647.

5 Bac Abr, Infancy and Age (F); *O'Shanassy v Joachim* (1876) 1 App Cas 82, PC; and see GIFTS vol 52 (2009) PARA 216.

6 1 Roll Abr, Enfants (B); *Keane v Boycott* (1795) 2 Hy Bl 511 at 515 per Lord Eyre CJ. Cf *Re Blakely Ordnance Co, Lumsden's Case* (1868) 4 Ch App 31.

7 *Croxon v Lever* (1863) 12 WR 237; *Bennett v Harfoot* (1871) 19 WR 428; *Wolverhampton and Staffordshire Banking Co v George* (1883) 24 ChD 707.

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#### **40. Receipts and the discharge of personal representatives.**

The mere capacity of a child to take a legacy does not enable him to give a valid receipt for it<sup>1</sup> but a married child has statutory power to give valid receipts for all income (including statutory accumulations) to which he may be entitled<sup>2</sup>. At common law an executor was not discharged by paying a legacy without leave of the court to the father or any person other than the child's guardian on his behalf unless the will expressly or by implication authorised such payment<sup>3</sup>. However, parents and others who have 'parental responsibility' under the Children Act 1989<sup>4</sup> have the rights, powers and duties which a guardian<sup>5</sup> of the child's<sup>6</sup> estate would have had in relation to the child and his property<sup>7</sup>; and these rights include in particular the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description wherever situated which a child is entitled to receive or recover<sup>8</sup>.

1 *Philips v Paget* (1740) 2 Atk 80.

2 Law of Property Act 1925 s 21.

3 *Re Somech, Westminster Bank Ltd v Phillips* [1957] Ch 165, [1956] 3 All ER 523.

4 For the meaning of 'parental responsibility' see para 134 post.

5 As to guardians, guardianship and special guardianship see para 144 et seq post.

6 For the meaning of 'child' see para 3 ante.

7 Children Act 1989 s 3(2). As to the right to administer property see para 135 post. As to the appointment of a guardian of a child's estate see para 147 post.

8 *Ibid* s 3(3). See further para 135 post.



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#### **41. Voidable transactions.**

A purchase of property, or the acceptance of a gift of property, by a child is voidable by him either by himself during minority<sup>1</sup>, or upon attaining full age, or by his successors in title if he dies without having confirmed it<sup>2</sup>, but in the meantime it is valid<sup>3</sup>. If he avoids the purchase or gift after attaining full age, it is void ab initio and the property revests in the vendor or donor<sup>4</sup>.

1 Co Litt 380b; *Newry and Enniskillen Rly Co v Coombe* (1849) 3 Exch 565.

2 Co Litt 2b; 1 Bl Com (14th Edn) 465; 2 Bl Com (14th Edn) 292; *North Western Rly Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114 at 123 per Parke B.

3 Com Dig, Infant (B 1); *Ketsey's Case* (1613) Cro Jac 320, sub nom *Keteley's Case* (1613) 1 Brownl 120; *Thompson v Leach* (1690) 2 Vent 198 at 203 per Ventris. See also GIFTS vol 52 (2009) PARA 216.

4 Shep Touch (7th Edn) 285; 2 Preston's Treatise on Conveyancing 226; *Butler and Baker's Case* (1591) 3 Co Rep 25a; *Thompson v Leach* (1690) 2 Vent 198; *Mallott v Wilson* [1903] 2 Ch 494 at 501 per Byrne J, where 'void ab initio' was explained as not meaning that the deed never had effect, but that on avoidance the property revests in the donor.

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## 42. Property subject to burdens and conditions.

A child takes property subject to all its burdens, such as a mortgage<sup>1</sup>, a lien<sup>2</sup>, a lease<sup>3</sup>, a contract for sale by his predecessor in title<sup>4</sup>, or the liability to repair a bridge or highway<sup>5</sup>. He is bound by all the conditions attached to the property<sup>6</sup>, whether precedent<sup>7</sup> or subsequent<sup>8</sup>, except a subsequent condition which is inapplicable to a child or cannot be performed by him<sup>9</sup>.

1 *Tracey v Lawrence* (1854) 2 Drew 403. As to children and mortgages see MORTGAGE vol 77 (2010) PARAS 157, 312.

2 See *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1, CA; affd sub nom *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL. As to liens arising from family relationships see LIEN vol 68 (2008) PARA 875.

3 Com Dig, Infant (B 1); *Maddon d Baker v White* (1787) 2 Term Rep 159; *Kelly v Coote* (1856) 5 ICLR 469. He is not liable to pay a rent higher than the profits he receives: *Re Fair (a minor)* (1850) 13 I Eq R 278. As to the capacity to grant and accept tenancies see LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 25, 38.

4 *Bullock v Bullock* (1820) 1 Jac & W 603. As to the capacity to contract see para 14 ante; and CONTRACT vol 9(1) (Reissue) para 630.

5 2 Co Inst 703; Bac Abr, Infancy and Age (G); *R v Sutton* (1835) 3 Ad & El 597 at 612 per Lord Denman CJ. As to the liability to repair highways and bridges see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) paras 247 et seq, 859 et seq.

6 Bac Abr, Infancy and Age (G).

7 Co Litt 246b; *Gundry v Baynard* (1704) 2 Vern 479; *Scot v Haughton and Fuller* (1706) 2 Vern 560; *Griffin v Griffin* (1804) 1 Sch & Lef 352; *Gardiner v Slater* (1858) 25 Beav 509; *Re Brown's Will, Re Brown's Settlement* (1881) 18 ChD 61, CA; *Bevan v Mahon-Hagan* (1893) 31 LR Ir 342, CA (affg *Bevan v Mahon-Hagan* (1892) 27 LR Ir 399).

8 Co Litt 380b; *Cary v Bertie* (1696) 2 Vern 333 at 342-343 per Lord Somers LC; *Hearle v Greenbank* (1749) 1 Ves Sen 298 at 304 per Lord Hardwicke LC. Where the condition is for payment out of the rent, of which he does not get possession until of full age, the child is not bound until he gets possession: *Slade v Tompson* (1615) 3 Bulst 58.

9 Eg a condition of residence (*Parry v Roberts* (1871) 19 WR 1000; *Partridge v Partridge* [1894] 1 Ch 351) or of forfeiture in case of refusal or neglect to take name or arms (*Re Edwards, Lloyd v Boyes* [1910] 1 Ch 541, where the condition was not precedent as in *Bevan v Mahon-Hagan* (1893) 31 LR Ir 342, CA, and a child was held to be incapable of refusal or neglect). See *Re May, Eggar v May* [1917] 2 Ch 126 (forfeiture if legatee be a Roman Catholic inoperative during infancy); subsequent proceedings [1932] 1 Ch 99, CA. See also *Re Borwick, Borwick v Borwick* [1933] Ch 657.

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### 43. Gifts in general.

Where property (other than a legal estate in land) is given to a child, it vests in the child immediately upon the gift's being completed<sup>1</sup>. A gift inter vivos to a child cannot afterwards be revoked<sup>2</sup>. If a gift, either inter vivos or by testamentary disposition, is made to a child for a particular purpose, the gift is effectual, irrespective of and notwithstanding the failure of the purpose<sup>3</sup>. There is a presumption in favour of the validity of a gift by a parent or grandparent to a child<sup>4</sup>, if it is complete<sup>5</sup>.

1 *Hunter v Westbrook* (1827) 2 C & P 578; and see GIFTS vol 52 (2009) PARA 218.

2 *Smith v Smith* (1836) 7 C & P 401; *Andrew v Andrew* (1874) 22 WR 684.

3 *Barlow v Grant* (1684) 1 Vern 255; *Nevill v Nevill* (1701) 2 Vern 431; *Barton v Cooke* (1800) 5 Ves 461 at 463 per Arden MR; *Lewes v Lewes* (1848) 16 Sim 266; *Noel v Jones* (1848) 16 Sim 309; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 484; GIFTS vol 52 (2009) PARA 218. Cf *Re Borwick*, *Borwick v Borwick* [1933] Ch 657, where a condition interfering with a parent in the exercise of his parental duty was held void.

4 *Garrett v Wilkinson* (1848) 2 De G & Sm 244 at 246 per Shadwell V-C; *Beanland v Bradley* (1854) 2 Sm & G 339 at 343 per Stuart V-C.

5 *May v May* (1863) 33 Beav 81 at 87 per Romilly MR; *Jones v Lock* (1865) 1 Ch App 25; and cf *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL. See further GIFTS vol 52 (2009) PARA 267 et seq.

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#### **44. Appointments.**

An appointment of property to a child may be made under a power of appointment to or among children if it is not precluded by the terms of the power and is made in good faith<sup>1</sup>. If it is made for a corrupt purpose, as for instance to a child in bad health, with a view to the appointor taking the appointed property upon the child's death as his next of kin, it is void<sup>2</sup>; but such considerations do not apply to the release of a power of appointment<sup>3</sup>.

<sup>1</sup> *Henty v Wrey* (1882) 21 ChD 332, CA; *Re De Hoghton, De Hoghton v De Hoghton* [1896] 2 Ch 385 at 396 per Stirling J.

<sup>2</sup> *Lord Hinchinbroke v Seymour* (1784) 1 Bro CC 395, referred to sub nom *Lord Sandwich's Case* in *M'Queen v Farquhar* (1805) 11 Ves 467 at 479 per Lord Eldon LC, and in *Keily v Keily* (1843) 4 Dr & War 38 at 55 per Lord Sugden LC; *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143; and see POWERS vol 36(2) (Reissue) para 365.

<sup>3</sup> *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227, CA; *Re Somes, Smith v Somes* [1896] 1 Ch 250, where Chitty J said there was no duty imposed on the donee of a limited power to make an appointment, and no fiduciary relationship between him and the objects of the power apart from the duty, if the power was exercised, to exercise it honestly.

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#### **45. Bank deposits.**

A child may have a current or deposit account with a bank<sup>1</sup>. If he is under seven years of age, he may by another person or, if he is over seven, he may by himself be a depositor in the National Savings Bank<sup>2</sup>.

<sup>1</sup> See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 820.

<sup>2</sup> See the National Savings Bank Act 1971 s 8(1)(f); the National Savings Bank Regulations 1972, SI 1972/764, regs 5, 6 (both as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 814. As to payments of deposits of a child under seven which are urgently needed for his benefit see para 67 post.

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#### 46. Alienation generally.

A child can dispose of property by sale, demise or gift<sup>1</sup> in the same manner as an adult, except where the alienation of the property is clearly prejudicial to his interests<sup>2</sup>. However, except in the case of alienation of property pursuant to or in performance of a contract which is in law binding upon him<sup>3</sup>, a child cannot make a finally effectual disposition of property by deed<sup>4</sup>, as the disposition is voidable by him when he comes of age<sup>5</sup>, or by his successors in title if he dies before attaining full age or dies after attaining full age without having confirmed the disposition<sup>6</sup>. The disposition remains valid until it is revoked<sup>7</sup>.

A child can consent to the exercise of a power to invest money with his consent<sup>8</sup>, and to a resettlement with his consent pursuant to a power conferred by a settlor<sup>9</sup>.

In general, a child is unable to appoint an agent<sup>10</sup> and cannot give a valid power of attorney<sup>11</sup>.

1 As to gifts by a child see GIFTS vol 52 (2009) PARA 211. As to gifts void for undue influence see EQUITY vol 16(2) (Reissue) para 417 et seq; GIFTS vol 52 (2009) PARA 259; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 839 et seq; SETTLEMENTS vol 42 (Reissue) para 616 et seq. As to unconscionable bargains see EQUITY vol 16(2) (Reissue) paras 429-431; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 854 et seq. Since 1925 a child cannot hold, and so cannot dispose of, a legal estate in land: see para 30 ante.

2 *Harvey v Ashley* (1748) 3 Atk 607 at 610 per Lord Hardwicke LC.

3 As to contracts which are binding on children see para 12 et seq ante.

4 Co Litt 171b; 2 Bl Com (14th Edn) 291-292; Bac Abr, Infancy and Age (I) 1; Com Dig, Infant (C 2); *Paget v Paget* (1882) 11 LR Ir 26 at 28, CA, per Lord Law LC. An agreement, however, in the marriage settlement of a child for the settlement of her present and after-acquired property may sever her joint tenancy in property coming within the agreement, the settlement being taken to be for her benefit: *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416. As to wills of children see para 53 post. As to church patronage see ECCLESIASTICAL LAW.

5 Co Litt 171b; Perkins's Profitable Book (1657) Ch I para 12; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1801 et seq per Lord Mansfield; - *v Handcock* (1810) 17 Ves 383; *Paget v Paget* (1882) 11 LR Ir 26 at 28, CA, per Lord Law LC; *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416 at 424 per Pearson J. A child can avoid his disposition during minority, but until he attains full age such avoidance is as voidable as the disposition itself and cannot therefore be final: Littleton's Tenures s 258; Co Litt 171b, 380b; Bac Abr, Infancy and Age (I) 7; *Slator v Trimble* (1861) 14 ICLR 342; and see GIFTS vol 52 (2009) PARA 218.

6 *Whittingham's Case* (1603) 8 Co Rep 42b; Perkins's Profitable Book (1657) Ch I para 12; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794; *Lecky v Knox* (1809) 1 Ball & B 210; - *v Handcock* (1810) 17 Ves 383; *Allen v Allen* (1842) 2 Dr & War 307 at 338 et seq per Lord Sugden LC; *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416. As to the transfer to and by a child of shares in a company see further COMPANIES vol 14 (2009) PARAS 330, 398.

7 *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228, CA. In *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA, a child contracted to assign the copyright of a book yet to be written, so that when the work came into existence the ownership of the copyright had passed to the publishers. It was held that even if the contract was voidable the child could not recover the personal property so transferred for value; in that respect there was a difference between the vesting of personal copyright and a deed granting a property and interest: *Chaplin v Leslie Frewin (Publishers) Ltd* supra at 97, 774 per Winn LJ (distinguishing *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794).

8 *Re Cardross' Settlement* (1878) 7 ChD 728.

9 *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257.

10 *Doe d Thomas v Roberts* (1847) 16 M & W 778. See also para 86 post; and AGENCY vol 1 (2008) PARA 5.

11 *Oliver v Woodroffe* (1839) 4 M & W 650. As to the powers of attorney generally see AGENCY vol 1 (2008) PARAS 16-17, 31-33. A child cannot create a lasting power of attorney: see the Mental Capacity Act 2005 s 9(2)(c); and AGENCY vol 1 (2008) PARA 196.

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#### 47. Real property.

At common law, a child's interest in real estate<sup>1</sup> cannot be bound by contract nor settled nor alienated by his parent or guardian<sup>2</sup> or by the Chancery Division of the High Court<sup>3</sup> under its general powers in reference to children, even when it is for the benefit of the child<sup>4</sup>, unless it is a case of salvage<sup>5</sup>. The court, however, assumed the power to deal with a child's interests in personal estate where it would be for his benefit<sup>6</sup>, and the court has statutory jurisdiction to authorise dealings with trust property<sup>7</sup>.

1 A child cannot hold a legal interest in land: see para 30 ante.

2 *Field v Moore, Field v Brown* (1855) 7 De GM & G 691 at 709 per Turner LJ. A child cannot create a lasting power of attorney: see the Mental Capacity Act 2005 s 9(2)(c); para 46 note 11 ante; and AGENCY vol 1 (2008) PARA 196.

3 *Taylor v Philips* (1750) 2 Ves Sen 23; *Simson v Jones* (1831) 2 Russ & M 365 at 376-377 per Leach MR; *Calvert v Godfrey* (1843) 6 Beav 97; *Field v Moore, Field v Brown* (1855) 7 De GM & G 691 at 709 et seq per Turner LJ; *Daly v Daly* (1845) 2 Jo & Lat 752 at 758 per Lord Sugden LC; *Re Staines, Staines v Staines* (1886) 33 ChD 172.

4 *Calvert v Godfrey* (1843) 6 Beav 97; *Re Staines, Staines v Staines* (1886) 33 ChD 172 at 173 per North J; *Re Swanston (a child)* (1887) 31 Sol Jo 427, CA; *Re Hurst, Hurst v Hurst* (1891) 29 LR Ir 219; *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v De Teissier* [1893] 1 Ch 153.

5 *Re Jackson, Jackson v Talbot* (1882) 21 ChD 786; *Re Hurst, Hurst v Hurst* (1891) 29 LR Ir 219; *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364, sub nom *Re Heyworth's Settlements* [1956] 2 All ER 21.

6 *Nunn v Hancock* (1871) 6 Ch App 850; *Re Wells, Boyer v Maclean* [1903] 1 Ch 848 (not following *Peto v Gardner* (1843) 2 Y & C Ch Cas 312; and *Day v Day* (1845) 9 Jur 785), as explained in *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL. See also *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364, sub nom *Re Heyworth's Settlements* [1956] 2 All ER 21; and cf the cases as to compromise cited in para 1423 post. As to settlements for the benefit of children see SETTLEMENTS vol 42 (Reissue) para 605.

7 See the Trustee Act 1925 s 57; and para 57 post. This provision does not apply to trustees of a settlement for the purposes of the Settled Land Act 1925: see the Trustee Act 1925 s 57(4). See, however, the Settled Land Act 1925 s 64 (as amended); and SETTLEMENTS vol 42 (Reissue) para 671. See also the Variation of Trusts Act 1958; *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL; para 57 post; and SETTLEMENTS vol 42 (Reissue) para 670 et seq; TRUSTS vol 48 (2007 Reissue) paras 1062, 1063.



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#### **48. Election.**

The doctrine of election<sup>1</sup> applies to children in the same way as to adults<sup>2</sup>. Election will be made by the court on the child's behalf if, on inquiry, it is found to be for his benefit<sup>3</sup>.

1 As to the doctrine of election see EQUITY vol 16(2) (Reissue) paras 724-738.

2 *Bennett v Houldsworth* (1877) 6 ChD 671.

3 *Simson v Jones* (1831) 2 Russ & M 365 at 374 per Leach MR. The doctrine applies equally in the case of real estate (*Streatfield v Streatfield* (1735) Cas temp Talb 176) and personal estate (*Hervey v Desbouverie* (1735) Cas temp Talb 130). See also *Brown v Brown* (1866) LR 2 Eq 481.

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#### 49. Mortgages and leases by children.

A mortgage by a child will be ineffective<sup>1</sup>.

A lease purported to be granted by a child can at best convey only an equitable interest to the lessee, which may be overridden by a conveyance by the persons in whom the legal estate in the child's land is vested<sup>2</sup>, and the lease is void if it is necessarily to the prejudice of the child<sup>3</sup>.

The grant of a lease by a child is voidable by him on attaining full age<sup>4</sup>, and his successors in title have the same option if he dies before attaining full age<sup>5</sup>, but not during his minority<sup>6</sup>. If the lessee is in possession, avoidance of the lease must be by a distinct act which will intimate the fact of avoidance to the lessee, such as notice or entry or demand of possession<sup>7</sup>. If, after he has attained majority, the lessor accepts rent<sup>8</sup> or otherwise<sup>9</sup> recognises the lease as subsisting, he is taken to have confirmed it and the lease is then binding on him as from its date<sup>10</sup>; if he does not avoid it within a reasonable time after attaining majority, even though he was not aware of his right, the lease in effect is confirmed and he cannot avoid it<sup>11</sup>. The lessee cannot repudiate the lease on the ground of the lessor's infancy<sup>12</sup>.

Leases may be granted and accepted under the powers contained in a settlement, if any, or in pursuance of statutory powers, by the persons in whom the child's land is vested<sup>13</sup>; and the court has jurisdiction to authorise leases in excess of these powers<sup>14</sup>.

1 This is so notwithstanding the repeal of the Infants Relief Act 1874 s 1 (which made contracts for the repayment of money lent to a child 'absolutely void': see para 14 ante): see *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL; and para 42 note 2 ante.

2 See the Law of Property Act 1925 s 2 (as amended); and SETTLEMENTS vol 42 (Reissue) para 874.

3 *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1807-1808 per Lord Mansfield. If a child grants a lease reserving no rent, it will be void (*Lane v Cowper* (1575) Moore KB 103 at 105; *Blunden v Baugh* (1634) Cro Car 302 at 303 per Richardson CJ), unless it is beneficial to him in some other way (*Rames v Machin* (1608) Noy 130; *Slator v Brady* (1863) 14 ICLR 61 at 64-65 per Fitzgerald B), or, at any rate, it will be voidable by him even during his minority (*Slator v Trimble* (1861) 14 ICLR 342 at 357 per Hayes J). The rent need not be the best obtainable: *Slator v Trimble* supra at 356 per Hayes J; *Slator v Brady* supra at 65 per Fitzgerald B.

4 See para 46 text and notes 5-6 ante. See also *North Western Rly Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114 at 124 per Parke B. Similarly, if the lessor, after he attains full age but without having an opportunity of exercising his adult judgment, executes a lease arranged while he was a child, he is entitled to have it set aside: *Say v Barwick* (1812) 1 Ves & B 195; *Aylward v Kearney* (1814) 2 Ball & B 463 at 478 per Manners LC.

5 Co Litt 45b, 308a; Bac Abr, Infancy and Age (I) 7; *Rames v Machin* (1608) Noy 130; *Blunden v Baugh* (1634) Cro Car 302 at 303 per Richardson CJ; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1804 per Lord Mansfield.

6 *Slator v Trimble* (1861) 14 ICLR 342 at 356 per Hayes J; *Slator v Brady* (1863) 14 ICLR 61 at 68 per Fitzgerald B.

7 *Slator v Brady* (1863) 14 ICLR 61 at 66 per Fitzgerald B. The execution of a new lease to another person is not in itself sufficient: *Slator v Brady* supra at 65 per Fitzgerald B; cf *Inman v Inman* (1873) LR 15 Eq 260.

8 *Ashfield v Ashfield* (1627) Godb 364; *Smith v Low* (1739) 1 Atk 489; *Baylis v Dineley* (1815) 3 M & S 477 at 480 per Lord Ellenborough; *Slator v Trimble* (1861) 14 ICLR 342 at 352 per O'Brien J. If the lessor elects to avoid the lease he cannot recover arrears of rent as rent, but he can recover them as damages in an action of

trespass: see *Slator v Trimble* supra. During his minority he can, apparently, sue for the rent: *Smith v Bowin* (1669) 1 Mod Rep 25.

9 *Anon* (1582) 4 Leon 4, pl 15 ('God give you joy of it'); *Story v Johnson* (1837) 2 Y & C Ex 586 at 607.

10 *Slator v Trimble* (1861) 14 ICLR 342 at 353 per O'Brien J; cf *Doe d Miller v Noden* (1797) 2 Esp 528; and see *Smith v Low* (1739) 1 Atk 489.

11 See *Carter v Silber*, *Carter v Hasluck* [1892] 2 Ch 278 at 284, CA, per Lindley LJ, and at 288 per Kay LJ; affd sub nom *Edwards v Carter* [1893] AC 360, HL. As to the repayment of any premium see *Evroy v Nicholas* (1733) 2 Eq Cas Abr 488. The doctrine of confirmation does not apply to a lease made by an agent for a child, and a ratification after the child has attained full age does not validate the lease: *Doe d Thomas v Roberts* (1847) 16 M & W 778 at 781 per Parke B.

12 *Davies v Manington* (1658) 2 Sid 109; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1806 per Lord Mansfield; *Slator v Brady* (1863) 14 ICLR 61 at 66 per Fitzgerald B; cf *Forrester's Case* (1661) 1 Sid 41 at 42; and see *Smith v Bowin* (1669) 1 Mod Rep 25.

13 See para 30 et seq ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 25; SETTLEMENTS vol 42 (Reissue) para 678. The former power of a guardian to make leases of his ward's property is obsolete.

14 See the Settled Land Act 1925 s 64 (as amended); and the Trustee Act 1925 s 57. See also para 57 post; and SETTLEMENTS vol 42 (Reissue) paras 670-671; TRUSTS vol 48 (2007 Reissue) para 1061. As to which court has jurisdiction see para 57 note 1 post.

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## 50. Alienation by payment on delivery.

Payment of purchase money by a child by his own hand on delivery of a chattel is valid and effectual<sup>1</sup>. If it is for valuable consideration, the transaction cannot be revoked after any part of the consideration has been enjoyed by the child<sup>2</sup>, but if the consideration wholly fails, the child may recover any money paid<sup>3</sup>. After an exchange of chattels, the child cannot recover that given in exchange, even if it is the more valuable<sup>4</sup>. Whether or not a transaction will be wholly set aside depends on whether there has been a total failure of consideration, not on whether the child has derived any advantage. Further performance of his engagements cannot, however, be enforced<sup>5</sup>. A child can recover money or chattels disposed of by way of gift<sup>6</sup>.

A female married child has not been permitted to waive in favour of her husband her rights in respect of money in court<sup>7</sup> or her equity to a settlement<sup>8</sup>.

1 Bac Abr, Infancy and Age (I); *Manby v Scott* (1663) 1 Mod Rep 124 at 137, Ex Ch, per Hyde J; *Earl of Buckinghamshire v Drury* (1761) 2 Eden 60 at 72, HL, per Lord Mansfield; *Wilson v Kears* (1800) Peake Add Cas 196; *Holmes v Blogg* (1818) 8 Taunt 508 at 511 per Gibbs CJ; *Re Burrows, ex p Taylor* (1856) 8 De GM & G 254. As to gifts by children see GIFTS vol 52 (2009) PARA 211. As to the effect of a cheque or bill of exchange drawn by a child see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 842; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1471.

2 Bac Abr, Infancy and Age (I); *Holmes v Blogg* (1818) 8 Taunt 508; *Corpe v Overton* (1833) 10 Bing 252 at 255 et seq per Tindal CJ; *North Western Ry Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Ry Co v Pilcher* (1850) 5 Exch 114 at 128 per Parke B; *Re Burrows, ex p Taylor* (1856) 8 De GM & G 254; *Valentini v Canali* (1889) 24 QBD 166; cf *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA.

3 *Corpe v Overton* (1833) 10 Bing 252; *Everett v Wilkins* (1874) 29 LT 846; *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589.

4 *Pearce v Brain* [1929] 2 KB 310.

5 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA (shares allotted to child which, though valueless at date of repudiation of contract, had at one time some value), distinguishing *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589, where the facts were similar, but there was no evidence that the shares ever had any value, and it was held that there was a total failure of consideration.

6 See GIFTS vol 52 (2009) PARA 211. As to the effect of parental and other influence on the validity of gifts to parents and persons in a fiduciary position see SETTLEMENTS vol 42 (Reissue) paras 1005, 1021. As to the presumption of undue influence between parent and child see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 843 et seq.

7 *Stubbs v Sargon* (1839) 2 Beav 496; *Abraham v Newcombe* (1842) 12 Sim 566.

8 *Shipway v Ball* (1881) 16 ChD 376. A married child may give receipts for income: see the Law of Property Act 1925 s 21; and para 40 ante. The doctrine of the wife's equity to a settlement is now virtually obsolete.

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## **51. Compulsory acquisition.**

Where the Lands Clauses Consolidation Act 1845<sup>1</sup> or the Compulsory Purchase Act 1965<sup>2</sup> applies, power is given to trustees, executors and administrators to sell and convey children's land or interests to the company or body of persons authorised to purchase them<sup>3</sup>, and to release land from any rent, charge or incumbrance, and to agree for the apportionment of the rent, charge or incumbrance<sup>4</sup>.

1 As to the application of the Lands Clauses Consolidation Act 1845 see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 509 et seq.

2 As to the application of the Compulsory Purchase Act 1965 see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 513-514.

3 See the Lands Clauses Consolidation Act 1845 s 7 (as amended); the Compulsory Purchase Act 1965 ss 2, 3 (as amended), Sch 1 para 2(4); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 553.

4 See the Lands Clauses Consolidation Act 1845 s 8 (as amended); the Compulsory Purchase Act 1965 Sch 1 para 3(b); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 553.

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## 52. Exercise of powers.

The capacity of a child to dispose of or affect property by the exercise of a power by deed or writing inter vivos varies according to the character and subject matter of the power. A power may be (1) collateral, where it relates to property in which he has no interest; (2) in gross, where it relates to property in which he has an interest but does not touch his interest in it; or (3) appendant or appurtenant, where he has an interest which may be affected by the exercise of the power<sup>1</sup>.

As regards real estate, a child can exercise a collateral power<sup>2</sup>, but not a power in gross<sup>3</sup> nor a power appendant or appurtenant<sup>4</sup>. As regards personal estate, he can exercise a collateral power<sup>5</sup> and also a power in gross<sup>6</sup>, but he can only exercise a power appendant or appurtenant where the donor of the power has indicated an intention that he should do so during minority<sup>7</sup>, and he cannot even then exercise it so as to defeat his interest in the property<sup>8</sup>, although he can exercise it so as to vary or diminish his interest if the exercise is for his benefit<sup>9</sup>.

A power of appointment over or power to convey or charge land or any interest in land, whether created by a statute or other instrument or implied by law, operates only in equity<sup>10</sup>.

A child may exercise a power to appoint a new trustee of a settlement, subject to the general rule that he will not be bound by an act which is either imprudent or prejudicial to his interest, or which, where he is executing an authority with which he is entrusted, touches his interest<sup>11</sup>.

1 *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 232-233 per Jessel MR. See POWERS vol 36(2) (Reissue) para 203.

2 *Hearle v Greenbank* (1749) 3 Atk 695 at 710 per Lord Hardwicke LC; *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 233 per Jessel MR.

3 *Hearle v Greenbank* (1749) 3 Atk 695; *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 243-244 per Brett LJ.

4 *Grange v Tiving* (1665) O Bridg 107 at 115-116; *Hearle v Greenbank* (1749) 3 Atk 695; *King v Bellord* (1863) 1 Hem & M 343. He may, however, do so if expressly authorised by Act of Parliament: *Lord Kilmurry v Geery* (1713) 2 Salk 538, cited in *Evelyn v Evelyn* (1731) 2 P Wms 659 at 671, and in *Hearle v Greenbank* supra at 713 per Lord Hardwicke LC.

5 *Hearle v Greenbank* (1749) 3 Atk 695; *King v Bellord* (1863) 1 Hem & M 343; *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228.

6 *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228.

7 *Re Cardross' Settlement* (1878) 7 ChD 728; *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 234 per Jessel MR, and at 243 et seq per Brett LJ. A child may exercise a power where he is merely 'a conduit pipe of the will of the donor of the power', and has no discretion in the matter (*Grange v Tiving* (1665) O Bridg 107 at 109; *Hearle v Greenbank* (1749) 3 Atk 695 at 710 per Lord Harwicke LC; *King v Bellord* (1863) 1 Hem & M 343 at 348 per Wood V-C); and it seems that a child may exercise a power even though it is coupled with an interest, if an intention clearly appears that it should be exercisable during minority (*Re Cardross' Settlement* supra; *Re D'Angibau, Andrews v Andrews* supra; *Re Duke of Newcastle's Estates* (1883) 24 ChD 129 at 136 per Pearson JJ).

8 *Re Armit's Trusts* (1871) 5 IR Eq 352; but see *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257 at 265 per Lawrence J.

9 *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257 at 265-266 per Lawrence J.

10 Law of Property Act 1925 s 1(7). This provision applies to powers whether created before or after 1 January 1926, but not to a power vested in a legal mortgagee or all estate owner in right of his estate and exercisable by him or by another person in his name or on his behalf: s 1(7). See further POWERS vol 36(2) (Reissue) para 204.

11 *Re Parsons, Barnsdale and Smallman v Parsons* [1940] Ch 973, [1940] 4 All ER 65.

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### **53. Testamentary incapacity.**

The general incapacity of a child under the age of 18 years to make a will or any testamentary appointment<sup>1</sup> is subject, as regards realty or personalty<sup>2</sup>, to an exception in favour of children who are soldiers or airmen on actual military service<sup>3</sup>, or are mariners or seamen (including merchant seamen) at sea<sup>4</sup>, or are members of the royal naval or marine forces who, though not at sea, are so circumstanced that if they were soldiers they would be in actual military service<sup>5</sup>.

1 See the Wills Act 1837 s 7 (as amended); para 4 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 103, 307; WILLS vol 50 (2005 Reissue) para 323.

2 See *ibid* s 3 (as amended); and WILLS vol 50 (2005 Reissue) paras 328-329.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 113-114.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 114-115.

5 See the Wills Act 1837 s 11 (as amended); para 4 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 113-117. The power to dispose of property by will includes power to exercise a general power of appointment over personalty: *Re Wernher, Wernher v Beit* [1918] 2 Ch 82, CA.



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## ***B. MANAGEMENT, MAINTENANCE AND ADVANCEMENT***

### **(A) MANAGEMENT**

#### **54. Trustees' powers of management.**

As long as any child is entitled to a beneficial interest in possession affecting land<sup>1</sup> (1) the trustees appointed for this purpose by the settlement<sup>2</sup>, or, if there are none; (2) the trustees of the settlement<sup>3</sup>, unless the settlement or the order of the court<sup>4</sup> by which they or their predecessors in office were appointed to be such trustees expressly provides to the contrary, or, if there are none; (3) any persons appointed as trustees for this purpose by the court on the application of the child's litigation friend, may enter into and continue in possession of the land on the child's behalf<sup>5</sup>.

1 For the meaning of 'land' see SETTLEMENTS vol 42 (Reissue) para 680.

2 For the meaning of 'settlement' see SETTLEMENTS vol 42 (Reissue) para 678.

3 For the meaning of 'trustees of the settlement' see SETTLEMENTS vol 42 (Reissue) para 750.

4 The Chancery Division of the High Court and the county courts have jurisdiction under the Settled Land Act 1925: see s 113 (as amended); and SETTLEMENTS vol 42 (Reissue) para 792 et seq.

5 Ibid s 102(1). This provision has effect subject to an express appointment of trustees by the settlement or by the court for the purposes of s 102 (as amended): s 102(4). It applies subject to any contrary intention expressed in the instrument under which the child's interest arises, and to the terms of that instrument and the provisions contained in it: s 102(6). The repeals effected by the Settled Land Act 1925 and the Trustee Act 1925 do not affect the validity or legality of any dealing in land or other transaction completed, or any title or right acquired or appointment made, before 1 January 1926 (see the Settled Land Act 1925 s 119(1)(a)), or any vesting order or appointment made or other thing done before that date (see the Trustee Act 1925 s 70(a)). As to the powers of management of trustees of a settlement, and as to the expenses of management and keeping down charges, see the Settled Land Act 1925 s 102(2) (as amended), (3); and SETTLEMENTS vol 42 (Reissue) paras 665-666.

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## **55. Powers where children contingently entitled.**

The powers of management conferred on trustees in relation to land<sup>1</sup> to which a child is beneficially entitled in possession<sup>2</sup> are available where any person is contingently entitled to land under an instrument coming into operation on or after 1 January 1926, subject to any prior interests or charges affecting the land<sup>3</sup>. The powers are exercisable until the interest of the beneficiary vests, or, if his interest vests during his minority, until he attains the age of 18 years<sup>4</sup>.

1 For the meaning of 'land' see SETTLEMENTS vol 42 (Reissue) para 680.

2 As to the powers of management of trustees of a settlement, and as to the expenses of management and keeping down charges, see the Settled Land Act 1925 s 102(2) (as amended), (3); and SETTLEMENTS vol 42 (Reissue) paras 665-666.

3 See *ibid* s 102(5); and SETTLEMENTS vol 42 (Reissue) para 665.

4 *Ibid* s 102(5) (amended by the Family Law Reform Act 1969 s 1(3), Sch 1). As to the attainment of full age see para 1 *ante*. The Settled Land Act 1925 s 102 (as amended) applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the person contingently entitled arises, and has effect subject to the terms of that instrument and to the provisions contained in it: s 102(6).

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## **56. Exercise of powers of tenant for life.**

Where a child would if of full age be a tenant for life<sup>1</sup> of, or have the powers of a tenant for life<sup>2</sup> over, settled land<sup>3</sup>, then, during the minority of the child (1) if the settled land is vested in a personal representative<sup>4</sup>, the personal representative, until a principal vesting instrument<sup>5</sup> has been executed; and (2) in every other case, the trustees of the settlement<sup>6</sup>, have, in reference to the settled land and capital money<sup>7</sup>, all the powers conferred on a tenant for life and on the trustees of the settlement<sup>8</sup>.

If the settled land is vested in a personal representative, then, if and when during the minority the child, if of full age, would have been entitled to have the legal estate in the settled land conveyed to or otherwise vested in him pursuant to the provisions of the Settled Land Act 1925, a principal vesting instrument must, if the trustees of the settlement so require, be executed, at the cost of the trust estate, for vesting the legal estate in themselves<sup>9</sup>. In the meantime, during the minority, the personal representative must give effect to the directions of the trustees of the settlement, and is not concerned with the propriety of any conveyance directed to be made by those trustees, if the conveyance appears to be a proper one, and the capital money, if any, arising under the conveyance is paid to or by the direction of the trustees of the settlement or into court<sup>10</sup>.

These provisions apply to the case of two or more children jointly entitled in possession to a legal estate in land until one of them attains full age<sup>11</sup>, and they apply to the case of two or more children who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life until one of them attains full age<sup>12</sup>.

1 For the meaning of 'tenant for life' see SETTLEMENTS vol 42 (Reissue) para 671. As to who is a tenant for life see the Settled Land Act 1925 s 19; and SETTLEMENTS vol 42 (Reissue) para 761.

2 As to the persons having the powers of a tenant for life see *ibid* s 20 (as amended); and SETTLEMENTS vol 42 (Reissue) para 762.

3 For the meaning of 'settled land' see SETTLEMENTS vol 42 (Reissue) para 680.

4 For the meaning of 'personal representative' see SETTLEMENTS vol 42 (Reissue) para 697.

5 See para 33 note 5 ante; and SETTLEMENTS vol 42 (Reissue) para 688 et seq.

6 For the meaning of 'trustees of the settlement' see SETTLEMENTS vol 42 (Reissue) para 750.

7 For the meaning of 'capital money' see SETTLEMENTS vol 42 (Reissue) para 795.

8 Settled Land Act 1925 s 26(1). Nothing in s 26 affects prejudicially any beneficial interest of a child: s 26(6). As to the powers of a tenant for life and of the trustees of the settlement see SETTLEMENTS vol 42 (Reissue) paras 665 et seq, 761 et seq.

9 *Ibid* s 26(2).

10 *Ibid* s 26(2). A purchaser paying the capital money to the personal representative is not concerned with its ultimate destination, or whether the personal representative is liable to give effect to any directions or whether any directions have been given: s 26(2). Section 26(2) applies whether the child becomes entitled before or on or after 1 January 1926, and has effect during successive minorities until a person of full age becomes entitled to require the settled land to be vested in him: s 26(3).

11 Ibid s 26(4). As to the attainment of full age see para 1 ante.

12 Ibid s 26(5). Where the child would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, the person of full age constitutes the tenant for life: see ss 19(3), 37, Sch 2 para 3(6).

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## **57. Departure from the terms of a trust.**

The court<sup>1</sup> may authorise trustees in whom any property is vested to effect in the management or administration of the trust property any act not authorised by the trust instrument which the court considers expedient<sup>2</sup>. As a rule, a court of equity did not allow a child's realty to be converted into personalty, or personalty into realty. It would not normally order the sale of a child's realty nor allow money which did not partake of the character of realty to be invested in real property. If real property was lawfully sold, the money arising from the sale was impressed with the character of realty<sup>3</sup>. Where, however, the sale was directed by the court for the purpose of paying costs, the balance of the proceeds after payment of the costs was treated as personalty and descended as such<sup>4</sup>.

1 The High Court or, where the trust fund to be dealt with does not exceed the limit prescribed for its jurisdiction, a county court: see the Trustee Act 1925 s 63A (as added), s 67(1) (as amended); and TRUSTS vol 48 (2007 Reissue) para 641-642. As to the county court limit and county court jurisdiction generally see COURTS vol 10 (Reissue) para 710 et seq.

2 See the Trustee Act 1925 s 57(1); and TRUSTS vol 48 (2007 Reissue) para 1061. A corresponding but slightly wider power in relation to settled land is conferred by the Settled Land Act 1925 s 64 (as amended), while the Variation of Trusts Act 1958 s 1(1) empowers the court to approve on behalf of a child arrangements varying or revoking trusts or enlarging the powers of the trustees: see SETTLEMENTS vol 42 (Reissue) paras 671-672; TRUSTS vol 48 (2007 Reissue) para 1062. This statutory jurisdiction is additional to the court's inherent jurisdiction to modify beneficial trusts by approving a compromise on behalf of children and possible after-born beneficiaries: see *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL; and para 1423 et seq post. The Matrimonial Causes Act 1973 and the Children Act 1989 confer wide powers to vary settlements: see paras 549, 552 post.

3 See EQUITY vol 16(2) (Reissue) para 709. A child cannot elect to convert property from realty into personalty or vice versa: see EQUITY vol 16(2) (Reissue) para 720.

4 *Seeley v Jago* (1717) 1 P Wms 389; *Carr v Ellison* (1786) 2 Bro CC 56; *Van v Barnett* (1812) 19 Ves 102 at 111 per Lord Eldon LC. Cf *Howard v Jalland* [1891] WN 210; and *Re Norton, Norton v Norton* [1900] 1 Ch 101 (sales in partition actions at request of child plaintiffs).

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## (B) MAINTENANCE

### 58. Express powers.

It is usual in settlements to rely on the statutory powers<sup>1</sup> to apply the property of a child for his maintenance, and to omit the trusts or discretionary powers, which until 1860 it was usual to insert in settlements, authorising the trustees during the minority of any beneficiary to apply the yearly produce of his share of the settled fund to his maintenance. Express powers of maintenance should, however, be inserted if the settlement is not to be governed by English law, or if the interests thereby provided for children are of such a nature that the statutory powers do not apply, or if it is desired to vary them<sup>2</sup>.

<sup>1</sup> See para 61 et seq post. These powers may be extended by appropriate express provision.

<sup>2</sup> There is some doubt whether a power of maintenance applies to an appointed share: *Re Greenslade, Greenslade v McCowen* [1915] 1 Ch 155 at 160 per Eve J; but see *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34; *M'Mahon v Ganssen* [1896] 1 IR 143 (cases of a power of advancement). See SETTLEMENTS vol 42 (Reissue) para 667. It is therefore advisable to make express provision for maintenance both in the instrument creating the power and also in the appointment. See TRUSTS vol 48 (2007 Reissue) para 1049.

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## 59. Exercise of express powers.

Any express trusts or powers for providing maintenance or education for or otherwise benefiting a child, which are lawfully created by the settlement or will, are exercisable in respect of the property in which the child is interested<sup>1</sup>. Where there is an imperative trust and not a mere power to apply the income, the trustees are not entitled to accumulate<sup>2</sup>. A power to apply income for the maintenance and support of a child authorises its application for his education<sup>3</sup> and may be exercised during his father's lifetime in spite of the father's legal duty to maintain the child<sup>4</sup>, if the terms of the power so direct<sup>5</sup> or authorise<sup>6</sup>. A power to apply income for the benefit of a child will include expenditure not strictly comprehended under maintenance or education<sup>7</sup>. If the power is discretionary, the court will not interfere with the donee's discretion so long as it is exercised in good faith<sup>8</sup>, but if the trustees' opinion is divided the court may exercise the discretion for them<sup>9</sup>; and the father cannot obtain under it recoupment of sums paid by him for past maintenance of the child<sup>10</sup>. The trustees must exercise their discretion for the child's benefit, and should not be deterred from doing what is for his benefit merely because it is also a benefit to the father<sup>11</sup>.

1 *Hall v Carter* (1742) 2 Atk 354; *Lyddon v Lyddon* (1808) 14 Ves 558; *Prater v Prater* (1827) 6 LJOS Ch 90; *Meacher v Young* (1834) 2 My & K 490; *Stocken v Stocken* (1838) 4 My & Cr 95; *Ellis v Maxwell* (1841) 3 Beav 587; *Brophy v Bellamy* (1873) 8 Ch App 798; *Re Alford, Hunt v Parry* (1886) 32 ChD 383; *Dean v Dean* [1891] 3 Ch 150; *King-Harman v Cayley* [1899] 1 IR 39. An account will not be ordered as to the mode in which the trust or power has been exercised: *Hora v Hora* (1863) 33 Beav 88. See TRUSTS vol 48 (2007 Reissue) para 1049. As to the exercise of powers see POWERS vol 36(2) (Reissue) para 260 et seq.

2 *Re Peel, Tattersall v Peel* [1936] Ch 161.

3 *Re Breeds' Will* (1875) 1 ChD 226 at 229 per Jessel MR.

4 As to the duty to maintain a child see para 528 et seq post.

5 *Mundy v Earl Howe* (1793) 4 Bro CC 223; *Meacher v Young* (1834) 2 My & K 490; *Stocken v Stocken* (1838) 4 My & Cr 95; *Kekewich v Langston* (1840) 11 Sim 291; *White v Crane* (1854) 18 Beav 571; *Birch v Sumner* (1857) 3 Jur NS 712; *Newton v Curzon* (1867) 16 LT 696.

6 *Berkeley v Swinburne* (1834) 6 Sim 613; *Hawkins v Watts* (1834) 7 Sim 199; *Stephens v Lawry* (1842) 2 Y & C Ch Cas 87; *Brophy v Bellamy* (1873) 8 Ch App 798; *Malcomson v Malcomson* (1885) 17 LR Ir 69, CA.

7 *Re Peel, Tattersall v Peel* [1936] Ch 161.

8 *Thompson v Griffin* (1841) Cr & Ph 317; *Re Lofthouse (an infant)* (1885) 29 ChD 921, CA; *Re Bryant, Bryant v Hickley* [1894] 1 Ch 324; *Re Senior, Senior v Wood* [1936] 3 All ER 196; cf *Howard v Howard* [1945] P 1 at 4, [1945] 1 All ER 91 at 94, CA, per Lord Greene MR; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 905, HL, per Lord Reid; and see para 68 post.

9 *Klug v Klug* [1918] 2 Ch 67.

10 *Re Kerrison's Trusts* (1871) LR 12 Eq 422; *Wilson v Turner* (1883) 22 ChD 521, CA (overruling *Ransome v Burgess* (1866) LR 3 Eq 773).

11 *Re Lofthouse (an infant)* (1885) 29 ChD 921 at 932, CA, per Cotton LJ. See the Trustee Act 1925 s 31(1)(i) (b); and para 63 post.





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## **60. Duration of express powers.**

If not expressly confined to his minority, a trust or gift for the maintenance and education of a child, or for his use and benefit, may extend to a longer period<sup>1</sup>, and may confer on him a life interest<sup>2</sup>. Where a father by settlement or will provides for the maintenance of his children, the provision is assumed to be intended to continue until they attain full age<sup>3</sup>, and not to cease, in the case of a daughter, on her marriage under age<sup>4</sup>. It is otherwise where the mother is directed to maintain the children until they come of age, and a son marries and leaves the maternal roof<sup>5</sup>.

1 *Ellis v Maxwell* (1841) 3 Beav 587 at 594-595 per Lord Langdale MR; *Longmore v Elcum* (1843) 2 Y & C Ch Cas 363; *Carr v Living (No 2)* (1864) 33 Beav 474; *Scott v Key* (1865) 35 Beav 291; *Re Booth, Booth v Booth* [1894] 2 Ch 282; and cf *Re Breeds' Will* (1875) 1 ChD 226. See TRUSTS vol 48 (2007 Reissue) para 1049. As to gifts to children see GIFTS vol 52 (2009) PARA 218.

2 *Alexander v M'Culloch* (1787) 1 Cox Eq Cas 391; *Soames v Martin* (1839) 10 Sim 287; *Lewes v Lewes* (1848) 16 Sim 266; *Yates v Maddan* (1851) 3 Mac & G 532; *Wilkins v Jodrell* (1879) 13 ChD 564; *Williams v Papworth* [1900] AC 563 at 567, PC.

3 *Chambers v Goldwin* (1805) 11 Ves 1; *Martin v Martin* (1866) LR 1 Eq 369 at 371 per Page Wood V-C (dissenting from *Kime v Welfitt* (1830) 3 Sim 533).

4 *Chambers v Goldwin* (1805) 11 Ves 1; *Conolly v Farrell* (1845) 8 Beav 347.

5 *Staniland v Staniland* (1865) 34 Beav 536.

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## **61. Statutory powers where settlement is in operation before 1926.**

The statutory powers of maintenance vary according to whether the instrument creating the settlement came into operation before 1 January 1926 or on or after that date<sup>1</sup>. Where, under an instrument<sup>2</sup> in operation before 1 January 1926<sup>3</sup>, property is held by trustees in trust for a child, either for life or for any greater interest, and whether absolutely or contingently on his attaining full age<sup>4</sup>, or on the occurrence of any event before his attaining full age, then subject to the provisions of the instrument under which the interest of the child arises, and so far as a contrary intention is not expressed in it<sup>5</sup>, the trustees<sup>6</sup> have certain powers of maintenance<sup>7</sup>.

These powers do not arise where the child's interest depends on an event which may not occur until after he has attained full age<sup>8</sup>, nor where he takes a vested but defeasible interest<sup>9</sup>, nor where on attaining full age he becomes entitled to the capital of the property only and not to the interest accrued during his minority<sup>10</sup>. They do arise in the case of a gift to a class contingently on the members of the class attaining full age<sup>11</sup>, or where the child has a life interest determinable on bankruptcy or attempted alienation<sup>12</sup>.

<sup>1</sup> Although it is possible for settlements made before 1 January 1926 to benefit persons who are presently children, it is clear that the provisions described in the text and notes 2-12 *infra* are of limited application, if not actually obsolete.

<sup>2</sup> In *Re Bass, Bass v Public Trustee* [1914] WN 368, the court made an order declaring that the Public Trustee, who had been appointed by the court a trustee of the trusts relating to the shares in the personal estate of an intestate, had power, notwithstanding the absence of a written instrument, to allow maintenance to child beneficiaries out of the income of their shares. As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) para 766 *et seq*.

<sup>3</sup> The Conveyancing Act 1881 s 43 was repealed by the Law of Property Act 1925 except so far as it relates to instruments in operation before 1 January 1926.

<sup>4</sup> As to the attainment of full age see para 1 *ante*.

<sup>5</sup> Conveyancing Act 1881 s 43(3) (repealed with savings: see note 3 *supra*). The statutory provisions are deemed to be incorporated in the settlement: *Re Moody, Woodroffe v Moody* [1895] 1 Ch 101; *Re Stokes, Bowen v Davidson* [1928] Ch 716. A direction to accumulate the income was not an expression of a contrary intention (*Re Thatcher's Trusts* (1884) 26 ChD 426); nor was a maintenance clause ceasing on marriage (*Re Cooper, Cooper v Cooper* [1913] 1 Ch 350). A gift of residue which would include the income might be a sufficient contrary intention (*Re Dickson, Hill v Grant* (1885) 29 ChD 331 at 339, CA, per Fry LJ; *Re Wells, Wells v Wells* (1889) 43 ChD 281; *Re Humphreys, Humphreys v Levett* [1893] 3 Ch 1, CA); so might a direction that income is not to be applied for maintenance while the child is in his father's custody (*Re Borwick's Settlement, Woodman v Borwick, Re Woodman* [1916] 2 Ch 304).

<sup>6</sup> This includes an executor where a testator has made a bequest to a child absolutely (*Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302), and an administrator with the will annexed (*Re Adams, Verrier v Haskins* (1906) 51 Sol Jo 113). See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 499.

<sup>7</sup> Conveyancing Act 1881 s 43(1) (repealed with savings: see note 3 *supra*); *Re Medlock, Ruffle v Medlock* (1886) 55 LJCh 738; *Re Burton's Will, Banks v Heaven* [1892] 2 Ch 38; *Re Adams, Adams v Adams* [1893] 1 Ch 329; *Re Clements, Clements v Pearsall* [1894] 1 Ch 665; *Re Woodin, Woodin v Glass* [1895] 2 Ch 309, CA; *Re Jeffery, Arnold v Burt* [1895] 2 Ch 577. In the case of a child so contingently entitled, the trustees may apply intermediate income for his maintenance notwithstanding that if not so applied it will never belong to the child: *Re Boulter, Capital and Counties Bank v Boulter* [1918] 2 Ch 40. See TRUSTS vol 48 (2007 Reissue) para 1049.

- 8     *Re Judkin's Trusts* (1884) 25 ChD 743 at 749 per Kay J; *Re Abrahams, Abrahams v Bendon* [1911] 1 Ch 108.
- 9     *Re Buckley's Trusts* (1883) 22 ChD 583.
- 10    *Re Dickson, Hill v Grant* (1885) 29 ChD 331, CA; *Re Holford, Holford v Holford* [1894] 3 Ch 30 at 52, CA, per Kay LJ (overruling *Re Jeffery, Burt v Arnold* [1891] 1 Ch 671).
- 11    *Re Holford, Holford v Holford* [1894] 3 Ch 30 (overruling *Re Jeffery, Burt v Arnold* [1891] 1 Ch 671); and see *Re Burton's Will, Banks v Heaven* [1892] 2 Ch 38. So long as no member has attained a vested interest, the income is applicable for the maintenance of all: *Re Adams, Adams v Adams* [1893] 1 Ch 329. If some attain full age, those who are still children are entitled to maintenance out of the income of their contingent shares, even though the class is capable of increase: *Re Jeffery, Arnold v Burt* [1895] 2 Ch 577; *Re Maber, Ward v Maber* [1928] Ch 88; *Re King, Public Trustee v Aldridge* [1928] Ch 330.
- 12    *Re Long, Lovegrove v Long* [1901] WN 166.

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## **62. Application of income where settlement is in operation before 1926.**

Where the statutory powers of maintenance arise<sup>1</sup>, the trustees may at their discretion<sup>2</sup> pay to the child's parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, all or any part of the income of the property, whether or not there is any other fund applicable to that purpose, or any person bound by law to provide for his maintenance or education<sup>3</sup>. The residue of the income must be invested and accumulated in securities sanctioned by the settlement, if any, or authorised by law for the investment of trust money; and the accumulations must be held as an accretion to the capital for the benefit of the person who ultimately becomes entitled to the property from which they arise<sup>4</sup>. The trustees may at any time, if they think fit, apply all or any of the accumulations as if they were income arising in the then current year<sup>5</sup>.

<sup>1</sup> See para 61 ante.

<sup>2</sup> Where trustees have not exercised their discretion, or have exercised it under a mistake, past maintenance may be allowed: *Maberly v Turton* (1808) 14 Ves 499; *Stopford v Lord Canterbury* (1840) 11 Sim 82 at 99 per Shadwell V-C; *Re Wells, Wells v Wells* (1889) 43 ChD 281.

<sup>3</sup> Conveyancing Act 1881 s 43(1), (3) (repealed with savings: see para 61 note 3 ante). See TRUSTS vol 48 (2007 Reissue) para 1049.

<sup>4</sup> Ibid s 43(2) (repealed with savings: see para 61 note 3 ante); *Re Buckley's Trusts* (1883) 22 ChD 583; *Re Wells, Wells v Wells* (1889) 43 ChD 281; *Re Humphreys, Humphreys v Levett* [1893] 3 Ch 1, CA; *Re Bowlby, Bowlby v Bowlby* [1904] 2 Ch 685 at 710, CA, per Romer LJ (overruling *Re Scott, Scott v Scott* [1902] 1 Ch 918); and see *Re Mellor, Alvarez v Dodgson* [1922] 1 Ch 312, CA.

<sup>5</sup> Conveyancing Act 1881 s 43(2) (repealed with savings: see para 61 note 3 ante). It has been suggested that past accumulations may be applied towards past maintenance (*Re Pitts' Settlement, Collins v Pitts* [1884] WN 225), but it appears that the point did not actually arise in the case (see *Re Pitts' Settlement, Collins v Pitts* supra at 242 per Chitty J). The income accrued in past years may be applied in subsequent years, whether or not the trustees, in capitalising income, have exercised their discretion: *Re Cooper, Cooper v Cooper* [1913] 1 Ch 350; *Edwards v Grove* (1860) 2 De GF & J 210; *Re Wise, Jackson v Parrott* [1896] 1 Ch 281; *Re Tod, Bradshaw v Tod* (1913) 134 LT Jo 386.

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### 63. Statutory powers where instrument came into operation after 1925.

The statutory powers of maintenance vary according to whether the instrument creating the settlement came into operation before 1 January 1926 or on or after that date<sup>1</sup>. The following statutory provisions<sup>2</sup> for maintenance and accumulation apply where the instrument under which the beneficiary's interest arises came into operation on or after 1 January 1926<sup>3</sup>.

Subject to any contrary intention expressed in the trust instrument<sup>4</sup>, where any property<sup>5</sup> is held by trustees (including personal representatives)<sup>6</sup> in trust for any person for any interest whatsoever, whether vested or contingent<sup>7</sup>, then, subject to any prior interests or charges affecting that property (1) during the minority of any such person, if his interest so long continues, the trustees may, at their sole discretion<sup>8</sup>, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is any other fund applicable to the same purpose or any person bound by law to provide for his maintenance or education<sup>9</sup>; and (2) if that person on attaining the age of 18 years<sup>10</sup> has not a vested interest in the income, the trustees must thenceforth pay the income of that property and of any accretion thereto<sup>11</sup> to him, until he either attains a vested interest in it or dies or until failure of his interest<sup>12</sup>.

<sup>1</sup> As to the statutory powers of maintenance where the settlement is in operation before 1925 see paras 61-62 ante.

<sup>2</sup> I.e. the Trustee Act 1925 s 31 (as amended): see the text and notes 9-12 infra; and paras 64-66 post.

<sup>3</sup> Ibid s 31(5). The document which exercises the power, not that which creates the power, is the instrument under which an appointed interest arises: *Re Dickinson's Settlements*, *Bickersteth v Dickinson* [1939] Ch 27.

<sup>4</sup> See the Trustee Act 1925 s 69(2); *Re Turner's Will Trusts*, *District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA; and cf *Re Rees*, *Lloyds Bank Ltd v Rees* [1954] Ch 202, sub nom *Re Rees' Will Trusts*, *Lloyds Bank Ltd v Rees* [1954] 1 All ER 7; *Re Evans' Settlement*, *Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294. For examples of a contrary intention see *Re Thatcher's Trusts* (1884) 26 ChD 426; *Re Cooper*, *Cooper v Cooper* [1913] 1 Ch 350; *Re Borwick's Settlement*, *Woodman v Borwick*, *Re Woodman* [1916] 2 Ch 304; *Re Reade-Revell*, *Crellin v Melling* [1930] 1 Ch 52; *Re Ransome's Will Trusts*, *Moberly v Ransome* [1957] Ch 348, sub nom *Re Ransome's Will Trusts* [1957] 1 All ER 690; *Re McGeorge*, *Ratcliff v McGeorge* [1963] Ch 544, [1963] 1 All ER 519; *Re Hunter's Will Trust*, *Gilks v Harris* [1963] Ch 372, [1962] 3 All ER 1050; *Re Erskine's Settlement Trusts*, *Hollis v Pigott* [1971] 1 All ER 572, [1971] 1 WLR 162; and para 61 note 5 ante. See also *Re Delamere's Settlement Trusts*, *Kenny v Cunningham-Reid* [1984] 1 All ER 584, [1984] 1 WLR 813, CA.

<sup>5</sup> The Trustee Act 1925 s 31 (as amended) applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income of it to the annuitant for the period for which the annuity is payable, but in any case accumulations (see s 31(2) (as amended)); and para 65 post) made during the annuitant's minority are to be held in trust for him or his personal representatives absolutely: s 31(4).

<sup>6</sup> See ibid ss 68(17), 69 (as amended); and TRUSTS vol 48 (2007 Reissue) para 603. The statutory provisions as to maintenance and accumulation are expressly made applicable where the residuary estate of an intestate or any part of it is held upon the statutory trusts for the issue of the intestate: see the Administration of Estates Act 1925 s 47(1)(ii) (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 605, 608. Trustees appointed on an intestacy under s 42 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 496), and who hold property on trust for beneficiaries who are to be ascertained according to the provisions of some foreign law, possess the statutory powers of maintenance: *Re Kehr*, *Martin v Foges* [1952] Ch 26, [1951] 2 All

ER 812. As to the nature of the discretion in cases arising on intestacy see *J v J (C intervening) (minors: financial provision)* [1989] Fam 29, [1989] 1 All ER 1121, CA.

7 As to contingent interests see the Trustee Act 1925 s 31(3); and para 66 post.

8 As to when the court will interfere with the trustees' discretion see para 68 post. For a case where the father was expressly excluded see *Re Borwick's Settlement, Woodman Borwick, Re Woodman* [1916] 2 Ch 304.

9 Trustee Act 1925 s 31(1)(i). See note 12 infra. See also TRUSTS vol 48 (2007 Reissue) para 1049.

10 Ie, as from 1 January 1970, full age: see para 1 ante. See, however, note 12 infra.

11 Ie under the provisions for accumulation contained in the Trustee Act 1925 s 31(2) (as amended): see para 65 post.

12 Ibid s 31(1)(ii) (amended by the Family Law Reform Act 1969 s 1(3), Sch 1 Pt I). This power does not depend upon the person's being under full age when the instrument takes effect: *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA.

As from 1 January 1970, a person attains full age on attaining the age of 18 (see para 1 ante), but this does not affect the Trustee Act 1925 s 31 (as amended) in its application to any interest under an instrument made before that date, or in its application, by virtue of the Administration of Estates Act 1925 s 47(1)(ii) (as amended), to the estate of an intestate dying before that date: Family Law Reform Act 1969 s 1(4), Sch 3 para 5(1). In any case in which trustees have power under the Trustee Act 1925 s 31(1)(i) (see the text to note 9 supra) to pay income to the parent or guardian of any person who has attained the age of 18, or to apply it for or towards the maintenance, education or benefit of any such person, they also have power to pay it to that person himself: Family Law Reform Act 1969 Sch 3 para 5(2).

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#### **64. Exercise of trustees' discretion.**

In deciding whether the whole or any part of the income arising under an instrument which came into operation on or after 1 January 1926 is during a minority to be paid or applied for the statutory purposes<sup>1</sup>, the trustees must have regard to the child's age and requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for those purposes<sup>2</sup>. Where trustees have notice that the income of more than one fund is applicable for the statutory purposes, then, so far as practicable, unless the entire income of the funds is so paid or applied or the court otherwise directs, a proportionate part only of the income of each fund is to be so paid or applied<sup>3</sup>.

1    le the purposes specified in the Trustee Act 1925 s 31(1) (as amended): see para 63 ante.

2    Ibid s 31(1) proviso.

3    Ibid s 31(1) proviso. Where the instrument came into operation before 1926, if there were two funds, the court applied for maintenance the income of the one which it was more advantageous to the child to have so applied: *Re Weaver* (1882) 21 ChD 615, CA; *Re Wells, Wells v Wells* (1889) 43 ChD 281 at 286-287 per North J; and see *Foljambe v Willoughby* (1824) 2 Sim & St 165; *Lucas v King* (1863) 11 WR 818; *Martin v Martin* (1866) LR 1 Eq 369; *Re Burton's Will, Banks v Heaven* [1892] 2 Ch 38; *Smith v Cock* [1911] AC 317, PC. Maintenance would be ordered out of the income of a fund in which the child had a defeasible or limited interest rather than out of property to which he was absolutely entitled (*Ravenhill v Dansey* (1723) 2 P Wms 179; *Bruin v Knott* (1845) 1 Ph 572; *Lygon v Lord Coventry* (1845) 14 Sim 41; *Methold v Turner* (1851) 4 De G & Sm 249; *Furley v Hyder* (1872) 41 LJCh 583), except where the income of one fund was expressly directed to be only applied for his maintenance so far as actually necessary (*Rawlins v Goldfrap* (1800) 5 Ves 440). Cf *Gisborne v Gisborne* (1877) 2 App Cas 300, HL (where the trustees had an 'uncontrollable discretion'). Where maintenance was directed to be supplied from one fund and permitted to be taken from another, the first fund had to be exhausted before the second could be drawn on: *Re Wakley, Wakley v Vachell* [1920] 2 Ch 205, CA. See TRUSTS vol 48 (2007 Reissue) para 1049.

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## 65. Accumulation.

Subject to any contrary intention<sup>1</sup> expressed in a trust instrument which came into operation on or after 1 January 1926, during the minority of any person, if his interest so long continues, the trustees must accumulate all the residue of the income in the way of compound interest by investing it and the resulting income from time to time in authorised investments<sup>2</sup> and hold those accumulations as follows<sup>3</sup>:

- 3 (1) if any such person attains the age of 18 years<sup>4</sup>, or marries or forms a civil partnership under that age, and his interest in the income during his minority or until his marriage or civil partnership is a vested interest<sup>5</sup>, or if any person on attaining the age of 18 years, or on marriage or formation of a civil partnership under that age, becomes entitled to the property from which the income arose in fee simple, absolute or determinable, or absolutely<sup>6</sup>, or for an entailed interest<sup>7</sup>, the trustees must hold the accumulations in trust for him absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his minority<sup>8</sup>; and his receipts after marriage or formation of a civil partnership, even though he is still a child<sup>9</sup>, are to be a good discharge<sup>10</sup>;
- 4 (2) in any other case, notwithstanding that that person has a vested interest in the income, the trustees must hold the accumulations as an accretion to the capital of the property from which the accumulations arose and as one fund with such capital for all purposes<sup>11</sup>; and if the property is settled land, the accumulations must be held upon the same trusts as if they were capital money arising from it<sup>12</sup>.

During his minority, the child's interest in the surplus income so accumulated is only a contingent interest upon his attaining full age or marrying or forming a civil partnership under that age<sup>13</sup>. At any time during his minority, if his interest so long continues, the trustees may apply those accumulations, or any part of them, as if they were income arising in the then current year<sup>14</sup>.

<sup>1</sup> See para 63 note 4 ante.

<sup>2</sup> 'Authorised investments' means investments authorised by the instrument, if any, creating the trust for the investment of money subject to the trust, or by law: Trustee Act 1925 s 68(1). See further the Trustee Investments Act 1961; and TRUSTS vol 48 (2007 Reissue) para 1017 et seq.

<sup>3</sup> Trustee Act 1925 s 31(2), (5) (s 31(2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 5). Accumulations of a vested annuity made during the annuitant's minority must be held in trust for him or his personal representatives absolutely in every case: Trustee Act 1925 s 31(4).

<sup>4</sup> As from 1 January 1970, a person attains full age at 18: see para 1 ante. As to the application of these provisions in the case of instruments made, or trusts arising on a death, before that date see para 63 note 12 ante.

<sup>5</sup> If the income which may be received by a child arises from the exercise of the trustees' discretion, the child has no vested interest in it; he takes merely as an object of the discretionary trust, and the Trustee Act 1925 s 31 (as amended) does not apply: *Re Baron Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1951] Ch



209, [1950] 2 All ER 891, CA. There is a distinction between an interest which subsists as a vested interest liable to be divested and a contingent interest: *Re Mallinson Consolidated Trusts, Mallinson v Gooley* [1974] 2 All ER 530, [1974] 1 WLR 1120 (daughter's interest was contingent; income accumulated during her minority to be added to capital to which she was not entitled).

6 In relation to personalty, 'absolutely' here denotes an interest which is not merely a vested interest in the entire capital and income of the property but is so vested free from any power or condition which might in the future defeat it; it is impossible to construe 'absolute' in relation to personalty as meaning 'absolute or determinable': *Re Sharp's Settlement Trusts, Ibbotson v Bliss* [1973] Ch 331, [1972] 3 All ER 151; *Re Delamere's Settlement Trusts, Kenny v Cunningham-Reid* [1984] 1 All ER 584, [1984] 1 WLR 813, CA.

7 As to entailed interests see REAL PROPERTY vol 39(2) (Reissue) para 117 et seq.

8 Trustee Act 1925 s 31(2)(i) (amended by the Family Law Reform Act 1969 s 1(3), Sch 1 Pt I; and the Civil Partnership Act 2004 s 261(1), Sch 27 para 5(1), (2)(a)).

9 As to the power of a married child to give valid receipts see para 40 ante.

10 Trustee Act 1925 s 31(2)(i) (as amended: see note 8 supra).

11 Ibid s 31(2)(ii).

12 Ibid s 31(2)(ii).

13 *Stanley v IRC* [1944] KB 255, [1944] 1 All ER 230, CA.

14 Trustee Act 1925 s 31(2). As to the application of accumulations for past maintenance see para 62 note 2 ante; and see also *Re Cooper, Cooper v Cooper* [1913] 1 Ch 350 (receipt of income delayed). Where the children for whom maintenance is to be provided constitute a fluctuating class, the shares of income and accumulations must be provisionally assigned; if a child attains a vested interest, he will take his share and its accumulations, but if he dies without attaining a vested interest, or if another member of the class comes into existence, the shares must be reassigned as at that date: *Re King, Public Trustee v Aldridge* [1928] Ch 330 (not followed in *Re Joel's Will Trusts, Rogerson v Brudenell-Bruce* [1967] Ch 14, [1966] 2 All ER 482, where it was held that accumulations of income belonging contingently to a grandchild dying before attaining a vested interest should thereafter be dealt with as part of the entire capital of the trust fund).

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## 66. Contingent interests.

In the case of a contingent interest, the statutory powers to apply income for maintenance and to accumulate surplus income<sup>1</sup> are exercisable only if the limitation or trust carries the intermediate income of the property<sup>2</sup>. Those powers are, however, exercisable in the case of a future or contingent legacy by the parent of, or a person standing in loco parentis<sup>3</sup> to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, in which case the rate of interest, if the income available is sufficient, and subject to any rules of court to the contrary, is £5 per cent per annum<sup>4</sup>.

1 As to these powers see paras 63-65 ante.

2 Trustee Act 1925 s 31(3). The income must follow the capital of the fund, and the same person must under the terms of the trust be entitled to it; the provision does not apply if there is a possibility of complete severance between income and capital (*Re Bourne's Settlement Trusts, Bourne v Mackay* [1946] 1 All ER 411, CA), nor when the interest in the capital fund is contingent and the right to income arises on the exercise of the trustees' discretion (*Re Baron Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1951] Ch 209, [1950] 2 All ER 891, CA). Where there is a specific direction to accumulate the surplus income, the trust does not carry the intermediate income: *Re Reade-Revell, Crellin v Melling* [1930] 1 Ch 52; *Re Stapleton, Stapleton v Stapleton* [1946] 1 All ER 323 (distinguishing *Re Leng, Dodsworth v Leng* [1938] Ch 821, [1938] 3 All ER 181).

3 As to persons standing in loco parentis see *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 154 per Lord Eldon LC; *Powys v Mansfield* (1835) 6 Sim 528 at 556 per Shadwell V-C ('the party has so acted to the children as that he has thereby imposed on himself a moral obligation to provide for them'); *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574; *Re Eyre, Johnson v Williams* [1917] 1 Ch 351.

4 Trustee Act 1925 s 31(3). As to contingent legacies carrying interest for maintenance of the legatee see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 497-502.

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## **67. Application of savings bank deposits.**

During any period while a depositor is a child under the age of seven years (1) in respect of any account before 1 January 1990, where it is proved to the satisfaction of the Director of Savings<sup>1</sup> that any deposits in that account are urgently needed for the child's maintenance, education or benefit, or that in any other circumstances it is expedient to do so, the Director may pay the deposits, or any part of them, to any person whom he judges proper to receive them<sup>2</sup>; and (2) in respect of any account opened after 31 December 1989, the Director may in his discretion pay the deposits, or any part thereof, to any person who satisfies him that he is a proper person to receive payment<sup>3</sup>. The receipt of such a person is a good discharge to the Director<sup>4</sup>.

1 As to the Director of Savings see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 810 et seq.

2 National Savings Bank Regulations 1972, SI 1972/764, reg 6(4)(a) (reg 6(4) substituted by SI 1989/2045).

3 National Savings Bank Regulations 1972, SI 1972/764, reg 6(4)(b) (as substituted: see note 2 supra).

4 Ibid reg 54. As to bank deposits by a child see generally para 45 ante.

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## **68. Court's powers as to maintenance out of income.**

With respect to the income of property belonging to or held in trust for a child, the Chancery Division of the High Court or a county court has jurisdiction to take care of it and apply it for his maintenance or otherwise for his benefit, and accumulate any surplus not required to be so applied<sup>1</sup>. Where, however, the property is vested in trustees upon whom a power has been expressly conferred (which would include a power conferred by statute) of applying at their discretion all or any part of the income for the child's maintenance, education or benefit, the court will not override or interfere with that discretion if the trustees actually exercise it<sup>2</sup> and are not manifestly doing so in a manner prejudicial to the child's interests<sup>3</sup>.

Maintenance will be ordered out of income directed to be accumulated where there appears to be a paramount intention that the child should be suitably maintained<sup>4</sup>.

In exceptional cases<sup>5</sup>, where the income is insufficient, the court has directed maintenance for a child or some other outlay for his benefit to be provided out of the corpus of his personal property<sup>6</sup>, and even, where necessary, by a charge on his real property<sup>7</sup>.

1 *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 133-134, HL, per Lord Redesdale; *Coster v Coster* (1836) 1 Keen 199; *Havelock v Havelock, Re Allan* (1881) 17 ChD 807; *Re Smeed, Archer v Prall* (1886) 2 TLR 535. See further TRUSTS vol 48 (2007 Reissue) para 1049.

2 *Wilson v Turner* (1883) 22 ChD 521, CA; *Re Wells, Wells v Wells* (1889) 43 ChD 281 at 286-287 per North J.

3 *Brophy v Bellamy* (1873) 8 Ch App 798; *Re Hodges, Davey v Ward* (1878) 7 ChD 754; *Re Lofthouse (an infant)* (1885) 29 ChD 921, CA; *Re Bryant, Bryant v Hickley* [1894] 1 Ch 324. As to the exercise of express powers see para 59 ante.

4 *Havelock v Havelock, Re Allan* (1881) 17 ChD 807; *Re Collins, Collins v Collins* (1886) 32 ChD 229; *Re Alford, Hunt v Parry* (1886) 32 ChD 383; *Re Walker, Walker v Duncombe* [1901] 1 Ch 879; and see *Re Colgan (infants)* (1881) 19 ChD 305; but cf *Re Reade-Revell, Crellin v Melling* [1930] 1 Ch 52.

5 See *Walker v Wetherell* (1801) 6 Ves 473. A trustee has no power to break in upon the capital unless expressly authorised to do so by the terms of the trust: *Walker v Wetherell* supra at 474 per Arden MR. See now the statutory power given by the Trustee Act 1925 s 53; and see para 71 post.

6 *Barlow v Grant* (1684) 1 Vern 255; *Harvey v Harvey* (1722) 2 P Wms 21; *Ex p Green* (1820) 1 Jac & W 253 (where the property was very small); *Re Swift, ex p Swift* (1828) 1 Russ & M 575; *Ex p Chambers* (1829) 1 Russ & M 577; *Fentiman v Fentiman* (1842) 13 Sim 171; *Bridge v Brown* (1843) 2 Y & C Ch Cas 181; *Farrance v Viley* (1852) 21 LJCh 313 (where the property was under £20); *Re Lane* (1853) 17 Jur 219; *Re Clarke* (1853) 17 Jur 362; *Re Welch* (1854) 23 LJCh 344.

7 *Ex p Whitehead* (1828) 2 Y & J 243; *Fentiman v Fentiman* (1842) 13 Sim 171; *Re Corkers (minors)* (1846) 3 Jo & Lat 377; *Re Allen* (1850) 8 Ch App 417 note (5); *Re Howarth* (1873) 8 Ch App 415; *Nottley v Palmer, Nottley v Nottley* (1865) 11 Jur NS 968. The charge did not, however, bind the person on whom the estate descended as heir, if the child died before attaining full age, unless that person was represented: *Re Howarth* (1873) 8 Ch App 415 at 418 per James LJ. That case was apparently decided on the ground that a judgment might be obtained against the child for necessities supplied to him by which his inheritance would be bound. It 'went to the very verge of the law, and perhaps beyond it': *Cadman v Cadman* (1886) 33 ChD 397 at 401, CA, per Lindley LJ. See also *Ex p M'Key* (1810) 1 Ball & B 405.

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## **69. Order for maintenance out of reversionary or contingent interests.**

Where necessary, maintenance may be ordered out of capital or income in which the child has only a reversionary or a contingent interest<sup>1</sup>. If the interest is taken under a will, the testator's creditors will be safeguarded<sup>2</sup>; and where recourse is had to income or capital to which the child is not absolutely entitled in possession, its recoupment, in the interest of parties who are prejudiced by the transaction, will be secured by a policy of assurance on the child's life<sup>3</sup>, or by a charge on any interest in remainder which he may have in the property<sup>4</sup>.

1 See the Trustee Act 1925 s 53; *Kilminster v Noel* (1834) 4 LJCh 52; *Re Hays, ex p Hays* (1849) 3 De G & Sm 485; *De Witte v Palin* (1872) LR 14 Eq 251; and para 71 post. This is so even where such income is directed to be accumulated: *Re Colgan (infants)* (1881) 19 ChD 305. Cf *Re Badger, Badger v Badger* [1913] 1 Ch 385, CA, where maintenance by charging a child's reversionary interest in real estate was refused.

2 *Revel v Watkinson* (1748) 1 Ves Sen 93 at 95 per Lord Hardwicke LC.

3 *Re Arbuckle* (1866) 14 WR 535; *Re Robinson (an infant)* (1868) 16 WR 1106; *De Witte v Palin* (1872) LR 14 Eq 251; *Re Bruce (an infant)* (1882) 30 WR 922; *Re Tanner* (1884) 53 LJCh 1108 at 1110 per Kay J.

4 *Fentiman v Fentiman* (1842) 13 Sim 171; *Re Colgan (infants)* (1881) 19 ChD 305; *Re Tanner* (1884) 53 LJCh 1108 at 1110 per Kay J.

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## 70. Court's former practice.

Cases may still occur where the express or implied powers are inapplicable or inadequate and it is necessary to seek the court's assistance. In such cases, regard should be had to the court's former practice under which it would not relieve the father of his legal duty to maintain his children<sup>1</sup> by directing maintenance out of their property<sup>2</sup> unless he was not in a position to maintain them in a manner suitable to their expectant fortunes<sup>3</sup>.

Where maintenance was allowed, the amount depended upon the child's age, position and fortune<sup>4</sup>. The court took into consideration the pecuniary position of the child's father<sup>5</sup> or mother<sup>6</sup>, and also the interests of his brothers or sisters who were otherwise insufficiently provided for and might benefit by the allowance<sup>7</sup>. It would allow a larger sum than actually required for his maintenance<sup>8</sup>, and, if his interests so required, a further amount would be directed, notwithstanding that maintenance had been expressly provided for him under a settlement or will<sup>9</sup>.

On the same principles which regulate directions for future maintenance, the court directed the recoupment of sums advanced for the past maintenance of the child by his father<sup>10</sup>, or mother<sup>11</sup>, or other relatives<sup>12</sup>, or by executors or trustees<sup>13</sup>, or by a stranger<sup>14</sup>, except where the advances were regarded as having been made by way of gift<sup>15</sup>, or where the money had been expended before the statutory power was applicable<sup>16</sup>.

1 See para 528 et seq post.

2 *Jackson v Jackson* (1737) 1 Atk 513 at 515 per Lord Hardwicke LC; *Butler v Freeman and Butler* (1743) 3 Atk 58 at 60 per Lord Hardwicke LC; *Darley v Darley* (1746) 3 Atk 399; *Andrews v Partington* (1790) 2 Cox Eq Cas 223. There was no similar obligation on the mother during the father's lifetime (*Haley v Bannister* (1820) 4 Madd 275; *Hodgens v Hodgens* (1837) 4 Cl & Fin 323, HL), or after his death (*Douglas v Andrews* (1849) 12 Beav 310).

3 *Buckworth v Buckworth* (1784) 1 Cox Eq Cas 80; *Haley v Bannister* (1820) 4 Madd 275; *Re Williams, ex p Williams* (1846) 2 Coll 740. If the child's fortune is large, a liberal view will be taken of the father's position: *Jervoise v Silk* (1813) Coop G 52; *Re Williams, ex p Williams* supra; *Havelock v Havelock, Re Allan* (1881) 17 ChD 807.

4 *Ex p Lord Petre* (1802) 7 Ves 403; *Kay v Johnston* (1856) 21 Beav 536 at 537-538 per Romilly MR; *Griggs v Gibson, Maynard v Gibson, ex p Maynard (No 2)* (1866) 14 WR 538; *Havelock v Havelock, Re Allan* (1881) 17 ChD 807; *Re Collins, Collins v Collins* (1886) 32 ChD 229; *Barnes v Ross* [1896] AC 625, HL; *Re Walker, Walker v Duncombe* [1901] 1 Ch 879. The amount may be increased as the child grows older: *Nunn v Harvey* (1848) 2 De G & Sm 301.

5 *Hill v Chapman* (1787) 2 Bro CC 231; *Jervoise v Silk* (1813) Coop G 52; *Havelock v Havelock, Re Allan* (1881) 17 ChD 807. A direct benefit will not be given to the father out of a child's property: *Re Stables* (1852) 21 LJCh 620.

6 *Roach v Garvan* (1748) 1 Ves Sen 157 at 160 per Lord Hardwicke LC; *Heysham v Heysham* (1785) 1 Cox Eq Cas 179; *Barnes v Ross* [1896] AC 625, HL.

7 *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444 at 447 per Lord Hardwicke LC; *Tweddell v Tweddell* (1822) Turn & R 1 at 13 per Lord Eldon LC; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 28, HL, per Lord Eldon LC; *Re Weld (a person of unsound mind)* (1882) 20 ChD 451 at 457 per Jessel MR; *Re Walker, Walker v*

*Duncombe* [1901] 1 Ch 879. The interests of an illegitimate brother of the child have even been considered: *Bradshaw v Bradshaw* (1820) 1 Jac & W 647.

8 *Brown v Smith* (1878) 10 ChD 377 at 381, CA, per Jessel MR; *Re Lofthouse (an infant)* (1885) 29 ChD 921 at 932, CA, per Cotton LJ.

9 *Aynsworth v Pratchett* (1807) 13 Ves 321; *Re Walker, Walker v Duncombe* [1901] 1 Ch 879.

10 *Reeves v Brymer* (1801) 6 Ves 425; *Sherwood v Smith* (1801) 6 Ves 454; *Ex p Darlington* (1809) 1 Ball & B 240; *Parsons v Peters* (1864) 11 Jur NS 150; *Re Hodges, Davey v Ward* (1878) 7 ChD 754.

11 *Coster v Coster* (1836) 1 Keen 199; *Bruin v Knott* (1845) 1 Ph 572; *Brown v Smith* (1878) 10 ChD 377, CA.

12 The amount has been recouped to a brother (*Boycot v Cotton* (1738) 1 Atk 552 at 556-557 per Lord Hardwicke LC), and to a brother-in-law (*Re Welch* (1854) 23 LJCh 344).

13 *Sisson v Shaw* (1804) 9 Ves 285; *Collis v Blackburn* (1804) 9 Ves 470; *Maberly v Turton* (1808) 14 Ves 499.

14 *Marlow v Pitfeild* (1719) 1 P Wms 558.

15 *Re Cottrell's Estate, Joyce v Cottrell* (1871) LR 12 Eq 566.

16 *Re Senior, Senior v Wood* [1936] 3 All ER 196.

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## **71. Vesting orders.**

Where a child is beneficially entitled to any property, then, with a view to the application of the capital or income for the child's maintenance, education or benefit<sup>1</sup>, the court may make an order appointing a person to convey that property, or, in the case of stock or a thing in action, vesting in any person the right to transfer or call for a transfer of the stock or to receive the dividends or income or to sue for and recover the thing in action upon such terms as the court may think fit<sup>2</sup>.

<sup>1</sup> See *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364, sub nom *Re Heyworth's Settlements* [1956] 2 All ER 21, where the application was refused because the agreement was not entered into 'with a view to the application' of the capital or income for the maintenance, education, or benefit of the child.

<sup>2</sup> Trustee Act 1925 s 53. This provision has been applied in the case of a child tenant in tail to authorise a mortgage of the settled land, subject to interests having priority over the child's tenancy in tail, so framed as to vest in the mortgagee a security which would be as effective a bar against the child's issue and subsequent remaindermen as if the child were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act 1833 (see REAL PROPERTY vol 39(2) (Reissue) para 125 et seq): *Re Gower's Settlement* [1934] Ch 365. The court has jurisdiction under the Trustee Act 1925 s 53 to appoint a person to convey the entailed interest of a child in the residuary trust estate where the purchase price is to be re-settled on virtually the same trusts as those on which the residuary estate was settled: see *Re Meux, Gilmour v Gilmour* [1958] Ch 154, sub nom *Re Meux's Will Trusts, Gilmour v Gilmour* [1957] 2 All ER 630 (distinguishing *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364, sub nom *Re Heyworth's Settlements* [1956] 2 All ER 21); and see also *Re Bristol's Settled Estate, Bristol v Jermyn* [1964] 3 All ER 939, [1965] 1 WLR 469; *Re Lansdowne's Will Trusts, Marquis of Lansdowne v Earl of Shelburne* [1967] Ch 603, [1967] 1 All ER 888. Formerly the corpus of real property could not be charged where the child had only an estate tail or some other limited interest: *Re Hamilton (infants)* (1885) 31 ChD 291, CA; *Cadman v Cadman* (1886) 33 ChD 397, CA; *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620. As to the jurisdiction of a county court in such matters see COURTS vol 10 (Reissue) para 710 et seq.



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## **72. Interest on portions and legacies.**

Where, under a settlement of real estate by a parent or person in loco parentis<sup>1</sup>, a portion is given to a child not otherwise provided for which will not be raiseable if he dies before attaining full age, interest on the portion may nevertheless be allowed to the child for maintenance during minority<sup>2</sup>.

A child may be entitled to maintenance out of interest on, or the income of, a legacy under the will of his parent or of another person in loco parentis<sup>3</sup>.

1 As to persons standing in loco parentis see para 66 note 3 ante.

2 *Staniforth and Clerkson v Staniforth* (1703) 2 Vern 460; *Inclendon v Northcote* (1746) 3 Atk 430 at 438 per Lord Hardwicke LC; *Brown v Temperley* (1827) 3 Russ 263; *Re Greaves' Settled Estates, Jones v Greaves* [1900] 2 Ch 683.

3 See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 497.

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## (C) ADVANCEMENT

### 73. Advancement out of capital by trustees or the court.

An advancement for preferring a child beneficiary in life, or otherwise for a special benefit to him, as distinct from ordinary maintenance and education<sup>1</sup>, may generally be made by a trustee in suitable cases out of the capital of the personal estate in which the child has a vested or presumptive or contingent interest, where this is authorised by the terms of the trust<sup>2</sup>, and by the Chancery Division of the High Court out of capital in which the child has an absolute interest<sup>3</sup>, or, with the consent of the other persons interested, out of capital in which he has less than an absolute interest<sup>4</sup>.

The court, however, has no power to charge a child's real estate for the purpose of his advancement<sup>5</sup>, or to dispense with the consent of a particular person where that consent is required under the terms of the settlement governing the property<sup>6</sup>. The mere conferring of 'a power of advancement' upon trustees, without specifying the property out of which the advancement is to be made, does not authorise it to be made out of capital to which the child would otherwise have no right<sup>7</sup>.

1 *Walker v Wetherell* (1801) 6 Ves 473 at 474 per Arden MR; *Simpson v Brown* (1864) 13 WR 312; *Re Breeds' Will* (1875) 1 ChD 226. As to maintenance see paras 58-72 ante.

2 *Re Aldridge, Abram v Aldridge* (1886) 55 LT 554, CA. See also *Re Wills' Will Trusts, Wills v Wills* [1959] Ch 1, [1958] 2 All ER 472 ('vested' in a particular clause of a will meant vested in interest, not vested in possession, so that the power of advancement in respect of sons' shares came to an end when the shares vested absolutely, ie, as and when each son attained the age of 25 years; accordingly, the power of advancement was not void for remoteness). See TRUSTS vol 48 (2007 Reissue) para 1050.

3 *Walker v Wetherell* (1801) 6 Ves 473 at 474 per Arden MR; *Curtis v Curtis* [1901] 1 IR 374; *Morgan v Morgan* [1917] 1 IR 181.

4 *Evans v Massey* (1826) 1 Y & J 196. In *Franklin v Green* (1690) 2 Vern 137 the advancement of a child who died before attaining full age was sanctioned as against his brothers and sisters who took his share in the capital by survivorship.

5 *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v De Teissier* [1893] 1 Ch 153.

6 *Re Forster's Settlement, Forster v Custodian of Enemy Property for England* [1942] Ch 199, [1942] 1 All ER 180.

7 *Re Aldridge, Abram v Aldridge* (1886) 55 LT 554, CA. As to the statutory provisions applying where there are two funds see para 64 ante.

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#### **74. Extent of power.**

The word 'advancement' is properly appropriate to an early period of life<sup>1</sup>, but a power of advancement is often so worded as to include any other benefit<sup>2</sup>, and its operation is sometimes expressly extended beyond minority<sup>3</sup>. Such an extension must, however, be expressly authorised<sup>4</sup>. If a trustee without express authority makes an advance, for a proper purpose, out of capital to which the child is absolutely entitled, the advancement will be sanctioned<sup>5</sup>. If the child is entitled to the capital contingently on his attaining full age, the advancement will be allowed if the child attains full age<sup>6</sup>, but if he dies during minority the trustee will be liable to account for the advance to the person who thereupon becomes entitled to the property<sup>7</sup>.

1 *Re Kershaw's Trusts* (1868) LR 6 Eq 322 at 323 per Malins V-C.

2 'Benefit' includes a settlement upon the wife and child of the object of the power: *Re Halsted's Will Trusts, Halsted v Halsted* [1937] 2 All ER 570.

3 *Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Lowther v Bentinck* (1874) LR 19 Eq 166; *Re Breeds' Will* (1875) 1 ChD 226; and cf *Re Williams' Will Trusts, Chartered Bank of India, Australia and China v Williams* [1953] Ch 138, [1953] 1 All ER 536. It is conceived that the statutory power would so extend unless the terms of the will were held to prevent an extension: see the cases cited in para 63 note 4 ante. As to the statutory power of advancement see para 76 post.

4 *Clarke v Hogg* (1871) 19 WR 617. Unless a power of advancement permits delegation of powers and discretions, a settlement created in exercise of the power is invalid in so far as it purports to delegate powers or discretions in relation to beneficial interests: *Re Wills' Will Trusts, Wills v Wills* [1959] Ch 1 at 12-13, [1958] 2 All ER 472 at 478 per Upjohn J.

5 *Worthington v M'Craer* (1856) 23 Beav 81 at 85 per Romilly MR. The advance will not be sanctioned where the child's father is the trustee: *Darley v Darley* (1746) 3 Atk 399.

6 *Worthington v M'Craer* (1856) 23 Beav 81. As to the attainment of full age see para 1 ante.

7 *Worthington v M'Craer* (1856) 23 Beav 81 at 85-86 per Romilly MR. This would not apply to the exercise of the statutory powers where the possible defeasance of the interest of the advanced person is expressly contemplated.

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## 75. Purpose of advancement.

At all events where the enlarging word 'benefit' is not present in the power of advancement in the settlement, the advancement must not be merely to put money into the child's pocket<sup>1</sup>, but must be for a definite purpose to his advantage<sup>2</sup>. The advanced person is under a duty to carry out that purpose, and cannot properly apply the money advanced to another purpose<sup>3</sup>.

The advancement must be replaced if, through the default or negligence of the trustee making it, it is not applied to the intended purpose<sup>4</sup>, but not if, immediately after its having been so applied, the purpose fails owing to circumstances over which the trustee has no control<sup>5</sup>.

1 *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452 at 453 per Lord Romilly MR.

2 See *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303 at 333, [1963] 3 All ER 1 at 8, CA, per Willmer LJ (the parties to a settlement intend the normal trusts to take effect, and a power of advancement is to be exercised only if there is some good reason for it; that good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may thereafter become interested under the trusts of the settlement). Advancement has been allowed for purchasing a commission in the army (*Cope v Wilmot* (1772) Amb 704, cited in *Thompson v Thompson* (1844) 1 Coll 381 at 396 note (a) per Knight Bruce V-C; *Evans v Massey* (1826) 1 Y & J 196; *Lawrie v Bankes* (1858) 4 K & J 142); putting out as apprentice (*Swinnoek v Crisp* (1681) Freem Ch 78; *Franklin v Green* (1690) 2 Vern 137; *Simpson v Brown* (1864) 13 WR 312; *Curtis v Curtis* [1901] 1 IR 374); emigrating (*Re England's Estate* (1830) 1 Russ & M 499; *Re Salter's Trusts* (1866) 17 I Ch R 176); purchasing an outfit (*Re Welch* (1854) 23 LJCh 344); furnishing a house (*Perry v Perry* (1870) 18 WR 482); providing on marriage a settled fund to yield income (*Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452); establishment in business (*Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Re Mead, Public Trustee v Mead* (1918) 88 LJCh 86, CA); but not for making a deposit for the purpose of becoming a member of Lloyd's (*Re Craven's Estate, Lloyds Bank Ltd v Cockburn (No 2)* [1937] Ch 431, [1937] 3 All ER 33). A power to pay money to a beneficiary for starting him in business or for advancement in his business was held to apply to a profession, and entitled the trustees to purchase a house to be used for his medical practice: *Re Williams' Will Trusts, Chartered Bank of India, Australia and China v Williams* [1953] Ch 138, [1953] 1 All ER 536. Advancement is permitted to discharge the moral obligation of a wealthy person to contribute to a charitable foundation provided that the beneficiary himself recognises that moral obligation: *Re Clore's Settlement Trusts, Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955.

3 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA, where bank trustees were in breach of trust for not making reasonably sure that money advanced was used for the purpose of the advancement.

4 *Simpson v Brown* (1864) 13 WR 312.

5 *Lawrie v Bankes* (1858) 4 K & J 142, where the commission purchased with the advancement was sold a few months afterwards.

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## 76. Statutory powers.

In the case of trusts constituted<sup>1</sup> or created on or after 1 January 1926, a statutory power of advancement is conferred on trustees<sup>2</sup>. Subject to certain limitations<sup>3</sup>, trustees may at any time or times pay or apply any capital money subject to a trust in such manner as they may, in their absolute discretion, think fit, for the advancement or benefit<sup>4</sup> of any person entitled to the capital of the trust property or any share of it, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event<sup>5</sup>, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and that payment or application may be made notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs<sup>6</sup>. The advancement need not be for any specific purpose, but the trustees must be satisfied that it will benefit the recipient<sup>7</sup>.

1 A trust in a will is not constituted or created until the testator dies: *Re Darby, Farrell v Fergus* (1943) 59 TLR 418; *Re Taylor's Will Trusts, Public Trustee v Burge* [1950] WN 437. In the case of an appointment made under a special power, the relevant date is the date of the creation of the power (*Re Batty, Public Trustee v Bell* [1952] Ch 280, [1952] 1 All ER 425), but if made under a general power, the governing date is that of the exercise of the power (*Re Bransbury's Will Trusts, Grece v Bransbury* [1954] 1 All ER 605, [1954] 1 WLR 496).

2 See the Trustee Act 1925 s 32(1), (3); and TRUSTS vol 48 (2007 Reissue) para 1050. This power applies so far as a contrary intention is not expressed in the instrument creating the trust and has effect subject to the terms of the instrument: s 69(2). A protective life interest and the discretionary trust arising under it on forfeiture do not constitute a contrary intention for this purpose, where the will does not contain an express provision for advancement (*Re Rees, Lloyds Bank Ltd v Rees* [1954] Ch 202, sub nom *Re Rees' Will Trusts, Lloyds Bank Ltd v Rees* [1954] 1 All ER 7), but a trust for accumulation may show a contrary intention (*IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320, CA; *Re Evans' Settlement, Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294, where a contrary intention was implied from the express power in the settlement).

3 As to the limitations see note 2 supra; and para 77 post. As to the property to which these provisions apply see para 78 post.

4 This includes the application of capital money for educational purposes (*Re Harris' Settlement, Dent v Harris* (1940) 162 LT 358), the setting aside of money to accumulate for the child's eventual benefit (*Re Baron Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1951] Ch 209, [1950] 2 All ER 891, CA), the transfer of money to trustees of a settlement to be made for the child's benefit (*Re Ropner's Settlement Trusts, Ropner v Ropner* [1956] 3 All ER 332n, [1956] 1 WLR 902), and a resettlement (*Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL). There is nothing in the language of the Trustee Act 1925 s 32 (as amended) which in terms or by implication restricts the width of the manner or purpose of advancement; in particular, if the whole provision made for the object of the power is for his benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise, nor is it bad merely because the money is to be tied up in a proposed settlement: see *Pilkington v IRC* supra at 636 and 628 per Viscount Radcliffe.

5 Although the word 'event' is used in the singular, it may include a compound event, eg the attainment of a specified age and the surviving of the tenant for life: *Re Garrett, Croft v Ruck* [1934] Ch 477.

6 Trustee Act 1925 s 32(1). See further TRUSTS vol 48 (2007 Reissue) para 1050.

7 *Re Moxon's Will Trusts, Downey v Moxon* [1958] 1 All ER 386, [1958] 1 WLR 165; and see *Re Pilkington's Will Trusts, Pilkington v Pilkington* [1961] Ch 466, [1961] 2 All ER 330, CA.

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## **77. Limitations on the statutory power of advancement.**

The statutory power of advancement<sup>1</sup> is subject to the following limitations: (1) the money paid or applied for the advancement or benefit of any person must not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property<sup>2</sup>; (2) if the person advanced is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied must be brought into account as part of that share<sup>3</sup>; and (3) no payment or application may be made so as to prejudice any person entitled to any prior life<sup>4</sup> or other interest<sup>5</sup>, whether vested or contingent, in the money paid or applied unless that person is in existence and of full age, and consents in writing to the payment or application<sup>6</sup>.

1 As to the statutory power of advancement see para 76 ante.

2 Trustee Act 1925 s 32(1) proviso (a). As to the trust property to which s 32 (as amended) applies see para 78 post. The person in whose favour the power of advancement is exercised must be absolutely or contingently entitled to the capital, and a person entitled to a life interest only would not be within this power (*Re Winch's Settlement*, *Winch v Winch* [1917] 1 Ch 633), though a settlement might expressly authorise the advancement of a life tenant (*Lowther v Bentinck* (1874) LR 19 Eq 166; *Re Brittlebank*, *Coates v Brittlebank* (1881) 30 WR 99). Where two trustees differed as to the exercise of a power of advancement, the court gave directions for its exercise: *Klug v Klug* [1918] 2 Ch 67.

3 Trustee Act 1925 s 32(1) proviso (b). As to the liability for inheritance tax (replacing estate duty) where advances have been made see *Re Tollemache*, *Forbes v Public Trustee* [1930] WN 138; and INHERITANCE TAXATION vol 24 (Reissue) para 637.

4 In the case of a protected life interest arising under a will made before 1 January 1926 but coming into operation on or after that date, consent to the exercise of this power may give rise to a forfeiture: *Re Stimpson's Trusts*, *Stimpson v Stimpson* [1931] 2 Ch 77, as explained and distinguished in *Re Rees*, *Lloyds Bank Ltd v Rees* [1954] Ch 202, sub nom *Re Rees' Will Trusts*, *Lloyds Bank Ltd v Rees* [1954] 1 All ER 7. See also *Re Hodgson*, *Weston v Hodgson* [1913] 1 Ch 34; *Re Salting*, *Baillie-Hamilton v Morgan* [1932] 2 Ch 57; *Re Shaw's Settlement*, *Shaw v Shaw* [1951] Ch 833, [1951] 1 All ER 656.

5 The objects of a discretionary trust are not persons entitled to any prior life or other interest, whose consent is necessary: *Re Beckett's Settlement*, *Re Beckett*, *Eden v Von Stutterheim* [1940] Ch 279. Similarly, there is no need to have the consent of persons who would be interested under the discretionary trusts that may arise out of protective trusts under the Trustee Act 1925 s 33 (as amended) (see SETTLEMENTS vol 42 (Reissue) para 917): *Re Harris' Settlement*, *Dent v Harris* (1940) 162 LT 358.

6 Trustee Act 1925 s 32(1) proviso (c). See *IRC v Bernstein* [1960] Ch 444, [1960] 1 All ER 697; affd on another point [1961] Ch 399, [1961] 1 All ER 320, CA.

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### **78. Property to which the statutory power applies.**

The statutory power of advancement<sup>1</sup> does not apply to capital money arising under the Settled Land Act 1925<sup>2</sup>. Where, however, trustees wish to transfer property to a beneficiary by way of advancement, they may do so directly instead of advancing cash to enable him to buy the property from them<sup>3</sup>.

1 As to the statutory power of advancement see para 76 ante.

2 Trustee Act 1925 s 32(2) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(8)).

3 *Re Collard's Will Trusts, Lloyds Bank Ltd v Rees* [1961] Ch 293, [1961] 1 All ER 821, where the purpose of the advancement was to avoid estate duty. 'The court will not insist on circuitry of action if the same result as can legitimately be achieved by circuitous action can be achieved by direct action': *Re Collard's Will Trusts, Lloyds Bank Ltd v Rees* supra at 300 and 823 per Buckley J.

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## **79. Variation of statutory power.**

An express power of advancement should be given if it is desired to vary the statutory power<sup>1</sup>, or if the settlement is not to be governed by English law<sup>2</sup>. If the power is to advance a remainderman, its exercise is usually made dependent on obtaining the consent of the tenant for life<sup>3</sup>.

1 As to the statutory power of advancement see para 76 ante.

2 See para 58 ante. See also *Re Evans' Settlement*, *Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294.

3 A tenant for life who has assigned his life interest or become bankrupt cannot consent (*Noel v Lord Henley, ex p Schwench and Mann* (1825) M'Cle & Yo 302, Ex Ch; *Nottidge v Green* (1875) 33 LT 220; *Oliver v Lowther* (1880) 28 WR 381), except with the sanction of his assignee or trustee in bankruptcy (*Re Cooper, Cooper v Slight* (1884) 27 ChD 565). The committee of a tenant for life of unsound mind was authorised to consent on his behalf in *Re Nevill* (1885) 31 ChD 161, CA. Where the consent of a particular person is required, the court cannot dispense with it: *Re Forster's Settlement*, *Forster v Custodian of Enemy Property for England* [1942] Ch 199, [1942] 1 All ER 180.



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### **80. Effect of advancement.**

An advancement has a definite meaning distinct from an appointment; it means that a certain portion of the fund is actually taken out of the settlement altogether and paid to the object of the power<sup>1</sup>. An advancement in this sense, therefore, does not fall within the operation of the ordinary hotchpot clause which only relates to appointed shares<sup>2</sup>. The exercise of a power of appointment does not take the appointed share out of the provisions of the original settlement so as to defeat an advancement clause contained in it<sup>3</sup>.

1 *Re Gosset's Settlement* (1854) 19 Beav 529; *Re Fox, Wodehouse v Fox* [1904] 1 Ch 480. This is not the only meaning of 'advancement' in law; besides a gift for establishing a child in life, the word denotes also a gift in anticipation of an interest under a will or intestacy: see *Re Hayward, Kerrod v Hayward* [1957] Ch 528 at 540, [1957] 2 All ER 474 at 480, CA, per Jenkins LJ. See also *Re Collard's Will Trusts, Lloyds Bank Ltd v Rees* [1961] Ch 293, [1961] 1 All ER 821.

2 *Re Fox, Wodehouse v Fox* [1904] 1 Ch 480. As to hotchpot clauses see SETTLEMENTS vol 42 (Reissue) para 924; WILLS vol 50 (2005 Reissue) paras 688-690. As to hotchpot on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 605.

3 *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34, following *M'Mahon v Ganssen* [1896] 1 IR 143; but see *Re Greenslade, Greenslade v McCowen* [1915] 1 Ch 155 at 160 per Eve J. See SETTLEMENTS vol 42 (Reissue) para 922 et seq.

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### ***C. SETTLEMENTS AND TRUSTS***

#### **81. Children's disability to be trustees or executors.**

The appointment of a child to be a trustee in relation to any settlement or trust is void, but without prejudice to the power to appoint a new trustee to fill the vacancy<sup>1</sup>.

Where a child is appointed executor, the appointment does not operate to vest in him the testator's estate or any part thereof, or to constitute the child a personal representative for any purpose unless and until probate is granted to him in accordance with probate rules<sup>2</sup>. An executor under the age of 18 cannot obtain probate until he reaches that age<sup>3</sup>.

<sup>1</sup> Law of Property Act 1925 s 20. As to the appointment of a new trustee see TRUSTS vol 48 (2007 Reissue) para 818 et seq.

<sup>2</sup> Supreme Court Act 1981 s 118. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 16. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> See the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 32-34 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 203 et seq.

#### **UPDATE**

#### **81 Children's disability to be trustees or executors**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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## 82. Child's settlement voidable at common law.

A settlement of, or covenant to settle, real or personal estate made or entered into by a child whether on marriage or not is voidable at common law<sup>1</sup>, and no validity is given to it by the consent of the parent or guardian, or by the intervention of the court<sup>2</sup>. If it is confirmed by the child after attaining full age either by deed or by conduct<sup>3</sup>, or is not repudiated by him within a reasonable time after attaining full age, it is binding<sup>4</sup>. In the case of reversionary property, time runs from the date when the child attains full age, and not from the date when the property falls into possession<sup>5</sup>.

1 *Salsbury v Bagott* (1677) 2 Swan 603; *Nightingale v Earl Ferrers* (1733) 3 P Wms 206; *Durnford v Lane* (1780) 1 Bro CC 106 at 115 per Lord Thurlow LC; *Clough v Clough* (1801) 5 Ves 710 at 717 per Arden MR; *Milner v Lord Harewood* (1810) 18 Ves 259 at 275, 280 per Lord Eldon LC; *Stamper v Barker* (1820) 5 Madd 157 at 164 per Leach V-C; *Simson v Jones* (1831) 2 Russ & M 365 at 374 per Leach MR; *Pimm v Insall* (1849) 1 Mac & G 449 at 456-457 per Lord Cottenham LC; *Honywood v Honywood* (1855) 20 Beav 451; *Nelson v Stocker* (1859) 4 De G & J 458; *Kingsman v Kingsman* (1880) 6 QBD 122 at 127, CA, per Lord Selborne LC; *Smith v Lucas* (1881) 18 ChD 531 at 543 per Jessel MR; *Cooke v Cooke* (1887) 38 ChD 202 at 209 per North J; *Cooper v Cooper* (1888) 13 App Cas 88 at 108, HL, per Lord Macnaghten; *Duncan v Dixon* (1890) 44 ChD 211. See further SETTLEMENTS vol 42 (Reissue) para 625. As to the effect of foreign domicile see CONFLICT OF LAWS vol 8(3) (Reissue) paras 417-418. As to settlements for the benefit of children see SETTLEMENTS vol 42 (Reissue) para 605.

2 *Field v Moore, Field v Brown* (1855) 7 De GM & G 691 at 706-707 per Turner LJ; and see SETTLEMENTS vol 42 (Reissue) para 618. As to the former statutory provisions relating to children's settlements on marriage see para 85 post.

3 *Barrow v Barrow* (1858) 4 K & J 409; *Willoughby v Middleton* (1862) 2 John & H 344; *Merryweather v Jones* (1864) 4 Giff 509; *Davies v Davies* (1869) LR 9 Eq 468; *Trowell v Shenton* (1878) 8 ChD 318, CA; *Wilder v Pigott* (1882) 22 ChD 263; *Re Hodson, Williams v Knight* [1894] 2 Ch 421. Appointment of new trustees does not by itself amount to confirmation: *Haywood v Tidy* (1890) 63 LT 679. As to the attainment of full age see para 1 ante.

4 *Clough v Clough* (1801) 5 Ves 710 at 717 per Arden MR; *Edwards v Carter* [1893] AC 360 at 364, HL, per Lord Herschell LC (acquiescence for five years considered too long to allow repudiation); *Viditz v O'Hagan* [1900] 2 Ch 87, CA (child wife by law of her domicile incapable of ratifying). The decision in *Re Jones, Farrington v Forrester* [1893] 2 Ch 461, that a settlement by a child might be repudiated after a lapse of 20 years, is inconsistent with *Edwards v Carter* [1893] AC 360, HL, and was overruled in *Carnell v Harrison* [1916] 1 Ch 328, CA. By concurring in a marriage settlement, a child may lose the right to make a claim upon the property of the other party adversely to the settlement: *Harvey v Ashley* (1748) 3 Atk 607; *Earl of Buckinghamshire v Drury* (1762) 2 Eden 60, HL. See SETTLEMENTS vol 42 (Reissue) para 618.

5 *Carnell v Harrison* [1916] 1 Ch 328, CA.

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**83. Impounding child's interest in other property.**

If a child repudiates a marriage settlement after attaining full age, the interest taken by him in property brought into settlement by the other party may be impounded to make up to the beneficiaries under the settlement the loss which they sustain through the repudiation<sup>1</sup>.

<sup>1</sup> *Hamilton v Hamilton* [1892] 1 Ch 396; *Carter v Silber*, *Carter v Hasluck* [1891] 3 Ch 553 (revsd [1892] 2 Ch 278, CA; affd sub nom *Edwards v Carter* [1893] AC 360, HL). As to the attainment of full age see para 1 ante.

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**84. Child not compellable to execute settlement.**

A child cannot be compelled to execute a settlement of property on marriage<sup>1</sup>. At one time, however, if an adult married a child ward of court, the court might impose terms that a settlement be made by the adult<sup>2</sup>, but this power is no longer exercised in practice.

<sup>1</sup> *Re Potter* (1869) LR 7 Eq 484; *Seaton v Seaton* (1888) 13 App Cas 61 at 71, HL, per Lord Herschell; *Re Leigh, Leigh v Leigh* (1888) 40 ChD 290 at 296, CA, per Lindley LJ. The court has, however, committed to prison a ward who married without its leave pending arrangements as to her future: *Re H's Settlement, H v H* [1909] 2 Ch 260.

<sup>2</sup> *Re Potter* (1869) LR 7 Eq 484. This is not so if both parties are children: *Field v Moore, Field v Brown* (1855) 7 De GM & G 691 at 711 per Turner LJ.

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### **85. Former law relating to settlements with the sanction of the court.**

Before 1970<sup>1</sup>, a male child above the age of 20 years, and a female child above the age of 17 years, might, upon or in contemplation of marriage, with the sanction of the Chancery Division of the High Court, make a valid settlement, or contract for a settlement, of all or any property, real or personal, whether in possession, reversion, remainder or expectancy<sup>2</sup>, to or over which the child was entitled or had any power of appointment<sup>3</sup>, not being a power expressly declared to be incapable of being exercised during infancy<sup>4</sup>; and all conveyances, appointments of property, and contracts to make a conveyance or appointment, executed by the child with the approbation of the court in order to give effect to the settlement, were as valid as if the child had been of full age<sup>5</sup>. Where, however, the child was tenant in tail, an appointment under a power of appointment, or a disentailing assurance executed by him, was void if he died under age<sup>6</sup>.

1 The Infant Settlements Act 1855 was repealed by the Family Law Reform Act 1969 except in relation to anything done before 1 January 1970: see s 11(a). As from that date a person attains full age at 18: see para 1 ante.

2 This included a legacy bequeathed after marriage: *Re Johnson, Moore v Johnson* [1891] 3 Ch 48.

3 This enabled an absolute appointment to be made in favour of the child which would take effect on failure of the limitations in the settlement: *Re Scott, Scott v Hanbury* [1891] 1 Ch 298.

4 Infant Settlements Act 1855 s 1 (repealed: see note 1 supra).

5 Ibid s 1 (repealed: see note 1 supra). The Act only removed the disability of infancy so far as the making of the settlement was concerned, and did not remove any disability attaching to coverture (*Seaton v Seaton* (1888) 13 App Cas 61, HL), nor the disability of infancy in respect of any subsequent act of the child, eg execution of a power, under the provisions of the settlement (*Re Armit's Trusts* (1871) 5 IR Eq 352 at 360 per Sullivan MR). As to the exercise of powers by children see para 52 ante. The powers conferred by the Infant Settlements Act 1855 were not affected by the Settled Land Act 1925, provided that a legal estate in land was not vested in a child: see s 27(3) (repealed).

6 Infant Settlements Act 1855 s 2 (repealed: see note 1 supra); *Re Scott, Scott v Hanbury* [1891] 1 Ch 298 at 302-303 per North J. See also REAL PROPERTY vol 39(2) (Reissue) para 117 et seq.

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## **(v) Agency, Partnership, Company and Society Membership**

### **86. Appointment of agent or attorney.**

A child cannot appoint an agent to make a disposition of his property so as to bind him irrevocably<sup>1</sup>, nor give a valid power of attorney<sup>2</sup>, but whenever a child can lawfully do an act on his own behalf so as to bind himself he may instead appoint an agent to do it for him<sup>3</sup>. Thus he could appoint an agent to make an admission on his behalf in affiliation proceedings<sup>4</sup>. Where the appointment of an agent or attorney is void, any act done by him by virtue of the appointment is also void<sup>5</sup>.

1 *Doe d Thomas v Roberts* (1847) 16 M & W 778 at 780 per Parke B. See also the cases cited in note 3 infra.

2 *Bac Abr*, minority and Age (I) 3; *Whittingham's Case* (1603) 8 Co Rep 42b, 45a; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1801, 1804 per Lord Mansfield; *Motteux v St Aubin* (1777) 2 Wm Bl 1133; *Saunderson v Marr* (1788) 1 Hy Bl 75; *Ashlin v Langton* (1834) 4 Moo & S 719; *Oliver v Woodroffe* (1839) 4 M & W 650. A child could appoint an attorney to accept livery of seisin because it was for his benefit: *Rames v Machin* (1608) Noy 130. As to powers of attorney given by minors see AGENCY vol 1 (2008) PARA 5. As to powers of attorney generally see AGENCY vol 1 (2008) PARAS 16-17, 31-33.

3 *G (A) v G (T)* [1970] 2 QB 643 at 652, [1970] 3 All ER 546 at 549, CA, per Lord Denning MR, explaining dicta in *Re Shephard*, *Shephard v Cartwright* [1953] Ch 728, [1953] 2 All ER 608, CA. See also AGENCY vol 1 (2008) PARA 5. As to child agents see para 87 post.

4 *G (A) v G (T)* [1970] 2 QB 643, [1970] 3 All ER 546, CA, where, however, no admission was proved. See also *Ewer v Jones* (1846) 9 QB 623. Affiliation proceedings were abolished by the Family Law Reform Act 1987. An apprenticeship deed was held to be sufficiently executed and delivered where the names of the child apprentice and his father, both being illiterate, were at their request written on it opposite to their seals by a third person, and the child afterwards delivered it to the master: *R v Longnor Inhabitants* (1833) 4 B & Ad 647.

5 *Whittingham's Case* (1603) 8 Co Rep 42b; *Raby v Robinson* (1667) 1 Sid 321; *Stokes v Oliver* (1696) 5 Mod Rep 209; *Motteux v St Aubin* (1777) 2 Wm Bl 1133; *Saunderson v Marr* (1788) 1 Hy Bl 75; *Doe d Thomas v Roberts* (1847) 16 M & W 778; and see also *Biddell v Dowse* (1827) 6 B & C 255.

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### **87. Child agent.**

A child may act as agent and may be the donee of a power of attorney<sup>1</sup>. He can bind his principal to the same extent as an agent or attorney of full age<sup>2</sup>, but he is not liable to account to his principal, nor is he liable to third parties for his dealings with them, in circumstances where an adult agent would have been personally liable to them<sup>3</sup>, except in cases of tort<sup>4</sup>. Children have no implied or presumed authority, as such, to pledge the credit of their parents, even for necessities<sup>5</sup>.

1 Co Litt 52a; Bac Abr, Authority (B); *Smally v Smally* (1700) 1 Eq Cas Abr 6, 283; *Watkins v Vince* (1818) 2 Stark 368; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228 at 246, CA, per James LJ. However, an attorney under a lasting power of attorney must have attained the age of 18 when he executes the power: see the Mental Capacity Act 2005 s 9(2)(c); paras 46-47 ante; and AGENCY vol 1 (2008) PARAS 9, 196. As to a child as bailee see para 27 ante.

2 See note 1 supra. As to the attainment of full age see para 1 ante.

3 *Smally v Smally* (1700) 1 Eq Cas Abr 6, 283. See AGENCY vol 1 (2008) PARA 9.

4 See para 27 ante.

5 *Shelton v Springett* (1851) 11 CB 452; *Mortimore v Wright* (1840) 6 M & W 482.



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## **88. Child partner.**

A child may be a partner in trade or business<sup>1</sup>, but he incurs no liability for the firm's debts or for his co-partners' acts<sup>2</sup>. The partnership assets are, however, applicable in payment of the liabilities of the partnership in priority to the child's share<sup>3</sup>.

<sup>1</sup> *Lovell and Christmas v Beauchamp* [1894] AC 607 at 611, HL, per Lord Herschell LC; and see PARTNERSHIP vol 79 (2008) PARA 33.

<sup>2</sup> *Harris v Beauchamp Bros* [1893] 2 QB 534, CA. However, as a child can be an agent (see para 87 ante), his acts will bind his partners if he is authorised or held out as a partner.

<sup>3</sup> *Lovell and Christmas v Beauchamp* [1894] AC 607 at 611, HL, per Lord Herschell LC.

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## **89. Repudiation or dissolution of partnership.**

On attaining full age, a child partner may repudiate and dissolve the partnership, but if he neglects to do so within a reasonable time he will incur full liability as a partner<sup>1</sup>. On repudiation he cannot recover money which he has paid as a premium on entering the partnership unless there has been a total failure of consideration<sup>2</sup>. On dissolution of the partnership, the minority of one partner will not prevent a sale of the partnership concern and assets<sup>3</sup>.

1 *Goode v Harrison* (1821) 5 B & Ald 147; and see PARTNERSHIP vol 79 (2008) PARA 33. As to the attainment of full age see para 1 ante.

2 *Corpe v Overton* (1833) 10 Bing 252; *Everett v Wilkins* (1874) 29 LT 846.

3 *Crawshay v Maule* (1818) 1 Swan 495 at 530 per Lord Eldon LC. As to the dissolution of partnerships generally see PARTNERSHIP vol 79 (2008) PARA 174 et seq.

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## **90. Membership of companies.**

A child may be a member of a company regulated by the Companies Act 1985<sup>1</sup>. He may, however, repudiate his membership either during minority or when he comes of age, but he may not recover money paid by him for shares unless there has been a total failure of consideration<sup>2</sup>.

1 See COMPANIES vol 14 (2009) PARAS 103, 330, 398, 402.

2 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA. See also para 46 ante; and COMPANIES vol 14 (2009) PARA 330. As to the attainment of full age see para 1 ante.

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## **91. Membership of corporations.**

A child's capacity to be a member of a corporation depends upon whether the charter or statute under which the corporation is constituted permits children to be members of it, whether expressly or by implication<sup>1</sup>. Where the charter or statute contains no express provision on the subject, a child's capacity to be a member depends upon whether the charter or statute contemplates the exercise by the members of functions which may or may not be discharged by persons of tender age<sup>1</sup>.

1 As to corporations constituted by statute see CORPORATIONS vol 9(2) (2006 Reissue) paras 1128, 1143 et seq; as to corporations constituted by charter see CORPORATIONS vol 9(2) (2006 Reissue) paras 1128, 1130 et seq.

2 Grant's Law of Corporations 6; *R v Carter* (1774) 1 Cowp 220; and see *Re Royal Naval School, Seymour v Royal Naval School* [1910] 1 Ch 806, where a subscription was paid for a child to become a member of the corporation governing the Royal Naval School, and the child voted on a proposal affecting the future of the school. It was held that he was not entitled to do so as the legislature could not have intended that the membership of the corporation should include minors. See also CORPORATIONS vol 9(2) (2006 Reissue) para 1156.

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## **92. Membership of certain societies.**

Subject to certain conditions, a child may be a member of a building society<sup>1</sup>, a friendly society<sup>2</sup>, an industrial and provident society<sup>3</sup> or a trade union<sup>4</sup>.

- 1 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1891.
- 2 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2129.
- 3 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2469.
- 4 As to trade union membership see EMPLOYMENT vol 40 (2009) PARA 974 et seq.

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### **(3) LEGAL PARENTAGE**

#### **(i) Introduction**

##### **93. Historical background.**

The traditional assumption of the law has been that a child's parents are those who provided the genetic material, that is to say the egg and sperm (or gametes) which resulted in the child's conception and birth. This assumption underlies the provisions of the Family Law Reform Act 1969 which permit the court, in any civil proceedings in which the parentage of a person is in issue, to direct the taking of samples from the child, the mother and the alleged father (or from any of those parties), for the purpose of determining whether the party alleged to be the father is excluded from being the father<sup>1</sup>. Motherhood has been said to be a biological fact which could be proved demonstrably by parturition<sup>2</sup>. Developing practices of human assisted reproduction, however, have put this assumption into doubt<sup>3</sup>, necessitating the enactment of statutory provisions for the determination of parentage<sup>4</sup>.

1 See the Family Law Reform Act 1969 s 20(1) (as substituted); and para 113 post.

2 *Amphill Peerage Case* [1977] AC 547 at 575, [1976] 2 All ER 411 at 424, HL, per Lord Simon. See, however, the Human Fertilisation and Embryology Act 1990 ss 27-30; the Family Law Reform Act 1969 s 20 (as amended), providing for the determination of 'parentage' rather than 'paternity'; and paras 101-119 post.

3 See generally the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) (1984) (the 'Warnock Report'); and para 514 et seq post.

4 See para 101 et seq post.

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## **(ii) Presumptions relating to Parentage**

### **A. PRESUMPTION OF LEGITIMACY**

#### **94. The common law presumption of legitimacy.**

At common law it is presumed<sup>1</sup> that a child born to a married woman during the subsistence of her marriage is also the child of her husband<sup>2</sup>. The presumption of legitimacy applies even if the child must have been conceived before the marriage<sup>3</sup>, or where the child is born within the possible period of gestation<sup>4</sup> after the husband's death<sup>5</sup> or a final decree of divorce<sup>6</sup>. In every case the husband and wife must have had the opportunity of access<sup>7</sup> to each other during the period in which the child could be conceived and born in the course of nature<sup>8</sup>, and the husband must not be proved to be impotent<sup>9</sup>. The presumption, however, is not a presumption *juris et de jure*, which cannot be rebutted<sup>10</sup>, but a presumption only<sup>11</sup>, which may be rebutted by evidence of circumstances proving the contrary<sup>12</sup>.

The presumption of legitimacy does not apply where the spouses are living apart under a decree of judicial separation<sup>13</sup>, but it has been held to apply in other circumstances notwithstanding, for example, the fact that the parties were living apart under a separation deed or agreement<sup>14</sup>. The presumption exists even where, from the date of the child's birth, it is clear that the child must have been conceived out of wedlock (as where it is born the day after the marriage<sup>15</sup>), for the act of marriage is a recognition by the husband of the child as his own<sup>16</sup>. The presumption, though not so strong as it would be if the child were conceived after the marriage, is not met merely by proving that someone else had intercourse with the woman<sup>17</sup>.

The presumption of legitimacy is not affected where the mother, living apart from her husband, is maintained by him under an order of a magistrates' court which contains no provision that the parties be no longer bound to cohabit with one another<sup>18</sup>. Where the parties are living apart by agreement, whether by deed, writing under hand, oral agreement or agreement implied by conduct, the presumption is that the child is legitimate<sup>19</sup>. The presumption is reversed, however, if the parties are separated under an order of the court, such as a decree of judicial separation, which ends the duty of the spouses to live together<sup>20</sup>.

1 In practice the availability of scientific testing (see paras 113-119 post) has much reduced the need to rely on the presumption, but it may still be important in some cases, eg where no acceptable blood samples are obtainable: see *W v K (proof of paternity)* [1988] 1 FLR 86 (mother having sexual intercourse with both her husband and one other man; blood tests indicated 'paternity index' for this man being the father to be 97.4%, and evidence that husband was infertile; it was held that the presumption was rebutted and the third party was the child's father); but cf *T (H) v T (E)* [1971] 1 All ER 590, sub nom *T (HH) v T (E)* [1971] 1 WLR 429 (husband denied that he was the father; blood tests did not exclude the possibility of his paternity, and they also indicated that one in nine or ten West European males could be the father; it was held that the presumption was not rebutted). See also *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA, where the court would not order blood tests to establish the paternity of a child whose mother had had intercourse with her husband and another man, since the child had been brought up as a child of the family and it would not be in her best interests to jeopardise the presumption of legitimacy.

2 *Re G (a minor) (child abuse: evidence)* [1988] 1 FLR 314 at 319 per Sheldon J. For this purpose a marriage will be regarded as subsisting notwithstanding its dissolution by a decree of a foreign court if the English courts do not regard that decree as valid: see *Shaw v Gould* (1868) LR 3 HL 55. As to recognition of foreign decrees by

English courts see *Indyka v Indyka* [1969] 1 AC 33, [1967] 2 All ER 689, HL; *Messina v Smith* [1971] P 322, [1971] 2 All ER 1046; and CONFLICT OF LAWS vol 8(3) (Reissue) paras 260, 263.

Although legitimacy as such is now of less significance than was formerly the case, it is apparent that the presumption set out in the text necessarily embodies a presumption of parentage: if a child is the legitimate child of A and B, A and B must logically be the child's parents.

3 *Gardner v Gardner* (1877) 2 App Cas 723, HL; *Poulett Peerage Case* [1903] AC 395, HL.

4 As to possible periods of gestation see note 8 infra.

5 *Knowles v Knowles* [1962] P 161, [1962] 1 All ER 659.

6 *Re Leman's Will Trusts, Public Trustee v Leman* (1945) 115 LJCh 89.

7 Where opportunities of access exist, it is immaterial whether or not the parties are living together: *R v Mansfield Inhabitants* (1841) 1 QB 444. As to 'access' see paras 96-97 post.

8 *Hargrave v Hargrave* (1846) 9 Beav 552. The period of which judicial notice will be taken as being the normal period of gestation is 270-280 days: *Bosville v A-G* (1887) 12 PD 177 at 183 per Butt J; *Burnaby v Baillie* (1889) 42 ChD 282 at 296 per North J; *Preston-Jones v Preston-Jones* [1951] AC 391 at 401, [1951] 1 All ER 124 at 127, HL, per Lord Simonds, at 410 and 134 per Lord Oaksey, and at 419 and 139-140 per Lord MacDermott. The following periods between coitus and birth have been held possible periods of gestation: 174 days (*Clark v Clark* [1939] P 228, [1939] 2 All ER 59); 306 days (*Jamieson v Dobie* 1935 SC 415, Ct of Sess); 307 days (*Bowden v Bowden* (1917) 62 Sol Jo 105); 331 days (*Gaskill v Gaskill* [1921] P 425); 346 days (*Wood v Wood* [1947] P 103, [1947] 2 All ER 95); 349 days (*Hadlum v Hadlum* [1949] P 197, [1948] 2 All ER 412, CA). In the following cases the alleged period of gestation was not accepted by the court and the presumption of legitimacy was held to be displaced: *Re S B (an infant), B v B* [1949] Ch 108 (188 days); *M-T v M-T and Official Solicitor* [1949] P 331 (340 days); *Preston-Jones v Preston-Jones* supra (where the House of Lords by a majority held that they were not entitled to assume judicial knowledge that 360 days was impossible, but that on the evidence the husband had discharged the onus then applicable of proving beyond reasonable doubt that the child was illegitimate). The standard of proof required to rebut the presumption of legitimacy has been lowered (see para 95 post) and it seems likely that the court will now be less ready to accept as possible periods of gestation periods which differ substantially from what is normal.

9 See the first answer of the judges in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *Legge v Edmunds* (1855) 25 LJCh 125.

10 *Bosville v A-G* (1887) 12 PD 177.

11 *Gardner v Gardner* (1877) 2 App Cas 723 at 728, HL, per Lord Cairns; *Russell v Russell and Mayer* [1924] AC 687 at 705, HL, per Lord Finlay.

12 See the first answer of the judges in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *Re Hamer's Estate, Public Trustee v A-G* [1937] 1 All ER 130.

13 *Parishes of St George's v St Margaret's, Westminster* (1706) 1 Salk 123. As to judicial separation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 346-414.

14 *Morris v Davies* (1837) 5 Cl & Fin 163, HL; *Ettenfield v Ettenfield* [1940] P 96, [1940] 1 All ER 293, CA. As to separation deeds and agreements see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 371 et seq.

15 Co Litt 244a. See also *Anon v Anon* (1856) 23 Beav 273 per Romilly MR; *Gardner v Gardner* (1877) 2 App Cas 723, HL (where the child was born less than seven weeks after the marriage); *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733, HL.

16 *R v Luffe* (1807) 8 East 193 at 208 per Lord Ellenborough.

17 *Gardner v Gardner* (1877) 2 App Cas 723 at 737-738, HL, per Lord Blackburn.

18 *Bowen v Norman* [1938] 1 KB 689, [1938] 2 All ER 776.

19 *Re Bromage, Public Trustee v Cuthbert* [1935] Ch 605; *Ettenfield v Ettenfield* [1940] P 96, [1940] 1 All ER 293, CA (overruling *Mart v Mart* [1926] P 24); *Stafford v Kidd* [1937] 1 KB 395, [1936] 3 All ER 1023, DC.

20 *Hetherington v Hetherington* (1887) 12 PD 112. See the Matrimonial Causes Act 1973 s 18(1), which provides that on the making of a judicial separation order it is not obligatory for the petitioner to cohabit with the respondent; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 219. This provision is repealed with



savings by the Family Law Act 1996 s 66(3), Sch 10, as from a day to be appointed; but at the date at which this volume states the law no such day had been appointed.

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## 95. Rebutting the presumption of legitimacy: standard of proof.

Any presumption of law as to the legitimacy or illegitimacy of any person<sup>1</sup> may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it is not necessary to prove that fact beyond reasonable doubt in order to rebut the presumption<sup>2</sup>. Thus there is no longer a requirement<sup>3</sup> that, in order to rebut the presumption, it must be shown beyond reasonable doubt that the husband was not the father of the child; but the standard of proof may depend on the gravity of the particular issue to be resolved, and since parentage is a serious matter<sup>4</sup>, the standard of proof required to rebut the presumption which is implicit in the presumption of legitimacy is somewhat higher than a mere balance of probabilities<sup>5</sup>.

1 As to the common law presumption of legitimacy see para 94 ante.

2 Family Law Reform Act 1969 s 26. As to the availability of scientific testing to determine parentage see paras 113-119 post.

3 See eg *Watson v Watson* [1954] P 48, sub nom *W v W* [1953] 2 All ER 1013; *Cotton v Cotton* [1954] P 305, [1954] 2 All ER 105, CA. For recognised exceptions see the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; and the *Aylesford Peerage Case* (1885) 11 App Cas 1, HL.

4 See *Serio v Serio* (1983) 4 FLR 756, CA, per Cumming-Bruce LJ ('Where the issue is the paternity of a child, it is difficult to imagine an issue in civil proceedings of greater gravity'); *W v K (proof of paternity)* [1988] 1 FLR 86.

5 See *Re J S (a minor)* [1981] Fam 22, [1980] 1 All ER 1061, CA; *Serio v Serio* (1983) 4 FLR 756, CA; *W v K (proof of paternity)* [1988] 1 FLR 86; *Re G (a minor) (child abuse: evidence)* [1988] 1 FLR 314 at 319-320 per Sheldon J. Contrast, however, the view expressed by Lord Reid in *S v S, W v Official Solicitor* [1972] AC 24 at 41, [1970] 3 All ER 107 at 109, HL, per Lord Reid, that the presumption of legitimacy merely determines the onus of proof, and any evidence against legitimacy would prevail in the absence of evidence to the contrary; the presumption has no weight in deciding the question of legitimacy unless the court is unable to decide the issue on the evidence; see further *T (H) v T (E)* [1971] 1 All ER 590, sub nom *T (HH) v T (E)* [1971] 1 WLR 429. As to the inference which can be drawn from a refusal to undergo a blood test to establish paternity see para 116 post.

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## 96. Rebuttal of presumption by proof of non-access.

The prima facie presumption of legitimacy<sup>1</sup>, which arises when a husband and wife have opportunities of access, may be rebutted by satisfactory evidence that such access did not take place between them as by the law of nature is necessary in order for the husband to be in fact the father of the child<sup>2</sup>. The non-existence of this access<sup>3</sup> is a physical fact which may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact<sup>4</sup>, but non-access is a fact to be proved by those denying the legitimacy<sup>5</sup>.

In the absence of evidence on one side or the other, sexual intercourse is presumed to have taken place between the husband and wife<sup>6</sup>, and the legitimacy of the child will be proved<sup>7</sup> unless there is evidence, such as evidence that the wife has committed adultery during the period of conception, which shows that it is more probable than not that the child is illegitimate<sup>8</sup>. The presumption of sexual intercourse continues until it is countered by such evidence as satisfies the court that, on a balance of probabilities<sup>9</sup>, such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of the child<sup>10</sup>.

The fact that sexual intercourse between husband and wife took place at the period of conception only with the use of contraceptives will not normally be sufficient to discharge the burden of proof in the absence of other evidence, but that fact will be evidence which, in conjunction with other evidence, could discharge the burden, where, for example, it is proved that at the relevant time the wife committed adultery<sup>11</sup>. Such medical evidence as may be available on either side must not be ignored<sup>12</sup>.

1 As to the common law presumption of legitimacy see para 94 ante.

2 See the second answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *Morris v Davies* (1837) 5 Cl & Fin 163 at 251, HL, per Lord Cottenham.

3 ie of sexual intercourse. The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife' (fifth answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL), or 'non-generating access' (second answer in the *Banbury Peerage Case* supra).

4 Second answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153; *Morris v Davies* (1837) 5 Cl & Fin 163 at 251, HL, per Lord Cottenham; *Poulett Peerage Case* [1903] AC 395 at 398, HL, per Lord Halsbury LC.

5 Second answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *R v Luffe* (1807) 8 East 193 at 208 per Grose J; *R v Mansfield Inhabitants* (1841) 1 QB 444 at 451 per Lord Denman.

6 *Morris v Davies* (1837) 5 Cl & Fin 163 at 215, HL, per Lord Lyndhurst.

7 Cf *Morris v Davies* (1837) 5 Cl & Fin 163 at 251, HL, per Lord Cottenham.

8 See the Family Law Reform Act 1969 s 26; and para 95 ante. See, however, *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA, where the court would not direct that blood tests be taken, even though the mother had had intercourse with her husband and another man (and the other man was claiming to be the father of the child), as the child concerned had been brought up as a child of the family and therefore the displacement of the presumption of legitimacy was not in her best interests. See also *F v Child Support Agency* [1999] 2 FCR 385, [1999] 2 FLR 244 (where a refusal by the putative father with whom the mother had committed adultery to comply with a court order to give a test blood sample was used as evidence to rebut the presumption of legitimacy); and para 116 post.

- 9 See the Family Law Reform Act 1969 s 26; and para 95 ante.
- 10 Fourth answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL.
- 11 See *Watson v Watson* [1954] P 48, sub nom *W v W* [1953] 2 All ER 1013; *Francis v Francis* [1960] P 17, [1959] 3 All ER 206. Both these cases were decided before the standard of proof required to rebut the presumption of legitimacy was altered by the Family Law Reform Act 1969 s 26: see para 95 ante.
- 12 See *Preston-Jones v Preston-Jones* [1951] AC 391, [1951] 1 All ER 124, HL.

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## **97. Opportunity for intercourse not conclusive.**

In determining the question whether or not sexual intercourse at the relevant time did take place, it is not sufficient to show that opportunities for sexual intercourse existed, for opportunities of sexual intercourse are not conclusive evidence that it took place<sup>1</sup>, but the whole circumstances of the case must be considered<sup>2</sup>. When a husband and wife are shown to be sleeping together, there being no natural impediment, the evidence is irresistible that the intercourse took place<sup>3</sup> unless it is contradicted by evidence of the husband or wife that intercourse did not take place and that evidence is accepted on a balance of probabilities<sup>4</sup>, but the evidence is less strong when it is merely shown that they were living in the same town and had opportunities of meeting<sup>5</sup>, or even that they were in the same house or room<sup>6</sup>. In these circumstances a husband may in one sense be said to have access to his wife, and yet the facts may, instead of proving, tend to disprove that any sexual intercourse took place between them<sup>7</sup>.

<sup>1</sup> *Morris v Davies* (1837) 5 Cl & Fin 163 at 252, HL, per Lord Cottenham; *R v Mansfield Inhabitants* (1841) 1 QB 444.

<sup>2</sup> *Morris v Davies* (1837) 5 Cl & Fin 163 at 243, HL, per Lord Cottenham; *Re Bromage, Public Trustee v Cuthbert* [1935] Ch 605; cf *Farnham v Farnham* (1925) 133 LT 320; *Ross v Ellison (or Ross)* [1930] AC 1, HL.

<sup>3</sup> *Morris v Davies* (1837) 5 Cl & Fin 163, HL. Except where this factor exists, it is immaterial in determining the question of sexual intercourse whether the parties are living together or apart: see *Banbury Peerage Case* (1813), as reported in Nicolas, *A Treatise on the Law of Adulterine Bastardy, with a Report of the Banbury Case, and of All Other Cases Bearing Upon the Subject* (1836) 291 at 459 et seq (where the parties were living together, and yet the children were illegitimated); *Morris v Davies* supra; *R v Mansfield Inhabitants* (1841) 1 QB 444; *Legge v Edmonds* (1855) 25 LJCh 125.

<sup>4</sup> See the Family Law Reform Act 1969 s 26; and para 95 ante. See also *Cotton v Cotton* [1954] P 305 at 309, [1954] 2 All ER 105 at 107, CA, per Singleton LJ. Such evidence is admissible under the Matrimonial Causes Act 1973 s 48(1): see para 113 post.

<sup>5</sup> But where, though the parties may have met, the probabilities of the case are against the meeting, the burden of proof is on those who suggest that they did meet: *Aylesford Peerage Case* (1885) 11 App Cas 1 at 15, HL, per Lord Selborne.

<sup>6</sup> Fifth answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *Morris v Davies* (1837) 5 Cl & Fin 163 at 243, HL, per Lord Cottenham. However, these facts would be sufficient in the absence of any proof raising a presumption to the contrary: *Morris v Davies* supra.

<sup>7</sup> Fifth answer in the *Banbury Peerage Case* (1811) 1 Sim & St 153, HL; *Aylesford Peerage Case* (1885) 11 App Cas 1 at 18, HL, per Lord Bramwell. See *Cope v Cope* (1833) 5 C & P 604; *Sibbet v Ainsley* (1860) 3 LT 583.

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## ***B. PRESUMPTION FROM REGISTRATION***

### **98. Registration and re-registration of birth of illegitimate child.**

An entry in a register of births<sup>1</sup> and deaths<sup>2</sup> is prima facie evidence of all the facts required by statute to be entered in it<sup>3</sup>. In the case of a child whose father and mother<sup>4</sup> were not married to each other at the time of his birth<sup>5</sup>, no person may as father of the child be required to give information concerning the birth of the child, and the registrar<sup>6</sup> must not enter in the register the name of any person as father of the child except<sup>7</sup>:

- 5 (1) at the joint request of the mother and the person stating himself to be the father of the child (in which case that person must sign the register together with the mother)<sup>8</sup>; or
- 6 (2) at the request of the mother on production of a declaration in the prescribed form<sup>9</sup> made by her stating that that person is the father of the child, and a statutory declaration made by that person stating himself to be the father of the child<sup>10</sup>; or
- 7 (3) at the request of that person on production of a declaration in the prescribed form by him stating himself to be the father of the child, and a statutory declaration made by the mother that that person is the father of the child<sup>11</sup>; or
- 8 (4) at the request of the mother or that person on production of a copy of a parental responsibility agreement<sup>12</sup> made between them in relation to the child, and a declaration in the prescribed form by the person making the request stating that the agreement was made in compliance with the relevant statutory provision<sup>13</sup> and has not been brought to an end by an order of a court<sup>14</sup>; or
- 9 (5) at the request of the mother or that person on production of a certified copy of an order giving that person parental responsibility for the child<sup>15</sup>, and a declaration in the prescribed form by the person making the request stating that the order has not been brought to an end by an order of the court<sup>16</sup>; or
- 10 (6) at the request of the mother or that person on production of a certified copy of an order<sup>17</sup> which requires that person to make any financial provision for the child<sup>18</sup>, and a declaration in the prescribed form by the person making the request stating that the order has not been discharged by an order of the court<sup>19</sup>;
- 11 (7) at the request of the mother or that person on production of a certified copy of any of a number of specified orders<sup>20</sup> made in relation to the child, and a declaration in the prescribed form by the person making the request stating that the order has not been brought to an end or discharged by an order of a court<sup>21</sup>.

Notwithstanding the provisions described above, the registrar must not enter in the register as the father of a child the name of a man who is to be treated for that purpose as the father of a child born following fertility treatment after his death<sup>22</sup>, unless<sup>23</sup>:

- 12 (a) the mother requests the registrar to make such an entry in the register and produces the relevant documents<sup>24</sup>; or
- 13 (b) in the case of the death or inability of the mother, the relevant documents are produced by some other person who is a qualified informant<sup>25</sup>.

Where the birth of a child whose father and mother were not married to each other at the time of the birth has been registered but no person has been registered as the father of the child, the registrar must re-register the birth to show a person as the father, in the same circumstances as are described in heads (1) to (7) above in relation to a first registration<sup>26</sup>. Additionally, in the case of a man who is to be treated as the father of the child born following fertility treatment after his death, registration is required in the same circumstances as are described in heads (a) and (b) above<sup>27</sup>. Where a birth is re-registered under these provisions, the registrar must sign the register<sup>28</sup>, and the mother must also sign the register where she has been the person, or one of the persons, requesting<sup>29</sup> the re-registration<sup>30</sup>. Where the request<sup>31</sup> is made by the father, he must also sign the register<sup>32</sup>. Where a request is being made by a qualified informant<sup>33</sup> the qualified informant must also sign the register<sup>34</sup>. If the re-registration takes place more than three months after the birth, the superintendent registrar must also sign the register<sup>35</sup>.

1 'Birth' includes a live-birth and a still-birth: Births and Deaths Registration Act 1953 s 41.

2 As to the register of births and deaths see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 504 et seq.

3 See the Births and Deaths Registration Act 1953 s 34 (as amended); and *Brierley v Brierley and Williams* [1918] P 257, 87 LJP 153. As to the particulars of births to be registered see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 505 et seq. As to the duty to enter particulars of a birth in the register see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 541 et seq. As to the persons qualified to give information of the particulars required to be registered see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 547. As to changing a name after registration see *Dawson v Wearmouth* [1999] 2 AC 308, [1999] 1 FCR 625, HL (order for change of surname must be in the best interests of the child); *Re W (a child) (illegitimate child: change of surname)* [2001] Fam 1, sub nom *Re W (a child) (change of name)*, *Re A (a child) (change of name)*, *Re B (children) (change of name)* [1999] 3 FCR 337, CA; *A v Y (child's surname)* [1999] 2 FLR 5 (refusal to change surname of child of married parents to father's or double surname in view of delay and confusion to child); and see *Re R (a child)* [2001] EWCA Civ 1344, [2002] 1 FCR 170 (change of surname to that of both mother and father).

4 In relation to an adopted child, 'father' means the child's natural father; and 'mother' means the child's natural mother: Births and Deaths Registration Act 1953 s 41 (definitions added by the Children Act 1975 s 108(1), Sch 3 para 13(6)).

5 References to a child whose father and mother were not married to each other at the time of his birth must be construed in accordance with the Family Law Reform Act 1987 s 1 (as amended): Births and Deaths Registration Act 1953 s 10(3) (s 10 substituted by the Family Law Reform Act 1987 s 24; and amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 para 6(c), Sch 5). For these purposes, the expression 'child whose father and mother were not married to each other at the time of his birth' means an illegitimate child: see the Family Law Reform Act 1987 s 1 (as amended); and para 125 post.

6 'Registrar', in relation to any birth or death, means the registrar of births and deaths for the sub-district in which the birth or death takes place, or where any still-born child is found exposed or any dead body is found and no information as to the place of birth or death is available, for the sub-district in which the child or the dead body is found: Births and Deaths Registration Act 1953 s 41 (definition amended by the Children Act 1975 Sch 3 para 13(1)).

7 Births and Deaths Registration Act 1953 s 10(1) (s 10 as substituted (see note 5 supra); and s 10(1) amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 2). This is expressed to be notwithstanding anything in the Births and Deaths Registration Act 1953 ss 1-9 (as amended) (which make general provision as to the registration of births including the particulars which are to be registered, the time-limits within which information must be given to the registrar, the registration of births of abandoned children, the registrar's power to require information, and the penalties for improper or late registration or for giving information to a person other than the registrar: see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 538 et seq).

8 Ibid s 10(1)(a) (as substituted and amended: see notes 5, 7 supra).

9 le prescribed by regulations under *ibid* s 39 (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 606): s 41. For the prescribed form of the declaration to be made see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 505.

10 *Ibid* s 10(1)(b) (as substituted: see note 5 *supra*).

11 *Ibid* s 10(1)(c) (as substituted: see note 5 *supra*).

12 le an agreement made under the Children Act 1989 s 4(1)(b) (as substituted) that the father have parental responsibility for the child: see para 139 post. For the meaning of 'parental responsibility' see para 134 post.

13 le *ibid* s 4 (as amended) (acquisition of parental responsibility by father): see para 139 post.

14 Births and Deaths Registration Act 1953 s 10(1)(d) (s 10 as substituted (see note 5 *supra*); s 10(1)(d), (e), (f), (g) further substituted by the Children Act 1989 s 108(4), Sch 12 para 6(2); and the Births and Deaths Registration Act 1953 s 10(1)(d) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 6).

15 le an order made under the Children Act 1989 s 4(1)(a): see para 139 post.

16 Births and Deaths Registration Act 1953 s 10(1)(e) (as substituted: see note 14 *supra*).

17 le an order under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see para 539 post.

18 This does not include an order falling within *ibid* Sch 1 para 4(3) (order made against a person who is not the child's father): see para 546 post.

19 Births and Deaths Registration Act 1953 s 10(1)(f) (as substituted: see note 14 *supra*).

20 The orders in question are:

- 1 (1) an order under the Family Law Reform Act 1987 s 4 (repealed) that that person should have all the parental rights and duties with respect to the child (Births and Deaths Registration Act 1953 s 10(1A)(a) (s 10(1A) added by the Children Act 1989 Sch 12 para 6(1), (3));
- 2 (2) an order that that person should have custody or care and control or legal custody of the child under the Guardianship of Minors Act 1971 s 9 (repealed) at a time when such an order could only be made in favour of a parent (Births and Deaths Registration Act 1953 s 10(1A)(b) (as so added));
- 3 (3) an order made under the Guardianship of Minors Act 1971 s 9 (repealed) or s 11B (repealed) which requires that person to make any financial provision in relation to the child (Births and Deaths Registration Act 1953 s 10(1A)(c) (as so added)); or
- 4 (4) an order under the Affiliation Proceedings Act 1957 s 4 (repealed) naming that person as putative father of the child (Births and Deaths Registration Act 1953 s 10(1A)(d) (as so added)).

21 *Ibid* s 10(1)(g) (as substituted: see note 14 *supra*).

22 le in relation to a man treated as the father of the child by virtue of the Human Fertilisation and Embryology Act 1990 s 28(5A), (5B), (5C) or (5D) (as added): see para 103 post.

23 Births and Deaths Registration Act 1953 s 10ZA(1) (s 10ZA added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 3).

24 Births and Deaths Registration Act 1953 s 10ZA(2)(a) (as added: see note 23 *supra*). 'Relevant documents' means:

- 5 (1) the consent in writing and election mentioned in the Human Fertilisation and Embryology Act 1990 s 28(5A), (5B), (5C) or (as the case may be), s 28(5D) (as added) (Births and Deaths Registration Act 1953 s 10ZA(3)(a) (as added: see note 23 *supra*));
- 6 (2) a certificate of a registered medical practitioner as to the medical facts concerned (s 10ZA(3)(b) (as so added)); and
- 7 (3) such other documentary evidence (if any) as the registrar considers appropriate (s 10ZA(3)(c) (as so added)).



25 Ibid s 10ZA(2)(b) (as added: see note 23 supra).

26 See ibid s 10A(1)(a)-(f) (as added, substituted and amended); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

27 See ibid s 10A(1)(ff) (s 10A added by the Children Act 1975 s 93(2); and substituted by the Family Law Reform Act 1987 s 25; and the Births and Deaths Registration Act 1953 s 10A(1)(ff) added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 4).

28 See the Births and Deaths Registration Act 1953 s 10A(2)(a) (as added and substituted); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

29 See under ibid s 10A(1)(a), (b), or (d)-(g) (as added and substituted): see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

30 See ibid s 10A(2)(b) (as added, substituted and amended); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

31 See under ibid s 10A(1)(a), (c), or (d)-(g) (as added and substituted): see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

32 See ibid s 10A(2)(c) (as added, substituted and amended); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

33 See ibid s 10ZA(2)(ff) (as added: see note 27 supra).

34 Ibid s 10A(1)(bb) (added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 5).

35 See the Births and Deaths Registration Act 1953 s 10A(2)(d) (as added and substituted); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 556.

## UPDATE

### 98 Registration and re-registration of birth of illegitimate child

TEXT AND NOTES--See further 1953 Act s 10(1B) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 5(3)) (registration of second female parent where parents not civil partners).

NOTE 5--Parental responsibility for an unmarried father can only be obtained by complying with the Births and Deaths Registration Act 1953: *AAA v ASH* [2009] EWHC 636 (Fam), [2010] 1 FLR 1, [2009] All ER (D) 136 (Jun) (marriage not recognised as valid under English law; father registered birth, naming himself as father, without mother's presence).

TEXT AND NOTES 23-25--1953 Act s 10ZA substituted: Human Fertilisation and Embryology Act 2008 Sch 6 para 6 (registration of father or second female parent).

TEXT AND NOTES 26-35--1953 Act s 10A further amended and Human Fertilisation and Embryology (Deceased Fathers) Act 2003 Schedule para 5 repealed: Human Fertilisation and Embryology Act 2008 Sch 6 para 7, Sch 8 Pt 1.

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### ***C. PRESUMPTION FROM FINDINGS IN OTHER PROCEEDINGS***

#### **99. Findings in other proceedings.**

In any civil proceedings<sup>1</sup> the fact that a person has been found to be the father of a child in relevant proceedings<sup>2</sup> before any court<sup>3</sup> in England and Wales or Northern Ireland<sup>4</sup> is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he is, or was, the father of that child, whether or not he offered any defence to the allegation of paternity and whether or not he is a party to the civil proceedings<sup>5</sup>. In any civil proceedings in which a person is proved by virtue of these provisions<sup>6</sup> to have been found or adjudged to be the father of a child<sup>7</sup> (1) he must be taken to be, or have been, the father of that child, unless the contrary is proved; and (2) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the other proceedings in question are admissible in evidence for that purpose<sup>8</sup>.

Nothing in these provisions prejudices the operation of any enactment whereby a finding of fact in any affiliation or matrimonial proceedings<sup>9</sup> is for the purposes of any other proceedings made conclusive evidence of any fact<sup>10</sup>.

1 'Civil proceedings' includes, in addition to civil proceedings in any of the ordinary courts of law (1) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and (2) an arbitration or reference, whether under an enactment or not, but does not include civil proceedings in relation to which the strict rules of evidence do not apply: Civil Evidence Act 1968 s 18(1).

2 'Relevant proceedings' means: (1) proceedings on a complaint under the National Assistance Act 1948 s 42 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1040) or the Social Security Act 1986 s 26 (repealed) (see now the Social Security Administration Act 1992 s 105 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 397); (2) proceedings under the Children Act 1989; (3) proceedings which would have been relevant proceedings for the purposes of the Civil Evidence Act 1968 s 12 (as amended) in the form in which it was in force before the passing of the Children Act 1989 (namely, proceedings under the Family Law Reform Act 1969 s 6, the Guardianship of Minors Act 1971, the Children Act 1975 s 34(1)(a), (b) or (c) and certain proceedings under s 35, the Child Care Act 1980 s 47, and the Family Law Reform Act 1987 s 4 (all now repealed)); and (4) proceedings which are relevant proceedings as defined in the Civil Evidence Act (Northern Ireland) 1971 s 8(5): Civil Evidence Act 1968 s 12(5) (definition added by the Family Law Reform Act 1987 s 29(1), (4); substituted by the Courts and Legal Services Act 1990 s 116, Sch 16 para 2(1); and amended by the Child Support Act 1991 s 27(5); the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 6(b); and the Child Support, Pensions and Social Security Act 2000 s 85, Sch 9 Pt IX).

3 'Court' does not include a court-martial, and, in relation to an arbitration or reference, means the arbitrator or umpire and, in relation to proceedings before a tribunal (not being one of the ordinary courts of law), means the tribunal: Civil Evidence Act 1968 s 18(2). As from a day to be appointed, this definition is amended so that 'court-martial' will be replaced by 'service court' (ie the Court Martial, the Summary Appeal Court, the Service Civilian Court, the Court Martial Appeal Court or the Supreme Court on an appeal brought from the Court Martial Appeal Court): see the Civil Evidence Act 1968 s 18(2), (2A) (s 18(2) amended, and s 18(2A) added, by the Armed Forces Act 2006 s 378(1), Sch 16 para 53). At the date at which this volume states the law no such day had been appointed.

4 Civil Evidence Act 1968 s 12(1)(b) (substituted by the Family Law Reform Act 1987 s 29(2); and amended by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 6(a)).

5 Civil Evidence Act 1968 s 12(1). Only a subsisting finding or adjudication is so admissible: s 12(1). In any civil proceedings the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom is also admissible in evidence for the purposes of s 12(1) (as amended): s 12(1) (as amended: see note 4 supra). Affiliation proceedings were abolished by the Family Law Reform Act 1987. For the meaning of 'United Kingdom' see para 102 note 7 post.

6 le for the purposes of the Civil Evidence Act 1968 s 12 (as amended).

7 le as mentioned in ibid s 12(1)(b) (as substituted and amended): see the text and note 4 supra.

8 Ibid s 12(2) (amended by the Family Law Reform Act 1987 s 29(3)). Where in any civil proceedings the contents of any document are admissible in evidence by virtue of the Civil Evidence Act 1968 s 12(2) (as amended), a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document is admissible in evidence and must be taken to be a true copy of that document or part unless the contrary is shown: ss 11(4), 12(4).

9 Affiliation proceedings were abolished by the Family Law Reform Act 1987. As to matrimonial proceedings see further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

10 Civil Evidence Act 1968 s 12(3).

## **UPDATE**

### **99 Findings in other proceedings**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--Appointed day is 31 October 2009: SI 2009/1167.

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### **(iii) Parentage of Adopted Children**

#### **100. Parentage of adopted children.**

A child<sup>1</sup> who is adopted<sup>2</sup> by a married couple is treated in law as a child of the marriage, whether or not he was in fact born after the marriage was solemnised<sup>3</sup>. In any other case, the adopted child is treated as if he had been born to the adopter in wedlock, but not as a child of any actual marriage of the adopter<sup>4</sup>. With certain exceptions<sup>5</sup>, an adopted child is treated in law as if he were not the child of any person other than the adopters or adopter<sup>6</sup>. The effect of these rules is to prevent an adopted child from being illegitimate<sup>7</sup>.

1 For the meaning of 'child' see para 327 note 2 post.

2 As to the meaning of 'adoption' see para 375 post. As to adoption generally, and the legal effects of adoption, see para 323 et seq post.

3 See the Adoption Act 1976 s 39(1)(a); and para 376 post. As to the effect of adoption on the descent of any peerage or dignity or title of honour see para 378 post.

4 See *ibid* s 39(1)(b); and para 376 post.

5 *le* subject to *ibid* s 39(3) and s 39(3A) (as added): see para 376 post.

6 See *ibid* s 39(2) (amended by the Adoption (Intercountry Aspects) Act 1999 s 4(2)); the Adoption and Children Act 2002 s 67(1); and para 376 post.

7 See the Adoption Act 1976 s 39(4); the Adoption and Children Act 2002 s 67(2); and para 376 post.

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#### **(iv) Human Assisted Reproduction**

##### **A. PARENTAGE UNDER THE FAMILY LAW REFORM ACT 1987**

###### **101. Determination of parentage for children born by artificial insemination prior to 1 August 1991.**

Prior to 4 April 1988<sup>1</sup>, a child born as a result of artificial insemination by third party donor was considered illegitimate and the donor, not the mother's husband, was the legal father of the child<sup>2</sup>. However, where a child was born in England and Wales after that date as the result of the artificial insemination of a woman who (1) was at the time of the insemination a party to a marriage<sup>3</sup>, being a marriage which had not at that time been dissolved or annulled<sup>4</sup>; and (2) was artificially inseminated with the semen of some person other than the other party to that marriage<sup>5</sup>, then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child in question is treated in law as the child of the parties to that marriage and is not to be treated as the child of any person other than the parties to the marriage<sup>6</sup>. This provision does not apply to children carried by women as the result of their artificial insemination after 1 August 1991<sup>7</sup>.

1     le the date of commencement of the Family Law Reform Act 1987 s 27: see the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

2     See *Re M (Child Support Act: parentage)* [1997] 3 FCR 383, [1997] 2 FLR 902.

3     Any reference to 'marriage' includes a reference to a void marriage if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid, and for these purposes, it is presumed, unless the contrary is shown, that one of the parties did so believe: Family Law Reform Act 1987 s 27(2). See also the text and note 7 *infra*.

4     Ibid s 27(1)(a).

5     Ibid s 27(1)(b).

6     Ibid s 27(1). Nothing in s 27 affects the succession to any dignity or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title: s 27(3). See PEERAGES AND DIGNITIES vol 79 (2008) PARA 810.

As to publication of the fact of a father's infertility see *M v British Broadcasting Corp* [1997] 1 FCR 229, [1997] 1 FLR 51.

7     See the Human Fertilisation and Embryology Act 1990 s 49(4); and the Human Fertilisation and Embryology Act 1990 (Commencement No 3 and Transitional Provisions) Order 1991, SI 1991/1400. As to the position after that date see para 102 *et seq post*.

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## ***B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990***

### **102. Meaning of 'mother'.**

Under the Human Fertilisation and Embryology Act 1990, the woman who is carrying<sup>1</sup> or has carried a child as a result of the placing in her<sup>2</sup> of an embryo<sup>3</sup> or of sperm and eggs<sup>4</sup>, and no other woman, is to be treated as the mother<sup>5</sup> of the child<sup>6</sup>. This applies whether the woman was in the United Kingdom<sup>7</sup> or elsewhere at the time of the placing in her of the embryo or the sperm and eggs<sup>8</sup>. It does not, however, apply to any child to the extent that the child is treated by virtue of adoption<sup>9</sup> as not being the woman's child<sup>10</sup>, or, in relation to parental orders, to any child to the extent that the child is treated by virtue of the making of a parental order<sup>11</sup> as not being the child of any person other than the husband and wife<sup>12</sup>.

1 A woman is not to be treated as carrying a child until the embryo has become implanted: Human Fertilisation and Embryology Act 1990 s 2(3). See note 3 infra.

2 These provisions have effect only in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or of their artificial insemination, after 1 August 1991: *ibid* s 49(3); Human Fertilisation and Embryology Act 1990 (Commencement No 3 and Transitional Provisions) Order 1991, SI 1991/1400, art 2(2). As to the position relating to artificial insemination before that date see para 101 ante.

3 'Embryo' means a live human embryo where fertilisation is complete (ie on the appearance of a two cell zygote) except where otherwise stated; and references to an embryo include an egg in the process of fertilisation: Human Fertilisation and Embryology Act 1990 s 1(1).

4 References to gametes, eggs or sperm are references to live human gametes, eggs or sperm except where otherwise stated, but references to gametes or eggs do not include eggs in the process of fertilisation: *ibid* s 1(4).

5 Where, by virtue of *ibid* s 27, a person is to be treated in law as being the mother of a child that person is to be treated in law as the mother of the child for all purposes (s 29(1)), and where by virtue thereof a person is not to be treated as the mother of a child that person is to be treated in law as not being the mother for any purpose (s 29(2)). Where s 29(1) or (2) has effect, references to any relationship between two people in any enactment, deed or other instrument or document, whenever passed or made, must be read accordingly: s 29(3).

6 *Ibid* s 27(1). It is apprehended that these provisions override the common law rules for the attribution of parentage: see para 94 et seq ante.

7 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 3.

8 Human Fertilisation and Embryology Act 1990 s 27(3).

9 As to the status of adopted children see paras 100 ante, 375 et seq post.

10 Human Fertilisation and Embryology Act 1990 s 27(2) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 76, 77).

11 As to parental orders see para 106 post.

12 Human Fertilisation and Embryology Act 1990 s 27(2) (modified by the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, reg 4, Sch 3). For the meanings of 'the husband' and 'the wife' see the Human Fertilisation and Embryology Act 1990 30(1); and para 106 note 2 post.

## UPDATE

### 102-112 Parentage under the Human Fertilisation and Embryology Act 1990

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### 102 Meaning of 'mother'

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 ss 27, 29 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(2). See PARA 112A.

NOTE 3--In the Human Fertilisation and Embryology Act 1990 (except in the Human Fertilisation and Embryology Act 1990 s 4A (see MEDICAL PROFESSIONS) or in the term 'human admixed embryo') (1) embryo means a live human embryo and does not include a human admixed embryo (as defined by s 4A(6)), and (2) references to an embryo include an egg that is in the process of fertilisation or is undergoing any other process capable of resulting in an embryo: Human Fertilisation and Embryology Act 1990 s 1(1) (substituted by Human Fertilisation and Embryology Act 2008 s 1(2)).

If it appears to the Secretary of State necessary or desirable to do so in the light of developments in science or medicine, regulations may provide that in the Human Fertilisation and Embryology Act 1990 (except in s 4A) 'embryo', 'eggs', 'sperm' or 'gametes' includes things specified in the regulations which would not otherwise fall within the definition: Human Fertilisation and Embryology Act 1990 s 1(6) (s 1(6), (7) added by Human Fertilisation and Embryology Act 2008 s 1(5)). Regulations made by virtue of the Human Fertilisation and Embryology Act 1990 s 1(6) may not provide for anything containing any nuclear or mitochondrial DNA that is not human to be treated as an embryo or as eggs, sperm or gametes: s 1(7). 'Nuclear DNA', in relation to an embryo, includes DNA in the pronucleus of the embryo: Human Fertilisation and Embryology Act 1990 s 2(1) (amended by Human Fertilisation and Embryology Act 2008 s 2).

NOTE 4--In the Human Fertilisation and Embryology Act 1990 (except in the Human Fertilisation and Embryology Act 1990 s 4A (see MEDICAL PROFESSIONS)) (1) references to eggs are to live human eggs, including cells of the female germ line at any stage of maturity, but (except in s 1(1)(b) (see NOTE 3, head (2))) not including eggs that are in the process of fertilisation or are undergoing any other process capable of resulting in an embryo, (2) references to sperm are to live human sperm, including cells of the male germ line at any stage of maturity, and (3) references to gametes are to be read accordingly: Human Fertilisation and Embryology Act 1990 s 1(4) (substituted by Human Fertilisation and Embryology Act 2008 s 1(4)). See further NOTE 3.

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### 103. Meaning of 'father'.

If a child is being, or has been, carried<sup>1</sup> by a woman as the result of the placing in her of an embryo<sup>2</sup> or of sperm and eggs<sup>3</sup> or her artificial insemination<sup>4</sup>, and at the time<sup>5</sup> of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage<sup>6</sup>, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage<sup>7</sup>, the other party to the marriage is treated as the father<sup>8</sup> of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs, or to her insemination, as the case may be<sup>9</sup>. If no man is treated by virtue of the provision described above<sup>10</sup> as the father of the child, but the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services<sup>11</sup> provided for her and a man together by a person to whom a licence<sup>12</sup> applies, and the creation of the embryo carried by her was not brought about with the sperm of that man, then that man is to be treated as the father of the child<sup>13</sup>.

Where a person is treated as the father of a child by virtue of these provisions<sup>14</sup>, no other person is to be treated as the father of the child<sup>15</sup>. The provisions relating to who is treated as the father of a child<sup>16</sup> do not apply (1) in relation to England and Wales and Northern Ireland, to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to a marriage<sup>17</sup>; (2) to any child to the extent that the child is treated by virtue of adoption<sup>18</sup> as not being the man's child<sup>19</sup>; or (3) to any child to the extent that the child is treated by virtue of a parental order<sup>20</sup> as not being the child of any person other than the husband and wife<sup>21</sup>.

Provision has been made with respect to the following categories of deceased man<sup>22</sup>:

- 14 (a) where the deceased donor was married to the woman<sup>23</sup>;
- 15 (b) where he was not married to the woman but the treatment services<sup>24</sup> were provided to the deceased and the woman together before his death<sup>25</sup>;
- 16 (c) where the deceased and the woman were married and the embryo was not brought about with the sperm of the deceased<sup>26</sup>; and
- 17 (d) where the deceased and the woman were not married and the embryo was not brought about with the sperm of the deceased<sup>27</sup>.

A deceased donor who falls within any of heads (a) to (d) above is treated<sup>28</sup> as the father of the child if:

- 18 (i) the woman has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated as the father of the child<sup>29</sup>;
- 19 (ii) the man has consented in writing (and did not withdraw the consent) to: (A) in the case of heads (a) and (b), above, the use of his sperm after his death which brought about the creation of the embryo carried by the woman or (as the case may be) to placing in the woman after his death of the embryo which was brought about using his sperm before his death<sup>30</sup>; or (B) in the case of heads (c) and (d) above, to the placing of the embryo in the woman after his death<sup>31</sup>;



- 20 (iii) in all categories, he consented in writing (and did not withdraw his consent) to being treated<sup>32</sup> as the father of any resulting child<sup>33</sup>; and
- 21 (iv) no-one else is to be treated as the father of the child<sup>34</sup>.

In the circumstances described in heads (i) to (iv) above, the deceased man is to be treated in law as the father of the child for the purpose of enabling his particulars to be entered as the particulars of the child's father in (as the case may be) a register of live-births or still-births under the Births and Deaths Registration Act 1953, but he is not to be treated as the father of the child for any other purposes<sup>35</sup>.

All the provisions described above<sup>36</sup> apply whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination<sup>37</sup>.

1 As to the meaning of 'carrying' see para 102 note 1 ante.

2 For the meaning of 'embryo' see para 102 note 3 ante.

3 As to references to sperm and eggs see para 102 note 4 ante.

4 Human Fertilisation and Embryology Act 1990 s 28(1). This provision is subject to s 28(5A)-(5I) (as added) (see the text and notes 22-35 infra): see s 28(1) (amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 13).

5 These provisions have effect only in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or of their artificial insemination, after 1 August 1991: Human Fertilisation and Embryology Act 1990 s 49(3); Human Fertilisation and Embryology Act 1990 (Commencement No 3 and Transitional Provisions) Order 1991, SI 1991/1400, art 2(2). As to the position relating to artificial insemination before that date see para 101 ante.

6 Human Fertilisation and Embryology Act 1990 s 28(2)(a). For the purposes of s 28(2) and s 28(5A)-(5D) (as added), references to the parties to a marriage at the time referred to in the text are to the parties to a marriage subsisting at that time, unless a judicial separation was then in force, but include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for these purposes it is presumed, unless the contrary is shown, that one of them did so believe: s 28(7) (amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 Schedule para 15). 'Judicial separation' includes a legal separation obtained in a country outside the British Islands and recognised in the United Kingdom: Human Fertilisation and Embryology Act 1990 s 28(9). 'The British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act 1978 s 5, Sch 1. For the meaning of 'United Kingdom' see para 102 note 7 ante.

7 Human Fertilisation and Embryology Act 1990 s 28(2)(b).

8 Where, by virtue of *ibid* s 28, a person is to be treated in law as being the father of a child, that person is to be treated in law as the father of the child for all purposes (s 29(1)), and where by virtue thereof a person is not to be treated as the father of a child that person is to be treated in law as not being the father for any purpose (s 29(2)). Where s 29(1) or (2) has effect, references to any relationship between the two people in any enactment, deed or other instrument or document, whenever passed or made, must be read accordingly: s 29(3). In a contact dispute between a husband and wife over a child who had been born as a result of artificial insemination by a third party donor, the court held that as the legal parent the husband was entitled to contact despite not being the biological father: see *Re CH (contact: parentage)* [1996] 1 FCR 768, [1996] 1 FLR 569. 'For all purposes' under the Human Fertilisation and Embryology Act 1990 s 29(1) entitles a person who has no biological links with the child, but is treated as a father, to apply for orders under the Children Act 1989 s 8 (see paras 199, 251 et seq post): see *Re R (contact: Human Fertilisation and Embryology Act 1990)* [2001] 1 FLR 247. Where a wife's eggs are mixed in error with the sperm of another man, and the husband has not consented to the use of another man's sperm, the husband cannot be presumed to be the legal father: *Leeds Teaching Hospital NHS Trust v A* [2003] EWHC 259 (QB), [2003] 1 FCR 599, [2003] 1 FLR 1091.

9 Human Fertilisation and Embryology Act 1990 s 28(2). This provision has effect only where the placing of the embryo or sperm and eggs in the carrying woman, or her artificial insemination, took place after 1 August 1991: see para 102 note 2 ante.

10 *Ie* by virtue of *ibid* s 28(2): see the text and notes 6-9 supra.

11 'Treatment services' means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children: *ibid* s 2(1). The procedures according to which treatment services should be carried out are governed by a code of practice made under s 25: see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 288.

12 Is a licence authorising activities in the course of providing treatment services granted by the Human Fertilisation and Embryology Authority under *ibid* Sch 2: s 2(1). In requiring the treatment to have been undertaken by a person with a licence, s 28(3) does not infringe the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 59 (now renumbered art 49 by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ) on freedom to provide services: *U v W (A-G intervening)* [1998] Fam 29, [1998] 1 FCR 526, [1997] 2 FLR 282. As to the Human Fertilisation and Embryology Authority and the grant of licences under the Human Fertilisation and Embryology Act 1990 see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280 et seq.

13 *Ibid* s 28(3). Thus, provided that the conception is brought about in the course of treatment services, an unmarried couple benefits from provisions similar to those relating to a married couple. If treatment is provided by a person who does not hold a licence, s 28(3) does not apply to confer paternity: see *U v W (A-G intervening)* [1998] Fam 29, [1998] 1 FCR 526, [1997] 2 FLR 282 (treatment had taken place abroad). The principle in relation to unmarried couples still applies where a stable relationship subsequently fails: *Re R (a child) (IVF: paternity of child)* [2005] UKHL 33, [2005] 2 AC 621, sub nom *Re R (a child)* [2005] 4 All ER 433. See also *B v R (by her legal guardian)* [2002] 2 FLR 843 (notwithstanding breakdown of relationship, applicant held to be father of child since conception brought about during 'course of treatment'); cf *Re R (a child) (IVF: paternity of child)* [2003] EWCA Civ 182, [2003] 2 All ER 131 (treatment following breakdown of relationship without applicant's knowledge not giving rise to paternity).

14 Is under the Human Fertilisation and Embryology Act 1990 s 28(2) or (3): see the text and notes *supra*. The treatment in law of a deceased man differs: see the text and notes 22-35 *infra*.

15 *Ibid* s 28(4). The treatment in law of a deceased man differs: see the text and notes 22-35 *infra*.

16 Is *ibid* s 28(2), (3): see the text and notes 5-13 *supra*.

17 *Ibid* s 28(5)(a). As to the common law presumption of legitimacy see para 94 et seq *ante*.

18 As to adoption see paras 100 *ante*, 323 et seq *post*.

19 Human Fertilisation and Embryology Act 1990 s 28(5)(c) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 76, 78).

20 As to parental orders see para 106 *post*.

21 Human Fertilisation and Embryology Act 1990 s 28(5)(c) (modified by the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, reg 4, Sch 3). For the meanings of 'the husband' and 'the wife' see the Human Fertilisation and Embryology Act 1990 s 30(1); and para 106 note 2 *post*.

22 See *ibid* s 28(5A)-(5I) (added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 1(1)).

23 Human Fertilisation and Embryology Act 1990 s 28(5A) (as added: see note 22 *supra*). This refers to the situation where:

- 8 (1) a child has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination (s 28(5A)(a) (as so added));
- 9 (2) the creation of the embryo carried by her was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in the woman after his death (s 28(5A)(b) (as so added));
- 10 (3) the woman was a party to a marriage with the man immediately before his death (s 28(5A)(c) (as so added)).

24 See note 11 *supra*. See *Evans v Amicus Healthcare Ltd (Secretary of State for Health intervening)* [2004] EWCA Civ 727, [2005] Fam 1, [2004] 2 FLR 766 (since the couple had separated and the man had withdrawn his consent, the treatment services which the woman required could not be said to be provided 'together'); *Evans v United Kingdom (Application 6339/05)* [2007] 2 FCR 5, [2007] 1 FLR 1990, ECtHR (domestic rules were clear and had been brought to the attention of the applicant and they struck a fair balance between competing interests so there was no violation of art 8 of the Convention for the Protection of Human Rights and

Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)); *U v W (A-G intervening)* [1998] 1 FCR 526, [1997] 2 FLR 282 (treatment services had been provided for the parties together within the meaning of the section as they attended the clinic together, received information together and both had signed a form permitting the use of donor sperm); *Re R (a child) (IVF: paternity of child)* [2005] UKHL 33, [2005] 2 AC 621, [2005] 2 FLR 843 (the 'joint enterprise' of fertility treatment had ended by the time the successful treatment had begun because, by that stage, the consenting couple had separated; the man was not the legal father of the resulting child).

25 Human Fertilisation and Embryology Act 1990 s 28(5B) (as added: see note 22 supra). This refers to the situation where:

- 11 (1) a child has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination (s 28(5B)(a) (as so added));
- 12 (2) the creation of the embryo carried by her was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in the woman after his death (s 28(5B)(b) (as so added));
- 13 (3) the woman was not a party to a marriage with the man immediately before his death but treatment services were being provided for the woman and the man together before his death either by a person to whom a licence applies or outside the United Kingdom (s 28(5B)(c) (as so added)).

26 Ibid s 28(5C) (as added: see note 22 supra). This refers to the situation where:

- 14 (1) a child has been carried by a woman as the result of the placing in her of an embryo (s 28(5C)(a) (as so added));
- 15 (2) the embryo was created at a time when the woman was a party to a marriage (s 28(5C)(b) (as so added));
- 16 (3) the creation of the embryo was not brought about with the sperm of the other party to the marriage (s 28(5C)(c) (as so added));
- 17 (4) the other party to the marriage died before the placing of the embryo in the woman (s 28(5C)(d) (as so added)).

27 Ibid s 28(5D) (as added: see note 22 supra). This refers to the situation where:

- 18 (1) a child has been carried by a woman as the result of the placing in her of an embryo (s 28(5D)(a) (as so added));
- 19 (2) the embryo was not created at a time when the woman was a party to a marriage but was created in the course of treatment services provided for the woman and a man together either by a person to whom a licence applies or outside the United Kingdom (s 28(5D)(b) (as so added));
- 20 (3) the creation of the embryo was not brought about with the sperm of that man (s 28(5D)(c) (as so added));
- 21 (4) the man died before the placing of the embryo in the woman (s 28(5D)(d) (as so added)).

28 See the text to note 35 infra.

29 Human Fertilisation and Embryology Act 1990 s 28(5A)(e), (5B)(e), (5C)(f), (5D)(f) (as added: see note 22 supra). The requirement of 42 days is nevertheless to be treated as satisfied if the required election is made after the end of that period but with the consent of the General Registrar (s 28(5F) (as so added)) if, on an application made to him in accordance with such requirements as he may specify, he is satisfied that there is a compelling reason for giving his consent to the making of such an election (s 28(5G) (as so added)).

30 Ibid s 28(5A)(d)(i), (5B)(d)(i) (as added: see note 22 supra). Where the man who might be treated as the father of the child under these provisions died before 18 September 2003 (ie the date of Royal Assent), the provisions of s 28(5A), (5B) (as added) have effect as if paragraph (d) of each subsection were omitted: see the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 3(6).

31 Human Fertilisation and Embryology Act 1990 s 28(5C)(e)(i), (5D)(e)(i) (as added: see note 22 supra). Where the man who might be treated as the father of the child under these provisions died before 18

September 2003 (ie the date of Royal Assent), the provisions of s 28(5C), (5D) (as added) have effect as if paragraph (e) of each subsection were omitted: see the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 3(6).

32    Ie for the purposes of the Human Fertilisation and Embryology Act 1990 s 28(5I) (as added): see note 35 infra.

33    Ibid s 28(5A)(d)(ii), (5B)(d)(ii), (5C)(e)(ii), (5D)(e)(ii) (as added: see note 22 supra). Where the man who might be treated as the father of the child under these provisions died before 18 September 2003 (ie the date of Royal Assent), the provisions of s 28(5A), (5B) (as added) have effect as if paragraph (d) of each subsection were omitted, and s 28(5C), (5D) (as added) have effect as if paragraph (e) of each subsection were omitted: see the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 3(6).

34    Human Fertilisation and Embryology Act 1990 s 28(5A)(f), (5B)(f), (5C)(g), (5D)(g) (as added: see note 22 supra). Ie no-one else is to be treated as the father of the child by virtue of s 28(2) or (3) (see the text and notes 9, 13 supra) or by virtue of adoption or the child being treated as mentioned in s 28(5)(a) (presumption of legitimacy: see note 17 supra).

35    Note that ibid s 28(1)-(3) (see the text and notes 1-13 supra) does not apply in a case to which s 28(5A), (5B), (5C) or (5D) (as added) applies, and the deceased man is to be treated in law as the father of the child for the purpose referred to in that subsection but is to be treated in law as not being the father of the child for any other purpose: see s 29(3A), (3B) (s 29(3A)-(3D) added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 1(2)). The purpose for which a deceased man is to be treated in law as the father of the child is of enabling the man's particulars to be entered as the particulars of the child's father in (as the case may be) a register of live-births or still-births under the Births and Deaths Registration Act 1953: see the Human Fertilisation and Embryology Act 1990 s 28(5I) (as added: see note 22 supra). References to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly; and for this purpose 'enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament or Northern Ireland legislation: s 29(3C), (3D) (as so added).

36    Ie ibid s 28 (as amended).

37    Ibid s 28(8).

## UPDATE

### 102-112 Parentage under the Human Fertilisation and Embryology Act 1990

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### 103 Meaning of 'father'

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 ss 28, 29 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(2). See PARA 112A.

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#### 104. Sperm donors.

Where a man is treated as being the father of a child because he was a party to a marriage with the woman who carried or is carrying the child<sup>1</sup>, or because treatment services<sup>2</sup> were provided for him together with the woman<sup>3</sup>, the donor of sperm<sup>4</sup> or other genetic material will not be treated as the child's father<sup>5</sup>.

Where (1) the sperm of a man who has given consent to the use of his gametes<sup>6</sup> for treatment services<sup>7</sup> was used for a purpose for which such consent was required<sup>8</sup>; or (2) his sperm, or any embryo<sup>9</sup> the creation of which was brought about with his sperm, was used after his death<sup>10</sup>, he is not (subject to specific provisions relating to deceased donors) to be treated as the father of a child<sup>11</sup>.

1     Ie by virtue of the Human Fertilisation and Embryology Act 1990 s 28(2): see para 103 ante.

2     For the meaning of 'treatment services' see para 103 note 11 ante.

3     Ie by virtue of the Human Fertilisation and Embryology Act 1990 s 28(3): see para 103 ante.

4     As to references to sperm see para 102 note 4 ante.

5     See the Human Fertilisation and Embryology Act 1990 s 28(4); and para 103 ante. Where by virtue of s 28 (as amended) a person is to be treated as the father of a child, that person is to be treated in law as the father for all purposes (s 29(1)), and where a person by virtue thereof is not to be treated as the father of a child that person is to be treated in law as not being the father for any purpose (s 29(2)). Where s 29(1) or (2) has effect, references to any relationship between two people in any enactment, deed or other instrument or document, whenever passed or made, are to be read accordingly: s 29(3). Note that the provisions of s 29(1), (2) do not apply in relation to the treatment in law of a deceased man in a case to which s 28(5A), (5B), (5C) or (5D) (as added) (see para 103 ante) applies: see s 29(3A) (added by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 1(2)). The Human Fertilisation and Embryology Act 1990 s 29(3B), (3C) (as added) applies as to the treatment in law of the deceased man: see para 103 ante.

6     As to references to gametes see para 102 note 4 ante.

7     Ie under the Human Fertilisation and Embryology Act 1990 s 28, Sch 3 para 5: see MEDICAL PROFESSIONS VOL 30(1) (Reissue) para 285.

8     Ibid s 28(6)(a). A person's gametes must not be used for the purposes of treatment services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent (Sch 3 para 5(1)), and a person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used (Sch 3 para 5(2)). Such consent must be given in writing: Sch 3 para 1. 'Effective consent' means a consent given in accordance with the provisions of Sch 3 (see MEDICAL PROFESSIONS VOL 30(1) (Reissue) para 285) which has not been withdrawn: Sch 3 para 1. However, this does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services: Sch 3 para 5(3).

9     For the meaning of 'embryo' see para 102 note 3 ante.

10    Human Fertilisation and Embryology Act 1990 s 28(6)(b).

11    Ibid s 28(6) (amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 14). The Human Fertilisation and Embryology Act 1990 s 28(6) (as amended) is subject to s 28(5A), (5B) (as added) (see para 103 ante). The position on the use of gametes after death has been challenged in the courts: see *R v Human Fertilisation and Embryology Authority, ex p Blood* [1999] Fam 151,

[1997] 2 All ER 687, CA, where it was held that the consent of the donor is required for the storage of, and treatment with, sperm or eggs.

It is clearly possible for a child to be fatherless in law where the donor is treated as not being the father, and (1) the husband of the woman who is inseminated establishes that he did not consent to the treatment carried out on his wife (see para 103 ante); or (2) the woman did not receive treatment services with a man who falls to be treated as the father (see para 103 ante).

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **104 Sperm donors**

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 ss 28, 29 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(2). See PARA 112A.

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### **105. Titles of honour, etc.**

In relation to England and Wales and Northern Ireland, nothing in the provisions attributing parentage in cases in which a child is, or has been, carried<sup>1</sup> by a woman as the result of the placing in her of an embryo<sup>2</sup> or of sperm and eggs<sup>3</sup> or her artificial insemination<sup>4</sup>, affects the succession to any dignity or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title, or the devolution of any property limited, expressly or not, to devolve, as nearly as the law permits, along with any dignity or title of honour<sup>5</sup>.

1 As to the meaning of 'carrying' see para 102 note 1 ante.

2 For the meaning of 'embryo' see para 102 note 3 ante.

3 As to references to sperm and eggs see para 102 note 4 ante.

4 I.e. the provisions of the Human Fertilisation and Embryology Act 1990 ss 27(1), 28(2)-(4), (5A)-(5I) (as added) (see para 103 ante), as read with the provisions of s 29 (as amended) (see paras 102-104 ante).

5 Ibid s 29(4) (amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 16). See *Re Moynihan* [2000] 1 FLR 113, [2000] Fam Law 21, HL. As to peerages, dignities etc see PEERAGES AND DIGNITIES vol 79 (2008) PARA 810.

### **UPDATE**

#### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **105 Titles of honour, etc**

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 ss 27-29 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(2). See PARA 112A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(iv) Human Assisted Reproduction/B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990/106. Parental orders in favour of gamete donors; surrogacy.

### **106. Parental orders in favour of gamete donors; surrogacy.**

The court<sup>1</sup> may make an order providing for a child to be treated in law as the child of the parties to a marriage<sup>2</sup> if:

- 22 (1) the child has been carried<sup>3</sup> by a woman other than the wife as the result of the placing in her of an embryo<sup>4</sup> or sperm and eggs<sup>5</sup> or her artificial insemination<sup>6</sup>; and
- 23 (2) the gametes<sup>7</sup> of the husband or the wife, or both, were used to bring about the creation of the embryo<sup>8</sup>.

The following conditions must be satisfied for the court to have jurisdiction to make such an order:

- 24 (a) the husband and wife must apply for the order within six months of the birth of the child<sup>9</sup>;
- 25 (b) at the time of the application and of the making of the order, the child's home must be with the husband and wife, and the husband or the wife or both must be domiciled in a part of the United Kingdom or in the Channel Islands or the Isle of Man<sup>10</sup>;
- 26 (c) at the time of the making of the order both the husband and the wife must have attained the age of 18<sup>11</sup>;
- 27 (d) the court must be satisfied that both the father of the child<sup>12</sup>, where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order<sup>13</sup>;
- 28 (e) the court must be satisfied that, unless authorised by the court, no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or wife for or in consideration of: (i) the making of the order; (ii) any agreement required by head (d) above; (iii) the handing over of the child to the husband and the wife; or (iv) the making of any arrangements with a view to the making of the order<sup>14</sup>.

Regulations<sup>15</sup> may provide (A) for any provision of the enactments about adoption<sup>16</sup> to have effect, with such modifications, if any, as may be specified in regulations, in relation to parental orders<sup>17</sup>, and applications for such orders, as it has effect in relation to adoption, and applications for adoption orders<sup>18</sup>; and (B) for references in any enactment<sup>19</sup> to adoption, an adopted child or an adoptive relationship to be read, respectively, as references to the effect of a parental order<sup>20</sup>, a child to whom such an order applies and a relationship arising by virtue of the enactments about adoption, as applied by the regulations, and for similar expressions in connection with adoption to be read accordingly<sup>21</sup>. The regulations may include such incidental supplemental provision as appears to the Secretary of State necessary or desirable in consequence of any provision made under these powers<sup>22</sup>.



Proceedings on an application for a parental order are 'family proceedings' for the purposes of the Children Act 1989<sup>23</sup>.

1 For the meaning of 'court' see para 145 note 2 post; definition applied by the Human Fertilisation and Embryology Act 1990 s 30(8).

2 The parties to a marriage are referred to in *ibid* s 30 as 'the husband' and 'the wife': s 30(1).

3 As to the meaning of 'carrying' see para 102 note 1 ante.

4 For the meaning of 'embryo' see para 102 note 3 ante.

5 As to references to sperm and eggs see para 102 note 4 ante.

6 This applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination: Human Fertilisation and Embryology Act 1990 s 30(11). For the meaning of 'United Kingdom' see para 102 note 7 ante. As to surrogacy see further paras 514-527 post.

7 As to references to gametes see para 102 note 4 ante.

8 Human Fertilisation and Embryology Act 1990 s 30(1). This provision was apparently intended to cover circumstances such as those which arose in *Re W (minors) (surrogacy)* [1991] FCR 419, [1991] 1 FLR 385 (eggs from the wife and sperm from the husband were implanted in another woman who agreed to hand over the child to the commissioning couple when it was born; the combined effect of the Human Fertilisation and Embryology Act 1990 ss 27, 28 (see paras 102-103 ante) would have been that the carrying woman would have been treated in law as the mother and her husband as the father unless he did not consent to the procedure).

9 Human Fertilisation and Embryology Act 1990 s 30(2). In the case of a child born before the coming into force of the Human Fertilisation and Embryology Act 1990 the husband and wife had to apply for the parental order within six months of such coming into force: s 30(2). As to the commencement of the Human Fertilisation and Embryology Act 1990 see s 49(2). The Act was brought into force on a number of different dates and it is submitted that the relevant date for the purposes of s 30(2) is 1 November 1994 (ie the date on which s 30(1) was brought into force: see the Human Fertilisation and Embryology Act 1990 (Commencement No 5) Order 1994, SI 1994/1776).

10 Human Fertilisation and Embryology Act 1990 s 30(3).

11 *Ibid* s 30(4).

12 The reference to the father of the child includes a person who is the father by virtue of *ibid* s 28 (as amended) (see para 103 ante): s 30(5).

13 *Ibid* s 30(5). This provision does not require the agreement of a person who cannot be found or is incapable of giving agreement, and the agreement of the woman who carried the child is ineffective for the purposes of this provision if given by her less than six weeks after the child's birth: s 30(6). Where pregnancy is achieved using sperm from a donor at a licensed clinic, that donor is not the father of the child by virtue of s 28(6) (see para 103 ante) and therefore there may be no man who is treated as the father of the child and consent for the purposes of s 30 is not necessary: see *Re Q (a minor) (parental order)* [1996] 2 FCR 345, sub nom *Re Q (parental order)* [1996] 1 FLR 369 (unmarried surrogate mother carried child using an egg from the wife of the commissioning couple and sperm from a donor). Any arrangement between the woman who carried the child and the commissioning husband and wife is unenforceable: see para 519 post. As to surrogacy arrangements generally see paras 514-527 post.

14 Human Fertilisation and Embryology Act 1990 s 30(7). 'Expenses reasonably incurred' is not defined by the Human Fertilisation and Embryology Act 1990. The court has a discretion retrospectively to authorise any payment which has already been made: see *Re Adoption Application (surrogacy)* [1987] Fam 81, [1987] 2 All ER 826, sub nom *Re Adoption Application AA212/86 (adoption: payment)* [1987] 2 FLR 291; *Re Q (a minor) (parental order)* [1996] 2 FCR 345, sub nom *Re Q (parental order)* [1996] 1 FLR 369; and see also *Re C (application by Mr and Mrs X under s 30 of the Human Fertilisation and Embryology Act 1990)* [2002] EWHC 157 (Fam), [2002] 1 FLR 909 (payment authorised retrospectively where husband and wife had acted honestly and in good faith).

15 See the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767; and note 18 *infra*. As to the making of regulations under the Human Fertilisation and Embryology Act 1990 see para 112 post.

16 In the Adoption and Children Act 2002, the Adoption (Scotland) Act 1978 and the Adoption (Northern Ireland) Order 1987, SI 1987/2203: Human Fertilisation and Embryology Act 1990 s 30(10). As from a day to be appointed, a reference to the Adoption and Children (Scotland) Act 2007 is inserted: Human Fertilisation and Embryology Act 1990 s 30(10) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 76, 79; and the Adoption and Children (Scotland) Act 2007 s 120(1), (2), Sch 2 para 6, Sch 3). At the date at which this volume states the law no such day had been appointed. As to adoption see paras 100 ante, 323 et seq post.

17 In orders under the Human Fertilisation and Embryology Act 1990 s 30.

18 Ibid s 30(9)(a). As to the regulations that have been made see the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, which apply specified provisions of the Adoption Act 1976 with modifications to a parental order granted under the Human Fertilisation and Embryology Act 1990 s 30(9): see the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, reg 2, Sch 1 para 1 (applications by gamete donors for a parental order), Sch 1 para 2 (effect of a parental order), Sch 1 para 3 (interpretation of certain events consequent upon the making of a parental order), Sch 1 para 4 (registration of parental orders), Sch 1 para 5 (procedure), Sch 1 para 6 (orders, rules and regulations), Sch 1 para 7 (interpretation), and Sch 1 para 8 (registration of adoptions). The regulations provide for the registration of parental orders in a register to be maintained by the Registrar General at the General Register Office, and for the issue of a certified copy of an entry in the register, which may be received as evidence of the birth of the child: Sch 1 para 4. As to the parental order register see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 510; and as to the Registrar General and the General Register Office see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq. For the form of entries to be made in the parental order register pursuant to a direction made by a court see the Forms of Entry for Parental Orders Regulations 1994, SI 1994/2981.

19 In the Human Fertilisation and Embryology Act 1990 s 30(9)(b), the words 'any enactment' are to be read as including a reference to any enactment contained in s 28(5A)-(5I) (as added) (see para 103 ante): see the modification made by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 17.

20 In an order under the Human Fertilisation and Embryology Act 1990 s 30.

21 Ibid s 30(9)(b). As to the regulations that have been made see note 18 supra.

22 Ibid s 30(9) (as modified: see note 19 supra). As to the regulations that have been made see note 18 supra. As to the Secretary of State see para 155 post.

23 Ibid s 30(8)(a). As to the classification of proceedings as 'family proceedings' see para 199 post. For the procedure on an application under s 30 in the High Court and the county court see the Family Proceedings Rules 1991, SI 1991/1247, Pt IVA (added by SI 1994/2165; and amended by SI 1994/3155; SI 2001/821; SI 2005/559); and for proceedings in the magistrates' court see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Pt IIA (added by SI 1994/2166; and amended by SI 1994/3156; SI 2001/818; SI 2005/585; SI 2005/617).

On such an application, the court must consider the appointment of a parental order reporter in accordance with the Children Act 1989 s 41(1) (see para 311 post): Family Proceedings Rules 1991, SI 1991/1247, r 4A.5 (as so added and amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21E (as so added and amended). 'Parental order reporter' means an officer of the Service (ie an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')) or a Welsh family proceedings officer appointed under the Children Act 1989 s 41 (as amended) in relation to proceedings under the Human Fertilisation and Embryology Act 1990 s 30: Family Proceedings Rules 1991, SI 1991/1247, r 4A.1(1), (2) (as so added and amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21A(1), (2) (as so added and amended). As to CAFCASS see para 230 et seq post. As to the meaning of 'officer of the Service' see para 230 post. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 post.

For transitional provisions where the Official Solicitor or someone else was appointed as guardian ad litem under the Children Act 1989 s 41 (as amended) (see para 311 post) before 1 April 2001 and the proceedings are still continuing see the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 3(1), (2); and para 230 post.

## UPDATE

### 102-112 Parentage under the Human Fertilisation and Embryology Act 1990

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

## **106 Parental orders in favour of gamete donors; surrogacy**

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 s 30 repealed: Human Fertilisation and Embryology Act 2008 s 57(3), Sch 8 Pt 1. Section 57(3) does not affect the validity of any order made under the Human Fertilisation and Embryology Act 1990 s 30 before the coming into force of the Human Fertilisation and Embryology Act 2008 s 57(3) (ie 6 April 2010: see SI 2010/987): Human Fertilisation and Embryology Act 2008 s 57(4). SI 1994/2767 revoked: SI 2010/986.

NOTE 14--See also *Re X (children) (parental order: foreign surrogacy)* [2008] EWHC 3030 (Fam), [2009] 2 WLR 1274, [2009] All ER (D) 183 (Apr).

NOTE 18--SI 1994/2981 replaced: Parental Orders (Prescribed Particulars and Forms of Entry) Regulations 2010, SI 2010/1205.

NOTE 23--SI 1991/1395 Pt IIA further amended: SI 2009/2025.

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### **107. The register of information.**

The Human Fertilisation and Embryology Authority ('the Authority')<sup>1</sup> must keep a register containing any information it obtains which relates to<sup>2</sup>: (1) the provision of treatment services<sup>3</sup> for any identifiable individual<sup>4</sup>; or (2) the keeping or use of the gametes<sup>5</sup> of any identifiable individual or of an embryo<sup>6</sup> taken from any identifiable woman<sup>7</sup>, or if it shows that any identifiable individual was, or may have been, born in consequence of treatment services<sup>8</sup>.

The Authority is subject to the provisions of the Data Protection Act 1998<sup>9</sup>.

1 The Authority was established under the Human Fertilisation and Embryology Act 1990 s 5: see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280. The Authority maintains a code of practice under s 25 which contains guidance about the proper conduct of activities carried on in pursuance of licences under the Human Fertilisation and Embryology Act 1990: see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 288. As to the Human Fertilisation and Embryology Authority generally see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280 et seq.

2 Ibid s 31(1).

3 For the meaning of 'treatment services' see para 103 note 11 ante.

4 Human Fertilisation and Embryology Act 1990 s 31(2)(a).

5 As to references to gametes see para 102 note 4 ante.

6 For the meaning of 'embryo' see para 102 note 3 ante.

7 Human Fertilisation and Embryology Act 1990 s 31(2)(b).

8 Ibid s 31(2). As to the disclosure of information contained in the register see para 108 et seq post.

9 See the Data Protection Act 1998 s 5; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 504.

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **107 The register of information**

TEXT AND NOTES 1-8--Human Fertilisation and Embryology Act 1990 s 31 now ss 31-31ZG: see PARA 107A.

TEXT AND NOTES 3-8--'Basic partner treatment services' means treatment services that are provided for a woman and a man together without using the gametes of any other person or embryos created outside the woman's body: 1990 Act s 2(1) (amended by SI 2007/1522). For the purposes of the 1990 Act, sperm is to be treated as partner-donated sperm if the donor of the sperm and the recipient of the sperm declare that they have an intimate physical relationship: s 1(5) (added by SI 2007/1522).

The Authority must keep a register recording the grant, suspension or revocation of a licence for treatment or a licence for storage authorising activities in relation to gametes or embryos intended for use for human application, a licence for non-medical fertility services and a licence authorising activities in connection with the derivation from embryos of stem cells that are intended for human application: 1990 Act s 31A(1) (s 31A added by SI 2007/1522; and amended by Human Fertilisation and Embryology Act 2008 Sch 7 para 10, Sch 8 Pt 1). The register must specify, in relation to each such licence (1) the activities authorised, (2) the address of the premises to which the licence relates, (3) the name of the person responsible and the name of the holder of the licence (if different), and (4) any variations made: 1990 Act s 31A(2). The Authority must make such of the information included in the register as it considers appropriate available to the public: s 31A(3).

The Authority must also keep a register containing information provided to it about any serious adverse event or serious adverse reaction and must make such of the information included in the register as it considers appropriate available to the public: s 31B (added by SI 2007/1522). For the meanings of 'serious adverse event' and 'serious adverse reaction' see the 1990 Act s 2(1) (definitions added by SI 2007/1522).

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### **107A. Information.**

Human Fertilisation and Embryology Act 1990 s 31 now ss 31-31ZG (substituted by Human Fertilisation and Embryology Act 2008 s 24).

See also Human Fertilisation and Embryology Act 1990 s 35A (added by Human Fertilisation and Embryology Act 2008 s 26) (mitochondrial donation).

As to the power of the Authority to charge fees to recoup the cost of meeting various statutory requests for information from donor-conceived people see Human Fertilisation and Embryology Act 1990 s 35B (added by Human Fertilisation and Embryology Act 2008 s 27).

#### **1. Register of information**

The Human Fertilisation and Embryology Authority must keep a register which is to contain any information which falls within the Human Fertilisation and Embryology Act 1990 s 31(2) and which (1) immediately before the coming into force of the Human Fertilisation and Embryology Act 2008 s 24 (ie 1 October 2009: SI 2009/2232), was contained in the register kept under the Human Fertilisation and Embryology Act 1990 s 31 by the Authority, or (2) is obtained by the Authority: s 31(1) (s 31 substituted by Human Fertilisation and Embryology Act 2008 s 24). Subject to the Human Fertilisation and Embryology Act 1990 s 31(3), information falls within s 31(2) if it relates to (a) the provision for any identifiable individual of treatment services other than basic partner treatment services, (b) the procurement or distribution of any sperm, other than sperm which is partner-donated sperm and has not been stored, in the course of providing non-medical fertility services for any identifiable individual, (c) the keeping of the gametes of any identifiable individual or of an embryo taken from any identifiable woman, (d) the use of the gametes of any identifiable individual other than their use for the purpose of basic partner treatment services, or (e) the use of an embryo taken from any identifiable woman, or if it shows that any identifiable individual is a relevant individual: s 31(2). In s 31 'relevant individual' means an individual who was or may have been born in consequence of (i) treatment services, other than basic partner treatment services, or (ii) the procurement or distribution of any sperm (other than partner-donated sperm which has not been stored) in the course of providing non-medical fertility services: s 31(4). Information does not fall within s 31(2) if it is provided to the Authority for the purposes of any voluntary contact register as defined by s 31ZF(1) (see PARA 107A.4): s 31(3).

#### **2. Request for information as to genetic parentage or intended spouse**

A person who has attained the age of 16 ('the applicant') may by notice to the Authority require the Authority to comply with a request under the Human Fertilisation and Embryology Act 1990 s 31ZA(2): s 31ZA(1) (ss 31ZA-31ZC substituted by Human Fertilisation and Embryology Act 2008 s 24). The applicant may request the Authority to give the applicant notice stating whether or not the information contained in the register shows that a person ('the donor') other than a parent of the applicant would or might, but for the relevant statutory provisions, be the parent of the applicant, and if it does show that (1) giving the applicant so much of that information as relates to the donor as the Authority is required by regulations to give (but no other information), or (2) stating whether or not that information shows that there are other

persons of whom the donor is not the parent but would or might, but for the relevant statutory provisions, be the parent and if so (a) the number of those other persons, (b) the sex of each of them, and (c) the year of birth of each of them: Human Fertilisation and Embryology Act 1990 s 31ZA(2). See further s 31ZA(3)-(7).

A person ('the applicant') may by notice to the Authority require the Authority to comply with a request under the Human Fertilisation and Embryology Act 1990 s 31ZB(2): s 31ZB(1). The applicant may request the Authority to give the applicant notice stating whether or not information contained in the register shows that, but for the relevant statutory provisions, the applicant would or might be related to a person specified in the request as (i) a person whom the applicant proposes to marry, (ii) a person with whom the applicant proposes to enter into a civil partnership, or (iii) a person with whom the applicant is in an intimate physical relationship or with whom the applicant proposes to enter into an intimate physical relationship: Human Fertilisation and Embryology Act 1990 s 31ZB(2). See further s 31ZB(3)-(7).

The Authority has power to inform a donor of the fact that a donor-conceived person has requested information about him: see Human Fertilisation and Embryology Act 1990 s 31ZC.

### **3. Provision to donor of information about resulting children and provision of information about donor-conceived genetic siblings**

Donors (including past donors) may be provided with information on request about the number, sex and year of birth of children born as a result of their donations: see Human Fertilisation and Embryology Act 1990 s 31ZD (ss 31ZD, 31ZE substituted by Human Fertilisation and Embryology Act 2008 s 24).

Donor-conceived people may request and obtain identifying information about their genetic half-siblings who were conceived using gametes from the same donor, where neither is the donor's legal offspring: see Human Fertilisation and Embryology Act 1990 s 31ZE.

### **4. Voluntary contact register**

The Authority may (1) set up a voluntary contact register in such manner as it thinks fit, (2) keep a voluntary contact register in such manner as it thinks fit, (3) determine criteria for eligibility for inclusion on the register and the particulars that may be included, (4) charge a fee to persons who wish their particulars to be entered on the register, (5) arrange for samples of the DNA of such persons to be analysed at their request, (6) make such arrangements as it thinks fit for the disclosure of information on the register between persons who appear to the Authority to be genetically related, and (7) impose such conditions as it thinks fit to prevent a person ('A') from disclosing information to a person to whom A is genetically related ('B') where that information would identify any person who is genetically related to both A and B: Human Fertilisation and Embryology Act 1990 s 31ZF(2) (ss 31ZF, 31ZG substituted by Human Fertilisation and Embryology Act 2008 s 24). A 'voluntary contact register' means a register of persons who have expressed their wish to receive information about any person to whom they are genetically related as a consequence of the provision to any person of treatment services in the United Kingdom before 1 August 1991: Human Fertilisation and Embryology Act 1990 s 31ZF(1). The Authority may make arrangements with any person by whom a voluntary contact register is kept before the commencement of s 31ZF (ie 1 October 2009: SI 2009/2232) for the supply by that person to the Authority of the information contained in the register maintained by that person: Human Fertilisation and Embryology Act 1990 s 31ZF(3).

The Authority may, instead of keeping a voluntary contact register, give financial assistance to any person who sets up or keeps a voluntary contact register: see Human Fertilisation and Embryology Act 1990 s 31ZG.

**UPDATE**

**102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.



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### **108. Disclosure of information about parentage.**

A person who has attained the age of 18 ('the applicant') may, by notice to the Human Fertilisation and Embryology Authority ('the Authority')<sup>1</sup>, require it to comply with a request for information<sup>2</sup>, and the Authority must do so if the information contained in the register<sup>3</sup> shows that the applicant was, or may have been, born in consequence of treatment services<sup>4</sup>, and he has been given a suitable opportunity to receive proper counselling about the implications of compliance with the request<sup>5</sup>. The applicant may request the Authority to give him notice stating whether or not the information contained in the register shows that a person other than a parent of the applicant would or might, but for the operation of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>6</sup>, be a parent of the applicant<sup>7</sup>. If the register does contain such information, the notice to the applicant must: (1) give him so much of that information as relates to the person concerned as the Authority is required by regulations<sup>8</sup> to give, but no other information<sup>9</sup>; or (2) state whether or not the information shows that, but for the operation of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>10</sup>, the applicant and the person specified in the request as a person whom the applicant proposes to marry, would or might be related<sup>11</sup>.

A person who has not attained the age of 18 ('the minor') may, by notice to the Authority specifying another person ('the intended spouse') as a person whom the minor proposes to marry, require the Authority to comply with a request<sup>12</sup> to give the minor notice stating whether or not the information contained in the register shows that, but for the operation of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>13</sup>, the minor and the intended spouse would or might be related<sup>14</sup>. The Authority must comply with the request if (a) the information contained in the register shows that the minor was, or may have been, born in consequence of treatment services<sup>15</sup>; and (b) the minor has been given a suitable opportunity to receive proper counselling about the implications of compliance with the request<sup>16</sup>.

Where a claim is made before the Registrar General<sup>17</sup> that a man is or is not the father of a child and it is necessary or desirable for the purpose of any function of the Registrar General to determine whether the claim is or may be well-founded<sup>18</sup>, the Authority must comply with any request made by the Registrar General by notice to the Authority to disclose whether any information on the register<sup>19</sup> tends to show that the man may be the father of the child<sup>20</sup> and, if it does, the Authority must disclose that information<sup>21</sup>.

1 As to the Human Fertilisation and Embryology Authority see para 107 note 1 ante.

2 Human Fertilisation and Embryology Act 1990 s 31(3). The request for information is a request under s 31(4): see the text and note 7 infra.

3 Ie the register kept by the Authority under *ibid* s 31: see para 107 ante.

4 *Ibid* s 31(3)(a). For the meaning of 'treatment services' see para 103 note 11 ante.

5 *Ibid* s 31(3)(b).

6 Ie *ibid* ss 27-29 (as amended) (meanings of 'mother' and 'father'): see paras 102-104 ante.

7 *Ibid* s 31(4).

8 Regulations cannot require the Authority to give any information as to the identity of a person whose gametes have been used or from whom an embryo has been taken if a person to whom a licence under *ibid* Sch 2 applied was provided with the information at a time when the Authority could not have been required to give information of the kind in question: s 31(5). As to the making of regulations under the Human Fertilisation and Embryology Act 1990 generally see para 112 post.

9 *Ibid* s 31(4)(a). The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, were made under the Human Fertilisation and Embryology Act 1990 s 31(4)(a), and they provide that the following information about the donor is to be given to the applicant (Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, regs 1, 2(1)):

- 22 (1) the sex, height, weight, ethnic group, eye colour, hair colour, skin colour, year of birth, country of birth and marital status of the donor (reg 2(2)(a));
- 23 (2) whether the donor was adopted (reg 2(2)(b));
- 24 (3) the ethnic group of the donor's parents (reg 2(2)(c));
- 25 (4) the screening tests carried out on the donor and information on his personal and family medical history (reg 2(2)(d));
- 26 (5) whether the donor has a child, the sex of that child and where the donor has children, the number of those children and the sex of each of them (reg 2(2)(e));
- 27 (6) the donor's religion, occupation, interests and skills and why the donor provided sperm, eggs or embryos (reg 2(2)(f));
- 28 (7) matters contained in any description of himself as a person which the donor has provided (reg 2(2)(g));
- 29 (8) any additional matter which the donor has provided with the intention that it be made available to the applicant (reg 2(2)(h)).

This information is not to include information which may identify the donor, either by itself or in combination with any other information which is likely to come into the possession of the applicant: reg 2(2).

The Authority is, however, required to give information from which the donor may be identified which he provides after 31 March 2005 to a person to whom a licence applies, being information as to:

- 30 (a) any matter specified in heads (1)-(8) *supra* (reg 2(3)(a));
- 31 (b) the surname and each forename of the donor and, if different, the surname and each forename of the donor used for the registration of his birth (reg 2(3)(b));
- 32 (c) the date of birth of the donor and the town or district in which he was born (reg 2(3)(c));
- 33 (d) the appearance of the donor (reg 2(3)(d));
- 34 (e) the last known postal address of the donor (reg 2(3)(e)).

The information which the Authority is required to give to the applicant does not include any information which, at the time of the request, the applicant indicates he does not wish to receive: reg 2(4).

10 See note 6 *supra*.

11 Human Fertilisation and Embryology Act 1990 s 31(4)(b).

12 *Ibid* s 31(6).

13 See note 6 *supra*.

14 Human Fertilisation and Embryology Act 1990 s 31(7).

15 *Ibid* s 31(6)(a).

16 *Ibid* s 31(6)(b).

17 For the purposes of *ibid* ss 32, 33 (as amended) (see para 109 post), 'the Registrar General' means the Registrar General for England and Wales, the Registrar General of Births, Deaths and Marriages for Scotland, or the Registrar General for Northern Ireland, as the case may be: s 32(3). As to the Registrar General see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

18 *Ibid* s 32(1).

19 *Ie* the register kept by the Authority under *ibid* s 31: see para 107 ante.

20 *Ie* by virtue of *ibid* s 28 (as amended) (meaning of 'father'): see para 103 ante.

21 *Ibid* s 32(2).

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **108 Disclosure of information about parentage**

TEXT AND NOTES 1-16--Human Fertilisation and Embryology Act 1990 s 31 now ss 31-31ZG: see PARA 107A.

NOTE 9--SI 2004/1511 amended: SI 2009/1892.

NOTE 17--Human Fertilisation and Embryology Act 1990 s 32(3) amended: Human Fertilisation and Embryology Act 2008 Sch 7 para 11.

TEXT AND NOTES 18-21--Human Fertilisation and Embryology Act 1990 s 32(1), (2) amended, s 32(2A) added: Human Fertilisation and Embryology Act 2008 Sch 6 para 33.

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### **109. Restrictions on disclosure of information by members and employees of the Human Fertilisation and Embryology Authority.**

No person who is or has been a member or employee of the Human Fertilisation and Embryology Authority ('the Authority')<sup>1</sup> may disclose any information which he holds or has held as such a member or employee<sup>2</sup> which is: (1) any information contained or required to be contained in the register<sup>3</sup>; or (2) any other information obtained by any member or employee of the Authority on terms or in circumstances requiring it to be held in confidence<sup>4</sup>.

The restriction on disclosure of information does not apply to any disclosure of information mentioned in head (1) above made:

- 29 (a) to a person as a member or employee of the Authority<sup>5</sup>;
- 30 (b) to a person to whom a licence applies for the purposes of his functions as such<sup>6</sup>;
- 31 (c) so that no individual to whom the information relates can be identified<sup>7</sup>;
- 32 (d) in pursuance of a court order to disclose information in the interests of justice<sup>8</sup>;
- 33 (e) to the Registrar General<sup>9</sup> in pursuance of a request for information<sup>10</sup>; or
- 34 (f) in response to a request<sup>11</sup> for details of the applicant's parentage contained in the register<sup>12</sup>.

The restriction on disclosure of information does not apply to any disclosure of information mentioned in head (2) above:

- 35 (i) made to a person as a member or employee of the Authority<sup>13</sup>;
- 36 (ii) made with the consent of the person or persons whose confidence would otherwise be protected<sup>14</sup>; or
- 37 (iii) which has been lawfully made available to the public before the disclosure is made<sup>15</sup>.

The above provisions<sup>16</sup> do not apply to the disclosure to any individual of information which: (A) relates to the provision of treatment services<sup>17</sup> for any identifiable individual, or the keeping or use of the gametes<sup>18</sup> of any identifiable individual or of an embryo<sup>19</sup> taken from any identifiable woman<sup>20</sup>; and (B) relates only to that individual or, in the case of an individual treated together with another, only to that individual and that other<sup>21</sup>.

Any person who discloses any information in contravention of these provisions is guilty of an offence and is liable to a term of imprisonment<sup>22</sup>, or a fine<sup>23</sup>, or both<sup>24</sup>.

The Authority is subject to the provisions of the Data Protection Act 1998<sup>25</sup>.

1 As to the Human Fertilisation and Embryology Authority see para 107 note 1 ante.

2 Human Fertilisation and Embryology Act 1990 s 33(1).

- 3    Ie the register kept by the Authority under *ibid* s 31: see para 107 ante.
- 4    Ibid s 33(2). As to restrictions on the disclosure of information generally see CONFIDENCE AND DATA PROTECTION.
- 5    Ibid s 33(3)(a).
- 6    Ibid s 33(3)(b).
- 7    Ibid s 33(3)(c).
- 8    Ibid s 33(3)(d). The order referred to in the text is an order under s 34 or s 35: see para 111 post.
- 9    For the meaning of 'the Registrar General' see para 108 note 17 ante.
- 10   Human Fertilisation and Embryology Act 1990 s 33(3)(e). The request for information is made under s 32: see para 108 ante.
- 11   Ie a request made under *ibid* s 31: see para 108 ante.
- 12   Ibid s 33(3)(f).
- 13   Ibid s 33(4)(a).
- 14   Ibid s 33(4)(b).
- 15   Ibid s 33(4)(c).
- 16   Ie *ibid* s 33(1)-(4): see the text and notes 1-15 supra.
- 17   For the meaning of 'treatment services' see para 103 note 11 ante.
- 18   As to references to gametes see para 102 note 4 ante.
- 19   For the meaning of 'embryo' see para 102 note 3 ante.
- 20   See the Human Fertilisation and Embryology Act 1990 s 33(7)(a). The text refers to information which falls within s 31(2) by virtue of s 31(2)(a) or (b) (see para 107 ante): s 31(7)(a).
- 21   Ibid s 33(7)(b).
- 22   A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding six months: *ibid* s 41(5)(a), (b).
- 23   On summary conviction the fine must not exceed the statutory maximum: *ibid* s 41(5)(b). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.
- 24   Human Fertilisation and Embryology Act 1990 s 41(5).
- 25   See the Data Protection Act 1998 s 5; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 504.

## UPDATE

### 102-112 Parentage under the Human Fertilisation and Embryology Act 1990

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

**109 Restrictions on disclosure of information by members and employees of the Human Fertilisation and Embryology Authority**

TEXT AND NOTES 1-21--Human Fertilisation and Embryology Act 1990 s 33 now ss 33A-33D (substituted by Human Fertilisation and Embryology Act 2008 s 25). In exercise of the powers conferred on him by the Human Fertilisation and Embryology Act 1990 s 33D, the Secretary of State has made the Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010, SI 2010/995.

TEXT AND NOTES 22-24--Human Fertilisation and Embryology Act 1990 s 41(5) amended: Human Fertilisation and Embryology Act 2008 s 29(5).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(iv) Human Assisted Reproduction/B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990/110. Restrictions on disclosure of information by licence holders.

### **110. Restrictions on disclosure of information by licence holders.**

No person who is, or has been, a person to whom a licence applies<sup>1</sup> and no person to whom directions<sup>2</sup> have been given may disclose any registrable information<sup>3</sup> which he holds or has held as such a person<sup>4</sup>. However, this does not apply to any disclosure of information made:

- 38 (1) to a person as a member or employee of the Human Fertilisation and Embryology Authority ('the Authority')<sup>5</sup>;
- 39 (2) to a person to whom a licence applies for the purposes of his functions as such<sup>6</sup>;
- 40 (3) so far as it identifies a person who, but for the operation of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>7</sup>, would or might be a parent of a person who instituted proceedings relating to child disability following fertility treatment under the Congenital Disabilities (Civil Liability) Act 1976<sup>8</sup>, but only for the purpose of defending such proceedings, or instituting connected proceedings for compensation against that parent<sup>9</sup>;
- 41 (4) so that no individual to whom the information relates can be identified<sup>10</sup>;
- 42 (5) in pursuance of directions given by a licensing committee where a licence has been varied or has ceased to have effect, whether by expiry, suspension, revocation or otherwise, or given by a licensing committee proposing to suspend, revoke or vary a licence<sup>11</sup>;
- 43 (6) necessarily, for any purpose preliminary to proceedings, or for the purposes of, or in connection with, any proceedings<sup>12</sup>;
- 44 (7) for the purpose of establishing, in any proceedings relating to an application for a parental order<sup>13</sup>, whether certain conditions<sup>14</sup> are met<sup>15</sup>; or
- 45 (8) on an application for access to health records<sup>16</sup>.

In the case of information relating to the provision of treatment services<sup>17</sup> for any identifiable individual, the restriction on disclosure of information<sup>18</sup> does not apply: (a) where one individual is identifiable, to disclosure with the consent of that individual<sup>19</sup>; (b) where both a woman and a man treated together with her are identifiable, to disclosure with the consent of them both, or if disclosure is made for the purpose of disclosing information about the provision of treatment services for one of them, to disclosure with the consent of that individual<sup>20</sup>; or (c) to disclosure in an emergency, that is to say, disclosure made by a person who is satisfied that it is necessary to make the disclosure to avert an imminent danger to the health of an individual with whose consent the information could be disclosed<sup>21</sup>, and in circumstances where it is not reasonably practicable to obtain that individual's consent<sup>22</sup>.

For the purposes of head (a) and head (b) above: (i) the consent must be to disclosure to a specific person, except where disclosure is to a person who needs to know (A) in connection with the provision of treatment services, or any other description of medical, surgical or obstetric services, for the individual giving the consent; (B) in connection with the carrying out of an audit of clinical practice; or (C) in connection with the auditing of accounts<sup>23</sup>; and (ii) consent to disclosure given at the request of another must be disregarded unless, before it is given, the person requesting it takes reasonable steps to explain to the individual from whom it is requested the implications of compliance with the request<sup>24</sup>.

In the case of information which shows that any identifiable individual was, or may have been, born in consequence of treatment services, the restriction on disclosure of information<sup>25</sup> does not apply to any disclosure which is necessarily incidental to disclosure under heads (a) to (c) above<sup>26</sup>.

Regulations may provide for additional exceptions to the restriction on disclosure of information<sup>27</sup>.

These provisions<sup>28</sup> do not apply to the disclosure to any individual of information which: (*aa*) relates to the provision of treatment services for any identifiable individual, or the keeping or use of the gametes of any identifiable individual or of an embryo<sup>29</sup> taken from any identifiable woman<sup>30</sup>; and (*bb*) relates only to that individual or, in the case of an individual treated together with another, only to that individual and that other<sup>31</sup>.

Any person who discloses any information in contravention of these provisions is guilty of an offence and liable to a term of imprisonment<sup>32</sup>, or a fine<sup>33</sup>, or both<sup>34</sup>.

1    Ie (1) an individual under whose supervision the activities authorised by a licence under the Human Fertilisation and Embryology Act 1990 Sch 2, authorising activities in the course of providing treatment services, the storage of gametes and embryos, or activities for the purposes of a project of research, are carried on; (2) any person designated in such a licence, or in a notice given to the Human Fertilisation and Embryology Authority by the person who holds the licence or the person described in head (1) supra, as a person to whom the licence applies; or (3) any person acting under the direction of the person described in head (1) supra or designated under head (2) supra: ss 2(1), 11(1), 17(1), (2). As to the grant of licences under the Human Fertilisation and Embryology Act 1990 see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280 et seq.

2    Ie directions given by the Human Fertilisation and Embryology Authority under *ibid* s 23 for any purpose for which directions may be given under the Human Fertilisation and Embryology Act 1990 or directions varying or revoking such directions: s 2(1). As to directions generally see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 288.

3    Ie information falling within *ibid* s 31(2): see para 107 ante.

4    Ibid s 33(5).

5    Ibid s 33(6)(a). As to the Human Fertilisation and Embryology Authority see para 107 note 1 ante.

6    Ibid s 33(6)(b).

7    Ie *ibid* ss 27-29 (meanings of 'mother' and 'father'): see paras 102-104 ante.

8    Ie under the Congenital Disabilities (Civil Liability) Act 1976 s 1A (as added): see TORT vol 97 (2010) PARA 439.

9    Human Fertilisation and Embryology Act 1990 s 33(6)(c).

10   Ibid s 33(6)(d) (amended by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(2)).

11   Human Fertilisation and Embryology Act 1990 s 33(6)(e). The directions referred to in the text are directions given by virtue of s 24(5), (6) for the purpose of securing the continued discharge of the duties of the person responsible under the licence concerned ('the old licence'), and such directions may in particular require anything kept or information held in pursuance of the old licence to be transferred to the Human Fertilisation and Embryology Authority or any other person, or provide for the discharge of the duties in question by any individual whose character, qualifications and experience are, in the opinion of the committee, such as are required for the supervision of the activities authorised by the old licence, and authorise those activities to be carried on under the supervision of that individual, but cannot require any individual to discharge any of those duties unless the individual has consented in writing to do so: s 25(7); and see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 287. As to licence committees see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280.

12   Ibid s 33(6)(f) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(2)). For these purposes, references to proceedings include any formal procedure for dealing with a complaint: Human Fertilisation and Embryology Act 1990 s 33(9) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(4)).



In so far as it relates to disclosure for the purposes of, or in connection with, any proceedings, the Human Fertilisation and Embryology Act 1990 s 33(6)(f) (as added) does not apply: (1) to disclosure of information enabling a person to be identified as a person whose gametes were used, in accordance with consent given under Sch 3 para 5 (see para 104 ante), for the purposes of treatment services in consequence of which an identifiable individual was, or may have been, born; or (2) to disclosure, in circumstances in which s 34(1) (see para 111 post) applies, of information relevant to the determination, in proceedings before the court, of whether a person is or is not the parent of a child by virtue of ss 27-29 (as amended) (see paras 102-104 ante): s 33(6A) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). As to references to gametes see para 102 note 4 ante.

The Human Fertilisation and Embryology Act 1990 s 33(6)(f), (6A) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

13    Ie under the Human Fertilisation and Embryology Act 1990 s 30(1): see para 106 ante.

14    Ie conditions under *ibid* s 30(1)(a) or (b): see para 106 ante.

15    *Ibid* s 33(6)(g) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(2)). The Human Fertilisation and Embryology Act 1990 s 33(6)(g) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

16    Human Fertilisation and Embryology Act 1990 s 33(6)(h) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(2)); Human Fertilisation and Embryology Act 1990 s 33(6)(i) (added by the Access to Health Records (Northern Ireland) Order 1993, SI 1993/1250, art 13). The reference in the text to applications for access to health records is a reference to access under the Access to Health Records Act 1990 s 3 (as amended) and the Access to Health Records (Northern Ireland) Order 1993, SI 1993/1250, art 5: see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 216.

The Human Fertilisation and Embryology Act 1990 s 33(6)(h) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

17    For the meaning of 'treatment services' see para 103 note 11 ante.

18    Ie under the Human Fertilisation and Embryology Act 1990 s 33(5): see the text and notes 1-4 supra.

19    *Ibid* s 33(6B)(a) (s 33(6B) added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The Human Fertilisation and Embryology Act 1990 s 33(6B) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

20    Human Fertilisation and Embryology Act 1990 s 33(6B)(b) (as added: see note 19 supra).

21    Ie under *ibid* s 33(6B) (as added): see the text and notes 17-20 supra.

22    *Ibid* s 33(6E) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The Human Fertilisation and Embryology Act 1990 s 33(6E) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

23    Human Fertilisation and Embryology Act 1990 s 33(6C) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The Human Fertilisation and Embryology Act 1990 s 33(6C) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

24    Human Fertilisation and Embryology Act 1990 s 33(6D) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The Human Fertilisation and Embryology Act 1990 s 33(6D) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

25    Ie under the Human Fertilisation and Embryology Act 1990 s 33(5): see the text and notes 1-4 supra.

26    *Ibid* s 33(6F) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The Human Fertilisation and Embryology Act 1990 s 33(6F) (as added) applies in relation to information

obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

27 See the Human Fertilisation and Embryology Act 1990 s 33(6G) (added by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 1(3)). The restriction on disclosure of information referred to in the text is that under the Human Fertilisation and Embryology Act 1990 s 33(5): see the text and notes 1-4 supra. However, no exception may be made for: (1) disclosure of a kind mentioned in s 33(6A) (as added) (see note 12 supra); or (2) disclosure, in circumstances in which s 32 (see para 108 ante) applies, of information having the tendency mentioned in s 32(2) (see para 108 ante): s 33(6G) (as so added). See the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511; and para 108 ante. As to the making of regulations under the Human Fertilisation and Embryology Act 1990 generally see para 112 post.

The Human Fertilisation and Embryology Act 1990 s 33(6A), (6G) (as added) applies in relation to information obtained before, as well as in relation to information obtained after, 16 July 1992 (ie the date on which the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 received Royal Assent): s 1(5).

28 Ie the Human Fertilisation and Embryology Act 1990 s 33(5)-(9) (as amended).

29 For the meaning of 'embryo' see para 102 note 3 ante.

30 See the Human Fertilisation and Embryology Act 1990 s 33(7)(a). The text refers to information which falls within s 31(2) by virtue of s 31(2)(a) or (b) (see para 107 ante): s 31(7)(a).

31 Ibid s 33(7)(b).

32 On conviction on indictment, such a person is liable to a term of imprisonment not exceeding two years: ibid s 41(5)(a). On summary conviction the term of imprisonment such a person is liable to a term of imprisonment not exceeding six months: s 41(5)(b).

33 On summary conviction, the person is liable to a fine not exceeding the statutory maximum: ibid s 41(5)(b). As to the statutory maximum see para 109 note 23 ante.

34 Ibid s 41(5).

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **110 Restrictions on disclosure of information by licence holders**

TEXT AND NOTES 1-31--Human Fertilisation and Embryology Act 1990 s 33 now ss 33A-33D: see PARA 109.

Human Fertilisation and Embryology (Disclosure of Information) Act 1992 repealed: Human Fertilisation and Embryology Act 2008 Sch 8 Pt 1.

NOTE 11--Human Fertilisation and Embryology Act 1990 s 24(5), (6) substituted: Human Fertilisation and Embryology Act 2008 s 22(5).

TEXT AND NOTES 32-34--Human Fertilisation and Embryology Act 1990 s 41(5) amended: Human Fertilisation and Embryology Act 2008 s 29(5).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(iv) Human Assisted Reproduction/B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990/111. Disclosure of information in the interests of justice.

### **111. Disclosure of information in the interests of justice.**

Where in any proceedings before a court the question whether a person is or is not the parent of a child by virtue of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>1</sup> falls to be determined, the court may, on the application of any party to the proceedings, make an order requiring the Human Fertilisation and Embryology Authority ('the Authority')<sup>2</sup> (1) to disclose whether or not any information relevant to that question is contained in the register kept by the Authority<sup>3</sup>; and, if it is, (2) to disclose so much of it as is specified in the order<sup>4</sup>. However, such an order may not require the Authority to disclose any information which relates to the keeping or use of the gametes<sup>5</sup> of any identifiable individual or of an embryo<sup>6</sup> taken from any identifiable woman<sup>7</sup>.

The court may not make such an order unless it is satisfied that the interests of justice require it to do so, taking into account any representations made by any individual who may be affected by the disclosure, and the welfare of the child, if under the age of 18 years, and of any other person under that age who may be affected by the disclosure<sup>8</sup>.

Where, for the purpose of instituting certain proceedings under the Congenital Disabilities (Civil Liability) Act 1976<sup>9</sup>, it is necessary to identify a person who would or might be the parent of a child but for the operation of certain provisions of the Human Fertilisation and Embryology Act 1990<sup>10</sup>, the court may, on the application of the child, make an order requiring the Authority to disclose any information contained in the register<sup>11</sup> identifying that person<sup>12</sup>.

1    Ie by virtue of the Human Fertilisation and Embryology Act 1990 ss 27-29 (meanings of 'mother' and 'father'): see paras 102-104 ante.

2    As to the Human Fertilisation and Embryology Authority see para 107 note 1 ante.

3    Human Fertilisation and Embryology Act 1990 s 34(1)(a). The register referred to in the text is the register kept in pursuance of s 31: see para 107 ante.

4    Ibid s 34(1)(b).

5    As to references to gametes see para 102 note 4 ante.

6    For the meaning of 'embryo' see para 102 note 3 ante.

7    Human Fertilisation and Embryology Act 1990 s 34(1). The information referred to in the text is information falling within s 31(2)(b): see para 107 ante.

8    Ibid s 34(2). If the proceedings before the court are civil proceedings the court may direct that the whole or any part of the proceedings on the application for an order under s 34(2) must be heard in private, and if it makes such an order the court may then or later direct that the whole or any part of any later stage of the proceedings must be heard in private: s 34(3). An application for such a direction must be heard in private unless the court otherwise directs: s 34(4).

9    Ie proceedings under the Congenital Disabilities (Civil Liability) Act 1976 s 1 (civil liability to a child born disabled): see TORT vol 97 (2010) PARA 439.

10   Ie the Human Fertilisation and Embryology Act 1990 ss 27-29: see paras 102-104 ante.

11   Ie the register kept in pursuance of ibid s 31: see para 107 ante.

12 Ibid s 35(1). The provisions of s 34(2)-(4) (see the text and note 8 supra) apply in relation to proceedings under s 35: s 35(3).

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

### **111 Disclosure of information in the interests of justice**

TEXT AND NOTES 7, 12--Human Fertilisation and Embryology Act 1990 ss 34(1), 35(1), (2) amended, s 35(2A) added: Human Fertilisation and Embryology Act 2008 Sch 6 paras 34, 35, Sch 7 para 12.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(iv) Human Assisted Reproduction/B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990/112. Power to make regulations under the Human Fertilisation and Embryology Act 1990.

## **112. Power to make regulations under the Human Fertilisation and Embryology Act 1990.**

The Secretary of State<sup>1</sup> may make regulations<sup>2</sup> for any purpose for which regulations may be made under the Human Fertilisation and Embryology Act 1990<sup>3</sup>, and such regulations may make different provision for different cases<sup>4</sup>. This power is exercisable by statutory instrument<sup>5</sup>. However, the Secretary of State must not make regulations by virtue of certain provisions<sup>6</sup> unless a draft has been laid before and approved by resolution of each House of Parliament<sup>7</sup>. If a statutory instrument containing regulations is made without a draft having been approved by resolution of each House of Parliament, it is subject to annulment in pursuance of such a resolution<sup>8</sup>.

1 As to the Secretary of State see para 155 post.

2 'Regulations' means regulations under the Human Fertilisation and Embryology Act 1990 s 45 (as amended): s 45(6).

3 Ibid s 45(1).

4 Ibid s 45(3).

5 Ibid s 45(2). As to statutory instruments generally see STATUTES vol 44(1) (Reissue) para 1499 et seq.

6 Ie by virtue of ibid ss 3(3)(c), 4(2), (3) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 278), ss 30, 31(4) (a) (see para 108 ante), s 33(6G) (as added) (see para 110 ante), s 43, Sch 2 para 1(1)(g) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 282), or Sch 2 para 3 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 284): s 45(4) (amended by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 s 2(2)).

7 Human Fertilisation and Embryology Act 1990 s 45(4) (as amended: see note 6 supra).

8 Ibid s 45(5).

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

## **112 Power to make regulations under the Human Fertilisation and Embryology Act 1990**

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 s 45 further amended: Human Fertilisation and Embryology Act 2008 s 30. The Secretary of State may by order make such provision modifying any provision made by or under any enactment as the Secretary of State considers necessary or expedient in consequence of any provision made by regulations under any of the relevant provisions of the Human Fertilisation and Embryology Act 1990: see Human Fertilisation and Embryology Act

1990 s 45A (added by Human Fertilisation and Embryology Act 2008 s 31). For provision as to orders under the Human Fertilisation and Embryology Act 1990 see Human Fertilisation and Embryology Act 1990 s 45B (added by Human Fertilisation and Embryology Act 2008 s 32).

NOTE 6--Human Fertilisation and Embryology (Disclosure of Information) Act 1992 repealed: Human Fertilisation and Embryology Act 2008 Sch 8 Pt 1.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(iv) Human Assisted Reproduction/B. PARENTAGE UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990/112A. Parenthood in cases involving assisted reproduction.

### **112A. Parenthood in cases involving assisted reproduction.**

The Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58) makes provision for parenthood in cases involving assisted reproduction. Sections 33-48 have effect only in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of those provisions (ie after 6 April 2009: SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(1).

#### **1. Meaning of 'mother'**

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child: Human Fertilisation and Embryology Act 2008 s 33(1). Section 33(1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child: s 33(2). Section 33(1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs: s 33(3).

#### **2. Meaning of 'father'**

As to the application of the following provisions (ie the Human Fertilisation and Embryology Act 2008 ss 35-41) see Human Fertilisation and Embryology Act 2008 s 34.

If (1) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, a woman (referred to as 'W') was a party to a marriage, and (2) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, subject to the Human Fertilisation and Embryology Act 2008 s 38(2),(4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be): Human Fertilisation and Embryology Act 2008 s 35(1). As to references to parties to a marriage see Human Fertilisation and Embryology Act 2008 s 49. Section 35 applies whether W was in the United Kingdom or elsewhere at the time mentioned in head (1): s 35(2).

If no man is treated by virtue of s 35 as the father of the child and no woman is treated by virtue of the Human Fertilisation and Embryology Act 2008 s 42 (see PARA 112A.3) as a parent of the child but (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies, (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed fatherhood conditions (as set out in the Human Fertilisation and Embryology Act 2008 s 37) were satisfied in relation to a man, in relation to treatment provided to W under the licence, (c) the man remained alive at that time, and (d) the creation of the embryo carried by W was not brought about with the man's sperm, then, subject to s 38(2), (4), the man is to be treated as the father of the child: Human Fertilisation and Embryology Act 2008 s 36.

Where a person is to be treated as the father of the child by virtue of s 35 or 36, no other person is to be treated as the father of the child: Human Fertilisation and Embryology Act 2008 s 38(1). Sections 35 and 36 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parties to a marriage: s 38(2). Sections 35 and 36 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the man's child: s 38(4).

If (i) the child has been carried by W as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, (ii) the creation of the embryo carried by W was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in W after his death, (iii) the man consented in writing (and did not withdraw the consent) (A) to the use of his sperm after his death which brought about the creation of the embryo carried by W or (as the case may be) to the placing in W after his death of the embryo which was brought about using his sperm before his death, and (B) to being treated for the purpose mentioned in the Human Fertilisation and Embryology Act 2008 s 39(3) (ie the purpose of enabling the man's particulars to be entered as the particulars of the child's father in a relevant register of births) as the father of any resulting child, (iv) W has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in s 39(3) as the father of the child, and (v) no one else is to be treated as the father of the child by virtue of s 35 or 36 or by virtue of s 38(2), or as a parent of the child by virtue of s 42 or 43 (see PARA 112A.3) or by virtue of adoption, then the man is to be treated for the purpose mentioned in s 39(3) as the father of the child: see the Human Fertilisation and Embryology Act 2008 s 39. For the meaning of 'relevant register of births' see the Human Fertilisation and Embryology Act 2008 s 51. Similar provision to s 39 is made in cases where donated sperm has been used: see the Human Fertilisation and Embryology Act 2008 s 40. The requirement under s 39 or 40 as to the making of an election is nevertheless to be treated as satisfied if the required election is made after the end of that period but with the consent of the Registrar General: see the Human Fertilisation and Embryology Act 2008 s 52.

Where the sperm of a man who had given such consent as is required by the Human Fertilisation and Embryology Act 1990 Sch 3 para 5 (consent to use of gametes for purposes of treatment services or non-medical fertility services: see MEDICAL PROFESSIONS) was used for a purpose for which such consent was required, he is not to be treated as the father of the child: Human Fertilisation and Embryology Act 2008 s 41(1). Where the sperm of a man, or an embryo the creation of which was brought about with his sperm, was used after his death, he is not, subject to s 39, to be treated as the father of the child: s 41(2). Section 41(2) applies whether W was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination: s 41(3).

### **3. Cases in which woman to be other parent**

As to the application of the following provisions (ie the Human Fertilisation and Embryology Act 2008 ss 42-47) see Human Fertilisation and Embryology Act 2008 s 34.

If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership, then subject to the Human Fertilisation and Embryology Act 2008 s 45(2), (4), the other party to the civil partnership is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be): Human Fertilisation and Embryology Act 2008 s 42(1). As to references to parties to a civil partnership see Human Fertilisation and Embryology Act 2008 s 50. Section 42 applies whether W was in the United Kingdom or elsewhere at the time mentioned in s 42(1): s 42(2).

If no man is treated by virtue of the Human Fertilisation and Embryology Act 2008 s 35 (see PARA 112A.2) as the father of the child and no woman is treated by virtue of s 42 as a parent of



the child but (1) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies, (2) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed female parenthood conditions (as set out in the Human Fertilisation and Embryology Act 2008 s 44) were met in relation to another woman, in relation to treatment provided to W under that licence, and (3) the other woman remained alive at that time, then, subject to s 45(2), (4), the other woman is to be treated as a parent of the child: Human Fertilisation and Embryology Act 2008 s 43.

Where a woman is treated by virtue of s 42 or 43 as a parent of the child, no man is to be treated as the father of the child: Human Fertilisation and Embryology Act 2008 s 45(1). Sections 42 and 43 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parties to a marriage: s 45(2). As to references to parties to a marriage see Human Fertilisation and Embryology Act 2008 s 49. Sections 42 and 43 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child: s 45(4).

Provision is made about registration of a deceased same sex partner as a child's parent in the register of births in certain circumstances: see Human Fertilisation and Embryology Act 2008 s 46. See also Human Fertilisation and Embryology Act 2008 s 52.

A woman is not to be treated as the parent of a child whom she is not carrying and has not carried, except where she is so treated (a) by virtue of s 42 or 43, or (b) by virtue of s 46, or (c) by virtue of adoption: see Human Fertilisation and Embryology Act 2008 s 47.

References to a child's father in legislation and in other documents whenever passed or made are to be read, in relevant cases, as references to a woman who is the child's parent by virtue of provision in ss 42 and 43: Human Fertilisation and Embryology Act 2008 s 53.

#### **4. Effect of the Human Fertilisation and Embryology Act 2008 ss 33 to 47**

Where by virtue of the Human Fertilisation and Embryology Act 2008 s 33, 35, 36, 42 or 43 (see PARAS 112A.1-112A.3) a person is to be treated as the mother, father or parent of a child, that person is to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes: Human Fertilisation and Embryology Act 2008 s 48(1). Where by virtue of s 33, 38, 41, 45 or 47 (see PARAS 112A.1-112A.3) a person is not to be treated as a parent of the child, that person is to be treated in law as not being a parent of the child for any purpose: s 48(2). Where s 39(1) or 40(1) or (2) applies (see PARA 112A.2), the deceased man (1) is to be treated in law as the father of the child for the purpose mentioned in s 39(3) or 40(4), but (2) is to be treated in law as not being the father of the child for any other purpose: s 48(3). Where s 46(1) or (2) applies (see PARA 112A.3), the deceased woman (a) is to be treated in law as a parent of the child for the purpose mentioned in s 46(4), but (b) is to be treated in law as not being a parent of the child for any other purpose: s 48(4). Where any of s 48(1)-(4) has effect, references to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly: s 48(5). For the meaning of 'enactment' see Human Fertilisation and Embryology Act 2008 s 58(1). A child who (i) has a parent by virtue of s 42, or (ii) has a parent by virtue of s 43 who is at any time during the period beginning with the time mentioned in s 43(b) and ending with the time of the child's birth a party to a civil partnership with the child's mother, is the legitimate child of the child's parents: s 48(6). As to references to parties to a civil partnership see Human Fertilisation and Embryology Act 2008 s 50. Nothing in the provisions of s 33(1) or ss 35-47, read with s 48 (A) affects the succession to any dignity or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title, or (B) affects the devolution of any property limited (expressly or not) to devolve (as nearly as the law permits) along with any dignity or title of honour: s 48(7).

## 5. Parental orders

On an application made by two people ('the applicants'), the court may make an order providing for a child to be treated in law as the child of the applicants if (1) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, (2) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and (3) the conditions in the Human Fertilisation and Embryology Act 2008 s 54(2)-(8) are satisfied: s 54(1). Head (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination: s 54(10). The applicants must be (a) husband and wife, (b) civil partners of each other, or (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other: s 54(2). For the purposes of the Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58), two persons are within prohibited degrees of relationship if one is the other's parent, grandparent, sister, brother, aunt or uncle; and in this provision references to relationships are to relationships of the full blood or half blood or, in the case of an adopted person, such of those relationships as would subsist but for adoption, and include the relationship of a child with his adoptive, or former adoptive, parents, but do not include any other adoptive relationships: Human Fertilisation and Embryology Act 2008 s 58(2). Except in a case falling within s 54(11), the applicants must apply for the order during the period of six months beginning with the day on which the child is born: s 54(3). At the time of the application and the making of the order the child's home must be with the applicants, and either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man: s 54(4). At the time of the making of the order both the applicants must have attained the age of 18: s 54(5). The court must be satisfied that both (i) the woman who carried the child, and (ii) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of s 35 or 36 (see PARA 112A.2) or any woman who is a parent by virtue of s 42 or 43 (see PARA 112A.3), have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order: s 54(6). Section 54(6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that provision if given by her less than six weeks after the child's birth: s 54(7). The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of (A) the making of the order, (B) any agreement required by s 54(6), (C) the handing over of the child to the applicants, or (D) the making of arrangements with a view to the making of the order, unless authorised by the court: s 54(8). For the purposes of an application under s 54, the Children Act 1989 s 92(7)-(10), Sch 11 Pt 1 (jurisdiction of courts) apply for the purposes of the Human Fertilisation and Embryology Act 2008 s 54 to determine the meaning of 'the court' as they apply for the purposes of the Children Act 1989 and proceedings on the application are to be 'family proceedings' for the purposes of the Children Act 1989: Human Fertilisation and Embryology Act 2008 s 54(9). An application which relates to a child born before the coming into force of s 54 (ie 6 April 2010: see SI 2010/987), and is made by two persons who, throughout the period applicable under the Human Fertilisation and Embryology Act 1990 s 30(2) (see PARA 106), were not eligible to apply for an order under s 30 in relation to the child as husband and wife, may be made within the period of six months beginning with the day on which Human Fertilisation and Embryology Act 2008 s 54 comes into force: s 54(11). See also Human Fertilisation and Embryology Act 1990 s 35A (added by Human Fertilisation and Embryology Act 2008 s 26) (mitochondrial donation).

The Secretary of State may by regulations provide (aa) for any provision of the Adoption and Children Act 2002 to have effect, with such modifications (if any) as may be specified in the regulations, in relation to orders under s 54, and applications for such orders, as it has effect in relation to adoption, and applications for adoption orders, and (bb) for references in any

enactment to adoption, an adopted child or an adoptive relationship to be read (respectively) as references to the effect of an order under s 54, a child to whom such an order applies and a relationship arising by virtue of the Adoption and Children Act 2002, as applied by the regulations, and for similar expressions in connection with adoption to be read accordingly: Human Fertilisation and Embryology Act 2008 s 55(1), (3). For the meaning of 'enactment' see Human Fertilisation and Embryology Act 2008 s 58(1). The regulations may include such incidental or supplemental provision as appears to the Secretary of State to be necessary or desirable in consequence of any provision made by virtue of head (aa) or (bb): s 55(2). In exercise of the power so conferred, the Secretary of State has made the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985. See also the Parental Orders (Prescribed Particulars and Forms of Entry) Regulations 2010, SI 2010/1205, reg 2.

## **UPDATE**

### **102-112 Parentage under the Human Fertilisation and Embryology Act 1990**

For provision as to parenthood in cases involving assisted reproduction see Human Fertilisation and Embryology Act 2008 Pt 2 (ss 33-58); and PARA 112A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/1. CHILDHOOD AND LEGAL RELATIONSHIPS/(3) LEGAL PARENTAGE/(v) Proof of Parentage by means of Scientific Evidence/113. Scientific tests for determining parentage.

## **(v) Proof of Parentage by means of Scientific Evidence**

### **113. Scientific tests for determining parentage.**

In proceedings in which the issue of parentage arises<sup>1</sup>, any evidence relevant to the issue may properly be led<sup>2</sup>. In practice, reliance has increasingly been placed on scientific evidence<sup>3</sup>, and Part III of the Family Law Reform Act 1969<sup>4</sup> contains provisions for the use of scientific tests<sup>5</sup> in determining paternity<sup>6</sup>.

In any civil proceedings<sup>7</sup> in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application<sup>8</sup> by any party to the proceedings, give a direction<sup>9</sup> (1) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person<sup>10</sup>; and (2) for the taking, within a period specified in the direction, of bodily samples<sup>11</sup> from all or any of the following, namely, that person, any party alleged to be his father or mother, and any other party to the proceedings; and the court may at any time revoke or vary such a direction previously given by it<sup>12</sup>. Tests required by such a direction<sup>13</sup> may only be carried out by a body which has been accredited for these purposes<sup>14</sup>.

The individual carrying out scientific tests in pursuance of such a direction<sup>15</sup> must make to the court a report<sup>16</sup> in which he must state: (a) the results of the tests; (b) whether any party to whom the report relates is or is not excluded<sup>17</sup> by the results from being the father or mother of the person whose parentage is to be determined; and (c) in relation to any party who is not so excluded, the value, if any, of the results in determining whether that party is the father or mother of that person; and the report must be received by the court as evidence in the proceedings of the matters stated in it<sup>18</sup>.

Where such a report has been made to the court, any party may, with the permission of the court, or must if the court so directs, obtain from the tester a written statement explaining or amplifying any statement made in the report, and that statement is deemed for certain purposes<sup>19</sup> to form part of the report made to the court<sup>20</sup>.

Where such a direction<sup>21</sup> is given in any proceedings, a party to the proceedings is not entitled to call as a witness the tester, or any other person by whom any thing necessary for the purpose of enabling those tests to be carried out was done (i) unless the court otherwise directs; or (ii) unless within 14 days after receiving a copy of the report he serves notice on the other parties to the proceedings, or on such of the parties as the court directs, of his intention to call the tester or that other person; and where the tester or any such person is called as a witness the party who called him is entitled to cross-examine him<sup>22</sup>.

The party on whose application such a direction<sup>23</sup> is given must pay the cost of taking and testing bodily samples for the purpose of giving effect to the direction, including any expenses reasonably incurred by any person in taking any steps required of him for the purpose, and of making a report to the court<sup>24</sup>, but the amount paid is treated as costs incurred by him in the proceedings<sup>25</sup>.

<sup>1</sup> The evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them at any period: Matrimonial Causes Act 1973 s 48(1). The Civil Evidence Act 1968 s 16(4) removed from the Matrimonial Causes Act 1965 s 43 (repealed) an exception in this regard to the

general rule of compellability of witnesses; that exception not having been reproduced in the Matrimonial Causes Act 1973, it is apprehended that the parties are compellable witnesses on this matter. As to the competence and compellability of witnesses see CIVIL PROCEDURE vol 11 (2009) PARAS 966, 969.

2 See eg *C v C and C (legitimacy: photographic evidence)* [1972] 3 All ER 577, [1972] 1 WLR 1335 (photographic evidence of family resemblance).

3 There was formerly a greater reliance on the common law presumption of legitimacy: see para 94 ante.

4 See the Family Law Reform Act 1969 Pt III (ss 20-25) (as amended); the text and notes 5-25 infra; and para 114 et seq post.

5 As originally enacted, the Family Law Reform Act 1969 s 20 provided for the use of blood tests to establish paternity; this was amended (as from 1 April 2001) to provide for the use of other scientific tests to take into account scientific developments (eg DNA testing). 'Blood tests' means blood tests carried out under the Family Law Reform Act 1969 Pt III (as amended), including any test made with the object of ascertaining the inheritable characteristics of blood: s 25 (definition as originally enacted). This definition has been replaced with a definition of 'bodily sample' by the Family Law Reform Act 1987 s 23(2)(a), as from 1 April 2001: see note 11 infra. 'Scientific tests' means scientific tests carried out under the Family Law Reform Act 1969 Pt III (as amended) and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue: s 25 (definition added by the Family Law Reform Act 1987 s 23(2)(b)).

6 See the text and notes 7-25 infra.

7 See eg *Re L* [1968] P 119, [1967] 2 All ER 1110 (affd [1968] P 119 at 144, [1968] 1 All ER 20, CA); *B (BR) v B (J)* [1968] P 466, sub nom *BRB v JB* [1968] 2 All ER 1023, CA; *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All ER 107, HL; *Re E (a minor) (parental responsibility)* [1994] 2 FCR 709, 1 FLR 392, CA.

8 As to the procedure on making an application see the Magistrates' Courts (Blood Tests) Rules 1971, SI 1971/1991, r 4 (amended by SI 2001/776; SI 2005/617).

9 As to the procedure on making a direction see the Magistrates' Courts (Blood Tests) Rules 1971, SI 1971/1991, rr 5-7, 9, 10 (amended by SI 2001/776; SI 2005/617). As to the court's discretion in making a direction see para 115 post.

10 Where a mother cast doubt on the paternity of the child and did not oppose the taking of blood tests, the court was entitled to grant the husband's application for an order for the taking of such tests, if it was in the child's best interests: *Re T (a minor) (blood tests)* [1992] 2 FCR 663, [1993] 1 FLR 901, CA; cf *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA.

11 'Bodily sample' means a sample of bodily fluid or bodily tissue taken for the purposes of scientific tests: Family Law Reform Act 1969 s 25 (definition added by the Family Law Reform Act 1987 s 23(2)(a)).

12 Family Law Reform Act 1969 s 20(1) (substituted by the Family Law Reform Act 1987 s 23(1)). The amendment made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: see Sch 3 para 1; Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777.

Where the proceedings in which the parentage of any person falls to be determined are proceedings on an application for a declaration of parentage, legitimacy or legitimation under the Family Law Act 1986 s 55A (as added) (see para 121 post) or s 56 (as substituted and amended) (see para 122 post), any reference in the Family Law Reform Act 1969 s 20(1) (as substituted) or s 20(2) (as substituted) (see the text and note 18 infra) to any party to the proceedings includes a reference to any person named in the application: s 20(2A) (added by the Family Law Reform Act 1987 s 23(1); and amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 para 9(b)).

It is apprehended that a direction may be made whether the child was born before or after the coming into force of the Family Law Reform Act 1987: *Hager v Osborne* [1992] Fam 94, [1992] 2 All ER 494. The fact that an application made under the Affiliation Proceedings Act 1957 (now repealed) was unsuccessful does not prevent the court from entertaining an application under the legislation now in force: *Hager v Osborne* supra.

13 Ie a direction under the Family Law Reform Act 1969 s 20 (as amended).

14 See *ibid* s 20(1A) (added by the Children Act 1989 s 89; and substituted by the Child Support, Pensions and Social Security Act 2000 s 82(1), (2)(a)). The amendments made by the Child Support, Pensions and Social Security Act 2000 did not have effect in relation to any proceedings which were pending on 1 April 2001: s 82(5); Child Support, Pensions and Social Security Act 2000 (Commencement No 7) Order 2001, SI 2001/774.

15 It is a direction under the Family Law Reform Act 1969 s 20(1) (as substituted and amended): see the text and note 12 *supra*. In *Re H (paternity: blood test)* [1996] 4 All ER 28 at 45, [1996] 2 FLR 65 at 83, CA, Ward LJ proposed the form of words for the direction as follows: 'It is directed pursuant to s 20(1) of the Family Law Reform Act 1969: (1) that blood tests (including DNA tests) be used to ascertain whether such tests show that [Mr A] is or is not excluded from being the father of [child B] born on [date]; and (2) that for that purpose blood samples be taken on or before [date] from the following persons: [Mr A], [Mrs C, mother of child B]] and [child B]; and (3) that the person appearing to the court to have care and control of [child B], who is under the age of 16, is [Mrs C]; and (4) that such tests be carried out by [Name of expert]'.

16 The report must be in the form prescribed by regulations made under the Family Law Reform Act 1969 s 22 (as amended) (see para 118 *post*): s 20(3). For the relevant form see the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 10, Sch 1 Form 2 (amended by SI 1989/776; SI 2001/773; SI 2005/617). See also the Magistrates' Courts (Blood Tests) Rules 1971, SI 1971/1991, rr 13, 14 (amended by SI 2001/776; SI 2005/617).

17 'Excluded' means excluded subject to: (1) the occurrence of mutation; (2) the Family Law Reform Act 1987 s 27 (see WILLS vol 50 (2005 Reissue) para 646); and (3) the Human Fertilisation and Embryology Act 1990 ss 27-29 (see paras 102-104 *ante*): Family Law Reform Act 1969 s 25 (definition amended by the Human Fertilisation and Embryology Act 1990 s 49, Sch 4 para 1). See also *S v S, W v Official Solicitor* [1972] AC 24 at 41, [1970] 3 All ER 107 at 109, HL, per Lord Reid.

18 Family Law Reform Act 1969 s 20(2) (substituted by the Family Law Reform Act 1987 s 23(1); and amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 para 9(a)). The amendments made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: see Sch 3 para 1; and the Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777. As to the procedure for sampling and testing see para 119 *post*.

19 It is for the purposes of the Family Law Reform Act 1969 s 20 (as amended), except s 20(3) (see note 16 *supra*).

20 *Ibid* s 20(4) (amended by the Child Support, Pensions and Social Security Act 2000 s 82(1), (2)(c)).

21 See note 13 *supra*.

22 Family Law Reform Act 1969 s 20(5) (amended by the Child Support, Pensions and Social Security Act 2000 s 82(1), (2)(d)).

23 See note 13 *supra*.

24 It is a report under the Family Law Reform Act 1969 s 20 (as amended).

25 *Ibid* s 20(6) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 21). As to the payment of fees for taking and testing samples see the Magistrates' Courts (Blood Tests) Rules 1971, SI 1971/1991, rr 8, 11, 12, 15 (all amended by SI 2001/776; SI 2005/617).

## UPDATE

### 113 Scientific tests for determining parentage

NOTE 5--As to the approach of the court when considering the procedure in relation to DNA testing, see *Re F (children) (DNA evidence)* [2007] EWHC 3235 (Fam), [2008] 1 FLR 348, [2008] All ER (D) 171 (Jan).

NOTE 16--SI 1971/1861 Sch 1 Form 2 further amended: SI 2008/972.

NOTE 17--Definition of 'excluded' in Family Law Reform Act 1969 s 25 further amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 13.

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#### **114. Consent to the taking of samples.**

A bodily sample<sup>1</sup> which is required to be taken from any person for the purpose of giving effect to a direction made by the court for the use of scientific tests<sup>2</sup> must not be taken from that person except with his consent<sup>3</sup>. The consent of a minor who has attained the age of 16 years to the taking from himself of a bodily sample is as effective as it would be if he were of full age, and where a minor has so given effective consent to the taking of a bodily sample, it is not necessary to obtain any consent for it from any other person<sup>4</sup>. A bodily sample may be taken from a person under the age of 16 years (not being a person suffering from a mental disorder<sup>5</sup> and incapable of understanding the nature of scientific tests) (1) if the person who has the care and control of him consents; or (2) where that person does not consent, if the court considers that it would be in the minor's best interests for the sample to be taken<sup>6</sup>.

The above provisions are without prejudice to the court's discretion to draw inferences from the failure to comply with a direction for scientific tests<sup>7</sup>.

1 For the meaning of 'bodily sample' see para 113 note 11 ante.

2 I.e. a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante. For the meaning of 'scientific tests' see para 113 note 5 ante.

3 Ibid s 21(1) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 22). This is expressed to be subject to the Family Law Reform Act 1969 s 21(3) (as amended) (see the text and notes 5-6 infra) and s 21(4) (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) para 613). The amendments made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: Sch 3 para 1; Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777.

4 Family Law Reform Act 1969 s 21(2) (amended by the Family Law Reform Act 1987 Sch 2 para 22). See note 3 supra.

5 I.e. a mental disorder within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) para 402.

6 Family Law Reform Act 1969 s 21(3) (amended by the Family Law Reform Act 1987 Sch 2 para 22; and the Child Support, Pensions and Social Security Act 2000 s 82(3)). See note 3 supra. The amendments made by the Child Support, Pensions and Social Security Act 2000 did not have effect in relation to any proceedings which were pending on 1 April 2001: s 82(5); Child Support, Pensions and Social Security Act 2000 (Commencement No 7) Order 2001, SI 2001/774. See also *Re R (a minor) (blood test: constraint)* [1998] 1 FCR 41, [1998] 1 FLR 745; *Re O (minor) (blood tests: constraint)*, *Re J (a minor)* [2000] Fam 139, sub nom *Re O (a child) (blood tests: constraint)*, *Re J (a child) (blood tests: constraint)* [2000] 2 All ER 29, [2000] 1 FCR 330. It is in the best interests of a child for a court to seek scientific certitude rather than presume the legitimacy of the child where it is born within marriage: *Re H and A (children)* [2002] EWCA Civ 383, [2002] 2 FCR 469. See also *Re D (paternity)* [2006] EWHC 3545 (Fam), [2007] 2 FLR 26 (testing stayed without limit of time due to 10-year-old's deep resistance to testing).

7 Family Law Reform Act 1969 s 21(5). The court's discretion referred to in the text is that under s 23 (as amended): see para 116 post.

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### 115. The court's discretion to make a direction for tests.

The court has a discretion as to whether or not to make a direction for carrying out scientific tests and taking bodily samples<sup>1</sup>. It appears that a court called upon to exercise that discretion should allow a test to be administered on a child unless satisfied that such a course would be against the child's interests<sup>2</sup>, although the child's welfare is not paramount when considering whether to make a direction for tests<sup>3</sup>. However, it will not be considered to be for the child's benefit to grant an application which is designed for some ulterior motive to call in question the legitimacy, otherwise unimpeached, of a child who had previously enjoyed a legitimate status<sup>4</sup>. Further, it would generally be unwise to subject a child who is able to understand the purpose and implications of such tests to the procedure against the child's will<sup>5</sup>. A test will not be directed merely to satisfy curiosity, if it would make no difference to the outcome of the proceedings<sup>6</sup>. Furthermore, although it is generally in the child's interests to know his true parentage, the court is entitled to consider the danger to the child's welfare of disrupting an established family unit by ordering a test as to the child's paternity<sup>7</sup>.

1 See the Family Law Reform Act 1969 s 20(1) (as substituted); and para 113 ante. A party's refusal to consent to undergo testing, the welfare of the child and the prospects of success in the proceedings in which the paternity issue has arisen are all factors to be taken into account in determining whether to exercise discretion under the Family Law Reform Act 1969 s 20(1) (as substituted): *Re H (a minor) (blood tests: parental rights)* [1997] Fam 89, [1996] 4 All ER 28, CA. An adverse inference may be drawn from the refusal to consent to tests: *Re CB (a minor) (blood tests)* [1994] 2 FCR 925, [1994] 2 FLR 762; cf *Re R (a minor) (blood tests: constraint)* [1998] 1 FCR 41, [1998] 1 FLR 745 (see para 114 ante). As to the inference which may be drawn see para 116 post.

Before the enactment of the Family Law Reform Act 1969 there was some difference of judicial opinion as to how this discretion should be exercised in cases where the question of submitting a child to blood testing (which might have the effect of bastardising him) arose: see *W v W* [1970] 1 All ER 1157, [1970] 1 WLR 682n, CA; *S v McC (formerly S) and M (S intervening)* [1970] 1 All ER 1162, [1970] 1 WLR 672, CA (affd sub nom *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All ER 107, HL).

2 *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All ER 107, HL. Where the mother of a child, who had been brought up as a child of the family, had had intercourse with her husband and another man at about the time of conception, but the relationship with the latter had ceased well before the birth, it was not in the child's best interests to put the presumption of legitimacy at risk, and the court would not, therefore, make a direction for blood tests to be carried out: *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA; followed in *Re CG (a minor) (blood tests)* [1994] 2 FCR 889, sub nom *Re G (a minor) (blood tests)* [1994] 1 FLR 495. See also *Re D (paternity)* [2006] EWHC 3545 (Fam), [2007] 2 FLR 26.

3 *Re H (a minor) (blood test: parental rights)* [1997] Fam 89 at 103-104, [1996] 4 All ER 28 at 40, CA, per Ward LJ.

4 *S v S, W v Official Solicitor* [1972] AC 24 at 47-48, [1970] 3 All ER 107 at 115, HL, per Lord MacDermott.

5 *S v S, W v Official Solicitor* [1972] AC 24 at 45, [1970] 3 All ER 107 at 113, HL, per Lord MacDermott; *Re JS (a minor)* [1981] Fam 22 at 30, [1980] 1 All ER 1061 at 1067, CA, per Ormrod LJ. See also *Re D (paternity)* [2006] EWHC 3545 (Fam), [2007] 2 FLR 26 (it was not in child's best interests to perform tests).

6 *Re JS (a minor)* [1981] Fam 22, [1980] 1 All ER 1061, CA; *Hodgkiss v Hodgkiss and Walker* [1984] FLR 563, 148 JP 417, CA; *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA.

7 *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA, where the court refused to give a direction for tests on the application of a third party whose sexual relationship with the mother had been concurrent with her husband's but had since ended, and who did not dispute the right of the mother



to have the child living with her. Where the parties' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) conflict, the best interests of the child are to be given particular consideration: *Re T (a child) (DNA tests: paternity)* [2001] 3 FCR 577, [2001] 2 FLR 1190 (child's right to know true parentage was weightiest consideration). See also *J v C* [2006] EWHC 2837 (Fam), [2007] 1 FCR 365, [2007] 1 FLR 1064 (no issue as to paternity between the parties, but court refused to give declaration of paternity to inform child of his true parentage due to negative impact it would have had on the child and the family: see para 121 post).

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### **116. Failure to comply with direction for tests.**

Where a court gives a direction for the use of tests to determine parentage<sup>1</sup> and any person fails to take any step required of him for the purpose of giving effect to that direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances<sup>2</sup>. Where in any proceedings in which the parentage of any person falls to be determined by the court hearing the proceedings there is a presumption of law that that person is legitimate<sup>3</sup>, then if (1) a direction<sup>4</sup> is given in those proceedings; and (2) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction, the court may adjourn the hearing for such a period as it thinks fit to enable that party to take that step<sup>5</sup>. If at the end of that period the party has failed without reasonable cause to take the step the court may, without prejudice to its discretion to draw inferences<sup>6</sup>, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption<sup>7</sup>.

Where any person named in a direction for the use of tests to determine parentage<sup>8</sup> fails to consent to the taking of a bodily sample<sup>9</sup> from himself or from any person named in the direction of whom he has the care and control, he is deemed for these purposes to have failed to take a step required of him for the purpose of giving effect to the direction<sup>10</sup>.

1    Ie a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

2    Ibid s 23(1). See generally *B v B and E (B intervening)* [1969] 3 All ER 1106, [1969] 1 WLR 1800, CA. The court should find proven forensically what the person, by his refusal, had prevented from being established scientifically: *Re G (a minor) (paternity: blood tests)* [1997] 2 FCR 325, sub nom *Re G (parentage: blood sample)* [1997] 1 FLR 360, CA. The court is entitled to draw the inference that a putative father is the father of a child by his refusal to submit to tests even where there exists a presumption that the child is the legitimate child of another man: *F v Child Support Agency* [1999] 2 FCR 385, [1999] 2 FLR 244 (refusal of putative father to undergo tests added weight to the mother's evidence that he was the father). See also *Secretary of State for Work and Pensions v Jones* [2003] EWHC 2163 (Fam), [2004] 1 FLR 282 (inference of paternity drawn in case where respondent refused to undergo DNA test after having affair with married woman). To avoid an adverse inference being drawn the putative father would have to advance very clear reasons, which it would be just and reasonable to allow him to maintain, for refusing to undergo tests: *Re GW (blood tests)* [1994] 2 FCR 908, sub nom *Re A (a minor) (paternity: refusal of blood test)* [1994] 2 FLR 463 at 473, CA, per Waite LJ. A failure to comply with the direction is 'other evidence' capable of corroborating a complainant's evidence: *McVeigh v Beattie* [1988] Fam 69, [1988] FCR 516.

3    As to the common law presumption of legitimacy see para 94 ante.

4    Ie a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

5    Ibid s 23(2) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 24). The amendments made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: see Sch 3 para 1; and the Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777.

6    Ie the discretion conferred by the Family Law Reform Act 1969 s 23(1): see the text and notes 1-2 supra.

7    Ibid s 23(2) (as amended: see note 5 supra).

8    See notes 4-5 supra.

9    For the meaning of 'bodily sample' see para 113 note 11 ante.

10 Family Law Reform Act 1969 s 23(3) (amended by the Family Law Reform Act 1987 Sch 2 para 24). See note 5 *supra*. See also *Re O (a minor) (blood tests: constraint)* [2000] Fam 139, sub nom *Re O, Re J (children) (blood tests: constraint)* [2000] 1 FCR 330.

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### **117. Personation.**

If for the purpose of providing a bodily sample<sup>1</sup> for a test required to give effect to a direction of the court for the use of tests to determine parentage<sup>2</sup> any person personates another, or proffers a child knowing that it is not the child named in the direction<sup>3</sup>, he is liable (1) on conviction on indictment to imprisonment<sup>4</sup>; or (2) on summary conviction to a fine<sup>5</sup>.

1 For the meaning of 'bodily sample' see para 113 note 11 ante.

2 Ie a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

3 Ibid s 24 (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 25). The amendments made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: see Sch 3 para 1; and the Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777.

4 Family Law Reform Act 1969 s 24(a). The term of imprisonment must not exceed two years: s 24(a).

5 Ibid s 24(b) (amended by Magistrates' Courts Act 1980 s 32(2)). The fine must not exceed the prescribed sum: Family Law Reform Act 1969 s 24(b) (as so amended). As to the prescribed sum see para 109 note 23 ante.

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**118. Power to provide for manner of giving effect to a direction for use of scientific tests.**

Regulations<sup>1</sup> may make provision as to the manner of giving effect to directions made by a court for the use of tests to determine parentage<sup>2</sup> and, in particular, any such regulations may<sup>3</sup>:

- 46 (1) provide that bodily samples<sup>4</sup> must not be taken except by registered medical practitioners or members of such professional bodies as may be prescribed by the regulations<sup>5</sup>;
- 47 (2) prescribe the bodily samples to be taken<sup>6</sup>;
- 48 (3) regulate the taking, identification and transport of bodily samples<sup>7</sup>;
- 49 (4) require the production at the time when a bodily sample is to be taken of such evidence of the identity of the person from whom it is to be taken as may be prescribed by the regulations<sup>8</sup>;
- 50 (5) require any person from whom a bodily sample is to be taken, or, in such cases as may be prescribed by the regulations, such other person as may be so prescribed, to state in writing whether he or the person from whom the sample is to be taken, as the case may be, has during such period as may be specified in the regulations suffered from any such illness or condition or undergone any such treatment as may be so specified or received a transfusion of blood<sup>9</sup>;
- 51 (6) prescribe conditions which a body must meet in order to be eligible for accreditation for the purposes of giving effect to a direction made by the court for the use of tests to determine parentage<sup>10</sup>;
- 52 (7) prescribe the scientific tests to be carried out and the manner in which they are to be carried out<sup>11</sup>;
- 53 (8) regulate the charges that may be made for the taking and testing of bodily samples and for the making of a report to a court concerning any tests which have been carried out in pursuance of a direction made by the court for the use of tests to determine parentage<sup>12</sup>;
- 54 (9) make provision for securing that so far as practicable the bodily samples to be tested for the purpose of giving effect to a direction made by the court for the use of tests to determine parentage are tested by the same person<sup>13</sup>;
- 55 (10) prescribe the form of the report to be made to a court for the purposes of giving effect to a direction made by the court for the use of tests to determine parentage<sup>14</sup>;
- 56 (11) make different provision for different cases or descriptions of case<sup>15</sup>.

The power to make regulations is exercisable by statutory instrument<sup>16</sup> which is subject to annulment in pursuance of a resolution of either House of Parliament<sup>17</sup>.

1 As to the regulations made see para 119 post.

2 I.e. directions under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

3 Ibid s 22(1) (amended by the Transfer of Functions (Magistrates' Courts and Family Law) Order 1992, SI 1992/709, art 3(2), Sch 2).

4 For the meaning of 'bodily sample' see para 113 note 11 ante.

5 Family Law Reform Act 1969 s 22(1)(a) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 23(1), (2); and the Child Support, Pensions and Social Security Act 2000 s 82(1), (4)(a)).

There are transitional savings with respect to the various amendments made to the Family Law Reform Act 1969 s 22 by the Family Law Reform Act 1987 and the Child Support, Pensions and Social Security Act 2000. The amendments made by the Family Law Reform Act 1987 did not have effect in relation to any application made under any enactment repealed or amended by the Family Law Reform Act 1987 if that application was pending on 1 April 2001: see Sch 3 para 1; and the Family Law Reform Act 1987 (Commencement No 3) Order 2001, SI 2001/777. The amendments made by the Child Support, Pensions and Social Security Act 2000 did not have effect in relation to any proceedings which were pending on 1 April 2001: see s 82(5); and the Child Support, Pensions and Social Security Act 2000 (Commencement No 7) Order 2001, SI 2001/774.

6 Family Law Reform Act 1969 s 22(1)(aa) (added by the Family Law Reform Act 1987 Sch 2 para 23(1), (3)). For savings see note 5 supra.

7 Family Law Reform Act 1969 s 22(1)(b) (amended by Family Law Reform Act 1987 Sch 2 para 23(1), (2)). For savings see note 5 supra.

8 Family Law Reform Act 1969 s 22(1)(c) (amended by the Family Law Reform Act 1987 Sch 2 para 23(1), (2)). For savings see note 5 supra.

9 Family Law Reform Act 1969 s 22(1)(d) (amended by the Family Law Reform Act 1987 Sch 2 para 23). For savings see note 5 supra.

10 Family Law Reform Act 1969 s 22(1)(e) (substituted by the Child Support, Pensions and Social Security Act 2000 s 82(1), (4)(b)). The direction referred to in the text is a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

11 Ibid s 22(1)(f) (amended by the Family Law Reform Act 1987 Sch 2 para 23(1), (2)). For savings see note 5 supra.

12 Family Law Reform Act 1969 s 22(1)(g) (amended by the Family Law Reform Act 1987 Sch 2 para 23(1), (2)). For savings see note 5 supra. The report referred to in the text is required under the Family Law Reform Act 1969 s 20(2) (as amended): see para 113 ante.

13 Ibid s 22(1)(h) (amended by the Family Law Reform Act 1987 Sch 2 para 23(1), (2)). For savings see note 5 supra. The direction referred to in the text is a direction under the Family Law Reform Act 1969 s 20 (as amended): see para 113 ante.

14 Ibid s 22(1)(i). For savings see note 5 supra. The direction referred to in the text is a direction under s 20 (as amended): see para 113 ante.

15 Ibid s 22(1)(j) (added by the Family Law Reform Act 1987 Sch 2 para 23(1), (5)). For savings see note 5 supra.

16 As to statutory instruments generally see STATUTES vol 44(1) (Reissue) para 1499 et seq.

17 Family Law Reform Act 1969 s 22(2). In exercise of these powers the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861 (as amended) have been made: see para 119 post.

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### **119. Procedure for sampling and testing.**

A sampler<sup>1</sup> may not take a sample<sup>2</sup> from a subject<sup>3</sup> unless Parts I and II of a direction form<sup>4</sup> have been completed, and the direction form purports to be signed by the proper officer of the court<sup>5</sup> or some person on his behalf<sup>6</sup>. Without prejudice to the provisions of rules of court, the sampler may make arrangements for the taking of samples from the subjects or may change any such arrangements already made and make other arrangements<sup>7</sup>.

Where a subject attends a sampler in accordance with arrangements made under a direction<sup>8</sup> the sampler must take a sample from him on that occasion<sup>9</sup> unless (1) in the case of a blood sample, the sampler has reason to believe that the subject has been transfused with blood within the three months immediately preceding the day on which the sample is to be taken<sup>10</sup>; (2) in the sampler's opinion tests on a sample taken at that time from the subject could not effectively be carried out for the purposes of and in accordance with the direction<sup>11</sup>; or (3) in the sampler's opinion the taking of a sample might have an adverse effect on the health of the subject<sup>12</sup>.

A subject who attends a sampler for the taking of a sample may be accompanied by a legal representative<sup>13</sup>. A subject who is under a disability<sup>14</sup> who attends a sampler for the taking of a sample must be accompanied by a person of full age, who must identify him to the sampler<sup>15</sup>. Where a sampler does not take a sample from a subject in accordance with arrangements made for the taking of that sample, and no other arrangements are made, the sampler must return the direction form relating to that subject to the court, having stated on the form his reason for not taking a sample and any reason given by the subject, or the person having the care and control of the subject, for any failure to attend in accordance with those arrangements<sup>16</sup>.

Before a sample is taken from any subject who has attained the age of 12 months by the date of the direction, the sampler must ensure that a photograph<sup>17</sup> of that subject is affixed to the direction form relating to that subject<sup>18</sup>. Before a sample is taken from a subject, he, or where he is under a disability, the person of full age accompanying him, must complete a declaration<sup>19</sup> that the subject is the subject to whom the direction form relates and, where a photograph is affixed to the direction form, that the photograph is a photograph of that subject, which must be signed in the presence of, and witnessed by, the sampler<sup>20</sup>. A sample must not be taken from any subject unless (a) he or, where he is under a disability, the person having the care and control of him, has signed a statement on the direction form that he consents to the sample being taken<sup>21</sup>; (b) where he is under a disability and is not accompanied by the person having the care and control of him, the sampler is in possession of a statement in writing, purporting to be signed by that person that he consents to the sample being taken<sup>22</sup>; or (c) where he is under the age of 16 years, and the person with care and control of him does not consent, the court has nevertheless ordered that a sample be taken<sup>23</sup>. If a subject or, where he is under a disability, the person having the care and control of him does not consent to the taking of a sample, he may record on the direction form his reasons for withholding his consent<sup>24</sup>.

When the sampler has taken a sample he must place it in a suitable container, and must affix to the container a label giving the full name, age and sex of the subject from whom it was taken and signed by the sampler<sup>25</sup>. The sampler must state on the direction form that he has taken the sample and the date on which he did so<sup>26</sup>. When a sampler has taken samples, he

must, where he is not himself the tester, pack the containers together with the relevant direction forms and despatch them forthwith to the tester by post by recorded delivery or deliver them or cause them to be delivered to the tester by some person other than a subject or a person who has accompanied a subject to the sampler<sup>27</sup>.

Samples taken for the purpose of giving effect to a direction must, so far as practicable, all be tested by the same tester<sup>28</sup>. A tester must not make tests on any samples for the purpose of a direction unless he will, in his opinion, be able to show from the results of those tests (whether alone or together with the results of tests on any samples which he has received and tested or expects to receive subsequently) that a subject is or is not excluded from being the father or mother of the person whose parentage falls to be determined<sup>29</sup>. On completion of the tests in compliance with the direction, the tester must forward to the court a report<sup>30</sup> together with the appropriate direction forms<sup>31</sup>. If at any time it appears to a tester that he will be unable to make tests in accordance with the direction, he must inform the court, giving his reasons, and return the direction forms in his possession to the court<sup>32</sup>.

1 'Sampler' means a registered medical practitioner, or a person who is under the supervision of such a practitioner and is either a registered nurse or a registered biomedical scientist, or a tester: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, regs 1, 2(1) (definition substituted by SI 2001/773; and amended by SI 2004/2033). For the meaning of 'registered medical practitioner' see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 4.

'Tester' means an individual employed to carry out tests by a body which has been accredited for the purposes of the Family Law Reform Act 1969 s 20 (as amended) (see para 113 ante) and which has been nominated in a direction to carry out tests: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1) (definition substituted by SI 2001/773). A body is not eligible for accreditation for the purposes of the Family Law Reform Act 1969 s 20 (as amended) unless it is accredited to ISO/IEC/17025 (General Requirements for the Competence of Testing and Calibration Laboratories) by an accreditation body which complies with the requirements of ISO Guide 58 (Calibration and Testing Laboratory Accreditation Systems - General Requirements in Operation and Recognition): Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 8A(1) (reg 8A added by SI 2001/773). However, a body which employed a person who, on 1 April 2001, was a tester appointed by the Lord Chancellor was, for three years after that date, eligible for accreditation for the purposes of the Family Law Reform Act 1969 s 20 (as amended) notwithstanding that it did not comply with the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 8A(1) (as added): reg 8A(2) (as so added).

'Direction' means a direction under the Family Law Reform Act 1969 s 20(1) (as substituted) (see para 113 ante): Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1). 'Direction form' means Form 1 set out in the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, Sch 1 (amended by SI 2001/773): Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1).

2 'Sample' means bodily fluid or bodily tissue taken for the purpose of scientific tests: *ibid* reg 2(1) (definition substituted by SI 2001/773). 'Tests' means scientific tests carried out under the Family Law Reform Act 1969 Pt III (ss 20-25) (as amended) (see para 113 et seq ante), including any test made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1) (definition amended by SI 2001/773).

3 'Subject' means a person from whom a court directs that bodily samples be taken: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1) (definition amended by SI 2001/773).

4 *Ie* Form 1 set out in the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, Sch 1 (amended by SI 2001/773): Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1). Parts I and II (both as amended) of the direction form are, respectively, the notification of direction and the request to the sampler to take a sample.

5 'Court' means a court which gives a direction for the use of scientific tests in pursuance of the Family Law Reform Act 1969 s 20(1) (as substituted) (see para 113 ante): Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(1) (definition amended by SI 2001/773).

6 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 3.

7 *Ibid* reg 5(1). As to the fee for the making of arrangements by the sampler see reg 12 (substituted by SI 2004/596).

8 For the meaning of 'direction' see note 1 *supra*.



9 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 5(2). This is expressed to be subject to the other provisions of the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861 (as amended).

10 Ibid reg 5(3)(i) (amended by SI 2001/773). See also the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, Sch 1 Form 1 Pt IV (amended by SI 2001/773). A sampler may take a sample from a subject who has been injected with a blood product or blood plasma if in the sampler's opinion the value of any tests done on that sample would not be affected as a result, but he must inform the tester that the subject was so injected: reg 5(4).

11 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 5(3)(ii).

12 Ibid reg 5(3)(iii).

13 Ibid reg 5(6).

14 I.e. a person who has not attained the age of 16 years or who is suffering from a mental disorder within the meaning of the Mental Health Act 1959 (repealed) (see now the Mental Health Act 1983 s 1(2), (3); and MENTAL HEALTH vol 30(2) (Reissue) para 402) and is incapable of understanding the nature and purpose of scientific tests: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 2(2) (amended by SI 2001/773).

15 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 4.

16 Ibid reg 5(5). See also Sch 1 Form 1 Pt VIII.

17 'Photograph' means a recent photograph, taken full face without a hat, of the size required for insertion in a passport: ibid reg 2(1).

18 Ibid reg 6(2) (amended by SI 2001/773). See also the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, Sch 1 Form 1 Pt III. The sampler must comply with all the requirements of reg 6 (as amended) in respect of one subject before any are complied with in respect of any other subject, so however that a report made in accordance with the Family Law Reform Act 1969 s 20(2) (as substituted) (see para 113 ante) or any other evidence relating to the samples or the tests made on the samples may not be challenged solely on the grounds that a sampler has not acted in accordance with the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6 (as amended): reg 6(1).

19 I.e. a declaration as set out in ibid Sch 1 Form 1 Pt V (amended by SI 2001/773).

20 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6(3). See note 18 supra.

21 Ibid reg 6(5)(a). See note 18 supra.

22 Ibid reg 6(5)(b). See note 18 supra. Any such statement must be affixed to the direction form by the sampler: reg 6(6). For the form of the statement see Sch 1 Form 1 Pt V (amended by SI 2001/773).

23 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6(5)(c) (added by SI 2001/773). See note 18 supra.

24 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6(7). See note 18 supra. See also Sch 1 Form 1 Pts V, VI (both amended by SI 2001/773).

25 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6(8) (amended by SI 2001/773). See note 18 supra.

26 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 6(9). See note 18 supra. Such a statement must be made on Sch 1 Form 1 Pt VII (as amended) of the declaration form: reg 6(9).

27 Ibid reg 7(1) (amended by SI 2001/773). If at any time a sampler despatches to a tester samples from some only of the subjects and has not previously despatched samples taken from the other subjects, he must inform the tester whether he is expecting to take any samples from those other subjects and, if so, from whom and on what date: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 7(2).

28 Ibid reg 9(1). Where a sampler is unable himself to take samples from all or any of the subjects, he may nominate another sampler to take the samples which he is unable to take: reg 8(1) (amended by SI 2001/773). The sampler must record such nomination on the relevant direction forms and must forward them to the sampler nominated by him: Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 8(2).

29 Ibid reg 9(2) (amended by SI 2001/773).

30 As to the content of the report see the Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, Sch 1 Form 2 (substituted by SI 1989/776; and amended by SI 2001/773; SI 2005/617).

31 Blood Tests (Evidence of Paternity) Regulations 1971, SI 1971/1861, reg 10.

32 Ibid reg 11.

## **UPDATE**

### **119 Procedure for sampling and testing**

NOTES--SI 1971/1861 Sch 1 Form I Pts I, III, IV, V, VI, and Form 2 further amended: SI 2008/972.

NOTE 1--SI 1971/1861 reg 8A(1) substituted: SI 2008/972.

NOTE 7--SI 1971/1861 reg 12 amended: SI 2008/972.

NOTE 14--SI 1971/1861 reg 2(2) revoked: SI 2008/972.

TEXT AND NOTE 15--SI 1971/1861 reg 4 amended: SI 2008/972.

TEXT AND NOTES 18-25--SI 1971/1861 reg 6(2) substituted, reg 6(3), (5), (7), (8) amended: SI 2008/972.

TEXT AND NOTE 27--SI 1971/1861 reg 7(1) further amended: SI 2008/972.

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## **(vi) Procedures for Judicial Determination of Parentage**

### **120. In general.**

In many cases, the issue of parentage will arise in the course of proceedings and will be dealt with, sometimes as a separate issue, in those proceedings. In particular, if jurisdiction is dependent on the applicant's being able to establish that he is the child's parent, that issue must be decided first, since the court will have no jurisdiction to make an order unless and until parentage has been established<sup>1</sup>.

<sup>1</sup> *Re O (a minor: access)* [1985] FLR 716, [1985] Fam Law 135, CA; *Re W (a minor) (interim custody)* [1990] FCR 540, [1990] 2 FLR 86, CA. The jurisdiction in wardship is not limited in this way: see *A v B and Hereford and Worcester County Council* [1986] 1 FLR 289, [1986] Fam Law 133.

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## 121. Declarations of parentage.

Any person may apply to the High Court, a county court or a magistrates' court for a declaration as to whether or not a person named in the application is or was the parent of another person so named<sup>1</sup>. A court has jurisdiction to entertain such an application only if either of the persons so named in it:

- 57 (1) is domiciled<sup>2</sup> in England and Wales on the date of the application<sup>3</sup>; or
- 58 (2) has been habitually resident<sup>4</sup> in England and Wales throughout the period of one year ending with that date<sup>5</sup>; or
- 59 (3) died before that date and either (a) was at death domiciled in England and Wales<sup>6</sup>; or (b) had been habitually resident in England and Wales throughout the period of one year ending with the date of death<sup>7</sup>.

Except in cases where the declaration sought is as to whether or not (i) the applicant is the parent of a named person; (ii) a named person is the parent of the applicant; or (iii) a named person is the other parent of a named child of the applicant<sup>8</sup>, the court must refuse to hear an application unless it considers that the applicant has a sufficient personal interest in the determination of it<sup>9</sup>. Where an application for a declaration of parentage is made and one of the persons named in it is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child<sup>10</sup>. Where the court refuses to hear an application it may order that the applicant may not apply again for the same declaration without leave of the court<sup>11</sup>.

Where a declaration of parentage is made by a court on an application, the prescribed officer of the court must notify the Registrar General, in such a manner and within such period as may be prescribed<sup>12</sup>, of the making of that declaration<sup>13</sup>.

An appeal lies to the High Court against:

- 60 (A) the making by a magistrates' court of a declaration of parentage<sup>14</sup>;
- 61 (B) any refusal by a magistrates' court to make such a declaration; or
- 62 (C) any order<sup>15</sup> that the applicant may not apply again for the same declaration without leave of the court<sup>16</sup>.

1 Family Law Act 1986 s 55A(1) (s 55A added by the Child Support, Pensions and Social Security Act 2000 s 83(1), (2)). This is expressed to be subject to the remaining provisions of the Family Law Act 1986 s 55A (as added). See *J v C* [2006] EWHC 2837 (Fam), [2007] 1 FCR 365, [2007] 1 FLR 1064 (declaration refused due to negative impact it would have had on the family). See also *M v W (declaration of parentage)* [2006] EWHC 2341 (Fam), [2006] Fam Law 397 (petitioner, who was placed for adoption shortly after birth, successfully petitioned for declaration that a deceased man was his true father). No such declaration may be made otherwise than under Pt III (ss 55-63) (as amended) by any court: s 58(4). An application for a declaration of parentage must be made in Form FL 423, and the declaration itself in Form FL 424: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3B(1), (13) (r 3B added by SI 2001/778). See further the Family Proceedings Rules 1991, SI 1991/1247, r 3.21 (added by SI 1993/295). Other than in respect of proceedings commenced before 1 April 2001 a petition by which proceedings are begun under the Family Law Act 1986 s 55A (as added) must contain the statements specified in the Family Proceedings Rules 1991, SI 1991/1247, r 3.13(1)-(3) (r 3.13 substituted by SI 2001/821): see the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 5. As to the court's discretion to grant a specific issue order to inform children of their true

parentage: see *Re F (children) (declaration of paternity)* (2007) Times, 6 August, [2007] All ER (D) 389 (Jul), CA; note 10 infra; and para 263 post.

Prior to 1 April 2001 a person could apply to the High Court or a county court for a declaration that a person named in the application is or was his parent: see the Family Law Act 1986 ss 56(1)(a), 63 (s 56 substituted by the Family Law Reform Act 1987 s 22). Both provisions were repealed as from 1 April 2001 by the Child Support, Pensions and Social Security Act 2000 s 85, Sch 9 Pt IX, but not so as to affect any proceedings pursuant to such an application which were pending immediately before that date: s 83(6); Child Support, Pensions and Social Security Act 2000 (Commencement No 7) Order 2001, SI 2001/774.

For general provisions as to the making and effect of declarations of status see paras 123-124 post.

2 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq.

3 Family Law Act 1986 s 55A(2)(a) (as added: see note 1 supra).

4 As to habitual residence see CONFLICT OF LAWS vol 8(3) (Reissue) para 59.

5 Family Law Act 1986 s 55A(2)(b) (as added: see note 1 supra).

6 Ibid s 55A(2)(c)(i) (as added: see note 1 supra).

7 Ibid s 55A(2)(c)(ii) (as added: see note 1 supra).

8 Ibid s 55A(4) (as added: see note 1 supra).

9 Ibid s 55A(3) (as added: see note 1 supra). This is expressed to be subject to the Child Support Act 1991 s 27 (as substituted) (see para 553 post).

10 Family Law Act 1986 s 55A(5) (as added: see note 1 supra). See *J v C* [2006] EWHC 2837 (Fam), [2007] 1 FCR 365, [2007] 1 FLR 1064. The family justice system is entitled to take responsibility for deciding whether a child should be told of his paternity, in the event of adult dispute: see *Re F (children) (declaration of paternity)* (2007) Times, 6 August, [2007] All ER (D) 389 (Jul), CA (sometimes it is appropriate to exercise discretion so that the child does not find out his true paternity and sometimes it is appropriate to tell the truth).

11 Family Law Act 1986 s 55A(6) (as added: see note 1 supra).

12 The Family Proceedings Rules 1991, SI 1991/1247, rr 3.13(4), (5) (r 3.13 substituted by SI 2001/821; and the Family Proceedings Rules 1991, SI 1991/1247, r 13.4 further substituted by SI 2003/184) provide that, other than in respect of proceedings commenced before 1 April 2001 (see the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 5), the prescribed officer for the purposes of the Family Law Act 1986 s 55A(7) (as added) is the family proceedings department manager of the principal registry, and that that officer must, within 21 days after a declaration of parentage has been made, send to the Registrar General a copy of the declaration in Form M30 and of the petition. The Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3B(14) (added by SI 2001/778) provides that, in respect of proceedings begun on or after 1 April 2001 (see the Family Proceedings Courts (Family Law Act 1986) Rules 2001, SI 2001/778, r 2), the prescribed officer for the purposes of the Family Law Act 1986 s 55A(7) (as added) is the justices' chief executive, and that that officer must, within 21 days after a declaration of parentage has been made, send to the Registrar General a copy of the declaration and of the application.

13 Family Law Act 1986 s 55A(7) (as added: see note 1 supra). Where, in the case of a person whose birth has been registered in England and Wales (1) the Registrar General receives, by virtue of s 55A(7) (as added), a notification of the making of a declaration of parentage in respect of that person; and (2) it appears to him that the birth of that person should be re-registered, he must authorise the re-registration of that person's birth, and the re-registration must be effected in such manner and at such place as may be prescribed: Births and Deaths Registration Act 1953 s 14A(1) (added by the Family Law Reform Act 1987 s 26, Sch 3 para 1; and amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 para 1). See further REGISTRATION CONCERNING THE INDIVIDUAL.

14 I.e a declaration under the Family Law Act 1986 s 55A (as added): see the text and notes 1-13 supra.

15 I.e any order under ibid s 55A(6) (as added) made on a refusal to make a declaration: see the text and note 11 supra.

16 See ibid s 60(5) (added by the Child Support, Pensions and Social Security Act 2000 s 83(1), (4)).

## UPDATE

## **121 Declarations of parentage**

NOTES 1, 10--*Re F (children)* cited, reported at [2007] EWCA Civ 873, [2008] 1 FCR 382.

NOTE 1--SI 1991/1247 r 3.13(1) further amended: SI 2009/636.

NOTE 10--See *Re L (identity of birth father)* [2008] EWCA Civ 1388, [2009] 1 FLR 1152, [2009] All ER (D) 45 (Jan) (appeal by mother against order to inform her son, who suffered from attention deficit hyperactivity disorder, of true identity of his birth father; evidence from child's psychiatrist required).

TEXT AND NOTES 14-16--Reference to the High Court is now to a county court: Family Law Act 1986 Act s 60(5) (amended by SI 2009/871).

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## **122. Declarations of legitimacy or legitimation.**

Any person may apply to the High Court or a county court for a declaration that he is the legitimate child of his parents<sup>1</sup>. Any person may also apply to the High Court or a county court for one or, in the alternative, the other, of the following declarations: (1) a declaration that he has become a legitimated person; (2) a declaration that he has not become a legitimated person<sup>2</sup>. A court has jurisdiction to entertain an application for a declaration if the applicant (a) is domiciled<sup>3</sup> in England and Wales on the date of the application; or (b) has been habitually resident<sup>4</sup> in England and Wales throughout the period of one year ending with that date<sup>5</sup>. Where a declaration is made by a court on an application, the prescribed officer<sup>6</sup> of the court must notify the Registrar General, in such a manner and within such period as may be prescribed<sup>7</sup>, of the making of that declaration<sup>8</sup>.

1 Family Law Act 1986 s 56(1) (s 56 substituted by the Family Law Reform Act 1987 s 22; and the Family Law Act 1986 s 56(1) amended by the Child Support, Pensions and Social Security Act 2000 ss 83(5), 85, Sch 8 paras 3, 5(a), Sch 9 Pt IX). No such declaration may be made otherwise than under the Family Law Act 1986 Pt III (ss 55-63) (as amended) by any court: s 58(4). A petition by which proceedings are begun under s 56(1) (as amended) must contain the statements and particulars specified in the Family Proceedings Rules 1991, SI 1991/1247, r 3.14.

2 Family Law Act 1986 s 56(2) (as substituted (see note 1 supra); and amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 5(a)). For the purposes of the Family Law Act 1986 s 56 (as substituted and amended), 'legitimated person' means a person legitimated or recognised as legitimated (1) under the Legitimacy Act 1976 ss 2, 3; (2) under the Legitimacy Act 1926 ss 1, 8 (see para 125 et seq post); or (3) by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and Wales and effected under the law of another country: Family Law Act 1986 s 56(5) (as so substituted). A petition by which proceedings are begun under s 56(2) (as substituted and amended) must contain the statements and particulars specified in the Family Proceedings Rules 1991, SI 1991/1247, r 3.14. As to legitimation and legitimacy generally see para 125 et seq post.

For general provisions as to the making and effect of declarations of status see paras 123-124 post.

3 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq.

4 As to habitual residence see CONFLICT OF LAWS vol 8(3) (Reissue) para 59.

5 Family Law Act 1986 s 56(3) (as substituted: see note 1 supra).

6 In respect of proceedings commenced before 1 April 2001 the prescribed officer for the purposes of ibid s 56(4) (as substituted) is the family proceedings department manager of the principal registry: Family Proceedings Rules 1991, SI 1991/1247, r 3.13(4) (r 3.13 substituted by SI 2001/821; and the Family Proceedings Rules 1991, SI 1991/1247, r 13.4 further substituted by SI 2003/184); Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 5.

7 Declarations made in accordance with the Family Law Act 1986 s 56(1)(b), (2) must be in the form prescribed in Form M31: Family Proceedings Rules 1991, SI 1991/1247, r 3.16(11).

8 Family Law Act 1986 s 56(4) (as substituted: see note 1 supra; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 5(b)). This amendment does not affect any proceedings pursuant to an application under the Family Law Act 1986 s 56(1)(a) which were pending immediately before that date: s 83(6); Child Support, Pensions and Social Security Act 2000 (Commencement No 7) Order 2001, SI 2001/774.

## **UPDATE**

## **122 Declarations of legitimacy or legitimation**

NOTES 1, 2--SI 1991/1247 r 3.14 amended: SI 2009/2027.

NOTE 2--Family Law Act 1986 s 56(5) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 23.



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### **123. The making and effect of declarations of status.**

The court hearing an application for a declaration of parentage<sup>1</sup>, legitimacy or legitimation<sup>2</sup> may direct that the whole or any part of the proceedings are to be heard in private, and an application for such a direction must be heard in private unless the court otherwise directs<sup>3</sup>.

Any such declaration made, and any application for such a declaration, must be in the form prescribed by rules of court<sup>4</sup>, which may make provision:

- 63 (1) as to the information required to be given by any applicant for a declaration of parentage or legitimacy;
- 64 (2) as to the persons who are to be parties to proceedings on such an application; and
- 65 (3) requiring notice of such an application to be served on the Attorney-General and on persons who may be affected by any declaration applied for<sup>5</sup>.

No proceedings relating to declarations of status<sup>6</sup> affect any final judgment or decree already pronounced or made by any court of competent jurisdiction<sup>7</sup>.

Where on an application to a court for such a declaration<sup>8</sup>, the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy<sup>9</sup>. Any such declaration made is binding on Her Majesty and all other persons<sup>10</sup>.

On the dismissal of an application for such a declaration, a court does not have any power to make any declaration for which an application has not been made<sup>11</sup>.

1    Ie an application for a declaration of parentage under the Family Law Act 1986 s 55A (as added): see para 121 ante.

2    Ie an application for a declaration of legitimacy or legitimation under *ibid* s 56 (as substituted and amended): see para 122 ante.

3    *Ibid* s 60(4).

4    *Ibid* s 60(1).

5    *Ibid* s 60(2) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 96). As to the rules which have been made under the Family Law Act 1986 s 60 (as amended) for the procedure governing applications for declarations of parentage, legitimacy or legitimation under Pt III (ss 55-63) (as amended) see the Family Proceedings Rules 1991, SI 1991/1247, rr 3.13 (substituted by SI 2001/821; and amended by SI 2003/184; SI 2005/2922); and the Family Proceedings Rules 1991, SI 1991/1247, rr 3.14, 3.16 (amended by SI 2001/821; SI 2005/2922).

6    Ie proceedings under the Family Law Act 1986 Pt III (as amended): see paras 121-122 ante.

7    *Ibid* s 60(3).

8    Ie under *ibid* Pt III (as amended): see paras 121-122 ante.

9    *Ibid* s 58(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 7(a)). As to public policy in this context see *Puttick v A-G* [1980] Fam 1, [1979] 3 All ER 463.

10 Family Law Act 1986 s 58(2). As to the effect of a declaration under previous legislation see *Amphill Peerage Case* [1977] AC 547, [1977] 2 All ER 411, HL.

11 Family Law Act 1986 s 58(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 7(b)).

## **UPDATE**

### **123 The making and effect of declarations of status**

NOTE 5--SI 1991/1247 r 3.13 further amended: SI 2009/636.

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#### **124. Intervention by the Attorney General.**

On an application to a court for a declaration of parentage<sup>1</sup>, legitimacy or legitimation<sup>2</sup>, the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney General<sup>3</sup>. The Attorney General, whether or not he is sent papers in relation to an application to a court for such a declaration, may intervene in the proceedings on that application in such manner as he thinks necessary or expedient, and may argue before the court any question in relation to the application which the court considers it necessary to have fully argued<sup>4</sup>.

<sup>1</sup> Ie an application for a declaration of parentage under the Family Law Act 1986 s 55A (as added): see para 121 ante.

<sup>2</sup> Ie an application for a declaration of legitimacy or legitimation under *ibid* s 56 (as substituted and amended): see para 122 ante.

<sup>3</sup> *Ibid* s 59(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 8(a)). As to the Attorney General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 529 et seq.

<sup>4</sup> Family Law Act 1986 s 59(2) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 8(a)). Where any costs are incurred by the Attorney General in connection with any application to a court for such a declaration, the court may make such order as it considers just as to the payment of those costs by parties to the proceedings: Family Law Act 1986 s 59(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 8(b)).

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## (4) THE STATUS OF CHILDREN

### 125. Legitimacy, illegitimacy, etc.

The Family Law Reform Act 1987<sup>1</sup> provides that in that Act and in enactments passed and instruments made after 4 April 1988<sup>2</sup> references (however expressed) to any relationship between two persons are to be construed, unless the contrary intention appears, without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time<sup>3</sup>.

The Family Law Reform Act 1987 also provides that in that Act and in enactments passed after 4 April 1988, unless the contrary intention appears, references to a person whose father and mother were married to each other at the time of his birth<sup>4</sup> include<sup>5</sup> references<sup>6</sup> to any person who is<sup>7</sup>:

- 66 (1) treated as legitimate by virtue of the Legitimacy Act 1976<sup>8</sup>;
- 67 (2) a legitimated person<sup>9</sup> within the meaning of the Legitimacy Act 1976<sup>10</sup>;
- 68 (3) an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002<sup>11</sup>; or
- 69 (4) a person who is otherwise treated in law as legitimate<sup>12</sup>.

The Family Law Reform Act 1987 did not remove distinctions between the legitimate and the illegitimate in a number of areas<sup>13</sup>, notably in relation to entitlement to British citizenship<sup>14</sup>, and succession to the throne of the United Kingdom<sup>15</sup>. Moreover, that Act does not seek to inhibit Parliament from enacting legislation which treats those whose parents were married differently from those whose parents were not<sup>16</sup>.

1 The Family Law Reform Act 1987 is the latest in a series of statutes removing the legal disadvantages of illegitimacy so far as the child was concerned, and giving effect to recommendations made by the Law Commission in its *Reports on Illegitimacy* (Law Com no 118 (1982); Law Com no 157 (1986)). The Family Law Reform Act 1987 reverses the common law rule that a child was legitimate if, and only if, he was either born or conceived at a time when his parents were validly married to one another: see *Birtwhistle v Vardill* (1840) 7 Cl & Fin 895, HL. The common law did not accept the doctrine of legitimation by subsequent marriage; thus if the child's father was domiciled both at the time of the child's birth and at the time of the subsequent marriage in a country whose law recognised legitimation, English law would recognise the status thereby conferred (see *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA), but a person legitimated in this way could not inherit English land (see *Birtwhistle v Vardill* supra; *Re Don's Estate* (1857) 27 LJCh 98; *Re Hurl, Angelini v Dick* [1952] Ch 722, [1952] 2 All ER 322; cf *Bamgbose v Daniel* [1955] AC 107, [1954] 3 All ER 263, PC). Illegitimacy involved many legal disadvantages at common law (see the survey in the Law Commission's *Report on Illegitimacy* (Law Com no 118 (1982)), and the general rule of construction was that in the absence of a contrary intention, express or implied, all statutory provisions in respect of children referred exclusively to legitimate children: *R v Wyke* (1746) Burr SC 264 at 265; *R v Maude* (1842) 6 Jur 646; *R v Totley Inhabitants* (1845) 7 QB 596 at 598 per Lord Denman CJ; *R v Birmingham Inhabitants* (1846) 8 QB 410 at 426 per Lord Denman CJ; *Dickinson v North Eastern Rly Co* (1863) 2 H & C 735 at 736 per Pollock CB; *Re Makein, Makein v Makein* [1955] Ch 194, [1955] 1 All ER 57 (a decision under the statutory provisions as to intestate succession); *Re M (an infant)* [1955] 2 QB 479, [1955] 2 All ER 911, CA.

2 The date of the coming into force of the Family Law Reform Act 1987 s 1: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425. The Family Law Reform Act 1987 is only prospective in effect but made many amendments to the law in force before 4 April 1988 in order to minimise the distinctions between children which depended on legitimacy, and much of that legislation has now been

subsumed in the provisions of the Children Act 1989. In particular, the Family Law Reform Act 1987 amends the Administration of Estates Act 1925 and the Trustee Act 1925 in order to give effect to the policy that the marriage of two people is generally irrelevant in determining their relationships with their children.

3 Family Law Reform Act 1987 s 1(1). In particular, the Children Act 1989 provides that references in that Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with the Family Law Reform Act 1987 s 1 (which extends their meaning): see the Children Act 1989 s 2(3). Hence, in *Re C (minors)* [1994] Fam 1, sub nom *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505, CA, it was held that the word 'parent' in the Children Act 1989 extended to the father of an illegitimate child (but note also *J v J (Property Transfer Application)* [1993] 1 FCR 471, [1993] 2 FLR 56). For the meaning of 'child' see para 3 ante.

4 For this purpose, the time of a person's birth is taken to include any time during the period beginning with: (1) the insemination resulting in his birth; or (2) where there was no such insemination, his conception, and (in either case) ending with his birth: Family Law Reform Act 1987 s 1(4).

5 Ibid s 1(3) (see the text to notes 8-12 infra) does not include references to a person whose father and mother were not married to each other at the time of his birth: s 1(2)(b).

6 Cognate references are to be construed accordingly: ibid s 1(2).

7 Ibid s 1(2). It appears to have been the draughtsman's intention that persons who were legitimate, or entitled to be treated as legitimate, under the law previously in force must be treated as persons whose 'father and mother were married to each other at the time of his birth' even though this was not in fact the case.

8 Ibid s 1(3)(a). The relevant provision of the Legitimacy Act 1976 is s 1 (as amended): see para 127 post.

9 'Legitimated person' means a person legitimated or recognised as legitimated: (1) under ibid s 2 or s 3; or (2) under the Legitimacy Act 1926 s 1 or s 8 (both repealed); or (3) except in the Legitimacy Act 1976 s 8 (see para 126 post), by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and Wales and effected under the law of any other country: s 10(1). Cognate expressions are to be construed accordingly: s 10(1). For the purposes of the Legitimacy Act 1976, 'legitimated person' includes, where the context admits, a person legitimated, or recognised as legitimated, before the passing of the Children Act 1975: Legitimacy Act 1976 s 10(2).

10 Family Law Reform Act 1987 s 1(3)(b). The relevant provision of the Legitimacy Act 1976 is s 10: see para 128 post.

11 Family Law Reform Act 1987 s 1(3)(c) (substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 50, 51). See paras 129, 375-381 post.

12 Family Law Reform Act 1987 s 1(3)(d). See also para 130 post.

13 Provision may be made by order for the construction in accordance with the provisions of the Family Law Reform Act 1987 s 1 (as amended) of such enactments passed before 4 April 1988 (see note 2 supra) as may be specified in the order; and such an order must so amend the enactments to which it relates as to secure that, so far as practicable, they continue to have the same effect notwithstanding the making of the order: s 30(1), (2). An order under s 30 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 30(3).

14 See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 16 et seq.

15 Succession to the throne is governed by the Act of Settlement 1700: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 36; CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 9.

16 See eg the distinction drawn by the Children Act 1989 s 2(2) (as amended) in relation to parental responsibility for a child: see para 138 post.

## UPDATE

### 125 Legitimacy, illegitimacy, etc

TEXT AND NOTES 3-12--Family Law Reform Act 1987 s 1(3) further amended, s 1(5)-(8) added to make provision for civil partnerships: Human Fertilisation and Embryology Act 2008 Sch 6 para 24.

NOTE 9--Definition of 'legitimated person' amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 19.

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**126. Rights and obligations of legitimated persons.**

A legitimated person<sup>1</sup> has the same rights, and is under the same obligations in respect of the maintenance and support of himself or of any other person, as if he had been born legitimate<sup>2</sup>.

1 For the meaning of 'legitimated person' see para 125 note 9 ante. Note that the definition there given is qualified for this purpose.

2 Legitimacy Act 1976 s 8. Subject to the provisions of that Act, the provisions of any Act relating to claims for damages, compensation, allowance, benefit or otherwise by or in respect of a legitimate child apply in like manner in the case of a legitimated person: s 8.

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### **127. Persons treated as legitimate under the Legitimacy Act 1976.**

The child of a void marriage<sup>1</sup>, whenever born<sup>2</sup>, is to be treated as the legitimate child of his parents if at the time of: (1) the insemination resulting in the birth; (2) where there was no such insemination, the child's conception or; (3) if later, the celebration of the marriage, both or either of the parties reasonably believed that the marriage was valid<sup>3</sup>. This provision applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law<sup>4</sup>. Moreover, in relation to a child born after 4 April 1988<sup>5</sup> it is presumed, unless the contrary is shown, that one of the parties to the void marriage reasonably believed at the time mentioned in head (1), head (2) or head (3) above that the marriage was valid<sup>6</sup>.

The above provisions<sup>7</sup> only apply where the father of the child was domiciled in England or Wales at the time of the birth or, if he died before the birth, was so domiciled immediately before his death<sup>8</sup>.

A person treated as legitimate by virtue of the above provisions<sup>9</sup> is included in any statutory reference after 4 April 1988<sup>10</sup> to a person whose father and mother were married at the time of his birth<sup>11</sup>.

1 'Void marriage' means a marriage, not being voidable only, in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have or would have had such jurisdiction if the parties were domiciled in England or Wales: Legitimacy Act 1976 s 10(1). This expression applies only to a person whose parents had entered into the void marriage before the date of his birth; and it does not apply to a person whose parents only entered into the void marriage after he had been born (notwithstanding the fact that, had the marriage been valid, it would have legitimated him under s 2 or s 3 or otherwise): *Re Spence, Spence v Dennis* [1990] Ch 652, [1990] 2 All ER 827, CA. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

2 These words denote that the provisions of the Legitimacy Act 1976 are to have retrospective effect as regards children born after a void marriage had taken place rather than applying to all children of a void marriage regardless of whether they were born before or after the void marriage: *Re Spence, Spence v Dennis* [1990] Ch 652, [1990] 2 All ER 827, CA.

3 Legitimacy Act 1976 s 1(1) (amended by the Family Law Reform Act 1987 s 28(1), Sch 3 para 1).

4 Legitimacy Act 1976 s 1(3) (added by the Family Law Reform Act 1987 Sch 3 para 1). See *Hawkins v A-G* [1966] 1 All ER 392, [1966] 1 WLR 978.

5 I.e. the date on which the Family Law Reform Act 1987 Sch 3 came into force: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

6 Legitimacy Act 1976 s 1(4) (added by the Family Law Reform Act 1987 Sch 3 para 1).

7 I.e. the Legitimacy Act 1976 s 1 (as amended): see the text and notes 3-6 supra.

8 Ibid s 1(2). As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq.

9 See note 7 supra.

10 See note 5 supra.

11 See the Family Law Reform Act 1987 s 1(2), (3)(a); and para 125 ante.



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## 128. Persons who are legitimated persons under the Legitimacy Act 1976.

Where the parents of an illegitimate person marry one another then, if the father of the illegitimate person is at the date of the marriage domiciled in England or Wales, the marriage renders that person, if living, legitimate from the date of the marriage<sup>1</sup>. Similarly<sup>2</sup>, where the parents of an illegitimate person marry one another and the father is not at the time of the marriage domiciled in England or Wales but is domiciled in a country by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, must in England and Wales be recognised as having been so legitimated from the date of the marriage notwithstanding that, at the time of his birth, his father was domiciled in a country the law of which did not permit legitimation by subsequent marriage<sup>3</sup>.

A person legitimated or recognised as legitimated under the provisions of the Legitimacy Act 1926<sup>4</sup> is a legitimated person for the purposes of the Legitimacy Act 1976<sup>5</sup>. A person legitimated or recognised as legitimated by a legitimation (whether or not by virtue of the subsequent marriage of his parents<sup>6</sup>) recognised by the law of England and Wales and effected under the law of any other country, is also a legitimated person for the purposes of that Act<sup>7</sup>.

Where the parents of an illegitimate child marry or have married one another and the father was or is, at the time of the marriage and at the time of the birth of the illegitimate person, domiciled in a country other than England and Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, the illegitimate person is recognised in English law, by international comity, as legitimate<sup>8</sup>.

A person who is a legitimated person by virtue of any of the above provisions is included in any statutory reference after 4 April 1988<sup>9</sup> to a person whose father and mother were married at the time of his birth<sup>10</sup>.

1 Legitimacy Act 1976 s 2. Section 2 takes effect subject to the provisions of ss 3-12 (ss 4, 6, 9, 10 as amended), Sch 1 (as amended), Sch 2: see paras 129-132 post. In particular, s 11, Sch 1 (as amended) embodies a number of savings, and ss 5, 6 (as amended) (see WILLS vol 50 (2005 Reissue) para 645) contain provisions relating to the rights of legitimated persons and others to take interests in property. A person legitimated under s 2 is a legitimated person for the purposes of the Legitimacy Act 1976. As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq. As to the legitimation of adopted children see para 129 post.

2 Ie subject to ibid s 3: see the text and note 3 infra. A person legitimated under s 3 is a legitimated person for the purposes of the Legitimacy Act 1976. As to the legitimation of adopted children see para 129 post.

3 Ibid s 3. Section 3 takes effect subject to the provisions of ss 4-12 (ss 4, 6, 9, 10 as amended), Sch 1 (as amended), Sch 2: see paras 129-132 post.

4 Ie the Legitimacy Act 1926 s 1 or s 8 (both repealed). The provisions of that Act rendered legitimate persons whose parents subsequently married, but were less extensive than the replacing provisions of the Legitimacy Act 1976 ss 2, 3 (see the text and notes 1-3 supra).

5 See ibid s 10(1)(b); and para 125 ante.

6 Eg by recognition under a foreign law: cf *Re Luck's Settlement Trusts*, *Re Luck's Will Trusts*, *Walker v Luck* [1940] Ch 864, sub nom *Re Luck*, *Walker v Luck* [1940] 3 All ER 307, CA.

7 See the Legitimacy Act 1976 s 10(1)(c); and para 125 ante.

8 *Re Wright's Trust* (1856) 2 K & J 595; *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259.

9 The date on which the Family Law Reform Act 1987 s 1 came into force: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

10 See the Family Law Reform Act 1987 s 1(2), (3)(b); and para 125 ante.

## **UPDATE**

### **128 Persons who are legitimated persons under the Legitimacy Act 1976**

TEXT AND NOTE 1--See also Legitimacy Act 1976 s 2A (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 16) (legitimation by subsequent civil partnership of parents).

TEXT AND NOTE 3--Legitimacy Act 1976 s 3 renumbered s 3(1) and s 3(2) (which relates to civil partnerships) added: Human Fertilisation and Embryology Act 2008 Sch 6 para 17.

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**129. Persons who are adopted children under the Adoption Act 1976 and the Adoption and Children Act 2002.**

The provisions of the Adoption Act 1976<sup>1</sup> prevent an adopted child from being illegitimate<sup>2</sup>. A person who is an adopted child within the meaning of that Act<sup>3</sup> is included in any statutory reference after 4 April 1988<sup>4</sup> to a person whose father and mother were married at the time of his birth<sup>5</sup>.

The provisions of the Adoption and Children Act 2002<sup>6</sup> provide that an adopted person is the legitimate child of the adopters or adopter and, if adopted by a couple, or by one of a couple<sup>7</sup>, is to be treated as the child of the relationship of the couple in question<sup>8</sup>.

An adopted person is to be treated in law as if born as the child of the adopters or adopter<sup>9</sup>.

The provisions of the Adoption Act 1976<sup>10</sup> and the Adoption and Children Act 2002<sup>11</sup> do not prevent an adopted child being legitimated<sup>12</sup> if either natural parent is the sole adoptive parent<sup>13</sup>.

1    Ie the Adoption Act 1976 s 39 (as amended): see para 376 post.

2    See *ibid* s 39(4); and para 376 post. For the effect of adoption see further para 323 post.

3    Ie within the meaning of *ibid* Pt IV (ss 38-49) (as amended).

4    Ie the date on which the Family Law Reform Act 1987 s 1 came into force: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

5    See the Family Law Reform Act 1987 s 1(2), (3)(c); and para 125 ante.

6    Ie the Adoption and Children Act 2002 s 67: see paras 323, 377 post.

7    Ie under *ibid* s 51(2): see para 363 post.

8    *Ibid* s 67(2).

9    *Ibid* s 67(1).

10   Ie the Adoption Act 1976 s 39 (as amended): see para 376 post.

11   Ie the Adoption and Children Act 2002 s 67: see paras 323, 377 post.

12   Ie under the Legitimacy Act 1976 s 2 (as amended) or s 3: see para 128 ante.

13   *Ibid* s 4(1) (amended by the Adoption Act 1976 s 73(2), Sch 3 para 23; and the Adoption and Children Act 2002 s 139(1), Sch 3 paras 16, 17). See also the Legitimacy Act 1976 s 4(2) (as amended); and para 376 post.

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**130. Persons who are otherwise treated in law as legitimate.**

A person who is treated in law as legitimate, otherwise than by virtue of the Legitimacy Act 1976<sup>1</sup>, the Adoption Act 1976 or the Adoption and Children Act 2002<sup>2</sup> is included in any statutory reference after 4 April 1988<sup>3</sup> to a person whose father and mother were married at the time of his birth<sup>4</sup>.

1 See paras 127-128 ante.

2 See para 129 ante.

3 I.e. the date on which the Family Law Reform Act 1987 s 1 came into force: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

4 See the Family Law Reform Act 1987 s 1(2), (3)(d); and para 125 ante. See also CONFLICT OF LAWS vol 8(3) (Reissue) para 336 et seq.

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**131. Distinctions between children of a void marriage and children legitimated by parents' subsequent valid marriage.**

If the distinction between legitimate and illegitimate is of any significance in a particular case, it may also be necessary to consider whether there is any significant difference in the legal position of children of a void marriage treated as legitimate by virtue of the Legitimacy Act 1976<sup>1</sup> and those who are legitimated by the subsequent valid marriage of their parents<sup>2</sup>. It appears that there are the following differences<sup>3</sup>:

- 70 (1) the child of a void marriage is 'treated as legitimate', whereas the child of a subsequent valid marriage is 'legitimated'<sup>4</sup>;
- 71 (2) the child of a void marriage is treated as legitimate from birth, whereas the child legitimated by a subsequent valid marriage is legitimated only as from the date of the marriage<sup>5</sup>;
- 72 (3) the child of a void marriage has rights of succession and other rights by virtue of being treated as legitimate, whereas the child legitimated by a subsequent valid marriage has limited property and other rights<sup>6</sup>;
- 73 (4) the child of a void marriage can succeed to a title of honour, whereas the child legitimated by a subsequent valid marriage cannot<sup>7</sup>;
- 74 (5) trustees and personal representatives are not excused from making inquiries about the children of void marriages<sup>8</sup> but are so excused in the case of children who may have been legitimated by subsequent valid marriage<sup>9</sup>;
- 75 (6) there is no obligation to re-register the birth of a child of a void marriage, whereas there is such an obligation in relation to children born before valid marriage<sup>10</sup>.

It has been suggested that Parliament must therefore have intended to put the child 'born in wedlock' of a void marriage in the same position as he would have been in had the marriage been valid<sup>10</sup>.

1 le by virtue of the Legitimacy Act 1976 s 1 (as amended): see para 127 ante.

2 le under the provisions of *ibid* s 2: see para 128 ante.

3 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C.

4 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C.

5 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C.

6 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C.

7 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C. In so far as it affects the succession to a dignity or honour, or the devolution of any property attached to such dignity or honour, only children born after 28 October 1959 of void marriages fall to be treated as legitimate: Legitimacy Act 1976 s 11, Sch 1 para 4(1). Apart from s 1 (as amended) (see para 127

ante), nothing in the Legitimacy Act 1976 affects the succession to any dignity or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title: Sch 1 para 4(2). In addition, apart from s 1 (as amended), nothing in the Legitimacy Act 1976 affects the devolution of any property limited (expressly or not) to devolve (as nearly as the law permits) along with any dignity or title of honour: Sch 1 para 4(3). However, Sch 1 para 4(3) applies only if and so far as a contrary intention is not expressed in the instrument, and has effect subject to the instrument: Sch 1 para 4(3). Nothing in the Legitimacy Act 1976 affects the succession to the throne: Sch 1 para 5. As to succession to the throne see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 36; CROWN AND ROYAL FAMILY vol 12(1) (Reissue) paras 8-11.

8 However, note that until 4 April 1988 trustees and personal representatives were not required in a distribution to make inquiries as to illegitimate children: Family Law Reform Act 1969 s 17 (repealed by the Family Law Reform Act 1987 s 20).

9 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C. A trustee or personal representative is not under a duty, by virtue of the law relating to trusts or the administration of estates, to enquire, before conveying or distributing any property, whether any person is illegitimate or has been adopted by one of his natural parents, and could be legitimated (or if deceased be treated as legitimated), if that fact could affect entitlement to the property: Legitimacy Act 1976 s 7(1). A trustee or personal representative is not liable to any person by reason of a conveyance or distribution of the property made without regard to any such fact if he has not received notice of the fact before the conveyance or distribution: s 7(2). However, s 7 does not prejudice the right of a person to follow the property, or any property representing it, into the hands of another person, other than a purchaser, who has received it: s 7(3). As to the protection of trustees and personal representatives see also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 690; TRUSTS vol 48 (2007 Reissue) para 914 et seq.

10 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C. As to the re-registration of birth of legitimated persons see also para 132 post.

11 *Re Spence, Spence v Dennis* [1990] Ch 652 at 659, [1990] 2 All ER 827 at 830-831, CA, per Sir Nicolas Browne-Wilkinson V-C.

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### **132. Re-registration of birth of legitimated persons.**

It is the duty of the parents of a legitimated person (or, in cases where re-registration can be effected on information furnished by one parent and one of the parents is dead, of the surviving parent) to furnish to the Registrar General information with a view to obtaining the re-registration of the birth of that person within three months after the date of the marriage by virtue of which he was legitimated<sup>1</sup>. Any parent who fails to give the required information commits an offence<sup>2</sup>. However, the failure of the parents or either of them to furnish such information in respect of any legitimated person does not affect the legitimation of that person<sup>3</sup>.

These requirements<sup>4</sup> do not apply in relation to a person who was legitimated otherwise than by virtue of the subsequent marriage of his parents<sup>5</sup>.

1 Legitimacy Act 1976 s 9(1). See also para 131 ante; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 522 et seq.

2 Ibid s 9(4). A person who is guilty of such an offence is liable on summary conviction to a fine not exceeding level 1 on the standard scale: s 9(4) (amended by virtue of the Criminal Justice Act 1982 ss 37, 38, 46). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

3 Legitimacy Act 1976 s 9(2).

4 *Ie* *ibid* s 9 (as amended).

5 *Ibid* s 9(3).

### **UPDATE**

### **132 Re-registration of birth of legitimated persons**

TEXT AND NOTES 1, 5--Legitimacy Act 1976 s 9(1), (3) amended to include civil partnerships: Human Fertilisation and Embryology Act 2008 Sch 6 para 18.

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## **(5) PARENTAL RESPONSIBILITY IN RELATION TO CHILDREN**

### **(i) Parental Responsibility**

#### **133. 'Custody' and other terms formerly used.**

The term 'custody' was formerly widely used in the context of a relationship between a child and others<sup>1</sup>, notwithstanding uncertainty as to its meaning<sup>2</sup>. The Matrimonial Causes Act 1973 used the expression 'custody and education'<sup>3</sup>, custody being defined, in relation to a child, as including access to the child, and 'education' as including training<sup>4</sup>. The Children Act 1975 adopted the expression 'parental rights and duties'<sup>5</sup>, meaning all the rights and duties which by law the mother and father had in relation to a legitimate child and his property<sup>6</sup>. In particular, 'legal custody' was defined as meaning so much of the parental rights and duties as related to the person of the child including the place and manner in which his time was spent<sup>7</sup>. The court was given power in certain proceedings<sup>8</sup> to make orders dealing with legal custody. The Children Act 1975 also defined 'actual custody' as meaning actual possession of the child's person<sup>9</sup>.

These provisions were all replaced by the concept of 'parental responsibility' introduced by the Children Act 1989<sup>10</sup>.

1 See para 4 note 7 ante.

2 See *Hewer v Bryant* [1970] 1 QB 357 at 373, [1969] 3 All ER 578 at 585-586, CA, per Sachs LJ, distinguishing between the wider meaning of 'custody', ie embracing a bundle of rights or powers including both the personal power physically to control the child until the years of discretion and the right to apply to the courts to exercise the powers of the Crown, and the limited meaning of 'custody', ie such personal power of physical control as a parent or guardian may have. See also para 4 ante.

3 See the Matrimonial Causes Act 1973 s 42 (repealed).

4 See *ibid* s 52 (repealed). See also *Dipper v Dipper* [1981] Fam 31, [1980] 2 All ER 722, CA.

5 The definition was adopted for legislation generally: see the Interpretation Act 1978 s 5, Sch 1 (definition repealed).

6 See the Children Act 1975 s 85(1) (repealed). The Children Act 1975 also provided that references to a parental right or duty must include the right of access and any other element included in a right or duty: s 85(1) (repealed).

7 See *ibid* s 86 (repealed). It was, however, specifically provided that a person was not entitled by virtue of having legal custody of a child to effect or arrange for his emigration from the United Kingdom unless he was a parent or guardian of the child: s 86 (repealed). For the meaning of 'United Kingdom' see para 102 note 7 ante.

8 Ie notably under the Guardianship of Minors Act 1971 and the Guardianship of Minors Act 1973, in custodianship proceedings under the Children Act 1975 s 33 (repealed), and in custody proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 s 8 (as substituted) (see para 309 post).

9 Children Act 1975 s 87 (repealed).

10 For the meaning of 'parental responsibility' see para 134 post.



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### **134. Parental responsibility under the Children Act 1989.**

'Parental responsibility'<sup>1</sup> means all the rights, duties, powers, responsibilities<sup>2</sup> and authority which by law a parent of a child has in relation to the child and his property<sup>3</sup>. However, with one exception<sup>4</sup>, the Children Act 1989 does not set out what rights or responsibilities are comprised in that definition, and in order to determine the scope of the powers normally included within parental responsibility reference must be made to case law<sup>5</sup>. Moreover, it does not seem necessarily to follow from the fact that a person has parental responsibility that he is under any enforceable legal responsibility, such as the responsibility to support a child. A guardian, for example, has 'parental responsibility' for a child, but there would seem to be no procedure whereby a guardian can, as such, be made liable to provide financially for the child<sup>6</sup>.

It has been held that the court, in the exercise of its wardship jurisdiction<sup>7</sup>, is not limited to the powers which a parent has to act on a child's behalf<sup>8</sup>.

Orders may be made by the court limiting the exercising of parental responsibility by one party upon issues such as: (1) changing the child's name<sup>9</sup>; (2) where one parent wishes to emigrate with the child<sup>10</sup>; or (3) circumcision<sup>11</sup>. In situations such as those in heads (1) to (3) above, the welfare of the child is paramount and the court must consider the prescribed factors<sup>12</sup>. The court may consider restrictions on the use of parental responsibility in general terms if the child's welfare demands it<sup>13</sup>. In disputes involving medical treatment, there may be a rebuttable presumption that the united appraisal of both parents is correct in identifying where the welfare of the child lies<sup>14</sup>. There is further scope for restrictions on parental responsibility under the Crime and Disorder Act 1998<sup>15</sup>.

The court has jurisdiction to entertain an application for parental responsibility where the child is permanently out of the jurisdiction, even if that child was born outside the jurisdiction<sup>16</sup>.

1 It has been said that the value of this term is twofold: first, that it unifies the many references in legislation to parental rights, powers and the rest; and secondly, that it more accurately reflects the fact that the true nature of most parental rights is of limited powers to carry out parental duties: see the Department of Health publication *An Introduction to the Children Act 1989* (HMSO, 1989) para 2.3.

2 *Hewer v Bryant* [1970] 1 QB 357, [1969] 3 All ER 578, CA.

3 Children Act 1989 s 3(1). However, parental responsibility also includes all the rights, powers and duties which a guardian of the child's estate would have had before the coming into force of s 5 (as amended) (court appointment of a child's guardian): see para 135 post. Where the court makes a residence order in favour of the father of a child it must, if the father would not otherwise have parental responsibility for the child, also make an order under s 4 (see para 139 post) giving him that responsibility: s 12(1). For the meaning of 'child' see para 3 ante. As to residence orders see para 262 post.

4 In relation to the administration of a child's estate: see para 135 post.

5 See generally *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, CA. At common law parental rights included: (1) the right to have the physical possession of the child (*R v de Manneville* (1804) 5 East 221; *Re Agar-Ellis, Agar-Ellis v Lascelles* (1883) 24 ChD 317, CA; *R v Barnardo* (1889) 23 QBD 305, CA (disapproved in *Barnardo v Ford, Gossage's Case* [1892] AC 326, HL); *Lough v Ward* [1945] 2 All ER 338; *R v Deputy Governor of Parkhurst Prison, ex p Hague, Weldon v Home Office* [1992] 1 AC 58 at 162, sub nom *Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office* [1991] 3 All ER 733 at 743, HL, obiter, per Lord Bridge of Harwich); (2) the right to determine the child's education (*Tremain's Case* (1719) 1 Stra 167; *Hall v Hall* (1749) 3 Atk 721); (3) the right to determine the child's religion (*Andrews v Salt* (1873) 8 Ch App 622; *Ward v Laverly* [1925] AC 101, HL); (4) the right to restrain the acts and conduct of the child and to inflict correction

on the child by personal or other chastisements to a reasonable degree (1 Hawk PC (8th Edn) 483; 1 Bl Com (14th Edn) 452-453; *R v Cheeseman* (1836) 7 C & P 455; *R v Hopley* (1860) 2 F & F 202 at 206-207 per Cockburn CJ; *R v Griffin* (1869) 11 Cox CC 402; *Halliwell v Counsell* (1878) 38 LT 176); (5) the right to the child's services (*Lough v Ward* supra; and see *Mills v IRC* [1973] Ch 225, [1972] 3 All ER 977, CA (revsd sub nom *IRC v Mills* [1975] AC 38, [1974] 1 All ER 722, HL)) (the cause of action for interference with this right has been abolished: Administration of Justice Act 1982 s 2(b)); (6) the right to represent the child in legal proceedings (*Woolf v Pemberton* (1877) 6 ChD 19, CA; but cf *Re Taylor's Application* [1972] 2 QB 369, [1972] 2 All ER 873, CA); (7) the right to consent to medical treatment (see para 4 ante); and (8) certain rights of administration of the child's property (*Dagley v Tolferry* (1715) 1 P Wms 285).

6 See para 149 post. Note, however, *Re C (minors) (parental rights)* as reported in [1992] 1 FLR 1 at 9, CA, per Waite J (a parental rights order under the Family Law Reform Act 1987 s 4 (repealed) imposes duties as well as conferring rights, and the fact that the father was willing to assume an immediately enforceable burden without its being matched at present by any obvious immediately enforceable benefit was regarded as counting in his favour rather than against him).

7 See para 200 et seq post.

8 *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA; *Re J (a minor) (child in care: medical treatment)* [1993] Fam 15, [1992] 4 All ER 614, CA. See also *South Glamorgan County Council v W and B* [1993] 1 FCR 626, [1993] 1 FLR 574; *R v Kirklees Metropolitan Borough Council, ex p C (a minor)* [1993] 2 FCR 381, [1993] 2 FLR 187, CA; and para 4 ante. In practice, therefore, where there is any doubt about the propriety of an act, the matter must be brought to the court for decision; eg it has been said that the leave of the court is required before an operation can be carried out involving the permanent sterilisation of a child: see *Re B (a minor) (wardship: sterilisation)* [1988] AC 199, [1987] 2 All ER 206, HL; *Re F (mental patient: sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; cf *Re H G (specific issue order: sterilisation)* [1993] 1 FCR 553, [1993] 1 FLR 587. As to the procedure for applying for leave to perform a sterilisation operation see *Practice Note* [1996] 3 FCR 95, [1996] 2 FLR 111. On the right to authorise medical procedures see *Re L (an infant)* [1968] P 119, [1967] 2 All ER 1110 (affd [1968] P 119, [1968] 1 All ER 20, CA); *Collins v Wilcock* [1984] 3 All ER 374, [1984] 1 WLR 1172, DC; *Re F (mental patient: sterilisation)* supra; and para 4 ante. See also *Re M M (medical treatment)* [2000] 1 FLR 224, [2000] Fam Law 92.

9 *Dawson v Wearmouth* [1999] 2 AC 308, [1999] 2 All ER 353, HL. Disputes as to the name of the child must be referred to the court, whoever has parental responsibility: *Re C (change of surname)* [1999] 1 FCR 318, [1998] 2 FLR 656, CA. See also *Re H (child's name: first name)* [2002] EWCA Civ 190, [2002] 1 FLR 973 (primary carer of child entitled to use, for official purposes not requiring production of birth certificate, forenames she gave child where other parent gave child his registered name).

10 *Re A (wardship jurisdiction)* [1995] 2 FCR 298, [1995] 1 FLR 767; *Re M (leave to remove child from jurisdiction)* [1999] 3 FCR 708, [1999] 2 FLR 334; *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FCR 425, [2001] 1 FLR 1052.

11 *Re J (child's religious upbringing and circumcision)* [1999] 2 FCR 345, sub nom *Re J (specific issue order: Moslem upbringing and circumcision)* [1999] 2 FLR 678; affd sub nom *Re J (specific issue orders: child's origin and upbringing and circumcision)* [2000] 1 FLR 571, CA.

12 *Re S (parental responsibility: jurisdiction)* [1998] 1 WLR 1701, [1998] 2 FLR 921, CA. The prescribed factors are those set out in the Children Act 1989: see s 1(3); and para 303 post.

13 The court can accept undertakings that aspects of parental responsibility will not be exercised: *Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, sub nom *B v A (parental responsibility)* [2006] All ER (D) 25 (Jan); but note *Re G (parental responsibility)* [2006] EWCA Civ 745, [2006] 2 FLR 1092 (the court cannot suspend a parental responsibility order once in existence).

14 *Re C (a child) (HIV test)* [2000] Fam 48, [1999] 3 FCR 289. In the absence of agreement between those with parental responsibility, immunisation of a child should only be carried out with the specific approval of the court: *Re B (a child) (immunisation)* [2003] EWCA Civ 1148, [2003] 3 FCR 156.

15 See the Crime and Disorder Act 1998 s 14; and para 624 post.

16 *Re S (parental responsibility: jurisdiction)* [1998] 1 WLR 1701, [1998] 2 FLR 921, CA.

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### **135. Right to administer property.**

Parental responsibility<sup>1</sup> includes the rights, powers and duties which a guardian of the child's estate<sup>2</sup> would have had in relation to the child and his property<sup>3</sup>. These rights include in particular the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover<sup>4</sup>. Thus it appears that persons with parental responsibility are entitled to administer the child's property and give valid receipts on the child's behalf<sup>5</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 I.e. a guardian appointed before 14 October 1991 (ie the commencement of the Children Act 1989 s 5: see para 145 et seq post) to act generally: Children Act 1989 (Commencement and Transitional Provisions) Order 1991, SI 1991/828; Children Act 1989 (Commencement No 2 - Amendment and Transitional Provisions) Order 1991, SI 1991/1990.

3 Children Act 1989 s 3(2).

4 Ibid s 3(3).

5 See *Guardianship* (Law Com Working Paper no 91) (1985) para 2.32. As to the appointment of a guardian of a child's estate see para 147 post.

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### **136. Responsibility distinguished from liability.**

The fact that a person has, or does not have, parental responsibility<sup>1</sup> for a child<sup>2</sup> does not affect:

- 76 (1) any obligation which he may have in relation to the child, such as a statutory duty to maintain the child<sup>3</sup>; or
- 77 (2) any rights which, in the event of the child's death, he or any other person may have in relation to the child's property<sup>4</sup>.

Liability to support a child is in fact imposed by a number of statutes<sup>5</sup>. In particular, a person who does not have parental responsibility<sup>6</sup> may be ordered to provide for the child, but will not, in the absence of an order of the court dealing with the matter, have parental responsibility for the child<sup>7</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 3(4)(a).

4 Ibid s 3(4)(b). As to the devolution of the estate of a child on intestacy see the Administration of Estates Act 1925 s 46(1)(iii), (iv) (as amended); the Family Law Reform Act 1987 s 18; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 583 et seq. The combined effect of the Administration of Estates Act 1925 and the Children Act 1989 is to make it clear beyond any doubt that, for example, a local authority which has parental responsibility for a child by virtue of a care order in its favour under the Children Act 1989 s 33 (see para 276 post) is not entitled to succeed to the child's property. As to care orders see para 270 et seq post.

5 See eg the Child Support Act 1991, the Child Support Act 1995 and the Child Support, Pensions and Social Security Act 2000. The Children Act 1989 itself contains provisions (see para 528 et seq post) enabling the court to make orders for the support of a child, and empowering the court to make contribution orders in respect of a child who is being looked after or is in the care of a local authority: see para 537 post.

6 Eg a step-parent in relation to whom a child is 'a child of the family': see para 134 ante.

7 See para 137 post. However, anyone who has responsibility for a child may be liable criminally if the child is neglected: see the Children and Young Persons Act 1933 s 1 (as amended); and para 611 post.

## **UPDATE**

### **136 Responsibility distinguished from liability**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **137. Powers of persons without parental responsibility.**

A person who does not have parental responsibility<sup>1</sup> for a particular child<sup>2</sup>, but has care of the child, may do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare<sup>3</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 3(5). This provision is subject to the provisions of the Children Act 1989: s 3(5). This means, for example, that a person with care would not be entitled to act contrary to the terms of a prohibited steps order made under that Act: see para 261 post. See also *B v B (minor) (residence order)* [1992] 2 FLR 32.

The question of what is reasonable may give rise to difficulties: see the discussion in *Family Law Review of Child Law Guardianship and Custody* (Law Com no 172) (1988) para 2.16.

A parent has no cause of action in damages for interference with parental authority: *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, CA.

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## **(ii) Persons Entitled to Exercise Parental Responsibility**

### **138. Persons exercising parental responsibilities.**

Where a child's mother and father were married to each other at the time of his birth<sup>1</sup> they each have parental responsibility<sup>2</sup> for the child<sup>3</sup>. Where the child's father and mother were not married to each other at the time of his birth, the mother has parental responsibility for the child, and the father does not have parental responsibility for the child unless he acquires it (and has not ceased to have it) in accordance with the provisions of the Children Act 1989<sup>4</sup>. The rule of law that a father is the natural guardian of his legitimate children is abolished<sup>5</sup>.

A person who has been appointed guardian of a child<sup>6</sup> has parental responsibility for that child<sup>7</sup>.

Where the court makes a residence order<sup>8</sup> in favour of any person who is not the parent or guardian of the child concerned that person has parental responsibility for the child while the residence order remains in force<sup>9</sup>. Such persons do not, however, have the right to agree or refuse to agree to the making of an adoption order or an order under the Adoption and Children Act 2002 giving parental responsibility prior to adoption abroad<sup>10</sup> with respect to the child, nor the right to appoint a guardian<sup>11</sup>.

While a care order<sup>12</sup> is in force with respect to a child, the local authority<sup>13</sup> designated by the order has parental responsibility for the child<sup>14</sup>. A local authority does not, however, have the right to agree or refuse to agree to the making of an adoption order or an order under the Adoption and Children Act 2002 giving parental responsibility prior to adoption abroad<sup>15</sup>, nor the right to appoint a guardian<sup>16</sup>. A local authority is not by virtue of a care order entitled to cause the child to be brought up in any religious persuasion other than that in which he would have been brought up had the order not been made<sup>17</sup>. While a child is subject to a care order, the local authority may determine the extent to which the child's parent, guardian, special guardian, or step-parent who has parental responsibility by virtue of an order under the Children Act 1989<sup>18</sup>, may meet his parental responsibility<sup>19</sup>.

While an emergency protection order<sup>20</sup> is in force it gives the applicant parental responsibility for the child<sup>21</sup>. However, the applicant may take, and may only take, such action in meeting his parental responsibility for the child as is reasonably required to safeguard or promote the welfare of the child (having regard in particular to the duration of the order)<sup>22</sup>.

1 References in the Children Act 1989 to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with the Family Law Reform Act 1987 s 1 (which extends their meaning): see the Children Act 1989 s 2(3); and para 125 note 3 ante. In effect, a child whose father and mother were married to each other is a child who, prior to the enactment of the Family Law Reform Act 1987, would have been described as legitimate (or entitled to be treated as legitimate by English law); references to a child whose father and mother were not married to each other are references to a child who would not have been entitled to be so treated.

2 For the meaning of 'parental responsibility' see para 134 ante.

3 Children Act 1989 s 2(1). The fact that an order was made prior to 14 October 1991 (ie the date on which the relevant provisions of the Children Act 1989 came into force), giving custody to one parent, does not affect the fact that both parents are now to be regarded as having parental responsibility: see s 108(6), Sch 14 para 6(1). For the meaning of 'child' see para 3 ante.

4 Ibid s 2(2) (amended by the Adoption and Children Act 2002 s 111(5)). The three methods by which an unmarried father may acquire parental responsibility are: (1) by being registered as the child's father under the Births and Deaths Registration Act 1953; (2) by the making of a parental responsibility order; or (3) by the making and filing of a parental responsibility agreement in the prescribed form: see para 139 post.

5 Children Act 1989 s 2(4).

6 Ie under ibid s 5 (as amended): see para 145 post.

7 Ibid s 5(6).

8 As to residence orders see para 262 post.

9 Children Act 1989 s 12(2).

10 Ie an order under the Adoption and Children Act 2002 s 84: see para 502 post. As to adoption orders see para 359 et seq post.

11 Children Act 1989 s 12(3). As to the appointment of guardians see para 145 post.

12 As to care orders see para 276 et seq post.

13 'Local authority' means, in relation to England, the council of a county, a metropolitan district, a London borough or the Common Council of the City of London; and, in relation to Wales, the council of a county or a county borough: Children Act 1989 s 105(1) (definition amended by the Local Government (Wales) Act 1994 ss 22(4), 66(8), Sch 10 para 13). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; and as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55.

14 Children Act 1989 s 33(3)(a).

15 See note 10 supra.

16 Children Act 1989 s 33(6)(b) (amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 paras 54, 63(c)(i), (ii), Sch 5).

17 Children Act 1989 s 33(6)(a).

18 Ie a person who has parental responsibility by virtue of an order under ibid s 4A (as added and amended): see para 140 post.

19 Ibid s 33(3)(b) (amended by the Adoption and Children Act 2002 Sch 3 paras 54, 63(a)). See also para 276 post.

20 Ie an order under the Children Act 1989 s 44: see para 583 et seq post.

21 Ibid s 44(4)(c).

22 Ibid s 44(5)(b). The applicant must comply with the requirements of any regulations made by the Secretary of State or the Welsh Ministers for the purpose: s 44(5)(c). At the date at which this volume states the law, no such regulations had been made. As to the Secretary of State and the Welsh Ministers see para 155 post.

## UPDATE

### 138 Persons exercising parental responsibilities

TEXT AND NOTES 3, 4--See further Children Act 1989 s 2(1A), (2A) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 26) which enables a second female parent to have parental responsibility for a child.

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### **139. Acquisition of parental responsibility by father; parental responsibility orders and agreements.**

Where a child's father and mother were not married to each other at the time of his birth<sup>1</sup> the father may acquire parental responsibility for the child<sup>2</sup> if:

- 78 (1) he becomes registered as the child's father under specified enactments relating to births and deaths registration<sup>3</sup>;
- 79 (2) he and the child's mother make an agreement (a 'parental responsibility agreement') providing for him to have parental responsibility for the child<sup>4</sup>; or
- 80 (3) the court, on his application, orders that he is to have parental responsibility for the child by making a 'parental responsibility order'<sup>5</sup>.

If there is any dispute about paternity, this must be resolved before the application for a parental responsibility order proceeds<sup>6</sup>. In deciding such an application, the court must be guided by the principle that the child's welfare is the paramount consideration<sup>7</sup>.

Where the court makes a residence order<sup>8</sup> in favour of the father of a child, it must also, if he would not otherwise have parental responsibility, make a parental responsibility order in favour of the father<sup>9</sup>.

No parental responsibility agreement may have effect for the purposes of the Children Act 1989 unless: (a) it is made in the prescribed form<sup>10</sup>; and (b) where regulations are made prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner<sup>11</sup>. The record of the agreement must be made available, during office hours, for inspection<sup>12</sup> by any person upon written request to an officer of the Principal Registry<sup>13</sup>.

A parental responsibility agreement may only be brought to an end by an order of the court made on the application of any person who has parental responsibility for the child or, with permission of the court, on the application of the child himself<sup>14</sup>. The court may only grant permission for the child's application<sup>15</sup> if it is satisfied that the child has sufficient understanding to make the proposed application<sup>16</sup>. A parental responsibility agreement<sup>17</sup> continues in force until the child reaches the age of 18, unless it is brought to an end earlier<sup>18</sup>.

1 See para 138 note 1 ante. The issue as to whether an unmarried father was discriminated against in comparison with a married father was considered in *B v United Kingdom (Application 39067/97)* [2000] 1 FCR 289, [2000] 1 FLR 1, ECtHR (complaint judged inadmissible as there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights).

2 For the meaning of 'parental responsibility' see para 134 ante. For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 4(1)(a) (s 4(1) amended by the Adoption and Children Act 2002 s 111(1), (2)). The enactments in question are the Births and Deaths Registration Act 1953 s 10(1)(a)-(c) (as substituted), s 10A(1) (as added), the Registration of Births, Deaths and Marriages (Scotland) Act 1965 s 18(1)(a), (b)(i), (c), (2)(b), s 20(1)(a) and the Births and Deaths Registration (Northern Ireland) Order 1976, SI 1976/1041, art 14(3)(a), (b), (c): see the Children Act 1989 s 4(1A) (s 4(1A), (1B) added by the Adoption and Children Act 2002 s 111(1), (3)). Further enactments may be added by order to this list: see the Children Act 1989 s 4(1B) (as so added; and



amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(a), 6, Schedule para 1).

Note that this registration will need the consent of the mother: see the Births and Deaths Registration Act 1953 s 10 (substituted); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) paras 547-548. Where the unmarried father has not signed the Birth Register but wants to be acknowledged as the father of the child, he can apply by himself or jointly with the mother to have the birth re-registered under the Births and Deaths Registration Act 1953 s 10A (as added, substituted and amended) by applying for a statutory declaration of parentage: see the Family Law Act 1986 s 55A (as substituted); and para 98 ante.

4 Children Act 1989 ss 4(1)(b), 105(1) (s 4(1) as amended: see note 3 supra). For a case in which such an agreement was made see *Re W (a minor)* (1992) Times, 22 May, CA. More than one person may have parental responsibility; the making of a parental responsibility order or agreement in favour of the father does not involve the loss of responsibility by the mother: see the Children Act 1989 s 2(6); and para 141 post. The existence of a care order does not preclude the parents of the child concerned from entering into a parental responsibility agreement: *Re X (minors) (care proceedings: parental responsibility)* [2000] Fam 156, [2000] 2 All ER 66. As to acquisition of parental responsibility by a step-parent see the Children Act 1989 s 4A (as added); and para 140 post.

5 Ibid s 4(1)(c) (as amended: see note 3 supra). See also s 91(14); and para 223 note 13 post. The court had jurisdiction to entertain an application for parental responsibility in relation to a child who was permanently out of the jurisdiction, even if that child had been born out of the jurisdiction: *Re S (a minor) (parental responsibility: jurisdiction)* [1998] 1 WLR 1701, [1998] 2 FLR 921, CA. On a father's application, where the mother has sole parental responsibility for the child who, she asserts, has lost his habitual residence in England, the mother must prove such loss: *Re V P (loss of child's habitual residence)* [2001] 1 FCR 712. An order will not be made where the father is incapable of exercising parental responsibility: *M v M (parental responsibility)* [1999] 2 FLR 737, [1999] Fam Law 538; but see also *Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, sub nom *B v A (parental responsibility)* [2006] All ER (D) 25 (Jan) (father granted parental responsibility where mother in same sex relationship, so that his status as father could be recognised).

In deciding whether to make the order, the court will consider the degree of commitment the father has shown to child, the degree of attachment between him and the child and the reasons he is applying for the order (see *Re R H (a minor) (parental responsibility)* [1998] 2 FCR 89, sub nom *Re H (parental responsibility)* [1998] 1 FLR 855, CA), but this not an exhaustive list so the court will apply the Children Act 1989 s 1 (see para 300 post) as the child's welfare is always the court's paramount consideration.

Where a parental responsibility order is made on grounds unrelated to paternity, it satisfies the requirement of a finding, or a judgment, of paternity for the purposes of making a maintenance assessment (see para 553 et seq post): *R v Secretary of State for Social Security, ex p W* [1999] 3 FCR 693, [1999] 2 FLR 604.

Since an application for a parental responsibility order is within the definition of 'family proceedings' (see the Children Act 1989 s 8(3); and para 199 post), the court may make a contact order, a residence order, a prohibited steps order or a specific issue order under s 8 (as amended; prospectively further amended) (see para 251 et seq post) if it considers that an order must be made even though no application has been made for an order under s 8 (as amended; prospectively further amended): s 10(1)(b). Before making an order under s 8 (as amended; prospectively further amended), where such order is opposed, the court must have regard to the matters listed in s 1(3) (see para 303 post): see s 1(4) (as amended); and para 303 post. Where a father makes concurrent applications for a contact order and a parental responsibility order, the court must consider each application separately: *Re C and V (minors) (parental responsibility order)* [1998] 1 FCR 52, [1998] 1 FLR 392, CA. As to contact orders see para 251 et seq post. As to residence orders see para 262 post. As to prohibited steps orders see para 261 post. As to specific issue orders see para 263 post.

6 See *Re O (a minor: access)* [1985] FLR 716, [1985] Fam Law 135, CA; cf *Re W (a minor) (interim custody)* [1990] FCR 540, [1990] 2 FLR 86, CA.

7 See the Children Act 1989 s 1(1); and para 300 post. In considering whether or not to make an order with respect to the child, the court must not make the order unless it considers that doing so would be better for the child than making no order at all: s 1(5). See also para 302 post. For factors which the court will take into account see eg *D v Hereford and Worcester County Council* [1991] Fam 14, [1991] 2 All ER 177; *Re H (minors) (local authority: parental rights) (No 3)* [1991] Fam 151, sub nom *Re H (minors) (adoption: putative father's rights)* [1991] 2 All ER 185, CA; *Re C (minors) (parental rights)* [1992] 2 All ER 86, [1992] 1 FLR 1, CA (all these cases were decided under comparable provisions of the Family Law Reform Act 1987). See also *F v S (wardship: jurisdiction)* [1991] 2 FLR 349 at 355 per Ward J; *Re H (a minor) (parental responsibility)* [1993] 1 FCR 85, [1993] 1 FLR 484, CA. See further *Re T (a minor) (parental responsibility and contact)* [1993] 1 FCR 973, [1993] 2 FLR 450, CA; *Re E (a minor) (parental responsibility)* [1994] 2 FCR 709, [1995] 1 FLR 392, CA; *Re G (a minor) (parental responsibility)* [1994] 2 FCR 1037, [1994] 1 FLR 504, CA; *Re S (a minor) (parental responsibility)* [1998] 1 WLR 1701, [1998] 2 FLR 921, CA; *Re R H (a minor) (parental responsibility)* [1998] 2 FCR 89, sub nom *Re H (parental responsibility)* [1998] 1 FLR 855, CA; *Re P (parental responsibility)* [1998] 3 FCR 98, [1998] 2 FLR 96, CA (order refused to prevent inappropriate use); *Re M (contact: parental responsibility: McKenzie friend)*

[1999] 1 FCR 703, [1999] 1 FLR 75, CA (order refused as mother in fear of father, resulting in emotional harm to children); *Re J-S (a child) (contact: parental responsibility)* [2002] EWCA Civ 1028, [2002] 3 FCR 433.

8 As to residence orders see para 262 post.

9 Children Act 1989 s 12(1). Where s 12(1) requires the court to make a parental responsibility order in respect of the father of a child, the court must not bring that order to an end at any time while the residence order concerned remains in force: s 12(4).

10 *Ibid* s 4(2)(a). For the prescribed form of agreement see the Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg 2, Schedule (substituted by SI 2005/2808).

11 Children Act 1989 s 4(2)(b). It must be recorded by filing the agreement, together with sufficient copies for each person with parental responsibility for the child, in the Principal Registry (Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg 3(1) (amended by SI 2005/2808)), whereupon an officer of the Principal Registry must seal the copies and send one to each person with parental responsibility for the child (Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg 3(2) (amended by SI 2005/2808)).

12 *Ie* on payment of the prescribed fee: Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg 3(3) (amended by SI 2004/3123). As to that fee see the Family Proceedings Fees Order 2004, SI 2004/3114, Sch 1 (substituted by SI 2007/2175; and amended by SI 2007/2800).

13 Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg 3(3).

14 Children Act 1989 s 4(3) (substituted by the Adoption and Children Act 2002 s 111(1), (4)). This is subject to the Children Act 1989 s 12(4): see note 9 *supra*. See also *Re P (terminating parental responsibility)* [1995] 3 FCR 753, [1995] 1 FLR 1048 (father's parental responsibility, which he had acquired following a parental responsibility agreement, was terminated by a court order after he inflicted serious injuries on the child).

15 *Ie* under the Children Act 1989 s 4(3) (as substituted): see the text and note 14 *supra*.

16 *Ibid* s 4(4).

17 *Ie* made under *ibid* s 4 (as amended): see the text and notes 3-16 *supra*.

18 See *ibid* s 91(7), (8)(a).

## UPDATE

### 139 Acquisition of parental responsibility by father; parental responsibility orders and agreements

TEXT AND NOTES--See also Children Act 1989 s 4ZA (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 27) (acquisition of parental responsibility by second female parent).

TEXT AND NOTE 4--Definition of 'parental responsibility agreement' in Children Act 1989 s 105(1) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 31.

TEXT AND NOTE 9--Children Act 1989 s 12(1A) added, s 12(4) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 28.

NOTE 10--SI 1991/1478 reg 2 amended and Schedule substituted by SI 2009/2026.

NOTE 12--SI 2004/3114 replaced: Family Proceedings Fees Order 2008, SI 2008/1054 (amended by SI 2008/2856 (amended by SI 2008/3106), SI 2009/1499). See *R (on the application of Hillingdon LBC) v The Lord Chancellor* [2008] EWHC 2683 (Admin), [2009] 1 FCR 1 (increase in fees justified).

NOTE 18--Children Act 1989 s 91(7), (8)(a) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 29.

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#### **140. Acquisition of parental responsibility by step-parent.**

Where a child's parent ('parent A') who has parental responsibility for the child<sup>1</sup> is married to, or is a civil partner of, a person who is not the child's parent ('the step-parent'):

- 81 (1) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child<sup>2</sup>; or
- 82 (2) the court may, on the application of the step-parent, order that the step-parent have parental responsibility for the child<sup>3</sup>.

A parental responsibility agreement under head (1) above, or an order under head (2) above, may only be brought to an end by an order of the court made either: (a) on the application of any person who has parental responsibility for the child; or (b) with the leave of the court, on the application of the child himself<sup>4</sup>.

If partners in a same sex couple are not registered as civil partners, the court could consider the grant of a shared residence order to confer parental responsibility on the non-parent<sup>5</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante. For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 4A(1)(a) (s 4A added by the Adoption and Children Act 2002 s 112; and the Children Act 1989 s 4A(1)(a) amended by the Civil Partnership Act 2004 s 75(1), (2)). Such an agreement is also a 'parental responsibility agreement', and the Children Act 1989 s 4(2) (see para 139 ante) applies in relation to such agreements as it applies in relation to parental responsibility agreements under s 4 (as amended) (see para 139 ante); s 4A(2) (as so added).

3 Ibid s 4A(1)(b) (as added: see note 2 supra).

4 Ibid s 4A(3) (as added: see note 2 supra). The court may only grant leave to the child if it is satisfied that he has sufficient understanding to make the proposed application: s 4A(4) (as so added).

5 See *Re G (residence: same sex partner)* [2005] EWCA Civ 462, [2006] 1 FCR 436, sub nom *Re G (children) (shared residence order: parental responsibility)* (2005) Times, 29 April.

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#### **141. Parental responsibility exercised by more than one person.**

More than one person may have parental responsibility<sup>1</sup> for the same child<sup>2</sup> at the same time<sup>3</sup>. A person who has parental responsibility for a child at any time does not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child<sup>4</sup>.

Thus, at any one time, there may be a number of persons who have parental responsibility in respect of the same child, and the interests of those persons may not be identical. Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility<sup>5</sup>. However, nothing in Part I of the Children Act 1989<sup>6</sup> affects the operation of any enactment<sup>7</sup> which requires the consent of more than one person in a matter affecting the child<sup>8</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 2(5).

4 Ibid s 2(6).

5 Ibid s 2(7). As to the duty to consult a person who has parental responsibility but who does not live with the child see *Re G (parental responsibility: education)* [1995] 2 FCR 53, [1994] 2 FLR 964, CA. Where two or more persons have parental responsibility for a child, the child's surname may lawfully be changed only if all those with parental responsibility agree, or an appropriate order of the court is obtained: *Re C (minors) (change of surname)* [1997] 3 FCR 310, sub nom *Re P C (change of name)* [1997] 2 FLR 730. See also *Re J (child's religious upbringing and circumcision)* [2000] 1 FCR 307, [2000] 1 FLR 571, CA (after the mother of a 5-year-old child objected to the father making arrangements for the child's circumcision for religious purposes, a prohibited steps order was made against the father). As to prohibited steps orders see para 261 post.

6 I.e. the Children Act 1989 Pt I (ss 1-7) (as amended): see para 134 et seq ante.

7 Eg the provisions of the Adoption and Children Act 2002 which require the agreement of every parent or guardian of a child to the making of a placement order: see para 331 et seq post.

8 Children Act 1989 s 2(7).

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#### **142. Acts inconsistent with orders under the Children Act 1989.**

The fact that a person has parental responsibility<sup>1</sup> for a child<sup>2</sup> does not entitle him to act in any way which would be incompatible with any order made with respect to the child under the Children Act 1989<sup>3</sup>. Moreover, the fact that a person has parental responsibility cannot override restrictions placed on parents and others by specific statutory provision<sup>4</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 2(8). Thus a parent entitled to contact with a child by virtue of a residence order made under s 8 (as amended) would not be entitled to remove the child from the home of the person in whose favour a residence order had been made inconsistently with the terms of that order: see para 262 post. As to residence orders see para 262 post.

4 See eg the Child Abduction Act 1984 Pt I (ss 1-5) (as amended), under which a parent commits an offence if he takes or sends a child out of the United Kingdom without the appropriate consent as defined in that Act: see para 781 post.

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### **143. Surrender or transfer of parental responsibility.**

A person with parental responsibility<sup>1</sup> for a child<sup>2</sup> may not surrender or transfer any part of that responsibility to another<sup>3</sup>. However, a person who has parental responsibility may arrange for some or all of it to be met by one or more persons acting on his behalf<sup>4</sup>. The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned<sup>5</sup>. The making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned<sup>6</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 2(9).

4 Ibid s 2(9).

5 Ibid s 2(10).

6 Ibid s 2(11). Hence, a parent or other person might be liable to criminal sanctions under the Children and Young Persons Act 1933, or in certain circumstances in tort to the child or others: see para 611 et seq post. A parent or foster parent is under a duty to take such care as is reasonable in all the circumstances of the case to ensure that a child is not exposed to unnecessary risk of injury, and the relevant standard of care is that of a careful parent in the prevailing circumstances: see *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559 at 570, CA, per Stocker LJ. However, the court must be wary in its approach to holding parents in breach of a duty of care owed to their children: *Surtees v Kingston-upon-Thames Borough Council* supra at 583 per Sir Nicholas Browne-Wilkinson V-C. See also *Stubbings v Webb* [1992] QB 197, [1991] 3 All ER 949, CA (action against adoptive father and brother in respect of physical and sexual abuse); revsd on the ground that the cause of action was statute-barred [1993] AC 498, [1993] 1 All ER 322, HL.

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## (6) GUARDIANS AND GUARDIANSHIP

### 144. Introduction.

The law formerly recognised two forms of parental guardianship, by nature and by nurture<sup>1</sup>. Guardians could be appointed under a variety of statutory provisions<sup>2</sup>, and it was also assumed that the court had an inherent power to appoint a guardian for any child<sup>3</sup>.

However, the rule of law that a father was the natural guardian of his legitimate child has been abolished<sup>4</sup>, and it is now provided that a guardian of a child<sup>5</sup> may only be appointed in accordance with the provisions of the Children Act 1989, which envisage appointments by the court or by a parent or guardian of a child<sup>6</sup>. Special guardianship orders now provide for children who are unable to live with their birth parents and for whom adoption is not appropriate but who may nevertheless benefit from a legally secure placement<sup>7</sup>.

1 See Co Litt 88b; and *Guardianship* (Law Com Working Paper no 91) (1985) para 2.6.

2 The law was to some extent rationalised by the Guardianship of Minors Act 1971 and the Guardianship Act 1973, although both of these Acts have now been repealed.

3 *Re McGrath (infants)* [1893] 1 Ch 143, CA; *Re N (infants)* [1967] Ch 512, [1967] 1 All ER 161. However, in *Re C (minors) (wardship: adoption)* [1989] 1 All ER 395, sub nom *Re C (minors) (adoption by relative)* [1989] 1 WLR 61, CA, it was doubted whether the court had an inherent jurisdiction to appoint a guardian in respect of a ward of court.

4 See the Children Act 1989 s 2(4); and para 138 ante.

5 'Guardian of a child' means a guardian (other than a guardian of the estate of a child) appointed in accordance with the provisions of *ibid* s 5 (see para 145 et seq post): s 105(1).

6 See *ibid* s 5(1), (3), (4), (13); and para 145 et seq post.

7 See *ibid* ss 14A-14F (as added); and para 151 et seq post.

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#### 145. Appointment of guardian by the court.

Where an application with respect to a child<sup>1</sup> is made to the court<sup>2</sup> by any individual, the court may by order appoint that individual<sup>3</sup> to be the child's guardian if:

- 83 (1) the child has no parent with parental responsibility for him<sup>4</sup>; or
- 84 (2) a residence order<sup>5</sup> has been made with respect to the child in favour of a parent, guardian or special guardian of his who has died while the order was in force<sup>6</sup>; or
- 85 (3) head (2) above does not apply, and the child's only or last surviving special guardian dies<sup>7</sup>.

This power to appoint an individual to be the child's guardian may<sup>8</sup> also be exercised in any family proceedings<sup>9</sup> if the court considers that the order should be made, even though no application has been made for it<sup>10</sup>. A guardian of a child may only be appointed in accordance with statutory provisions<sup>11</sup>.

There are no specific statutory restrictions as to the eligibility of individuals to be appointed as guardians<sup>12</sup>. However, the court must regard the child's welfare as the paramount consideration<sup>13</sup>, and it must not make an order unless it considers that doing so would be better for the child than making no order at all<sup>14</sup>.

1 For the meaning of 'child' see para 3 ante.

2 'Court' means the High Court, a county court or a magistrates' court: see the Children Act 1989 s 92(7); and para 208 post.

3 The Children Act 1989 empowers the court only to appoint an 'individual' to be a guardian: see s 5(1); and the text to notes 10-12 infra. It would seem to follow, therefore, that a local authority or voluntary agency could not be appointed as a guardian, or even an 'artificial individual' such as the director of social services: see *Re S H (care order: orphan)* [1996] 1 FCR 1, [1995] 1 FLR 746. However, the Interpretation Act 1978 provides that, unless the contrary intention appears, words in the singular include the plural, and it is submitted that the court could therefore appoint more than one person to act as a guardian: see s 6(c).

4 Children Act 1989 s 5(1)(a).

5 I.e a residence order made under *ibid* s 8 (as amended): see para 262 post.

6 *Ibid* s 5(1)(b) (amended by the Adoption and Children Act 2002 s 115(2), (4)). The Children Act 1989 s 5(1)-(7) (as amended) does not apply if the residence order was also made in favour of a surviving parent of the child: s 5(9). See also s 91(14); and para 223 post. As to special guardianship see para 151 et seq post.

7 *Ibid* s 5(1)(c) (amended by the Adoption and Children Act 2002 s 115(2), (4)).

8 I.e provided that the conditions set out in the Children Act 1989 s 5(1) (as amended) are satisfied: see the text and notes 1-7 *supra*.

9 For the meaning of 'family proceedings' see para 199 post.

10 Children Act 1989 s 5(2).



11 Ibid s 5(13). The text refers to appointment in accordance with s 5 (as amended): see the text and notes 1-10 supra; and paras 147-148 post.

12 See, however, note 3 supra.

13 See the Children Act 1989 s 1(1); and para 300 post. There is authority for the view that where the father or mother has expressed wishes but has not actually appointed a guardian, the court will pay attention to those wishes: *Re Duke of Newcastle* (1795), cited in *Ex p Mountfort* (1809) 15 Ves 445; *Hall v Storer* (1835) 1 Y & C Ex 556; *Re Kaye* (1866) 1 Ch App 387 at 390 per Turner LJ; *Ward v Lavery* [1925] AC 101, HL. The court would not pay such attention where it would not serve the minor's general welfare: *Hartley v Smith* (1862) 6 LT 734; *Re Wood (minors)* (1876) 16 WR 164 at 165. Where neither mother nor father is living, the court may have regard to the wishes of the nearest surviving relatives, one of whom it will preferably select as guardian: *Beattie v Johnstone* (1841) 1 Ph 17 at 34-35 per Lord Lyndhurst LC. In general the court would not appoint as guardian a firm (*De Mazar v Pybus* (1799) 4 Ves 644 at 649 per Lord Thurlow LC), or the solicitor to any of the parties concerned (*Re Johnstons (minors)*, *ex p Yeates* (1845) 2 Jo & Lat 222). A person living out of the jurisdiction would not usually be appointed sole guardian: *Logan v Fairlee* (1821) Jac 193. The selection of a guardian is a question for the discretion of the court of first instance and the Court of Appeal will only interfere with the appointment in exceptional circumstances: *Re Kaye* (1866) 1 Ch App 387 at 389 per Bruce LJ; and see *G v G (minors: custody appeal)* [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

14 See the Children Act 1989 s 1(5); and para 302 post.

## UPDATE

### 145 Appointment of guardian by the court

TEXT AND NOTES--An order made in the county court joining a child as a party in private law Children Act proceedings and directing the appointment of a guardian under SI 1991/1247 r 9.5 may be made by any appropriately nominated judge or district judge: see *President's Guidance (appointment of guardians in accordance with r 9.5: President's Guidance dated 25 February 2005: revocation)* [2008] All ER (D) 224 (Apr).

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#### **146. Power to make other orders on guardianship application.**

An application for appointment as a guardian falls within the definition of 'family proceedings'<sup>1</sup>, and it accordingly follows that on such an application the court<sup>2</sup> has power to make a contact order, a prohibited steps order, a residence order or a specific issue order, or an order varying or revoking such an order<sup>3</sup>, even though no application has been made for the order in question, if a question arises with respect to the welfare of any child, provided that the court considers such order should be made<sup>4</sup>. Additionally, in proceedings on a guardianship application, the court may make such an order as is mentioned above<sup>5</sup> on the application, made with the leave of the court<sup>6</sup>, of a person entitled to apply for the order<sup>7</sup>. This power is subject to the general restrictions on the making of such orders<sup>8</sup>.

1 An application for appointment as a guardian is an application under the Children Act 1989 Pt I (ss 1-7) (as amended), and thus within the definition of 'family proceedings' contained in s 8(4)(a): see para 199 post.

2 For the meaning of 'court' see para 145 note 2 ante.

3 I.e. an order under the Children Act 1989 s 8(1), (2). As to contact orders see para 251 et seq post. As to prohibited steps orders see para 261 post. As to residence orders see para 262 post. As to specific issue orders see para 263 post.

4 Ibid s 10(1)(b).

5 See note 3 supra.

6 As to the matters to which the court must have regard in considering whether or not to grant such leave see the Children Act 1989 s 10(8), (9); and para 249 post.

7 Ibid s 10(1)(a). As to the persons entitled to apply for an order under s 8 (as amended) see s 10(4)-(7), (10); and para 248 post.

8 Ibid s 10(3). Those restrictions are set out in s 9 (as amended): see para 264 post.

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**147. Appointment of guardian of child's estate.**

No court<sup>1</sup> may exercise the High Court's inherent jurisdiction to appoint a guardian of the estate of any child<sup>2</sup>, except as provided by any rules of court<sup>3</sup>. Rules provide that where the persons with parental responsibility<sup>4</sup> agree, or the court considers that their agreement may be dispensed with, the court may appoint the Official Solicitor to be a guardian of a child's estate<sup>5</sup>.

1 For the meaning of 'court' see para 145 note 2 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 5(11). Where rules of court are made under the provisions of s 5(11), they may prescribe the circumstances in which, and conditions subject to which, an appointment of such a guardian may be made: s 5(12).

4 For the meaning of 'parental responsibility' see para 134 ante.

5 See CPR 21.13; and para 1425 post. As to the CPR see para 1409 et seq post.

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#### **148. Appointment of guardian by individuals.**

A parent<sup>1</sup> who has parental responsibility<sup>2</sup> for the child<sup>3</sup> may appoint another individual to be the child's guardian in the event of his death<sup>4</sup>. There is nothing<sup>5</sup> to prevent such an appointment being made by two or more persons acting jointly<sup>6</sup>. Such an appointment<sup>7</sup> does not have effect unless it is made in writing, dated and signed by the person making the appointment<sup>8</sup>.

Where (1) on the death of any person making an appointment<sup>9</sup>, the child concerned has no parent with parental responsibility for him<sup>10</sup>; or (2) immediately before the death of any person making such an appointment, a residence order<sup>11</sup> in his favour was in force with respect to the child<sup>12</sup>, or he was the child's only (or last surviving) special guardian, the appointment takes effect on the death of that person<sup>13</sup>. Where, on the death of any person making an appointment<sup>14</sup> the child concerned has a parent with parental responsibility for him, and head (2) above does not apply<sup>15</sup>, then the appointment takes effect when the child no longer has a parent who has parental responsibility for him<sup>16</sup>.

Any appointment of a person to be a guardian of a child<sup>17</sup> which had taken effect before 14 October 1991<sup>18</sup> is deemed to be an appointment made and having effect under these provisions<sup>19</sup>.

1 This includes the unmarried father: see the Family Law Reform Act 1987 s 1; and para 125 ante.

2 For the meaning of 'parental responsibility' see para 134 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 5(3). A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death, and a special guardian of a child may appoint another individual to be the child's guardian in the event of his death: s 5(4) (amended by the Adoption and Children Act 2002 s 115(2), (4)). As to special guardianship see para 151 et seq post.

5 Ie in the Children Act 1989 s 5 (as amended): see the text and notes 1-4 supra, 6-19 infra; and para 145 ante.

6 Ibid s 5(10). See also para 145 ante.

7 Ie under ibid s 5(3) or (4): see the text and note 4 supra.

8 Ibid s 5(5). However, an appointment may have effect: (1) in the case of an appointment made by a will which is not signed by the testator, if it is signed at the direction of the testator in accordance with the requirements of the Wills Act 1837 s 9 (as substituted) (see WILLS vol 50 (2005 Reissue) para 353 et seq); or (2) in any other case, if it is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature: Children Act 1989 s 5(5).

9 See note 7 supra.

10 Children Act 1989 s 5(7)(a). An appointment by an unmarried mother will take effect on her death under this provision unless the father has acquired parental responsibility: see para 139 ante.

11 As to residence orders see para 262 post.

12 Children Act 1989 s 5(7)(b) (amended by the Adoption and Children Act 2002 s 115(2), (4)). The Children Act 1989 s 5 (as amended) does not apply if the residence order was also made in favour of a surviving parent of the child: s 5(9).

13 Ibid s 5(7) (as amended: see note 12 supra). Before the enactment of the Children Act 1989, the appointment of a guardian would always take effect immediately upon the death of the appointing parent; the surviving parent had a right to object to the appointment: see the Guardianship of Minors Act 1971 s 4 (repealed). The Children Act 1989 seeks to avoid the possibility of conflict between a surviving parent and a guardian appointed by the deceased parent: see *Family Law Review of Child Law Guardianship and Custody* (Law Com no 172) (1988) para 2.27.

14 See note 7 supra.

15 Ie the provisions of the Children Act 1989 s 5(7)(b) (as amended) do not apply: see the text to note 12 supra.

16 Ibid s 5(8).

17 Ie any appointment made under the Guardianship of Minors Act 1971 ss 3-5 (repealed), or the Sexual Offences Act 1956 s 38(3) (repealed), or under the High Court's inherent jurisdiction with respect to children: see note 19 infra.

18 Ie the date upon which most of the provisions of the Children Act 1989 s 5 came into force: see the Children Act 1989 (Commencement and Transitional Provisions) Order 1991, SI 1991/828 (amended by SI 1991/1990). As to the commencement of the remainder of the provisions of the Children Act 1989 see the Children Act 1989 (Commencement No 2--Amendment and Transitional Provisions) Order 1991, SI 1991/1990. As regards the appointment by the court of a guardian of the child's estate (see the Children Act 1989 s 5(11), (12)), the date is 1 February 1992: see para 147 ante.

19 Ibid s 108(6), Sch 14 para 12(1). Where the appointment has effect by virtue of an order made under the Sexual Offences Act 1956 s 38(3) (repealed), the appointment does not have effect for a period which is longer than any period specified in the order: Children Act 1989 Sch 14 para 12(2). Any appointment of a person to be a child's guardian made under the Guardianship of Minors Act 1971 ss 3-5 (repealed) (eg by deed) which had not taken effect immediately before 14 October 1991 will take effect in accordance with the Children Act 1989 s 5 (as amended) subject to certain modifications: see Sch 14 paras 8(2), 13. For the purposes of the Wills Act 1837 and of the Children Act 1989, any disposition by will and testament or devise of the custody and tuition of any child made before 14 October 1991 is deemed to be an appointment by will of a guardian of the child: Children Act 1989 Sch 14 para 14. As to dispositions by wills generally see WILLS.

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#### **149. Effect of appointment as guardian.**

A person appointed guardian of a child<sup>1</sup> has parental responsibility<sup>2</sup> for the child concerned<sup>3</sup>, and this will, for many purposes, equate the guardian's position with that of a parent. Thus a guardian has the right to consent or withhold consent to an application for a placement order<sup>4</sup>, to agree or withhold agreement to the child's adoption<sup>5</sup>, or to appoint a guardian to succeed him on his death<sup>6</sup>. The consent of a guardian is required for the marriage of a child under the age of 18<sup>7</sup>. However, there is no statutory procedure whereby a guardian may be subject to orders for financial provision or property adjustment<sup>8</sup>.

It has been said that guardianship is an office of trust<sup>9</sup>. It is therefore submitted that it follows that a guardian is under a duty to account to the child for the profits and income of his property: a guardian is, in equity, in the position of a trustee<sup>10</sup>.

1    I.e. a person appointed under the Children Act 1989 s 5 (as amended): see paras 145-148 ante. For the meaning of 'child' see para 3 ante.

2    For the meaning of 'parental responsibility' see para 134 ante.

3    Children Act 1989 s 5(6).

4    I.e. under the Adoption and Children Act 2002 s 21 (as amended): see para 335 post.

5    Note that this power is not given to a person who has parental responsibility by virtue of a residence order in his favour: see the Children Act 1989 s 12(3); and para 138 ante. As to residence orders see para 262 post.

6    See para 148 ante.

7    See the Marriage Act 1949 s 3(1A), (1B) (added by the Children Act 1989 s 108(4), Sch 12 para 5(2); and substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 1, 3, 4). As to provisions where a guardianship or care order was in force immediately before 14 October 1991 see the Children Act 1989 s 108(6), Sch 14 para 37.

8    A guardian was under no obligation to expend his own money on the child's maintenance or to advance sums from the guardian's own capital: *Carmichael v Wilson* (1830) 3 Mol 79 at 86 per Lord Hart LC. A guardian is not a liable relative for the purposes of the Child Support Act 1991 or the Social Security Administration Act 1992 ss 78(6), 105(3) (both as amended): see para 531 post; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 397.

9    *Duke of Beaufort v Berty* (1721) 1 P Wms 703; *Reynolds v Lady Tenham* (1723) 9 Mod Rep 40, HL; *Mathew v Brise* (1851) 14 Beav 341; *Sleeman v Wilson* (1871) LR 13 Eq 36; *Plowright v Lambert* (1885) 52 LT 646; *Keech v Sandford* (1726) 2 Eq Cas Abr 741.

10   As to the duties of trustees see TRUSTS vol 48 (2007 Reissue) para 949 et seq.

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### **150. Revocation, termination or disclaimer of appointment.**

An appointment of a guardian by a parent or guardian<sup>1</sup> revokes an earlier such appointment, including one made in an unrevoked will or codicil, made by the same person in respect of the same child<sup>2</sup>, unless it is clear<sup>3</sup> that the purpose of the later appointment is to appoint an additional guardian<sup>4</sup>. Similarly, an appointment by a parent or guardian, including one made in an unrevoked will or codicil, is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed by him, or at his direction, in his presence and in the presence of two witnesses who each attest the signature<sup>5</sup>. Such an appointment, including one made in an unrevoked will or codicil, is also revoked if the person appointed is the spouse or civil partner of the person who made the appointment and either:

- 86 (1) a decree of a court of civil jurisdiction in England and Wales dissolves or annuls the marriage or civil partnership; or
- 87 (2) the marriage or civil partnership is dissolved or annulled and the divorce, dissolution or annulment is entitled to recognition in England and Wales<sup>6</sup>,

unless a contrary intention appears by the appointment<sup>7</sup>.

An appointment by a parent or guardian made in a will or codicil is revoked if the will or codicil is revoked<sup>8</sup>. An appointment by a parent or guardian, other than one made in a will or codicil, is revoked if, with the intention of revoking the appointment, the person who made it destroys the instrument by which it was made, or has some other person destroy that instrument in his presence<sup>9</sup>.

Any appointment of a guardian<sup>10</sup> may be brought to an end at any time by order of the court: (a) on the application of any person who has parental responsibility<sup>11</sup> for the child; (b) on the application of the child concerned with leave of the court; or (c) in any family proceedings<sup>12</sup> if the court considers that it should be brought to an end even though no application has been made<sup>13</sup>.

A person who is appointed as a guardian by a parent or guardian<sup>14</sup> may disclaim his appointment by an instrument in writing signed by him and made within a reasonable time of his first knowing that the appointment has taken effect<sup>15</sup>. The Lord Chancellor may make regulations prescribing the manner in which such disclaimers must be recorded and if such regulations are made no such disclaimer has effect unless recorded in the prescribed manner<sup>16</sup>.

An appointment of a person as guardian of a child<sup>17</sup>, whether by the court or by an individual, continues in force until the child reaches the age of 18, unless the appointment is brought to an end earlier<sup>18</sup>.

1    le an appointment of a guardian under the Children Act 1989 s 5(3) or (4) (as amended): see para 148 ante.

2    For the meaning of 'child' see para 3 ante.

3    le whether as a result of an express provision in the later appointment or by any necessary implication: see the Children Act 1989 s 6(1).

- 4 Ibid s 6(1). As to the execution of wills and codicils see *WILLS* vol 50 (2005 Reissue) para 362.
- 5 Ibid s 6(2).
- 6 Ie the marriage's dissolution or annulment is entitled to recognition in England and Wales under the Family Law Act 1986 Pt II (ss 44-54) (as amended) or the civil partnership's annulment is entitled to recognition in England and Wales by virtue of the Civil Partnership Act 2004 Part 5 Ch 3 (see *MATRIMONIAL AND CIVIL PARTNERSHIP LAW*): see the Children Act 1989 s 6(3A), (3B) (as added); and note 7 *infra*.
- 7 Ibid s 6(3A) (added by the Law Reform (Succession) Act 1995 s 4(1)), Children Act 1989 s 6(3B) (added by the Civil Partnership Act 2004 s 76). As from a day to be appointed, the Children Act 1989 s 6(3A) (as added) is to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 41(2). At the date at which this volume states the law no such day had been appointed. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by Sch 8) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.
- 8 Children Act 1989 s 6(4).
- 9 Ibid s 6(3).
- 10 Ie any appointment under *ibid* s 5 (as amended), whether made by a parent or guardian, or by the court: see paras 145, 148 *ante*.
- 11 For the meaning of 'parental responsibility' see para 134 *ante*.
- 12 For the meaning of 'family proceedings' see para 199 *post*.
- 13 Children Act 1989 s 6(7). The child's welfare must be the court's paramount consideration: see s 1(1); and para 300 *post*.
- 14 Ie under *ibid* s 5(3) or (4) (as amended): see para 148 *ante*. A person appointed guardian by order of the court would appear to have no power to disclaim the appointment, nor does such a person appear to be eligible to apply to the court for the order to be terminated unless and until he acquires parental responsibility by virtue of the appointment: see s 6(7); and the text and notes 10-13 *supra*.
- 15 Ibid s 6(5).
- 16 Ibid s 6(6). At the date at which this volume states the law, no such regulations had been made.
- 17 Ie under *ibid* s 5(1), (3) or (4) (as amended): see para 145 *et seq ante*.
- 18 Ibid s 91(7), (8)(b).



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### 151. Special guardianship orders.

A special guardianship order is an order appointing one or more individuals to be a child's special guardian (or special guardians)<sup>1</sup>. Special guardianship was introduced in order to offer an alternative to adoption or residence orders<sup>2</sup>. It bestows parental responsibility for the child on the special guardian and places limits on the parental responsibility of the children's natural parents, but unlike adoption, they remain legally the child's parents<sup>3</sup>.

A special guardian must be aged 18 or over, and must not be a parent of the child in question, and the following provisions are to be read in that light<sup>4</sup>.

The court may make a special guardianship order with respect to any child on the application<sup>5</sup> of an individual who:

- 88 (1) is entitled to make such an application with respect to the child; or
- 89 (2) has obtained the leave of the court to make the application,

or on the joint application of more than one such individual<sup>6</sup>. The individuals who are entitled to apply for a special guardianship order with respect to a child are:

- 90 (a) any guardian of the child<sup>7</sup>;
- 91 (b) any individual in whose favour a residence order is in force with respect to the child<sup>8</sup>;
- 92 (c) any person with whom the child has lived for a period of at least three years<sup>9</sup>;
- 93 (d) any person who:

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- 1. (i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made<sup>10</sup>;
- 2. (ii) in any case where the child is in the care of a local authority, has the consent of that authority<sup>11</sup>; or
- 3. (iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child<sup>12</sup>,

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- 94 (e) a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application<sup>13</sup>.

The court may also make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if an application for the order has been made by an individual who is entitled to make an application with respect to the child or who has obtained the leave of the court to make such an application (or more than one such individual jointly)<sup>14</sup>. The court may also make an order if it considers that a special guardianship order should be made even though no such application has been made<sup>15</sup>.

No individual may make an application<sup>16</sup> unless, before the beginning of the period of three months ending with the date of the application, he has given written notice of his intention to make the application: (A) if the child in question is being looked after by a local authority, to that local authority; or (B) otherwise, to the local authority in whose area the individual is ordinarily resident<sup>17</sup>. On receipt of such a notice, the local authority must investigate the matter

and prepare a report for the court dealing with the suitability of the applicant to be a special guardian, and such matters (if any) as may be prescribed, together with any other matter which the local authority considers to be relevant<sup>18</sup>. The court may not make a special guardianship order unless it has received such a report<sup>19</sup>.

Where a placement order is in force, no special guardianship order may be made in respect of the child unless an application has been made for an adoption order, and the person applying for the special guardianship order has obtained the court's leave<sup>20</sup>.

1 Children Act 1989 s 14A(1) (s 14A added by the Adoption and Children Act 2002 s 115(1)). For the meaning of 'child' see para 3 ante.

2 See *Adoption: a new approach* (Cm 5017) (December 2000). As to adoption see para 323 et seq post. As to residence orders see para 262 post.

The decision whether a special guardianship order is appropriate, as opposed to an adoption order, depends entirely upon the facts of the particular case: see *Re S (a child) (adoption order or special guardianship order)* [2007] EWCA Civ 54, [2007] 1 FCR 271, [2007] 1 FLR 819; *Re S (a child) (adoption order or special guardianship order) (No 2)* [2007] EWCA Civ 90, [2007] 1 FCR 340, [2007] 1 FLR 855; *Re J (a child) (adoption order or special guardianship order)* [2007] EWCA Civ 55, sub nom *Re A J* [2007] 1 FCR 308; *Re M-J (a child) (adoption order or special guardianship order)* [2007] EWCA Civ 56, [2007] 1 FCR 329, [2007] 1 FLR 691.

3 See *Adoption: a new approach* (Cm 5017) (December 2000). As to the effect of special guardianship orders see para 152 post. For the meaning of 'parental responsibility' see para 134 ante. See *Re L (a child) (special guardianship order and ancillary orders)* [2007] EWCA Civ 196, [2007] 1 FCR 804, [2007] 2 FLR 50 (whilst the purpose of a special guardianship order undoubtedly was to give freedom to the special guardians to exercise parental responsibility in the best interests of the child, that did not mean that the special guardians were free from the exercise of judicial oversight).

4 Children Act 1989 s 14A(2) (as added: see note 1 supra).

5 *Ibid* s 9(3) (see para 249 post) applies in relation to an application for leave to apply for a special guardianship order as it applies in relation to an application for leave to apply for a section 8 order (see para 249 post): s 14A(4) (as so added).

6 *Ibid* s 14A(3) (as added: see note 1 supra). See *Re R (a child) (special guardianship order)* [2006] EWCA Civ 1748, [2007] Fam 41, [2007] 1 FCR 121 (a person who needed leave to apply for a special guardianship order could not give notice to the local authority of his intention to apply for such an order until he had obtained the court's permission to make the application).

7 Children Act 1989 s 14A(5)(a) (as added: see note 1 supra).

8 *Ibid* s 14A(5)(b) (as added: see note 1 supra).

9 *Ibid* ss 10(5)(b), 14A(5)(c) (as added: see note 1 supra). The period of three years need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application: s 10(10).

10 *Ibid* ss 10(5)(c)(i), 14A(5)(c) (as added: see note 1 supra).

11 *Ibid* ss 10(5)(c)(ii), 14A(5)(c) (as added: see note 1 supra).

12 *Ibid* ss 10(5)(c)(iii), 14A(5)(c) (as added: see note 1 supra).

13 *Ibid* s 14A(5)(d) (as added: see note 1 supra).

14 *Ibid* s 14A(3)(a), (b), (6)(a) (as added: see note 1 supra). See *Re N (a child) (special guardianship order)* [2007] EWCA Civ 264, [2007] All ER (D) 458 (Mar).

15 Children Act 1989 s 14A(6)(b) (as added: see note 1 supra).

16 *Ie* an application under *ibid* s 14A(3) (as added) or s 14A(6)(a) (as added): see the text and note 14 supra.

17 *Ibid* s 14A(7) (as added: see note 1 supra); but note *Re R (a child) (special guardianship order)* [2006] EWCA Civ 1748, [2007] Fam 41, [2007] 1 FCR 121.

18 Children Act 1989 s 14A(8) (as added: see note 1 supra). As to the matters prescribed for these purposes see the Special Guardianship Regulations 2005, SI 2005/1109, reg 21, Schedule; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 2, Schedule.

See *Re R (a child) (special guardianship order)* [2006] EWCA Civ 1748, [2007] Fam 41, [2007] 1 FCR 121 (the Children Act 1989 s 14A(8) (as added) is not triggered where a person who required the court's permission to make an application, but had not obtained it, purported to give notice of his intention to make an application for a special guardianship order).

The court may itself ask a local authority to conduct an investigation and prepare a report, and the local authority must do so: Children Act 1989 s 14A(9) (as so added). However, a judge should not invoke s 14A(9) (as added) to compel a local authority to perform its obligations under s 14A(8) (as added) at the instance of a person who needed but had not obtained permission to apply for a special guardianship order unless s 14A(6) (b) (as added) (see the text and note 15 supra) applies: *Re R (a child) (special guardianship order)* supra.

The Children Act 1989 s 10(8), (9) (see para 247 post) applies in relation to special guardianship orders as it applies in relation to section 8 orders: s 14A(12) (as so added). The local authority may make such arrangements as it sees fit for any person to act on its behalf in connection with conducting an investigation or preparing such a report: s 14A(10) (as so added). In proceedings for a special guardianship order, the local authority must file the report within the timetable fixed by the court and the court will consider the issues of disclosure: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.17A (added by SI 2005/2922); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17A (added by SI 2005/2930).

19 Children Act 1989 s 14A(11) (as added: see note 1 supra).

20 Ibid s 14A(13) (as added: see note 1 supra); Adoption and Children Act 2002 s 29(5). As to placement orders see para 331 et seq post. The Children Act 1989 s 14A(7) (as added) (see the text to note 17 supra) applies in respect of an application for a special guardianship order for which leave has been given as mentioned in the Adoption and Children Act 2002 s 29(5) with the omission of the words 'the beginning of the period of three months ending with': s 29(6).

## UPDATE

### 151 Special guardianship orders

TEXT AND NOTE 13--Head (f) a relative with whom the child has lived for a period of at least one year immediately preceding the application: Children Act 1989 s 14A(5)(e) (added by Children and Young Persons Act 2008 s 38).

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## **152. Making and effect of special guardianship orders.**

Before making a special guardianship order<sup>1</sup>, the court must consider whether, if the order were made:

- 95 (1) a contact order<sup>2</sup> should also be made with respect to the child<sup>3</sup>; and
- 96 (2) any section 8 order in force with respect to the child should be varied or discharged<sup>4</sup>.

As from a day to be appointed, before making a special guardianship order, where a contact order made with respect to the child is not discharged, there will also be a requirement for the court to consider whether any enforcement order relating to that contact order should be revoked<sup>5</sup>; and, where a contact activity direction has been made as regards contact with the child and is in force, the court will be required to consider whether that contact activity direction should be discharged<sup>6</sup>.

On making a special guardianship order, the court may give leave for the child to be known by a new surname<sup>7</sup>, or grant the leave required<sup>8</sup> for the child's removal from the United Kingdom, either generally or for specified purposes<sup>9</sup>. A special guardianship order may contain provisions which are to have effect for a specified period<sup>10</sup>. It may also contain directions about how it is to be carried into effect<sup>11</sup>, impose conditions which must be complied with<sup>12</sup>, and make such incidental, supplemental or consequential provision as the court thinks fit<sup>13</sup>.

The effect of a special guardianship order is that while the order remains in force: (a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made<sup>14</sup>; and (b) subject to any other order in force with respect to the child under the Children Act 1989, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child (apart from another special guardian)<sup>15</sup>.

While a special guardianship order is in force with respect to a child, no person may cause the child to be known by a new surname, or remove him from the United Kingdom<sup>16</sup>, without either the written consent of every person who has parental responsibility for the child or the leave of the court as mentioned above<sup>17</sup>.

If the child with respect to whom a special guardianship order is in force dies, his special guardian must take reasonable steps to give notice of that fact to each parent of the child with parental responsibility and each guardian of the child, but if the child has more than one special guardian, and one of them has taken such steps in relation to a particular parent or guardian, any other special guardian need not do so as respects that parent or guardian<sup>18</sup>.

In proceedings in which any question of making, varying or discharging<sup>19</sup> a special guardianship order arises, the court must (in the light of any rules of court<sup>20</sup>) draw up a timetable with a view to determining the question without delay, and give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to<sup>21</sup>.

1 See para 151 ante. See *Local Authority v Y, Z* [2006] 2 FLR 41, [2006] Fam Law 448, where it was considered that children should remain in their family placements subject to special guardianship orders with a defined contact order to their mother.

2 As to contact orders see para 251 et seq post.

3 Children Act 1989 s 14B(1)(a) (ss 14B, 14C, 14E all added by the Adoption and Children Act 2002 s 115(1)). For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 14B(1)(b) (as added: see note 3 supra). As to section 8 orders see para 247 et seq post. A court in England and Wales does not have jurisdiction to make a special guardianship order under the Children Act 1989 unless the condition in the Family Law Act 1986 s 3 (as amended) (see para 833 post) is satisfied: s 2(2A) (added by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 46, 48).

5 Children Act 1989 s 14B(1)(c) (s 14B(1)(c), (d) prospectively added by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 7, 8(b)). At the date at which this volume states the law, no day had been appointed for the commencement of this provision. As to contact orders see para 251 et seq post.

6 Children Act 1989 s 14B(1)(d) (prospectively added: see note 5 supra). At the date at which this volume states the law, no day had been appointed for the commencement of this provision. As to contact activity directions see para 252 et seq post.

7 Ibid s 14B(2)(a) (as added: see note 3 supra). See *Re L (a child) (special guardianship order and ancillary orders)* [2007] EWCA Civ 196, [2007] 1 FCR 804, [2007] 2 FLR 50 (changing child's surname was not in best interests of child).

8 Ie the leave required by the Children Act 1989 s 14C(3)(b) (as added): see the text and note 17 infra.

9 Ibid s 14B(2)(b) (as added: see note 3 supra). For the meaning of 'United Kingdom' see para 102 note 7 ante.

10 Ibid s 14E(4) (as added: see note 3 supra).

11 Ibid ss 11(7)(a), 14E(5) (as added: see note 3 supra).

12 Ibid ss 11(7)(b), 14E(5) (as added: see note 3 supra). Such conditions must be complied with by any of the following persons to whom the conditions are expressed to apply: (1) any person in whose favour the order is made; (2) any person who is a parent of the child concerned; (3) any person who is not a parent of his but who has parental responsibility for him; or (4) any person with whom the child is living: s 11(7)(b).

13 Ibid ss 11(7)(d), s 14E(5) (as added: see note 3 supra).

14 Ibid s 14C(1)(a) (as added: see note 3 supra). For the meaning of 'parental responsibility' see para 134 ante. Section 14C(1) (as added) does not affect the operation of any enactment or rule of law which requires the consent of more than one person with parental responsibility in a matter affecting the child, or any rights which a parent of the child has in relation to the child's adoption or placement for adoption: s 14C(2) (as so added). Section 14C (as added) is subject to the Adoption and Children Act 2002 s 29(7) (placement orders) (see notes 15, 17 infra): Children Act 1989 s 14C(6) (as so added).

15 Ibid s 14C(1)(b) (as added: see note 3 supra). See note 14 supra. Where a placement order is in force s 14C(1)(b) (as added) has effect subject to any determination under the Adoption and Children Act 2002 s 25(4) (see para 337 post): s 29(7)(a).

16 This does not prevent the removal of a child, for a period of less than three months, by his special guardian: Children Act 1989 s 14C(4) (as added: see note 3 supra).

17 Ibid s 14C(3) (as added: see note 3 supra). Where a placement order is in force s 14C(3) (as added) does not apply: Adoption and Children Act 2002 s 29(7)(b).

18 Children Act 1989 s 14C(5) (as added: see note 3 supra).

19 As to variation or discharge of orders see para 153 post.

20 Children Act 1989 s 14E(3) (as added: see note 3 supra). As to the power to make rules see s 11(2); and para 266 post.

21 Ibid s 14E(1) (as added: see note 3 supra). Section 14E(1) (as added) applies also in relation to proceedings in which any other question with respect to a special guardianship order arises: s 14E(2) (as so added).

## **UPDATE**

### **152 Making and effect of special guardianship orders**

NOTE 5--Children Act 1989 s 14B(1)(c), (d) in force on 8 December 2008: SI 2008/2870.

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### **153. Variation and discharge of special guardianship orders.**

The court may vary or discharge a special guardianship order<sup>1</sup> on the application of:

- 97 (1) the special guardian (or any of them, if there are more than one)<sup>2</sup>;
- 98 (2) any parent or guardian of the child concerned<sup>3</sup>;
- 99 (3) any individual in whose favour a residence order is in force with respect to the child<sup>4</sup>;
- 100 (4) any individual not falling within any of heads (1) to (3) above who has, or immediately before the making of the special guardianship order had, parental responsibility for the child<sup>5</sup>;
- 101 (5) the child himself<sup>6</sup>; or
- 102 (6) a local authority designated in a care order with respect to the child<sup>7</sup>.

In any family proceedings in which a question arises with respect to the welfare of a child with respect to whom a special guardianship order is in force, the court may also vary or discharge the special guardianship order if it considers that the order should be varied or discharged, even though no application has been made<sup>8</sup>.

The following must obtain the leave of the court before making an application under heads (1) to (6) above: (a) the child<sup>9</sup>; (b) any parent or guardian of his<sup>10</sup>; (c) any step-parent of his who has acquired, and has not lost, parental responsibility for him<sup>11</sup>; (d) any individual falling within head (4) above who immediately before the making of the special guardianship order had, but no longer has, parental responsibility for him<sup>12</sup>. The court may not grant leave to a person falling within head (b), (c) or (d) above unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order<sup>13</sup>.

An order varying a special guardianship order may contain provisions which are to have effect for a specified period<sup>14</sup>. In proceedings in which any question of varying or discharging a special guardianship order arises, the court must (in the light of any rules of court<sup>15</sup>) draw up a timetable with a view to determining the question without delay, and give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to<sup>16</sup>.

1 See para 151 ante.

2 Children Act 1989 s 14D(1)(a) (ss 14D, 14E both added by the Adoption and Children Act 2002 s 115(1)).

3 Children Act 1989 s 14D(1)(b) (as added: see note 2 supra). For the meaning of 'child' see para 3 ante.

4 Ibid s 14D(1)(c) (as added: see note 2 supra). As to residence orders see para 262 post.

5 Ibid s 14D(1)(d) (as added: see note 2 supra). For the meaning of 'parental responsibility' see para 134 ante.

6 Ibid s 14D(1)(e) (as added: see note 2 supra).

7 Ibid s 14D(1)(f) (as added: see note 2 supra).

8 Ibid s 14D(2) (as added: see note 2 supra).

9 Ibid s 14D(3)(a) (as added: see note 2 supra). Where the person applying for leave to make an application for the variation or discharge of an order is the child, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application: s 14D(4) (as so added).

10 Ibid s 14D(3)(b) (as added: see note 2 supra).

11 Ibid s 14D(3)(c) (as added: see note 2 supra). As to step-parents acquiring parental responsibility see s 4A (as added); and para 140 ante.

12 Ibid s 14D(3)(d) (as added: see note 2 supra).

13 Ibid s 14D(5) (as added: see note 2 supra).

14 Ibid s 14E(4) (as added: see note 2 supra). The provisions of s 11(7)(a), (b), (d) (see para 152 text and notes 11-13 ante) apply in relation to orders varying special guardianship orders as they apply in relation to section 8 orders: s 14E(5) (as so added). As to section 8 orders see para 247 et seq post.

15 Ibid s 14E(3) (as added: see note 2 supra). As to the power to make rules see s 11(2); and para 266 post.

16 Ibid s 14E(1) (as added: see note 2 supra).



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#### **154. Special guardianship support services.**

Each local authority must make arrangements for the provision within its area of special guardianship support services, which means counselling, advice and information, and such other services as are prescribed, in relation to special guardianship<sup>1</sup>. The power to make regulations to prescribe services is to be exercised so as to secure that local authorities provide financial support<sup>2</sup>.

At the request of any of: (1) a child with respect to whom a special guardianship order<sup>3</sup> is in force; (2) a special guardian; (3) a parent; (4) any other person who falls within a prescribed description, a local authority may carry out an assessment of that person's needs for special guardianship support services (but, if the Secretary of State or the Welsh Ministers<sup>4</sup> so provide in regulations, it must do so if he is a person of a prescribed description, or if his case falls within a prescribed description, or if both he and his case fall within prescribed descriptions)<sup>5</sup>. A local authority may, at the request of any other person, carry out an assessment of that person's needs for special guardianship support services<sup>6</sup>. Where, as a result of an assessment, a local authority decides that a person has needs for special guardianship support services, it must then decide whether to provide any such services to that person<sup>7</sup>.

If a local authority decides to provide any special guardianship support services to a person, and the circumstances fall within a prescribed description, the local authority must prepare a plan in accordance with which special guardianship support services are to be provided to him, and keep the plan under review<sup>8</sup>.

The Secretary of State or the Welsh Ministers may by regulations make provision about assessments, preparing and reviewing plans, the provision of special guardianship support services in accordance with plans and reviewing the provision of special guardianship support services<sup>9</sup>.

A local authority may provide special guardianship support services (or any part of them) by securing their provision by another local authority, or by a person within a prescribed description of persons who may provide special guardianship support services<sup>10</sup>, and may also arrange with any such authority or person for that other authority or that person to carry out the local authority's functions in relation to assessments under these provisions<sup>11</sup>.

A local authority may carry out an assessment of the needs of any person for these purposes at the same time as an assessment of his needs is made under any other provision of the Children Act 1989 or under any other enactment<sup>12</sup>.

1 Children Act 1989 s 14F(1) (s 14F added by the Adoption and Children Act 2002 s 115(1)). As to special guardianship see para 151 ante. The services prescribed by regulations include: financial support; services to enable discussion groups; mediation services; services in relation to the child's therapeutic needs; assistance to ensure the continuance of the relationship between the child and special guardian; and giving assistance in cash: see the Special Guardianship Regulations 2005, SI 2005/1109, reg 3; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 3(1). As to the provision of services to persons outside the local authority's area see the Special Guardianship Regulations 2005, SI 2005/1109, reg 5; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 3(2).

2 Children Act 1989 s 14F(2) (as added: see note 1 supra). As to the provision of financial support see the Special Guardianship Regulations 2005, SI 2005/1109, regs 6-10; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, regs 4, 7.

- 3 As to special guardianship orders see paras 151-153 ante.
- 4 As to the Secretary of State and the Welsh Ministers see para 155 post.
- 5 Children Act 1989 s 14F(3) (as added: see note 1 supra). As to requests and procedure for assessments see the Special Guardianship Regulations 2005, SI 2005/1109, regs 11-16; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, regs 5-11.
- 6 Children Act 1989 s 14F(4) (as added: see note 1 supra). See note 5 supra.
- 7 Ibid s 14F(5) (as added: see note 1 supra). See note 5 supra.
- 8 Ibid s 14F(6) (as added: see note 1 supra). As to the review procedure see the Special Guardianship Regulations 2005, SI 2005/1109, regs 17, 18; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 12.
- 9 Children Act 1989 s 14F(7), (8) (as added: see note 1 supra). As to the regulations that have been made in exercise of this power see the Special Guardianship Regulations 2005, SI 2005/1109; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513.
- 10 As to persons so prescribed see the Special Guardianship Regulations 2005, SI 2005/1109, reg 4; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 3(3).
- 11 Children Act 1989 s 14F(9) (as added: see note 1 supra). Section 27 (as amended) (co-operation between authorities) (see para 932 post) applies in relation to the exercise of functions of a local authority under s 14F (as added): s 14A(11) (as so added).
- 12 Ibid s 14F(10) (as added: see note 1 supra).

## **UPDATE**

### **154 Special guardianship support services**

NOTE 5--See *R (on the application of Barrett) v Kirklees Metropolitan Council* [2010] EWHC 467 (Admin), [2010] 2 FCR 153 (lawfulness of local authority's policy for setting special guardianship allowance).

NOTE 8--SI 2005/1513 reg 12 amended: SI 2008/1879.

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## **2. CENTRAL GOVERNMENT ADMINISTRATION**

### **(1) THE SECRETARY OF STATE AND THE WELSH MINISTERS**

#### **155. The Secretary of State and the Welsh Ministers.**

Ministerial powers and functions under the legislation relating to children and young persons are exercised in England by the Secretary of State<sup>1</sup> and in Wales by the Welsh Ministers<sup>2</sup>. Certain functions relating to England and Wales are exercised jointly by the Secretary of State and the Welsh Ministers<sup>3</sup>.

1 Most modern legislation refers simply to 'the Secretary of State' without reference to a particular department or ministry. In any enactment 'Secretary of State' means one of Her Majesty's principal Secretaries of State: Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is generally capable of performing the functions of all or any of them. As to the office of Secretary of State generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 355. In practice many of the statutory functions relating to children are exercised by the Secretary of State for Children, Schools and Families, who has assumed responsibility for many of the functions of the former Secretary of State for Education and Skills (see the Secretaries of State for Children, Schools and Families, for Innovation, Universities and Skills and for Business, Enterprise and Regulatory Reform Order 2007, SI 2007/3224, arts 3, 6) as well as being charged with the other responsibilities listed in the Prime Minister's written statement to Parliament (see 462 HC Official Report (6th series), 28 June 2007, col 36WS).

2 Functions of Ministers of the Crown under certain legislation relating to children and young persons, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, 3, Sch 1. The functions transferred by that order were those under the Children and Young Persons Act 1933 (except s 53 (repealed), s 58 (as amended; prospectively repealed), ss 79-81 (prospectively repealed), Sch 4 (as amended; prospectively repealed)), the Children and Young Persons Act 1963, the Children and Young Persons Act 1969 (except s 7 (as amended), s 19 (repealed), s 23(12) (as substituted and amended), s 30 (as amended), s 46 (as amended), s 65 (as amended), Sch 3 (as amended)), the Adoption Act 1976 ss 3-5, 8, 28, 51A, 57A, 58A, 65A (all now repealed), the Children Act 1989 and the Activity Centres (Young Persons' Safety) Act 1995: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1. Pursuant to the establishment of the Welsh Assembly Government under the Government of Wales Act 2006 Pt 2 (ss 45-92) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS), such functions, including functions under subordinate legislation, so far as exercisable in relation to Wales, are now almost exclusively the responsibility of Welsh Ministers (ie the First Minister and the Welsh Ministers established under ss 46, 48: see s 45(2); and CONSTITUTIONAL LAW AND HUMAN RIGHTS). Further transfers of ministerial functions to the Welsh Ministers may be effected by Order in Council pursuant to s 58, Sch 3 paras 1-8. For provisions as to the exercise of the transferred functions see Sch 11 paras 33-35 (as amended) (in the case of functions originally transferred to the Assembly by Order in Council under the Government of Wales Act 1998 s 22) or the Government of Wales Act 2006 Sch 3 para 9 (in the case of functions subsequently transferred to the Welsh Ministers by Order in Council under Sch 3 paras 1-8).

3 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 4. For example, in the Adoption and Children Act 2002 'appropriate minister' means, in relation to England and Wales, the Secretary of State and the Welsh Ministers acting jointly: see s 144(1); and para 921 post.

#### **UPDATE**

#### **155 The Secretary of State and the Welsh Ministers**

TEXT AND NOTES--Subject to any specific duties imposed on the Secretary of State, it is the general duty of the Secretary of State to promote the well-being of children in

England: Children and Young Persons Act 2008 s 7(1), (2). 'Children' means persons under the age of 18: s 7(6). The activities which may be undertaken or supported in the discharge of this general duty include activities in connection with parenting: s 7(3). The Secretary of State may take such action as the Secretary of State considers appropriate to promote the well-being of persons who are receiving services under the Children Act ss 23C-24D (see PARAS 922-926, 930, 931), and persons under the age of 25 of a prescribed description: Children and Young Persons Act 2008 s 7(4), (6). The Secretary of State, in discharging functions under s 7, must have regard to the aspects of well-being mentioned in the Children Act 2004 s 10(2)(a)-(e) (see PARA 187): s 7(5).

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## 156. Inspection of premises.

The Secretary of State<sup>1</sup> may cause to be inspected<sup>2</sup> from time to time any of the following<sup>3</sup>:

- 103 (1) a private children's home<sup>4</sup>;
- 104 (2) premises where a child<sup>5</sup> who is being looked after by a local authority is living<sup>6</sup>;
- 105 (3) premises where a child who is being accommodated by or on behalf of a local education authority or voluntary organisation is living<sup>7</sup>;
- 106 (4) premises where a child who is being accommodated by or on behalf of a local health board, special health authority, primary care trust, national health service trust or NHS foundation trust is living<sup>8</sup>;
- 107 (5) premises where a privately fostered child, or a child who is treated as a foster child<sup>9</sup>, is living, or where it is proposed that he will live<sup>10</sup>;
- 108 (6) premises where any person acts as a child minder<sup>11</sup>;
- 109 (7) premises with respect to which a person is registered as a provider of day care<sup>12</sup>;
- 110 (8) a care home or independent hospital used to accommodate children<sup>13</sup>;
- 111 (9) premises provided by a local authority in which any specified service is provided by the authority<sup>14</sup>; and
- 112 (10) a school or college providing accommodation for any child<sup>15</sup>.

Any person authorised to inspect premises<sup>16</sup> has a right to enter the premises for that purpose, or for the purpose of obtaining information or inspecting records<sup>17</sup>, at any reasonable time<sup>18</sup>, but he must, on request, produce some duly authenticated document showing his authority to do so<sup>19</sup>. Any person who intentionally obstructs another in the exercise of his right of entry is guilty of an offence, and liable on summary conviction to a fine<sup>20</sup>.

Any person inspecting any home or other premises may inspect the children there, and make such examination into the state and management of the home or premises and the treatment of the children as he thinks fit<sup>21</sup>.

The Secretary of State may require any specified person<sup>22</sup> to furnish him with information or allow him to inspect such records<sup>23</sup> as he may direct<sup>24</sup>. Any person authorised by the Secretary of State to exercise the power to inspect such records is entitled at any reasonable time to have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been used in connection with the records in question<sup>25</sup>. He may also require the person by whom or on whose behalf the computer is or has been so used, or any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material, to afford him such reasonable assistance as he may require<sup>26</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 An inspection must be conducted by a person authorised by the Secretary of State (Children Act 1989 s 80(2)), but an officer of a local authority is not so authorised except with the consent of that authority (s 80(3)). For the meaning of 'local authority' see para 138 note 13 ante.

3 Ibid s 80(1). The Secretary of State may by order disapply this provision to homes or premises specified in the order: see s 80(11), (12).

4 Ibid s 80(1)(a) (amended by the Care Standards Act 2000 s116, Sch 4 para 14(1), 16(a)). For the meaning of 'private children's home' see para 980 note 2 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vii)).

5 For the meaning of 'child' see para 3 ante.

6 Children Act 1989 s 80(1)(b). As to children looked after by local authorities see para 867 et seq post.

7 Ibid s 80(1)(c). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq. For the meaning of 'voluntary organisation' see para 248 note 10 post.

8 Ibid s 80(1)(d) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 118(8); the Health and Social Care (Community Health and Standards) Act 2003 Sch 4 para 80(a); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (8)(a); and the Health Authorities Order 2007 SI 2007/961, art 3, Sch para 20(1), (2)(g)). As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74; and as to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq. As to primary care trusts, national health service trusts, NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARAS 111 et seq, 155 et seq, 174 et seq. As to accommodation by health authorities etc see para 1195 post.

9 Ie by virtue of the Children Act 1989 s 66(5), Sch 8 para 9 (as amended): see para 1069 post.

10 Ibid s 80(1)(g). For the meaning of 'privately fostered child' see para 1049 post.

11 Ibid s 80(1)(h). As to child minding see para 1070 et seq post.

12 Ibid s 80(1)(i) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (16)(b)). The person in question must be registered for providing day care under the Children Act 1989 s 71(1)(b) (repealed) or Pt XA (ss 79A-79X) (as added): see para 1070 et seq post.

13 Children Act 1989 s 80(1)(j) (substituted by the Care Standards Act 2000 Sch 4 para 14(1), (16)(c)).

For the meaning of 'care home' see para 283 note 3 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)).

14 Children Act 1989 s 80(1)(k). The specified services referred to in the text are those contained in Pt III (ss 17-30) (as amended): see para 851 et seq post.

15 Ibid s 80(1)(l) (amended by the Care Standards Act 2000 s 109 (1), (2)). For the meaning of 'school' see para 271 note 8 ante. 'College' means an institution within the further education sector as defined in the Further and Higher Education Act 1992 s 91 (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 579): Children Act 1989 s 80(13) (added by the Care Standards Act 2000 s 109(1), (4)).

16 See note 2 supra.

17 Ie under the Children Act 1989 s 80(4): see the text and notes 23, 24 infra.

18 Ibid s 80(8). If a person attempting to exercise powers under s 80 (as amended) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: s 102(1), (6)(a). As to the application for, and grant of, such a warrant see s 102(2)-(5) (amended by the Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 10(c); and the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1771, art 3, Schedule Pt 1, para 4(c)).

19 Children Act 1989 s 80(9).

20 Ibid s 80(10). The fine must not exceed level 3 on the standard scale: s 80(10). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 823 note 3 post.

21 Ibid s 80(6). The Secretary of State may by order disapply this provision to homes or premises specified in the order: see s 80(11), (12).

22 The persons are any:

- 35 (1) local authority (ibid s 80(5)(a));
- 36 (2) voluntary organisation (s 80(5)(b));
- 37 (3) person carrying on a private children's home (s 80(5)(c) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (16)(a)));
- 38 (4) proprietor of an independent school or governing body of any other school (Children Act 1989 s 80(5)(d) (amended by the Care Standards Act 2000 s 109(1), (3)(a)));
- 39 (5) governing body of an institution designated under the Further and Higher Education Act 1992 s 28 (Children Act 1989 s 80(5)(da) (added by the Care Standards Act 2000 s 109(1), (3)(b)));
- 40 (6) further education corporation (Children Act 1989 s 85(db) (added by the Care Standards Act 2000 s 109(1), (3)(b)));
- 41 (7) person fostering any privately fostered child or providing accommodation for a child on behalf of a local authority, local education authority, local health board, special health authority, primary care trust, national health service trust, NHS foundation trust or voluntary organisation (Children Act 1989 s 80(5)(e) (amended by the National Health Service and Community Care Act 1990 Sch 9 para 36(4)(b); the Health Authorities Act 1995 s 2(1), Sch 1 para 118(8); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 75, 80(b); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 24(1), (8)(b); and the Health Authorities Order 2007 SI 2007/961, art 3, Sch para 20(1), (2)(g)));
- 42 (8) local education authority providing accommodation for any child (Children Act 1989 s 80(5)(f));
- 43 (9) person employed in a teaching or administrative capacity at any educational establishment (whether or not maintained by a local education authority) at which a child is accommodated on behalf of a local authority or local education authority (s 80(5)(g));
- 44 (10) person who is the occupier of any premises in which any person acts as a child minder (within the meaning of Pt X (ss 71-78) (repealed) or provides day care for young children (within the meaning of Pt X (repealed)) (Children Act 1989 s 80(5)(h));
- 45 (11) person who is the occupier of any premises in which any person required to be a registered child minder acts as a child minder (within the meaning of Pt XA (ss 79A-79X) (as added) (see para 1072 post) or with respect to which a person is required to be registered under Pt XA (as added) for providing day care (s 80(5)(hh) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (16)(d)));
- 46 (12) person carrying on any home of a kind mentioned in the Children Act 1989 s 80(1)(j) (see the text and note 13 supra) (s 80(5)(i));
- 47 (13) person carrying on a fostering agency (s 80(5)(j) (added by the Care Standards Act 2000 s 109(3)(c))).

At the date at which this volume states the law the amendments made by the Care Standards Act 2000 cited in heads (4), (5), (6), (13) supra had not been brought into force in relation to Wales. 'Further education corporation' has the same meaning as in the Further and Higher Education Act 1992 s 17(1) (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 1040): Children Act 1989 s 80(13) (added by the Care Standards Act 2000 s 109(1), (4)). 'Fostering agency' has the same meaning as in the Care Standards Act 2000 s 4(4) (see para 985 note 2 post): Children Act 1989 s 80(13) (added by the Care Standards Act 2000 s 109(1), (4)).

23 le relating to: (1) any of the premises mentioned in heads (1)-(10) in the text; (2) any child living in such premises; (3) the discharge by the Secretary of State of his statutory functions; or (4) the discharge by the local authority of its statutory functions: Children Act 1989 s 80(4) (amended by the Care Standards Act 2000 s 117(2)). 'Functions' includes powers and duties: Children Act 1989 s 105(1).

24 Ibid s 80(4). The Secretary of State may by order disapply this provision to homes or premises specified in the order: see s 80(11), (12).

25 Ibid s 80(7)(a).

26 Ibid s 80(7)(b).





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### **157. Financial support.**

The Secretary of State<sup>1</sup>, with the consent of the Treasury<sup>2</sup>, may defray or contribute towards any fees or expenses incurred by any person undergoing approved child care training<sup>3</sup>, any fees charged, or expenses incurred, by a person providing such training or in the preparation of material for use in connection with such training, or the cost of maintaining any person undergoing such training<sup>4</sup>.

The Secretary of State may make grants to local authorities<sup>5</sup> in respect of expenditure incurred by them in providing secure accommodation<sup>6</sup> in community homes other than assisted community homes<sup>7</sup>. However, where such a grant has been made with respect to any secure accommodation but the grant is not used for the purpose for which it was made or the accommodation is not used as, or ceases to be used as, secure accommodation, the Secretary of State, with the consent of the Treasury, may require the authority concerned to repay the whole or part of the grant<sup>8</sup>.

The Secretary of State may make grants to voluntary organisations towards:

- 113 (1) expenditure incurred by them in connection with the establishment, maintenance or improvement of voluntary homes<sup>9</sup> which at the time when the expenditure was incurred were assisted community homes or were designated as such<sup>10</sup>; or
- 114 (2) expenses incurred in respect of the borrowing of money to defray any such expenditure<sup>11</sup>.

Any grant made under the above provisions must be of such amount and subject to such conditions as the Secretary of State may, with the consent of the Treasury, determine<sup>12</sup>.

Any grant made, and any expenses incurred, by the Secretary of State under the Children Act 1989 are payable out of money provided by Parliament<sup>13</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 512 et seq.

3 'Child care training' means training undergone by a person with a view to, or in the course of: (1) his employment for the purpose of any of the functions mentioned in the Children Act 1989 s 83(9) (see para 159 note 5 ante) or in connection with the adoption of children or the accommodation of children in a care home or independent hospital; or (2) his employment by a voluntary organisation for similar purposes: s 82(6) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (18)). 'Approved child care training' means training which is approved by the Secretary of State: Children Act 1989 s 82(6). For the meaning of 'child' see para 3 ante. For the meaning of 'care home' see para 283 note 3 post; definition applied by s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)).

For the meaning of 'functions' see para 156 note 23 post. As to the accommodation of children in care homes or independent hospitals see para 1196 post.

4 Children Act 1989 s 82(1).

5 For the meaning of 'local authority' see para 138 note 13 post.

6 'Secure accommodation' means accommodation provided for the purpose of restricting the liberty of children: Children Act 1989 s 82(6). As to the use of secure accommodation see para 1037 et seq post.

7 Ibid s 82(2). For the meanings of 'community home' and 'assisted community home' see para 967 post.

Any sums received by the Secretary of State by way of repayment of any grant made under s 82(2) or s 82(4) (see heads (1) and (2) in the text) must be paid into the Consolidated Fund: s 106(2). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

8 Ibid s 82(3).

9 As to voluntary homes see para 975 et seq post.

10 Children Act 1989 s 82(4)(a). See note 7 supra.

11 Ibid s 82(4)(b). See note 7 supra.

12 Ibid s 82(7).

13 Ibid s 106(1).

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**158. Provision of homes.**

The Secretary of State<sup>1</sup> may arrange for the provision, equipment and maintenance of homes for the accommodation of children<sup>2</sup> who are in need of particular facilities and services which are or will be provided in those homes, and which in his opinion are unlikely to be readily available in community homes<sup>3</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 For the meaning of 'child' see para 3 ante; and for the meaning of 'children's home' see para 983 post.

3 Children Act 1989 s 82(5). For the meaning of 'community home' see para 967 post.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(1) THE SECRETARY OF STATE AND THE WELSH MINISTERS/159. Research and information.

### **159. Research and information.**

The Secretary of State<sup>1</sup> may conduct, or assist other persons in conducting, research into any matter connected with<sup>2</sup>:

- 115 (1) his functions<sup>3</sup> or those of local authorities<sup>4</sup> under specified enactments relating to the care of children<sup>5</sup>;
- 116 (2) the adoption<sup>6</sup> of children<sup>7</sup>; or
- 117 (3) the accommodation of children in a care home or independent hospital<sup>8</sup>.

Similarly, any local authority may conduct, or assist other persons in conducting, research into any matter connected with<sup>9</sup>:

- 118 (a) its functions under specified enactments relating to the care of children<sup>10</sup>;
- 119 (b) the adoption of children<sup>11</sup>; or
- 120 (c) the accommodation of children in a care home or independent hospital<sup>12</sup>.

Every local authority must transmit to the Secretary of State, at such times and in such form as he may direct, such particulars<sup>13</sup> as he may require with respect to<sup>14</sup>:

- 121 (i) the performance by the local authority of any or all of its functions under specified enactments relating to the care of children<sup>15</sup>, or in connection with the accommodation of children in a care home or independent hospital<sup>16</sup>; and
- 122 (ii) the children in relation to whom the authority has exercised those functions<sup>17</sup>.

Every voluntary organisation<sup>18</sup> must transmit to the Secretary of State, at such times and in such form as he may direct, such particulars<sup>19</sup> as he may require with respect to children accommodated by the organisation or on its behalf<sup>20</sup>. The Secretary of State may direct the justices' designated officer for each magistrates' court to which the direction is expressed to relate to transmit to such person as may be specified in the direction, and at such times and in such form as he may direct, such particulars as he may require with respect to proceedings of the court which relate to children<sup>21</sup>. In each year the Secretary of State must lay before Parliament a consolidated and classified abstract of the information transmitted to him<sup>22</sup>.

The Secretary of State must keep under review the adequacy of the provision of child care training<sup>23</sup>, and for that purpose must receive and consider any information from or representations made by certain persons or organisations concerning the provision of such training<sup>24</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 Children Act 1989 s 83(1).

3 For the meaning of 'functions' see para 156 note 23 ante.

4 For the meaning of 'local authority' see para 138 note 13 ante.

5 Children Act 1989 s 83(1)(a). The enactments specified are the Children Act 1989, the Children and Young Persons Acts 1933 to 1969, and the Mental Health Act 1983 s 116 (as amended) (so far as it relates to children looked after by local authorities) (see MENTAL HEALTH vol 30(2) (Reissue) para 430); Children Act 1989 s 83(9) (amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, SI 2005/2078, art 16(1), Sch 3).

6 As to adoption see para 323 et seq post.

7 Children Act 1989 s 83(1)(b). For the meaning of 'child' see para 3 ante.

8 Ibid s 83(1)(c) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (19)). For the meaning of 'care home' see para 283 note 3 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)).

9 Children Act 1989 s 83(2).

10 Ibid s 83(2)(a). As to the specified enactments see note 5 supra.

11 Ibid s 83(2)(b).

12 Ibid s 83(2)(c) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (19)).

13 The particulars to be transmitted may include particulars relating to and identifying individual children: Children Act 1989 s 83(4A) (added by the Children Act 2004 s 54).

14 Children Act 1989 s 83(3).

15 As to the specified enactments see note 5 supra.

16 Children Act 1989 s 83(3)(a) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (19)).

17 Children Act 1989 s 83(3)(b).

18 For the meaning of 'voluntary organisation' see para 248 note 10 post.

19 The particulars to be transmitted may include particulars relating to and identifying individual children: Children Act 1989 s 83(4A) (added by the Children Act 2004 s 54).

20 Children Act 1989 s 83(4).

21 Ibid s 83(5) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 159-160; and the Courts Act 2003 s 109(1), Sch 8 para 336). As to the justices' designated officer see MAGISTRATES vol 29(2) (Reissue) para 605.

22 Children Act 1989 s 83(6). The text refers to information transmitted under s 83(3)-(5) (as amended): see the text and notes 14-21 supra. The Secretary of State may institute research designed to provide information on which requests for information under s 83 (as amended) may be based: s 83(7).

23 For the meaning of 'child care training' see para 157 note 3 ante.

24 Children Act 1989 s 83(8). This provision refers to the Central Council for Education and Training in Social Work, and such representatives of local authorities and such other persons or organisations as appear to the Secretary of State to be appropriate; the Central Council for Education and Training in Social Work, however, has been abolished (see the Abolition of the Central Council for Education and Training in Social Work Order 2002, SI 2002/797; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1002 et seq).

## UPDATE

### 159 Research and information

TEXT AND NOTES--The Registrar General may supply to the Secretary of State or the Welsh Ministers for research purposes information that is kept by the Registrar General under any other enactment and relates to deceased person who was or may have been

under the age of 18 at the time of death: Children and Young Persons Act 2008 s 32(1), (3). 'For research purposes' means for the purposes of any research that is being or may be conducted or assisted under the Children Act 1989 s 83(1): Children and Young Persons Act 2008 s 32(4). The Secretary of State or the Welsh Ministers may disclose information so supplied to any other person if the disclosure is for research purposes and to a local safeguarding children board for the purposes of its functions: s 32(2).

TEXT AND NOTE 5--The following enactments are also specified: the Adoption and Children Act 2002 Pt 1 (ss 1-110), the Children Act 2004, and the Children and Young Persons Act 2008: Children Act 1989 s 83(9) (amended by the Children and Young Persons Act 2008 s 33 (in force in relation to England: SI 2009/268)).

TEXT AND NOTE 8--Head (4) the functions of local safeguarding children boards: Children Act 1989 s 83(1)(aa) (added by the Children and Young Persons Act 2008 s 33 (in force in relation to England: SI 2009/268)).

TEXT AND NOTE 12--Head (d) the functions of local safeguarding children boards: Children Act 1989 s 83(2)(aa) (added by the Children and Young Persons Act 2008 s 33 (in force in relation to England: SI 2009/268)).

TEXT AND NOTE 17--Head (iii) the performance by the local safeguarding children board established by the local authority under the Children Act 2004 of all or any of its functions: Children Act 1989 s 83(3)(c) (added by the Children and Young Persons Act 2008 s 33 (in force in relation to England: SI 2009/268)).

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**160. Power in default of action by local authority.**

If the Secretary of State<sup>1</sup> is satisfied that any local authority<sup>2</sup> has failed without reasonable excuse to comply with any of the duties imposed on it by or under the Children Act 1989, he may make an order<sup>3</sup>, declaring the authority to be in default with respect to that duty<sup>4</sup>. Such an order must contain the Secretary of State's reasons for making it<sup>5</sup>. It may also contain such directions for the purpose of ensuring that the duty is complied with, within such period as may be specified in the order, as appear to him to be necessary<sup>6</sup>. Any such direction is, on the application of the Secretary of State, enforceable by mandatory order<sup>7</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 For the meaning of 'local authority' see para 138 note 13 ante.

3 Orders under the Children Act 1989 s 84 are not statutory instruments (see s 104(1) (as amended); and para 161 post) and are not recorded in this work.

4 Ibid s 84(1). See *R v Brent London Borough Council, ex p S* [1994] 2 FCR 996, [1994] 1 FLR 203, CA (the Secretary of State's power to make an order should not be treated by the court as an alternative to judicial review). As to judicial review see JUDICIAL REVIEW.

5 Children Act 1989 s 84(2).

6 Ibid s 84(3).

7 Ibid s 84(4). As to mandatory orders see JUDICIAL REVIEW vol 61 (2010) PARA 703 et seq.

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### **161. Power to make regulations and orders.**

Any power of the Lord Chancellor, the Treasury<sup>1</sup>, or the Secretary of State<sup>2</sup> under the Children Act 1989 to make an order, regulations, or rules is exercisable by statutory instrument<sup>3</sup>; and any such statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament<sup>4</sup>.

An order amending (1) the list of enactments permitting registration of a child's father (and pursuant to which a father may acquire parental responsibility)<sup>5</sup>; or (2) any of the provisions regarding provision by the local authority of services for families<sup>6</sup>, must not be made unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament<sup>7</sup>.

Any statutory instrument made under the Children Act 1989 may: (a) make different provision for different cases<sup>8</sup>; (b) provide for exemptions from any of its provisions<sup>9</sup>; and (c) contain such incidental, supplemental and transitional provisions as the person making it considers expedient<sup>10</sup>.

The Lord Chancellor may by order make such amendments or repeals, in such enactments as may be specified in the order, as appear to him to be necessary or expedient in consequence of any provision of the Children Act 1989<sup>11</sup>.

1 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 512 et seq.

2 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante. As from a day to be appointed this also applies to any such power of the Welsh Ministers: Children Act 1989 s 104(1) (amended by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 10(a); and by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). At the date at which this title states the law no such day had been appointed.

3 Children Act 1989 s 104(1) (amended by the Care Standards Act 2000 s 117(2), Sch 6; and the Tax Credits 2002 s 47, Sch 3 paras 15, 19). This provision does not apply to the Children Act 1989 s 56(4)(a) (see para 972 post), s 57(3) (see para 973 post), s 84 (see paras 160 ante, 851 post), s 97(4) (as amended) (see para 227 post) or s 53(6), Sch 4 para 1(1) (as amended) (see para 968 post): see s 104(1) (as so amended).

4 Ibid s 104(2) (amended by the Adoption and Children Act 2002 s 111(6)(a)). This provision does not apply to a statutory instrument made under the Children Act 1989 s 4(1B) (as added) (see para 139 ante), s 17(4) (see para 853 post), s 107 (application to Channel Islands), or s 108(2) (commencement): see s 104(2). As from a day to be appointed this provision will not apply to a statutory instrument made solely by the Welsh Ministers: s 104(2A) (added by the Children and Adoption Act 2006 s 15(1), Sch 2 para 10(b); and amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). At the date at which this title states the law no such day had been appointed.

5 Ie an order under the Children Act 1989 s 4(1B) (as added): see para 139 ante.

6 Ie an order under ibid s 17(4): see para 853 post.

7 Ibid s 104(3) (amended by the Adoption and Children Act 2002 s 111(6)(b)).

8 Children Act 1989 s 104(4)(a).

9 Ibid s 104(4)(b).

10 Ibid s 104(4)(c).



11 Ibid s 108(9).

## **UPDATE**

### **161 Power to make regulations and orders**

TEXT AND NOTES--See also the Children Act 1989 s 104A (regulations and orders made by the Welsh Ministers under Part 3 etc) (added by the Children and Young Persons Act 2008 Sch 3 para 26).

NOTE 2--Amendment to Children Act 1989 s 104(1) in force on 8 December 2008: SI 2008/2870.

TEXT AND NOTES 4, 7--Children Act 1989 s 104(2) further amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 30; Children and Young Persons Act 2008 Sch 3 para 25(2). Children Act 1989 s 104(3) substituted by s 104(3A)-(3C): Children and Young Persons Act 2008 Sch 3 para 25(4).

NOTE 4--Children Act 1989 s 104(2A) repealed: Children and Young Persons Act 2008 Sch 3 para 25(3).

NOTE 10--Children Act 1989 s 104(4)(c) amended: Children and Young Persons Act 2008 Sch 3 para 25(5).

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**162. Effect of orders as between England and Wales and Northern Ireland, the Channel Islands or the Isle of Man.**

The Secretary of State<sup>1</sup> may make regulations providing:

- 123 (1) for prescribed orders which: (a) are made by a court in Northern Ireland<sup>2</sup>; and (b) appear to the Secretary of State to correspond in their effect to orders which may be made under any provision of the Children Act 1989<sup>3</sup>, to have effect in prescribed circumstances, for prescribed purposes of the Children Act 1989, as if they were orders of a prescribed kind made under that Act<sup>4</sup>;
- 124 (2) for prescribed orders which: (a) are made by a court<sup>5</sup> in England and Wales<sup>6</sup>; and (b) appear to the Secretary of State to correspond in their effect to orders which may be made under any provision in force in Northern Ireland<sup>7</sup>, to have effect in prescribed circumstances, for prescribed purposes of the law of Northern Ireland, as if they were orders of a prescribed kind made in Northern Ireland<sup>8</sup>.

Such regulations may provide for the order concerned to cease to have effect for the purposes of the law of Northern Ireland, or, as the case may be, the law of England and Wales, if prescribed conditions are satisfied<sup>9</sup>.

The Secretary of State may make regulations providing for prescribed orders which: (i) are made by a court in the Isle of Man or in any of the Channel Islands<sup>10</sup>; and (ii) appear to the Secretary of State to correspond in their effect to orders which may be made under the Children Act 1989<sup>11</sup>, to have effect in prescribed circumstances, for prescribed purposes of the Children Act 1989, as if they were orders of a prescribed kind made under that Act<sup>12</sup>.

Where a child<sup>13</sup>, who is in the care of a local authority<sup>14</sup>, is lawfully taken to live in Northern Ireland, the Isle of Man or any of the Channel Islands, the care order in question ceases to have effect if the conditions prescribed in regulations made by the Secretary of State are satisfied<sup>15</sup>.

The Secretary of State may by order arrange for the transfer of a person committed into care by a relevant order<sup>16</sup> between the managers of a training school in Northern Ireland<sup>17</sup> and the care of a local authority in England or Wales (and vice versa) in order to have the person committed in the area in which his parent or guardian resides or will reside: when a person is received into the care of the managers or the local authority the relevant order in consequence of which the transfer is made ceases to have effect; and the new order will function in the case of person committed to the managers of a training school and transferred to the care of a local authority as if it were a supervision order, and where the circumstances are reversed, as a training school order<sup>18</sup>.

The Secretary of State may authorise a local authority in England or Wales to receive into its care any person named in the authorisation who is the subject of a relevant order<sup>19</sup> made in the Isle of Man or any of the Channel Islands. While such an authorisation is in force in respect of any person he is deemed to be the subject of a care order<sup>20</sup> placing the child in the care of a named local authority or, where the relevant order was made as a criminal disposal in criminal proceedings, a supervision order<sup>21</sup> imposing a local authority residence requirement<sup>22</sup> with a requirement that the child be accommodated by a designated local authority<sup>23</sup>.

1 As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 Children Act 1989 s 101(1)(a)(i).

3 Ibid s 101(1)(a)(ii).

4 Ibid s 101(1)(a).

5 For the meaning of 'court' see para 145 note 2 ante.

6 Children Act 1989 s 101(1)(b)(i).

7 Ibid s 101(1)(b)(ii).

8 Ibid s 101(1)(b). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). As to regulations which have been made under s 101(1)(b) see the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 2 (transfer of care orders from England and Wales to Northern Ireland), reg 2A (added by SI 2006/837) (transfer of care orders to England and Wales from Northern Ireland), Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 6 (substituted by SI 2006/837) (transfer of recovery orders from England and Wales to Northern Ireland), Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 6A (added by SI 2006/837) (transfer of recovery orders to England and Wales from Northern Ireland). As to care orders see para 270 et seq post.

9 Children Act 1989 s 101(2).

10 Ibid s 101(3)(a).

11 Ibid s 101(3)(b).

12 Ibid s 101(3). As to regulations which have been made under s 101(3) see the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 3 (substituted by SI 2006/837) (transfer of care orders to England and Wales from the Isle of Man), Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 7 (substituted by SI 2006/837) (transfer of recovery orders to England and Wales from the Isle of Man).

13 For the meaning of 'child' see para 3 ante.

14 For the meaning of 'local authority' see para 138 note 13 ante.

15 Children Act 1989 s 101(4). As to regulations which have been made under s 101(4) see the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 4 (transfer of care orders from England and Wales to Isle of Man), reg 5 (transfer of care orders from England and Wales to Guernsey).

Any regulations made under the Children Act 1989 s 101 may:

48 (1) make such consequential amendments (including repeals) in the Children and Young Persons Act 1969 s 25 (as amended) (see the text and notes 16-18 *infra*) (transfers between England and Wales and Northern Ireland) or s 26 (as amended) (see the text and notes 18-23 *infra*) (transfers between England and Wales and Channel Islands or Isle of Man), as the Secretary of State considers necessary or expedient (Children Act 1989 s 101(5)(a)); and

49 (2) modify any provision of the Children Act 1989, in its application (by virtue of the regulations) in relation to an order made otherwise than in England and Wales (s 101(5)(b)).

As to regulations which have been made under s 101(5)(a) see the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 8 (amending the Children and Young Persons Act 1969).

16 A relevant order in the case of a transfer from Northern Ireland to a local authority in England or Wales means a fit person order, a training school order or an order under the Children and Young Persons Act 1969 s 25(2) (s 25(1A) (added by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 7(3))), and where the circumstances are reversed a care order to which the Children Act 1989 Sch 14 para 36 applies other than an interim order or a supervision order imposing a local authority residence requirement as mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 (see para 1346 post) or an

order under the Children and Young Persons Act 1969 s 25(1) (s 25(2) (amended by the Health and Social Services and Social Security Adjudications Act 1983 s 9, Sch 2 para 15(b); the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 39(a); the Transfer of Functions (Local Government etc) (Northern Ireland) Order 1973, SR & O 1973/256, art 3, Sch 2; and the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 8(1)(b)(i)-(v)).

17 'Training school' and 'training school order' have the same meaning as in the Children and Young Persons Act (Northern Ireland) 1968: Children and Young Persons Act 1969 s 25(5) (amended by the Transfer of Functions (Local Government, etc) (Northern Ireland) Order 1973, SR & O (NI) 1973/256, art 3, Sch 2).

18 Children and Young Persons Act 1969 s 25 (amended by the Health and Social Services and Social Security Adjudications Act 1983 s 9, Sch 2 para 15(b); the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 39(a); the Transfer of Functions (Local Government, etc) (Northern Ireland) Order 1973, SR & O (NI) 1973/256, art 3, Sch 2; the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 8(1); and the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, arts 7(1)-(3), 15, Schedule).

19 The Secretary of State may by order designate an order of any description which: (1) a court in the Isle of Man or any of the Channel Islands is authorised to make by the law for the time being in force in that country; (2) provides for the committal to the care of a public authority of a person who has not attained the age of 18; and (3) appears to the Secretary of State to be of the same nature as a care order other than an interim order or as a supervision order imposing a local authority residence requirement as mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 (see para 1346 post) as a relevant order for these purposes: Children and Young Persons Act 1969 s 26(1). At the date at which this title states the law the following orders had been made under s 26(1): the Children and Young Persons (Designation of Guernsey Order) Order 1971, SI 1971/348; the Children and Young Persons (Designation of Jersey Order) Order 1972, SI 1972/1074; and the Children and Young Persons (Designation of Isle of Man Orders) Order 1991, SI 1991/2031.

20 For the meaning of 'care order' see the Children Act 1989 s 31; and para 271 note 4 post.

21 For the meaning of 'supervision order' see *ibid* s 31; and para 271 note 5 post.

22 *Ie* as mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 (see para 1346 post): Children and Young Persons Act 1969 s 26(2) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 39(b)).

23 Children and Young Persons Act 1969 s 26 (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 39(b); and the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032, reg 8(2)).

## UPDATE

### **162 Effect of orders as between England and Wales and Northern Ireland, the Channel Islands or the Isle of Man**

TEXT AND NOTES 16-23--Children and Young Persons Act 1969 s 25 repealed, s 26 further amended: Criminal Justice and Immigration Act 2008 Sch 4 paras 15, 16, Sch 28 Pt 1.

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### 163. Guidance and regulations.

In the exercise of social services functions relating to children<sup>1</sup>, including the exercise of any discretion conferred by any relevant enactment, local authorities<sup>2</sup> must act under the general guidance of the Secretary of State<sup>3</sup>. At the date at which this title states the law a number of volumes of such guidance had been published in relation to the Children Act 1989 and the Children Act 2004<sup>4</sup>.

1 The functions under the following provisions are social services functions for these purposes (see the Local Authority Social Services Act 1970 s 2(1)(a), Sch 1; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2)(Reissue) para 1006):

- 50 (1) Children and Young Persons Act 1933 Pt 3 (ss 31-76) (as amended) (see paras 29, 1232, 1234, 1242, 1263 et seq post);
- 51 (2) Children and Young Persons Act 1963 Pt 1 (ss 1-33) (as amended) (see paras 1244, 1266, 1269 post);
- 52 (3) Children and Young Persons Act 1969 (the whole Act, except s 9, in so far as it assigns functions to a local authority in its capacity of a local education authority) (see paras 162 ante, 608, 1239 et seq post);
- 53 (4) Children Act 1989 (the whole Act, in so far as it confers functions on a local authority within the meaning of that Act);
- 54 (5) Adoption (Intercountry Aspects) Act 1999 ss 1, 2(4) (see paras 483, 486 post);
- 55 (6) Carers and Disabled Children Act 2000 (the whole Act, in so far as it confers functions on a local authority within the meaning of that Act) (see para 854 et seq post);
- 56 (7) Adoption and Children Act 2002 (see para 323 et seq post);
- 57 (8) Children Act 2004 ss 13-16, 31-34 (ss 13, 31 as amended) (see paras 189, 194 post).

2 As to the meaning of 'local authority' see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2)(Reissue) para 1005.

3 See the Local Authority Social Services Act 1970 s 7(1); and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1011. As to the Secretary of State, and the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

4 For examples of guidance and regulations and related documents currently available see the Department of Health publications *An Introduction to the Children Act 1989* (HMSO, 1989); *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 6 Children with Disabilities* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 7 Guardians Ad Litem and other Court Related Issues* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 8 Private Fostering and Miscellaneous* (HMSO, 1991); *The Children Act 1989: Guidance and Regulations Volume 9 Adoption Issues* (HMSO, 1991); and the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006). All such guidance is subject to review. At the date at which this title states the law, further information is available at [www.everychildmatters.gov.uk](http://www.everychildmatters.gov.uk).

The guidance has been described as 'authoritative guidance and valuable guidance which family proceedings courts should make clear that they have had regard to when they are arriving at or announcing their decision': *R v Oxfordshire County Council (secure accommodation order)* [1992] Fam 150 at 157, [1992] 3 All ER 660 at

665 per Douglas Brown J). Where an authority does not follow statutory guidelines for assessing the needs of a child it should follow an approach that is substantially similar to that contained in guidelines: *R (on the application of AB and SB) v Nottingham County Council* [2001] EWHC 235 (Admin), [2001] 3 FCR 349. As to the effect of the guidance generally see further *R v Islington London Borough Council, ex p Rixon* (1996) 32 BMLR 136.

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## **(2) THE CHILDREN'S COMMISSIONER AND THE CHILDREN'S COMMISSIONER FOR WALES**

### **(i) Functions of the Children's Commissioner**

#### **164. Establishment and function.**

There is established an office of Children's Commissioner<sup>1</sup> which has the function of promoting awareness of the views and interests of children<sup>2</sup> in England<sup>3</sup>.

The Commissioner may in particular: (1) encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests; (2) advise the Secretary of State on the views and interests of children; (3) consider or research the operation of complaints procedures so far as relating to children; (4) consider or research any other matter relating to the interests of children; and (5) publish a report on any matter considered or researched by him<sup>4</sup>.

The Commissioner is concerned in particular with the views and interests of children so far as relating to the following aspects of their well-being: (a) physical and mental health and emotional well-being; (b) protection from harm and neglect; (c) education, training and recreation; (d) the contribution made by them to society; (e) social and economic well-being<sup>5</sup>.

The Commissioner must take reasonable steps to involve children in the discharge of his function under these provisions, and in particular to ensure that children are made aware of his function and how they may communicate with him, and to consult children, and organisations working with children, on the matters he proposes to consider or research under head (3) or head (4) above<sup>6</sup>.

The Commissioner must not conduct an investigation of the case of an individual child under these provisions<sup>7</sup>.

The Commissioner or a person authorised by him may for the purposes of his function under these provisions at any reasonable time enter any premises, other than a private dwelling, for the purposes of interviewing any child accommodated or cared for there, and, if the child consents, interview the child in private<sup>8</sup>.

Any person exercising functions under any enactment must supply the Commissioner with such information in that person's possession relating to those functions as the Commissioner may reasonably request for the purposes of his function under these provisions, provided that the information is information which that person may lawfully disclose to him<sup>9</sup>.

Where the Commissioner has published a report containing recommendations in respect of any person exercising functions under any enactment, he may require that person to state in writing, within such period as the Commissioner may reasonably require, what action the person has taken or proposes to take in response to the recommendations<sup>10</sup>.

1 Children Act 2004 s 1(1).

2 For these purposes, 'child' means a person under the age of 18: *ibid* s 65(1). See also para 3 ante. Any reference to a child in Pt 1 (ss 1-9) (apart from a reference in s 2(11), (12)) includes, in addition to a person

under the age of 18, a person aged 18, 19 or 20 who has been looked after by a local authority in England and Wales at any time after attaining the age of 16, or has a learning disability: s 9(1), (2). A person is 'looked after by a local authority' if for the purposes of the Children Act 1989 he is looked after by a local authority in England and Wales (see s 22(1); and para 867 post): Children Act 2004 s 9(3). 'Learning disability' means a state of arrested or incomplete development of mind which induces significant impairment of intelligence and social functioning: s 9(3).

In considering what constitutes the interests of children, generally or so far as relating to a particular matter, the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child (20 November 1989; TS 44 (1992); Cm 1976), subject to any reservations, objections or interpretative declarations by the United Kingdom for the time being in force: Children Act 2004 s 2(11), (12).

3 Ibid s 2(1).

4 Ibid s 2(2). Where the Children's Commissioner publishes such a report he must, if and to the extent that he considers it appropriate, also publish the report in a version which is suitable for children, or, if the report relates to a particular group of children, for those children: s 2(5). For the purposes of the law of defamation any statement made by the Children's Commissioner in a report published under Pt 1 has absolute privilege, and any other statement made by him or a member of his staff for the purposes of Pt 1 has qualified privilege: s 1, Sch 1 para 10.

5 Ibid s 2(3).

6 Ibid s 2(4). For this purpose, the Children's Commissioner must have particular regard to groups of children who do not have other adequate means by which they can make their views known: s 2(6).

7 Ibid s 2(7). See further para 165 post.

8 Ibid s 2(8).

9 Ibid s 2(9).

10 Ibid s 2(10).



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### **165. Inquiries.**

Where the Children's Commissioner considers that the case of an individual child<sup>1</sup> in England raises issues of public policy of relevance to other children, he may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues<sup>2</sup>. The Commissioner may only conduct such an inquiry if he is satisfied that the inquiry would not duplicate work that is the function of another person (having consulted such persons as he considers appropriate)<sup>3</sup> and before holding such an inquiry he must consult the Secretary of State<sup>4</sup>. The Commissioner may, if he thinks fit, hold an inquiry, or any part of it, in private<sup>5</sup>. As soon as possible after completing an inquiry the Commissioner must publish a report containing his recommendations, and send a copy to the Secretary of State<sup>6</sup>. The report need not identify any individual child if the Commissioner considers that it would be undesirable for the identity of the child to be made public<sup>7</sup>. Where the Commissioner has published a report containing recommendations in respect of any person exercising functions under any enactment, he may require that person to state in writing, within such period as the Commissioner may reasonably require, what action the person has taken or proposes to take in response to the recommendations<sup>8</sup>.

Where the Secretary of State considers that the case of an individual child in England raises issues of relevance to other children, he may direct the Commissioner to hold an inquiry into that case<sup>9</sup>. The Commissioner may, if he thinks fit, hold such an inquiry, or any part of it, in private<sup>10</sup>. The Commissioner must, as soon as possible after the completion of such an inquiry, make a report in relation to the inquiry and send a copy to the Secretary of State<sup>11</sup>. The Secretary of State must publish each report received by him as soon as possible<sup>12</sup> and lay a copy of each report so published before each House of Parliament<sup>13</sup>.

As soon as possible after the end of each financial year the Commissioner must make a report on:

- 125 (1) the way in which he has discharged his functions<sup>14</sup>, other than functions of holding inquiries, and in particular an account of the steps taken by him to involve the children in relation to whom those functions are exercised<sup>15</sup>;
- 126 (2) what he has found in the course of exercising those functions during the year<sup>16</sup>; and
- 127 (3) the matters he intends to consider or research in the next financial year<sup>17</sup>.

1 For the meaning of 'child' see para 164 note 2 ante.

2 Children Act 2004 s 3(1). The Local Government Act 1972 s 250(2), (3) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 105) applies for the purposes of such an inquiry with the references to the person appointed to hold the inquiry substituted by references to the Children's Commissioner: Children's Act 2004 s 3(8).

3 Ibid s 3(2).

4 Ibid s 3(3).

5 Ibid s 3(4).

6 Ibid s 3(5). See also, for the purposes of the law of defamation, para 164 note 4 ante. As to the Secretary of State see para 155 ante.

7 Ibid s 3(6).

8 Ibid s 3(7).

9 Ibid s 4(1). The Local Government Act 1972 s 250(2), (3) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 105) applies for the purposes of such an inquiry with the references to the person appointed to hold the inquiry substituted by references to the Children's Commissioner: Children Act 2004 s 4(7).

10 Ibid s 4(2).

11 Ibid s 4(3). See also, for the purposes of the law of defamation, para 164 note 4 ante.

12 Ibid s 4(4). Where such a report identifies an individual child and the Secretary of State considers that it would be undesirable for the identity of the child to be made public, he may make such amendments to the report as are necessary to protect the identity of the child and publish the amended report only, or, if he considers that it is not possible to publish the report without identifying the child, he need not publish the report: s 4(5).

13 Ibid s 4(6).

14 Ie his functions under the Children Act 2004 Pt 1 (ss 1-9): s 8(1)(a).

15 Ibid s 8(1)(a), (2). Where the Children's Commissioner makes such a report he must send a copy to the Secretary of State who must, as soon as possible, lay a copy before each House of Parliament: s 8(3). As soon as possible thereafter the Commissioner must publish any such report together with (to the extent that he considers appropriate) a version suitable for children: s 8(4), (5).

16 Ibid s 8(1)(b). See note 15 supra.

17 Ibid s 8(1)(c). See note 15 supra. See also, for the purposes of the law of defamation, para 164 note 4 ante.

## **UPDATE**

### **165 Inquiries**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **166. Functions of the Children's Commissioner in relation to Wales.**

The Children's Commissioner<sup>1</sup> has the function of promoting awareness of the views and interests of children<sup>2</sup> in Wales, except in so far as relating to any matter falling within the remit of the Children's Commissioner for Wales<sup>3</sup>. In discharging this function the Children's Commissioner must take account of the views of, and any work undertaken by, the Children's Commissioner for Wales<sup>4</sup>. Where the Children's Commissioner considers that the case of an individual child in Wales raises issues of public policy of relevance to other children, other than issues relating to a matter falling within the remit of the Children's Commissioner for Wales<sup>5</sup>, he may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues<sup>6</sup>. Where the Secretary of State<sup>7</sup> considers that the case of an individual child in Wales raises issues of relevance to other children, other than issues relating to a matter falling within the remit of the Children's Commissioner for Wales<sup>8</sup>, he may direct the Children's Commissioner to hold an inquiry into that case<sup>9</sup>.

1 See para 164 ante.

2 For the meaning of 'children' see para 164 note 2 ante.

3 Children Act 2004 s 5(1). The text refers to any matter falling within the remit of the Children's Commissioner for Wales under the Care Standards Act 2000 s 72B (as added and amended) (see para 168 post), s 73 (as amended) (see para 169 post), s 74 (as amended) (see para 170 post): Children Act 2004 s 5(1). In the exercise of the Commissioner's functions pursuant to s 5(1) the functions set out in s 2(2)-(12) (see para 164 ante) are to apply: s 5(2). As to the role and functions of the Children's Commissioner for Wales generally see para 167 et seq post.

4 Ibid s 5(3).

5 See note 3 supra.

6 Children Act 2004 s 5(4). The provisions of s 3(2)-(8) (see para 165 ante) apply to such an inquiry: s 5(5).

7 As to the Secretary of State see para 155 ante.

8 See note 3 supra.

9 Children Act 2004 2(6). The provisions of s 4(2)-(7) (see para 165 ante) apply to such an inquiry: s 5(7).

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## **(ii) Functions of the Children's Commissioner for Wales**

### **167. The role and principal aim of the Children's Commissioner for Wales.**

Part V of the Care Standards Act 2000<sup>1</sup> provides for the establishment of the office of the Children's Commissioner for Wales ('Comisiynydd Plant Cymru')<sup>2</sup>. The principal aim of the Commissioner in exercising his functions is to safeguard and promote the rights and welfare of children to whom Part V of the Act applies<sup>3</sup>. The Commissioner may review the effect of the exercise of functions of the Welsh Ministers and other bodies on children to whom Part V applies<sup>4</sup>, and review and monitor the operation of certain arrangements by service providers to ascertain whether and to what extent they are effective in safeguarding and promoting the rights and welfare of children to whom Part V of the Act applies<sup>5</sup>.

Part V of the Act applies to children<sup>6</sup> who are ordinarily resident in Wales<sup>7</sup>, or to or in respect of whom regulated children's services in Wales are provided<sup>8</sup>, or to or in respect of whom services are provided in Wales by, or on behalf of or under arrangements with<sup>9</sup>:

- 128 (1) the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government<sup>10</sup>;
- 129 (2) any county council or county borough council in Wales<sup>11</sup>;
- 130 (3) any health authority for an area in, or consisting of, Wales<sup>12</sup>;
- 131 (4) any local health board for an area in, or consisting of, Wales<sup>13</sup>;
- 132 (5) any national health service trust all or most of whose hospitals, establishments and facilities are situated in Wales<sup>14</sup>;
- 133 (6) any further education corporation which conducts an institution in Wales<sup>15</sup>;
- 134 (7) any higher education corporation which conducts an institution in Wales<sup>16</sup>;
- 135 (8) certain universities in Wales in receipt of financial support<sup>17</sup>;
- 136 (9) certain institutions in Wales designated by the Secretary of State as eligible for funding<sup>18</sup>;
- 137 (10) any governing body of a school in Wales which is a maintained school<sup>19</sup>.

The Commissioner must take reasonable steps to ensure that:

- 138 (a) children in Wales are made aware of the location of the Commissioner's office or offices and the ways in which they can communicate with the Commissioner and his staff<sup>20</sup>;
- 139 (b) such children are encouraged to communicate with the Commissioner and his staff<sup>21</sup>;
- 140 (c) the content of any material issued by the Commissioner or his staff, whether printed or in electronic form, which is intended to be read by any one or more of such children, takes account, so far as practicable, of the age, level of understanding and usual language of the intended recipient<sup>22</sup>;
- 141 (d) the views of such children are sought as to how the Commissioner should exercise his functions and as to the content of the Commissioner's annual work programme<sup>23</sup>; and

142 (e) the Commissioner and his staff make themselves available to such children in the children's locality<sup>24</sup>,

and in exercising the above functions the Commissioner must have regard to what he reasonably considers to be the needs and circumstances of such children<sup>25</sup>.

In exercising his functions, the Commissioner has a duty to have regard to the United Nations Convention on the Rights of the Child<sup>26</sup>.

1 le the Care Standards Act 2000 Pt V (ss 72-78) (as amended).

2 Ibid s 72(1), (2), Sch 2. As to the appointment of the Children's Commissioner for Wales see para 176 et seq post.

The office of the Children's Commissioner for Wales was established to implement the recommendations in *Lost in Care--The Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council areas of Gwynedd and Clwyd since 1974* (HC Paper (1999-2000) no 201) (February 2000) ('the Waterhouse Report').

3 Care Standards Act 2000 s 72A (added by the Children's Commissioner for Wales Act 2001 s 2). As to the functions of the English Children's Commissioner in relation to Wales see para 166 ante.

4 See the Care Standards Act 2000 s 72B (as added and amended); and para 168 post. As to the Welsh Ministers see para 155 ante.

5 See ibid s 73 (as amended); and para 169 post.

6 For the purpose of ibid Pt V (as amended), 'child' includes:

58 (1) a person over the age of 18 in respect of whom services are provided in Wales by, or on behalf of or under arrangements with, a county council or county borough council in Wales by virtue of the Children Act 1989 s 23C (as added), s 24 (as substituted), s 24A (as added), s 24B (as added) or regulations made under s 23D (as added) (see para 922 et seq post) (see the Care Standards Act s 78(1A), (1B) (added by the Children's Commissioner for Wales Act 2001 s 1(1), (2)); and the Children's Commissioner for Wales Regulations 2001 SI 2001/2787, reg 21(1)); and

59 (2) a person (including a child) who was any time a child ordinarily resident in Wales, or a child to or in respect of whom services were provided in Wales by, or on behalf of or under arrangements with a person mentioned in any of heads (1)-(10) in the text, or a child to or in respect of whom regulated children's services in Wales were provided (see the Care Standards Act 2000 s 78(6) (amended by the Children's Commissioner for Wales Act 2001 s 1(1), (3)); and the Children's Commissioner for Wales Regulations 2001 SI 2001/2787, reg 21(2)).

7 Care Standards Act 2000 s 78(1)(a) (s 78(1) substituted by the Children's Commissioner for Wales Act 2001 s 1(1), (2)).

8 Care Standards Act 2000 s 78(1)(c) (as substituted: see note 7 ante). 'Regulated children's services in Wales' are any of the following services for the time being provided in respect of children:

60 (1) services of a description provided by or in Pt II undertakings, so far as provided in Wales (s 78(2)(a));

61 (2) services provided by local authorities in Wales in the exercise of relevant adoption functions or relevant fostering functions (s 78(2)(b));

62 (3) services of a description provided by persons registered under the Children Act 1989 Pt XA (ss 79A-79X) (as added) (see para 1072 et seq post), so far as provided in Wales (Care Standards Act 2000 s 78(2)(c));

63 (4) accommodation provided by schools or by an institution within the further education sector (as defined in the Further and Higher Education Act 1992 s 91 (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 579), so far as provided in Wales (Care Standards Act 2000 s 78(2)(d)).

In the case of the services mentioned in head (1) supra, the person who carries on the Pt II undertaking is to be treated as the provider of the services (s 78(3)(a)); and in the case of the services mentioned in head (4) supra,

the relevant person (as defined in the Children Act 1989 s 87 (as amended; and prospectively amended): see para 1197 post) is to be treated as the provider of the services (Care Standards Act 2000 s 78(3)(b)). For the purposes of s 78 (as amended), an establishment or agency, and an undertaking of any other description, is a Pt II undertaking if the provider of the services in question is for the time being required to be registered under Pt II (ss 11-42) (as amended) (see para 985 et seq post): s 78(4). Where the activities of an undertaking are carried on from two or more branches, each of those branches must be treated as a separate undertaking for the purposes of Pt V (as amended): s 78(5). 'Undertaking' includes any business or profession and (a) in relation to a public or local authority, includes the exercise of any functions of that authority; and (b) in relation to any other body of persons, whether corporate or unincorporate, includes any of the activities of that body: s 121(1). For the meaning of 'local authority' see para 138 note 13 ante; definition applied by s 121(1). For the meaning of 'relevant adoption functions' see para 196 note 11 post; definition applied by s 78(8). For the meaning of 'relevant fostering functions' see para 196 note 11 post; definition applied by s 78(8).

9 Ibid s 78(1)(b) (as substituted: see note 7 ante).

10 Ibid s 73, Sch 2B para 1 (Sch 2B added by the Children's Commissioner for Wales Act 2001 s 4(1), (10), Schedule Pt 2; and the Care Standards Act 2000 Sch 2B para 1 substituted by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 75). The Welsh Ministers may by order amend the Care Standards Act 2000 Sch 2B (as added): see s 73 (as amended); and para 169 post. As to the First Minister for Wales and the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

11 Ibid Sch 2B para 2 (as added: see note 10 supra). As to county councils, county borough councils and community councils in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

12 Ibid Sch 2B para 3 (as added: see note 10 supra). As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

13 Ibid Sch 2B para 3A (added by the Health Authorities Order 2007, SI 2007/961, art 3, Sch para 30(1), (6)).

14 Ibid Sch 2B para 4 (as added: see note 10 supra). As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

15 Care Standards Act 2000 Sch 2B para 6 (as added: see note 10 supra). The text refers to a further education corporation as defined in the Further and Higher Education Act 1992 s 17(1) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 579.

16 Care Standards Act 2000 Sch 2B para 7 (as added: see note 10 supra). The text refers to a higher education corporation as defined in the Further and Higher Education Act 1992 s 90(1): see EDUCATION vol 15(2) (2006 Reissue) para 579.

17 Care Standards Act 2000 Sch 2B para 8 (as added: see note 10 supra). The institutions referred to in the text are those falling within the Further and Higher Education Act 1992 s 91(5)(a): see EDUCATION vol 15(2) (2006 Reissue) para 646.

18 Care Standards Act 2000 Sch 2B para 9 (as added: see note 10 supra). The institutions referred to in the text are those in relation to which a designation under the Further and Higher Education Act 1992 s 28 (as amended) has effect, which on the date the designation took effect fell within s 28(2)(a) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 599.

19 Care Standards Act 2000 Sch 2B para 10 (as added: see note 10 supra). The text refers to a maintained school as defined in the School Standards and Framework Act 1998 s 20(7): see EDUCATION vol 15(1) (2006 Reissue) para 94 et seq.

20 Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 12(1)(a).

21 Ibid reg 12(1)(b).

22 Ibid reg 12(1)(c).

23 Ibid reg 12(1)(d).

24 Ibid reg 12(1)(e).

25 Ibid reg 12(2).

26 Ibid reg 22. The Convention referred to in the text is the Convention on the Rights of the Child (20 November 1989; TS 44 (1992); Cm 1976).



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**168. Power to review the exercise of the functions of the Welsh Ministers and other public bodies so far as affecting children.**

The Children's Commissioner for Wales may review the effect on children to whom Part V of the Care Standards Act 2000 applies<sup>1</sup> of the exercise or proposed exercise of<sup>2</sup>: (1) any function of the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government<sup>3</sup>, including the making or proposed making of any subordinate legislation<sup>4</sup>; or (2) the exercise or proposed exercise in relation to Wales of any function of any of the following<sup>5</sup>:

- 143 (a) any county council, county borough council or community council in Wales<sup>6</sup>;
- 144 (b) any health authority for an area in, or consisting of, Wales<sup>7</sup>;
- 145 (c) any local health board for an area in, or consisting of, Wales<sup>8</sup>;
- 146 (d) any national health service trust all or most of whose hospitals, establishments and facilities are situated in Wales<sup>9</sup>;
- 147 (e) any further education corporation which conducts an institution in Wales<sup>10</sup>;
- 148 (f) any higher education corporation which conducts an institution in Wales<sup>11</sup>;
- 149 (g) certain universities in Wales in receipt of financial support<sup>12</sup>;
- 150 (h) certain institutions in Wales which are designated voluntary aided schools<sup>13</sup>;
- 151 (i) any governing body of a school in Wales which is a maintained school<sup>14</sup>;
- 152 (j) Her Majesty's Chief Inspector of Education and Training in Wales<sup>15</sup>;
- 153 (k) any agricultural wages committee for an area wholly in, or consisting of, Wales<sup>16</sup>;
- 154 (l) a national park authority for a national park in Wales<sup>17</sup>;
- 155 (m) the Arts Council of Wales<sup>18</sup>;
- 156 (n) the Care Council for Wales<sup>19</sup>;
- 157 (o) the Countryside Council for Wales<sup>20</sup>;
- 158 (p) the National Library of Wales<sup>21</sup>;
- 159 (q) the National Museums and Galleries of Wales<sup>22</sup>;
- 160 (r) the Royal Commission on the Ancient and Historical Monuments of Wales<sup>23</sup>;
- 161 (s) the Sports Council for Wales<sup>24</sup>;
- 162 (t) the Welsh Language Board<sup>25</sup>.

<sup>1</sup> As to the children to whom the Care Standards Act 2000 Pt V (ss 72-78) (as amended) applies see para 167 ante.

<sup>2</sup> Ibid s 72B(1) (s 72B and Sch 2A added by the Children's Commissioner for Wales Act 2001 s 3(1), (2), Schedule Pt I). The Welsh Ministers may by order amend the Care Standards Act 2000 s 72B (as added) and Sch 2A (as added) (see the text and notes 6-25 infra) by:

64 (1) adding to Sch 2A (as added) any person some or all of whose functions are in a field in which functions are exercisable by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, who is established under an enactment or by virtue of Her Majesty's prerogative or is established in any other way by a Minister of the Crown or government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, and (unless the Secretary of State otherwise consents), at least half of whose expenditure on the exercise of functions in relation to Wales (or, where the person's functions relate only to a part of Wales, in relation to the part of



Wales to which they relate) is met directly from payments made by the Welsh Ministers, except that an order may not add to Sch 2A (as added) a person whose sole or main activity is either the investigation of complaints by members of the public about the actions of any person or the supervision or review of, or of steps taken following, such an investigation (s 72B(2)(a), (3)-(5) (as so added; and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 70(1), (4)-(7))); or

- 65 (2) omitting any person from the Care Standards Act 2000 Sch 2A (as added) (s 72B(2)(b) (as so added)); or
- 66 (3) altering the description of any person mentioned in Sch 2A (as added) (s 72B(2)(c) (as so added)); or
- 67 (4) making provision specifying, in respect of a person mentioned in Sch 2A (as added) and specified in the order, a function of the person which although exercisable in relation to Wales is not to be treated as such for the purposes of s 72B(1)(b) (see head (2) in the text) (s 72B(2)(d) (as so added)),

although the Welsh Ministers may make no such order if the result would be that the Children's Commissioner for Wales could review the effect of the exercise or proposed exercise of a person's functions in a field in which no functions are exercisable by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government (s 72B(6) (as so added; and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 70(1), (8))). As to the Welsh Ministers see para 155 ante.

3 As to the First Minister for Wales and the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

4 le within the meaning of the Interpretation Act 1978 s 21(1); definition applied by the Care Standards Act 2000 s 72B(7) (as added: see note 2 supra).

5 Ibid s 72B(1) (as added (see note 2 supra); and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 70(1), (2)).

6 Care Standards Act 2000 Sch 2A para 1 (as added: see note 2 supra). As to county councils, county borough councils and community councils in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

7 Ibid Sch 2A para 2 (as added: see note 2 supra). As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

8 Ibid Sch 2A para 2A (added by the Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 30(1), (5)).

9 Care Standards Act 2000 Sch 2A para 3 (as added: see note 2 supra). As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

10 Ibid Sch 2A para 5 (as added: see note 2 supra). The text refers to a further education corporation within the meaning of the Further and Higher Education Act 1992 s 17(1) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 579.

11 Care Standards Act 2000 Sch 2A para 6 (as added: see note 2 supra). The text refers to a higher education corporation within the meaning of the Further and Higher Education Act 1992 s 90(1): see EDUCATION vol 15(2) (2006 Reissue) para 646.

12 Care Standards Act 2000 Sch 2A para 7 (as added: see note 2 supra). The universities referred to in the text are any institutions falling within the Further and Higher Education Act 1992 s 91(5)(a): see EDUCATION vol 15(2) (2006 Reissue) para 646.

13 Care Standards Act 2000 Sch 2A para 8 (as added: see note 2 supra). The institutions referred to in the text are any institutions in relation to which a designation under the Further and Higher Education Act 1992 s 28 (as amended) has effect, which on the date the designation took effect was an institution falling within s 28(2)(a) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 599. As to voluntary aided schools see EDUCATION vol 15(1) (2006 Reissue) para 102 et seq.

14 Care Standards Act 2000 Sch 2A para 9 (as added: see note 2 supra). The text refers to a maintained school as defined in the School Standards and Framework Act 1998 s 20(7): see EDUCATION vol 15(1) (2006 Reissue) para 94 et seq.

15 Care Standards Act 2000 Sch 2A para 10 (as added: see note 2 supra). As to Her Majesty's Chief Inspector of Education and Training in Wales see the Learning and Skills Act 2000 s 73; and EDUCATION vol 15(2) (2006 Reissue) para 1188.

16 Care Standards Act 2000 Sch 2A para 11 (as added: see note 2 supra). As to agricultural wages committees see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1244.

17 Ibid Sch 2A para 12 (as added: see note 2 supra). As to national park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

18 Ibid Sch 2A para 13 (as added: see note 2 supra). As to the Arts Council of Wales see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 962.

19 Ibid Sch 2A para 14 (as added: see note 2 supra). As to the Care Council for Wales see the Care Standards Act 2000 s 54; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1003.

20 Ibid Sch 2A para 15 (as added: see note 2 supra). As to the Countryside Council for Wales see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 523 et seq.

21 Ibid Sch 2A para 16 (as added: see note 2 supra).

22 Ibid Sch 2A para 17 (as added: see note 2 supra). As to the National Museums and Galleries of Wales see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 892.

23 Ibid Sch 2A para 19 (as added: see note 2 supra). As to the Royal Commission on the Ancient and Historical Monuments of Wales see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 811.

24 Ibid Sch 2A para 20 (as added: see note 2 supra). As to the Sports Council for Wales see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 965.

25 Ibid Sch 2A para 23 (as added: see note 2 supra). As to the Welsh Language Board see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 44.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(2) THE CHILDREN'S COMMISSIONER AND THE CHILDREN'S COMMISSIONER FOR WALES/(ii) Functions of the Children's Commissioner for Wales/169. Power to review and monitor arrangements in respect of the provision of certain services for children.

**169. Power to review and monitor arrangements in respect of the provision of certain services for children.**

The Children's Commissioner for Wales may review, and monitor the operation of, the arrangements listed below<sup>1</sup> for the purpose of ascertaining whether, and to what extent, they are effective in safeguarding and promoting the rights and welfare of children<sup>2</sup> to or in respect of whom services are provided in Wales by or on behalf of or under arrangements with any person listed in heads (2)(a) to (j) below, or to or in respect of whom regulated children's services in Wales are provided<sup>3</sup>. The arrangements which the Commissioner may review are:

- 163 (1) arrangements made by the providers of regulated children's services in Wales<sup>4</sup> or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government<sup>5</sup>, for dealing with complaints or representations about such services made by or on behalf of children to whom such services are provided<sup>6</sup>;
- 164 (2) arrangements made by:
  - 3
  4. (a) the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government<sup>7</sup>;
  5. (b) any county council or county borough council in Wales<sup>8</sup>;
  6. (c) any health authority for an area in, or consisting of, Wales<sup>9</sup>;
  7. (d) any local health board for an area in, or consisting of, Wales<sup>10</sup>;
  8. (e) any national health service trust all or most of whose hospitals, establishments and facilities are situated in Wales<sup>11</sup>;
  9. (f) any further education corporation which conducts an institution in Wales<sup>12</sup>;
  10. (g) any higher education corporation which conducts an institution in Wales<sup>13</sup>;
  11. (h) any universities in Wales in receipt of financial support<sup>14</sup>;
  12. (i) certain institutions in Wales designated by the Secretary of State as eligible for funding<sup>15</sup>;
  13. (j) any governing body of a school in Wales which is a maintained school<sup>16</sup>,
  - 4
- 165 for dealing with complaints or representations made to the person by or on behalf of a child about services provided in Wales by the person to or in respect of the child<sup>17</sup>;
- 166 (3) arrangements made by a person providing services in Wales on behalf of, or under arrangements with, any person listed in heads (2)(a) to (j) above for dealing with complaints or representations made to the person by or on behalf of a child about a service which is so provided to or in respect of the child<sup>18</sup>;
- 167 (4) arrangements made by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government for dealing with complaints or representations made by or on behalf of a child about a service which is provided in Wales to or in respect of the child by, or on behalf of or under arrangements with, any person listed in heads (2)(a) to (j) above (other than the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government)<sup>19</sup>;

168 (5) arrangements made by the providers of regulated children's services in Wales, by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, or by any other person referred to in heads (2) (a) to (j) or (3) above, for ensuring that proper action is taken in response to any disclosure of information<sup>20</sup> which may tend to show<sup>21</sup>:

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- 14. (a) that a criminal offence has been committed<sup>22</sup>;
- 15. (b) that a person has failed to comply with any legal obligation to which he is subject<sup>23</sup>;
- 16. (c) that the health and safety of any person has been endangered<sup>24</sup>; or
- 17. (d) that information tending to show that any matter falling within one of heads (a) to (c) above has been deliberately concealed<sup>25</sup>,

6

169 in the course of or in connection with the provision of the relevant services<sup>26</sup>;  
 170 (6) arrangements made (whether by providers of regulated children's services in Wales, by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government or by any other person) for making persons available to represent the views and wishes of children to or in respect of whom services are provided in Wales by, or on behalf of or under arrangements with, any person listed in heads (2)(a) to (j) above, or to or in respect of whom regulated children's services in Wales are provided<sup>27</sup>, or to provide such children with advice and support of any prescribed<sup>28</sup> kind<sup>29</sup>.

The Commissioner may also assess the effect on children to or in respect of whom services are provided in Wales by, or on behalf of or under arrangements with, any person listed in heads (2)(a) to (j) above, or to or in respect of whom regulated children's services in Wales are provided, of the failure of any person to make the arrangements referred to above<sup>30</sup>.

Regulations confer power on the Commissioner to require prescribed persons to provide any information which the Commissioner considers it necessary or expedient to have for the purposes of his functions described above<sup>31</sup>.

1 le the arrangements falling within the Care Standards Act 2000 s 73(2) (as amended), s 73(2A) (as added), s 73(2B) (as added), s 73(2C) (as added), s 73(3) (as amended) or s 73(4) (as amended): see the text and notes 4-29 infra.

2 For the meaning of 'child' for these purposes see para 983 note 1 post.

3 Care Standards Act 2000 s 73(1) (amended by the Children's Commissioner for Wales Act 2001 s 4(1), (2) (b)). For the meaning of 'regulated children's services in Wales' see para 167 note 8 ante. As to the functions of the English Children's Commissioner in relation to Wales see para 166 ante.

Following the conclusion of an arrangements review, or monitoring pursuant to s 73(1), the Children's Commissioner for Wales may make a report: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(2). As to reports see further para 172 note 14 post.

The Welsh Ministers may by order amend the Care Standards Act s 73 (as amended) or Sch 2B (as added) (see heads (2)(a)-(j) in the text) by:

68 (1) adding to Sch 2B (as added) any person who provides services in Wales to or in respect of children, some or all of whose functions are in a field in which functions are exercisable by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, who is established under an enactment or by virtue of Her Majesty's prerogative or is established in any other way by a Minister of the Crown or government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, and (unless the Secretary of State otherwise consents) at least half of whose expenditure on the exercise of functions in relation to Wales (or, where the person's functions relate only to a part of Wales, in relation to the part of Wales to which they relate) is met directly from payments made by the Welsh Ministers, except that an order may not add to Sch 2B (as added) a person whose sole or main activity is either the investigation of complaints by members

of the public about the actions of any person or the supervision or review of, or of steps taken following, such an investigation (s 73(5A)(a), (5B)-(5D) (s 73(5A)-(5D) added by the Children's Commissioner for Wales Act 2001 s 4(1), (9); and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 71(1), (3), (4))); or

- 69 (2) omitting any person from the Care Standards Act 2000 Sch 2B (as added) (s 73(5A)(b) (as so added)); or
- 70 (3) altering the description of any person mentioned in Sch 2B (as added) (s 73(5A)(c) (as so added)); or
- 71 (4) making provision specifying, in respect of a person mentioned in Sch 2B (as added) and specified in the order, services which although provided by the person in Wales are not to be treated as such for the exercise of the Commissioner's functions (s 73(5A)(d) (as so added)),

although the Welsh Ministers may make no such order if the result would be that the Commissioner could exercise functions in relation to a person's functions in a field in which no functions are exercisable by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government (s 73(5E) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (9); and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 71(1), (5)). As to the Welsh Ministers see para 155 ante.

4 As to providers of regulated children's services in Wales see para 167 note 8 ante.

5 As to the First Minister for Wales and the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

6 Care Standards Act 2000 s 73(2) (amended by the Children's Commissioner for Wales Act 2001 s 4(1), (4); and the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 71(1), (2)).

7 Care Standards Act 2000 s 73(2A), Sch 2B para 1 (Sch 2B added by the Children's Commissioner for Wales Act 2001 s 4(1), Sch Pt 2; and the Care Standards Act 2000 Sch 2B para 1 amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 75).

8 Care Standards Act 2000 Sch 2B para 2 (as added: see note 7 supra). As to county councils, county borough councils and community councils in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

9 Ibid Sch 2B para 3 (as added: see note 7 supra). As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

10 Ibid Sch 2B para 3A (Sch 2B as added (see note 7 supra); and Sch 2B para 3A added by the Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 30(1), (6)).

11 Care Standards Act 2000 Sch 2B para 4 (as added: see note 7 supra). As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

12 Ibid Sch 2B para 6 (as added: see note 7 supra). The text refers to a further education corporation within the meaning of the Further and Higher Education Act 1992 s 17(1) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 579.

13 Care Standards Act 2000 Sch 2B para 7 (as added: see note 7 supra). The text refers to a higher education corporation within the meaning of the Further and Higher Education Act 1992 s 90(1) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 646.

14 Care Standards Act 2000 Sch 2B para 8 (as added: see note 7 supra). The universities in question are those falling within the Further and Higher Education Act 1992 s 91(5)(a): see EDUCATION vol 15(2) (2006 Reissue) para 646.

15 Care Standards Act 2000 Sch 2B para 9 (as added: see note 7 supra). The institutions referred to are those in relation to which a designation under the Further and Higher Education Act 1992 s 28 (as amended) has effect, which on the date the designation took effect fell within s 28(2)(a) (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 599.

16 Care Standards Act 2000 Sch 2B para 10 (as added: see note 7 supra). The text refers to a maintained school as defined in the School Standards and Framework Act 1998 s 20(7): see EDUCATION vol 15(1) (2006 Reissue) para 94 et seq.

- 17 Care Standards Act 2000 s 73(2A) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (5)).
- 18 Care Standards Act 2000 s 73(2B) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (5)).
- 19 Care Standards Act 2000 s 73(2C) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (5); and amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 71(1), (2)).
- 20 'Information' includes information recorded in any form: Care Standards Act 2000 s 78(7).
- 21 Ibid s 73(3) (amended by the Children's Commissioner for Wales Act 2001 s 4(1), (6)(a)).
- 22 Care Standards Act 2000 s 73(3)(a).
- 23 Ibid s 73(3)(b).
- 24 Ibid s 73(3)(c).
- 25 Ibid s 73(3)(d).
- 26 Ibid s 73(3) (amended by the Children's Commissioner for Wales Act 2001 s 4(1), (6)(b)). The services in the course of or in connection with the provision of which any of the acts or omissions referred to in heads (5) (a)-(d) in the text may be shown to have occurred for the purposes of s 73(3) 9as amended) are: (1) in the case of a person referred to in heads (2)(a)-(j) in the text, services provided in Wales by the person to or in respect of a child; (2) in the case of a person referred to in head (3) in the text, services provided in Wales by the person to or in respect of a child on behalf of or under arrangements with a person referred to in heads (2)(a)-(j) in the text; (3) in the case of a provider of regulated children's services in Wales, those services: Care Standards Act 2000 s 73(3A) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (7)).
- 27 Care Standards Act 2000 s 73(4)(a) (amended by the Children's Commissioner for Wales Act 2001 s 4(1), (8); and the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 71(1), (2)).
- 28 'Prescribed' means prescribed by regulations: Care Standards Act 2000 s 121(1).
- 29 Ibid s 73(4)(b). The kind of advice and support prescribed is the provision of services of advice and support to relevant children which is intended to enable or assist them to express their views and wishes orally or using any other means of communication and the provision of advice (including information) to such children about their rights and welfare: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 2.
- 30 Care Standards Act 2000 s 73(1A) (added by the Children's Commissioner for Wales Act 2001 s 4(1), (5)). Following the conclusion of an assessment pursuant to the Care Standards Act 2000 s 73(1A) (as added), the Commissioner may make a report: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(2). As to reports see further para 172 note 14 post.
- 31 Care Standards Act 2000 s 73(5). The Children's Commissioner for Wales may require a relevant person to provide to him information, recorded in any form, which he considers it necessary or expedient to have for the purposes of reviewing and monitoring arrangements in relation to complaints, whistle-blowing or advocacy; and assessing the effect of the failure of any person to make such arrangements pursuant to s 73(1A) (as added) (see the text and note 30 supra): Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 3(1). As to who is a relevant person for these purposes see reg 3(2).

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### **170. Power to examine cases.**

Regulations<sup>1</sup> may make provision for the examination by the Children's Commissioner for Wales of the cases of particular children<sup>2</sup> to whom Part V of the Care Standards Act 2000<sup>3</sup> applies<sup>4</sup>. Such regulations may include provision about:

- 171 (1) the types of case which may be examined<sup>5</sup>;
- 172 (2) the circumstances in which an examination may be made<sup>6</sup>;
- 173 (3) the procedure for conducting an examination, including provision about the representation of parties<sup>7</sup>; and
- 174 (4) the publication of reports following an examination<sup>8</sup>.

The regulations may make provision for requiring persons to provide the Commissioner with information<sup>9</sup>, or requiring persons who hold or are accountable for information to provide the Commissioner with explanations or other assistance, for the purposes of an examination or for the purposes of determining whether any recommendation made in a report following an examination has been complied with<sup>10</sup>. The regulations may make provision for the payment by the Commissioner of sums in respect of expenses or allowances to persons who attend or provide information for those purposes<sup>11</sup>.

1 The regulations made by the Welsh Ministers: Care Standards Act 2000 s 78(7) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 73). As to the Welsh Ministers see para 155 ante.

2 For the meaning of 'child' for these purposes see para 983 note 1 post.

3 The Care Standards Act 2000 Pt V (ss 72-78) (as amended).

4 Ibid s 74(1). As to the functions of the English Children's Commissioner in relation to Wales see para 166 ante. As to the children to whom Pt V (as amended) applies see para 167 ante. The power to make regulations under s 74 is exercisable only in connection with the Commissioner's functions under Pt V (as amended) not including the power to consider and make representations about any matter affecting the rights or welfare of children in Wales under s 75A (as added) (see para 171 post): s 74(1) (amended by the Children's Commissioner for Wales Act 2001 s 5(2)(a)); Care Standards Act 2000 s 74(1A) (added by the Children's Commissioner for Wales Act 2001 s 5(2)(b)).

5 Care Standards Act 2000 s 74(2)(a). The Commissioner may examine cases of particular children: (1) to or in respect of whom regulated children's services in Wales are being or have been provided; (2) to or in respect of whom services are being or have been provided by any of the persons mentioned in Sch 2B (as added and amended) (see para 167 ante) or persons providing such services on behalf of or under arrangements with any of those persons; or (3) who are ordinarily resident in Wales and who are being or have been affected by the exercise or proposed exercise of any function of the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government or a person mentioned in Sch 2A (as added) (see para 168 ante), where these cases relate to issues concerning the provision of such services or the effect on the children of the exercise of such functions: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 5 (amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). As to the First Minister for Wales and the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

6 Care Standards Act 2000 s 74(2)(b). The Commissioner may only examine the case of a particular child in circumstances where: (1) a representation is made to the Commissioner by the child concerned or, if the child is unable for any reason to make such a representation, where a representation is made to the Commissioner on

behalf of the child by a person who, in the reasonable opinion of the Commissioner, is suitable to make such a representation; (2) the Commissioner considers that the representation raises a question of principle which has a more general application or relevance to the rights or welfare of relevant children than in the particular case concerned; and (3) the Commissioner has taken into account whether the issues involved in the case have been or are being formally considered in any way and if they have not or are not whether, in the Commissioner's opinion, they are more suitable for consideration by other persons: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 6.

7 Care Standards Act 2000 s 74(2)(c). Where the Commissioner decides to conduct an examination he must: (1) produce terms of reference for the examination; (2) send the terms of reference to the person who made the representations giving rise to the examination; (3) send written notice of the proposed examination and copies of the terms of reference to the person being examined (in respect of whose provision of services or the exercise of whose functions there is to be an examination); and (4) afford the person being examined and, if he so desires, his representative an opportunity to make representations in writing or in person in relation to the matters being examined: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 7.

8 Care Standards Act 2000 s 74(2)(d). Following the conclusion of an examination undertaken pursuant to the Children's Commissioner for Wales Regulations 2001, SI 2001/2787, Pt III (regs 4-9), the Commissioner must make a report: reg 13(1). As to reports see further para 172 note 14 post.

9 For the meaning of 'information' see para 169 note 20 ante.

10 Care Standards Act 2000 s 74(3). For the purposes mentioned in s 74(3), the Commissioner has the same powers as the High Court in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad), and the provision of information: s 74(4). No person may be compelled for the purposes mentioned in s 74(3) to give any evidence or provide any information which he could not be compelled to give or provide in civil proceedings before the High Court: s 74(5).

In conducting an examination the Commissioner may require certain designated persons to provide any information which appears to the Commissioner to be necessary for the purposes of the examination in question; and require such a person (or such other person as may be accountable for the said information) to provide the Commissioner with an explanation of, or assistance in relation to, any matters which are the subject of the examination, or any information provided: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 8(1). As to the persons designated see reg 8(2).

The Commissioner may, if it is considered necessary for the purposes of an examination, require a person who is required to provide information under reg 8 to attend before the Commissioner in person to provide information, explanations or assistance: reg 9(1), (2). However, he may only require a person to attend in person at any place if reasonable written notice of the proposed date of attendance and the information, explanations or assistance required by the Commissioner has been given to that person: reg 9(3). In connection with such attendance in person, the Commissioner may, subject to the Care Standards Act 2000 s 74(4), issue witness summonses and administer oaths or affirmations and may permit a person to be represented before the Commissioner: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 9(4).

Where a person provides information to the Commissioner pursuant to reg 8 or attends before the Commissioner pursuant to reg 9, the Commissioner may, if he thinks fit, pay to that person sums in respect of expenses properly incurred by the person, and allowances by way of compensation for the loss of his time, in accordance with such scales, and subject to such conditions, as may be determined by the Commissioner: reg 20.

11 Care Standards Act 2000 s 74(6).



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**171. Additional power of consideration and representation.**

The Children's Commissioner for Wales may consider, and make representations to the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government<sup>1</sup> about, any matter affecting the rights or welfare of children<sup>2</sup> in Wales<sup>3</sup>.

1 As to the Welsh Ministers see para 155 ante. As to the First Minister for Wales or the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

2 For the meaning of 'child' for these purposes see para 983 note 1 post.

3 Care Standards Act 2000 s 75A(1) (s 75A added by the Children's Commissioner for Wales Act 2001 s 5(1); and the Care Standards Act 2000 s 75A(1) amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 72). This function is exercisable only where the Commissioner does not have power to consider and make representations about the matter in question by virtue of any other provision of the Care Standards Act 2000 or any other enactment: s 75A(2) (as so added).

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## **172. Further functions of the Commissioner.**

Regulations<sup>1</sup> may confer power on the Children's Commissioner for Wales to assist<sup>2</sup> a child<sup>3</sup> to whom Part V of the Care Standards Act 2000<sup>4</sup> applies<sup>5</sup> in making a complaint or representation to or in respect of a provider of regulated children's services in Wales<sup>6</sup>, to or in respect of a person whose arrangements are subject to review by the Commissioner<sup>7</sup>, or in any prescribed<sup>8</sup> proceedings<sup>9</sup>. The Commissioner may, in connection with his functions under Part V, give advice and information<sup>10</sup> to any person<sup>11</sup>.

Regulations may, in connection with the Commissioner's functions under Part V, confer further functions<sup>12</sup> on him<sup>13</sup>. The regulations may, in particular, include provision about the making of reports on any matter connected with any of his functions<sup>14</sup>; and provide that the Commissioner may make a joint report with the Commissioner for Older People in Wales where they have discharged their respective functions under this Act and the Commissioner for Older People (Wales) Act 2006 in relation to the same matters<sup>15</sup>. Apart from identifying any person investigated, a report by the Commissioner must not mention the name of any person, or include any particulars which, in the opinion of the Commissioner, are likely to identify any person and can be omitted without impairing the effectiveness of the report, unless, after taking account of the public interest (as well as the interests of any person who made a complaint and other persons), the Commissioner considers it necessary for the report to mention his name or include such particulars<sup>16</sup>. For the purposes of the law of defamation, the publication of any matter by the Commissioner in a report is absolutely privileged<sup>17</sup>.

The Commissioner or a person authorised by him may for the purposes of specified functions<sup>18</sup> of the Commissioner, at any reasonable time, enter any premises (other than a private dwelling) for the purpose of interviewing any child accommodated or cared for there and, if the child consents, interview the child in private<sup>19</sup>.

1    Ie regulations made by the Welsh Ministers: Care Standards Act 2000 s 78(7) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 73). As to the Welsh Ministers see para 155 ante.

2    For the purposes of the Care Standards Act 2000 s 76(1), assistance includes financial assistance, and arranging for representation, or the giving of advice or assistance, by any person; and the regulations may provide for assistance to be given on conditions, including (in the case of financial assistance) conditions requiring repayment in circumstances specified in the regulations: s 76(2).

3    For the meaning of 'child' for these purposes see para 983 note 1 post.

4    Ie the Care Standards Act 2000 Pt V (ss 72-78) (as amended).

5    As to the children to whom *ibid* Pt V (as amended) applies see para 167 ante.

6    *Ibid* s 76(1)(a). As to the provider of regulated children's services in Wales see para 167 note 8 ante.

7    *Ibid* s 76(1)(aa) (added by the Children's Commissioner for Wales Act 2001 s 6(a)). Persons whose arrangements are subject to review are those mentioned in the Care Standards Act 2000 Sch 2B (as added and amended) (see para 167 ante) or s 73(2B) (as added) (see para 169 ante).

8    'Prescribed' means prescribed by regulations: *ibid* s 121(1).

9 Ibid s 76(1)(b). For the purposes of s 76(1), 'proceedings' includes a procedure of any kind and any prospective proceedings: s 76(1). The proceedings which may be prescribed by virtue of s 76(1)(b) are proceedings relating to the exercise or proposed exercise of a function as mentioned in s 72B(1) (as added) (see para 168 ante); and the provision of services as mentioned in s 78(1)(b) or (c) (as substituted) (see para 167 ante): s 76(1A) (added by the Children's Commissioner for Wales Act 2001 s 6(b)).

The Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 10(1), (2) (amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30) provides that the Commissioner may, subject to reg 10(3), (5), provide relevant assistance to a relevant child:

- 72 (1) in relation to proceedings concerning:
  1. (a) the provision to or in respect of a relevant child of regulated children's services in Wales;  
1
  2. (b) the provision of services to or in respect of such a child by any person mentioned in the Care Standards Act 2000 Sch 2B (as added) (see para 167 ante) or any person providing services on behalf of or under arrangements with that person; or  
2
  3. (c) the effect on such a child of the exercise or proposed exercise of any function of the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government or a person mentioned in Sch 2A (as added and amended) (see para 168 ante),  
3
- 73 where, in the reasonable opinion of the Commissioner, the proceedings relate to matters which have a more general application or relevance to the rights and welfare of children in Wales than in the particular proceedings concerned; and
- 74 (2) in making a complaint or representation to or in respect of a provider of regulated children's services in Wales; and
- 75 (3) in making a complaint or representation to or in respect of a person mentioned in s 73(2B) (as added) (see para 169 ante) or Sch 2B (as added) (see para 167 ante).

In deciding whether to provide relevant assistance the Commissioner may take account of the financial and other assistance available to the relevant child in relation to the proceedings, complaint or representation concerned, including assistance under the Access to Justice Act 1999. For the purposes of this regulation 'relevant assistance', without affecting the law and practice as to who may represent a person in relation to any proceedings, means providing or arranging for the provision of advice to and representation of the child; and providing or arranging for the provision of any other assistance which the Commissioner considers appropriate: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 10(3)-(5).

Where the Commissioner decides to provide financial assistance to a relevant child pursuant to the above provisions the assistance may be provided subject to either or both of the following conditions: (i) the Commissioner may recover the reasonable cost of providing the assistance from any sums paid by other parties for this purpose in the proceedings concerned (for which purpose it is immaterial whether the sums paid by other parties are payable by virtue of a decision of a court or tribunal, an agreement reached to avoid proceedings or to bring them to an end, or otherwise); (ii) the assistance provided does not duplicate assistance which has been or may be provided under any enactment: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 11.

10 For the meaning of 'information' see para 169 note 20 ante.

11 Care Standards Act 2000 s 76(3).

12 The reference in ibid s 76(4), (5) to functions of the Commissioner does not include a reference to his power to consider and make representations by virtue of s 75A(1) (as added) (see para 171 ante): s 76(5A) (added by the Children's Commissioner for Wales Act 2001 s 6(c)).

13 Care Standards Act 2000 s 76(4).

14 Ibid s 76(5)(a) (renumbered by the Commissioner for Older People (Wales) Act 2006 s 22, Sch 4 para 1(1), (3)). See also note 12 supra.

A report made under the Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(1) (see para 170 note 8 ante), reg 13(2) (see para 169 notes 3, 30 ante) or reg 13(2A) (as added) (see note 15 infra) must set out the findings and conclusions of the Commissioner; and any recommendations made by him (reg 13(3) (amended by SI 2007/316)); and must send a copy of such a report to the First Minister, and the libraries of the National Assembly for Wales and of the Houses of Parliament (reg 13(4)).

In the case of a report made under reg 13(1) the Commissioner must send a copy to the child or person, as the case may be, who made a representation to the Commissioner in accordance with reg 6 (see para 170 note 6 ante) and in the case of a report made under reg 13(1) or (2) he must send a copy to the person or persons: (1) whose provision of services or the exercise of whose functions has been examined; (2) whose arrangements in relation to complaints, whistle-blowing or advocacy have been reviewed or monitored; (3) in respect of whom an assessment pursuant to the Care Standards Act 2000 s 73(1A) (as added) (see para 169 ante) has been carried out; or (4) who are mentioned in the report: Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(5).

Where the Commissioner has made a report under reg 13(1) which contains a recommendation in respect of a provider of regulated children's services in Wales, the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government or a person mentioned in the Care Standards Act 2000 Sch 2A (as added) (see para 168 ante), the Commissioner may require in writing the person in respect of whom the recommendation is made to provide the Commissioner with the relevant information within three months of the date on which the person is sent a copy of the report: reg 14(1) (amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). Where the Commissioner has made a report under the Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(2) which contains a recommendation in respect of such a person, the Commissioner may request in writing the person in respect of whom the recommendation is made to provide the Commissioner with the relevant information within three months of the date on which the person is sent a copy of the report: reg 14(2). Where such a requirement or request is made it must include a statement that failure to respond within the three months concerned may be published in such manner as the Commissioner considers appropriate: reg 14(4).

If the Commissioner reasonably considers, upon receipt of the relevant information, that the action taken or proposed to be taken to comply with the recommendation or that the reason for no such action being taken or not being proposed to be taken is inadequate, the Commissioner may send to the person concerned a written notice setting out the inadequacies which requires a response within one month of the date of sending: reg 14(5). Where the Commissioner receives no response in accordance with that written notice within one month or is dissatisfied with the response, he may send a supplementary notice which requires a supplementary response within one month of the date of sending: reg 14(6). The supplementary notice must include a statement that failure to provide what the Commissioner reasonably considers to be a satisfactory supplementary response, or a response at all, may be published in such manner as the Commissioner considers appropriate: reg 14(7).

The Commissioner must maintain a register containing details of recommendations contained in reports made under reg 13(1), (2), and the results of further action taken in accordance with reg 14(1), (2), (5), (6) (reg 14(1) as amended): reg 14(8). Any register so maintained must be open to inspection by any person at all reasonable times at the offices of the Commissioner and the Commissioner may make arrangements for copies of the register to be available for inspection in such other place or places or by such other means as he considers appropriate: reg 14(9). The Commissioner must publish the arrangements in such a way as to bring them to the attention of persons who are, in the reasonable opinion of the Commissioner, likely to be interested: reg 14(10).

The 'relevant information' means such information, explanations or assistance as to enable the Commissioner to determine whether the person concerned has complied with the recommendation or will be so complying, or an explanation of the reason for no such action having been taken or not being intended to be taken: reg 14(3).

Beginning in 2002, the Commissioner must make an annual report to the First Minister for Wales containing: (a) a summary of the action taken in the exercise of the Commissioner's functions under the Care Standards Act 2000 during the previous financial year including a summary of the reports issued during that period and of such representations as the Commissioner may have made during that period pursuant to s 75A (as added), including any representations made as to the range or effectiveness of the Commissioner's powers; (b) a review of issues relevant to the rights and welfare of children in Wales; and (c) a summary of the Commissioner's work programme for the financial year in which the report is made and of the Commissioner's proposals for a work programme for the financial year following that year: Children's Commissioner for Wales Regulations 2001 SI 2001/2787 reg 15(1), (3).

The Commissioner must also produce a version of the annual report which is, so far as reasonably practicable, suitable for children (reg 15(2)); and, no later than 1 October in each year, the Commissioner must send a copy of both of the annual reports to the First Minister and the libraries of the National Assembly for Wales and of the Houses of Parliament (reg 15(4)).

The Commissioner must arrange for copies of reports made under of reg 13(1), (2) and under reg 15 to be available for inspection at the Commissioner's office at all reasonable times and at such other places or by such other means, including by electronic means, as the Commissioner considers appropriate (reg 16(1)); and he must publish the arrangements in such a way as to bring them to the attention of persons who are, in the reasonable opinion of the Commissioner, likely to be interested (reg 16(2)).

15 Care Standards Act 2000 s 76(5)(b) (added by the Commissioner for Older People (Wales) Act 2006 s 22, Sch 4 para 1(1), (3)); Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 13(2A) (added by SI 2007/316). As to reports see further note 14 supra. As to the Commissioner's exercise of his functions jointly

with the Commissioner for Older People in Wales see para 174 post. As to the Commissioner for Older People in Wales see SOCIAL SERVICES AND COMMUNITY CARE.

16 Care Standards Act 2000 s 76(6).

17 Ibid s 76(7). As to absolute privilege see LIBEL AND SLANDER vol 28 (Reissue) para 94 et seq.

18 Ie those functions specified under ibid s 72B (as added) (see para 168 ante), s 73 (see para 169 ante) or s 76(4) (see the text to notes 12, 13 supra).

19 Ibid s 76(8) (added by the Children Act 2004 s 61).

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**173. Power to certify offence in relation to the obstruction of staff.**

The Children's Commissioner for Wales may certify an offence to the High Court where:

- 175 (1) a person, without lawful excuse, obstructs him or any member of his staff in the exercise of any of his functions under regulations<sup>1</sup>; or
- 176 (2) a person is guilty of any act or omission in relation to an examination under regulations<sup>2</sup> which, if that examination were proceedings in the High Court, would constitute contempt of court<sup>3</sup>.

Where an offence is so certified the High Court may inquire into the matter and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and any statement that may be offered in defence, the High Court may deal with the person charged with the offence in any manner in which it could deal with him if he had committed the same offence in relation to the High Court<sup>4</sup>.

1 Care Standards Act 2000 s 75(1)(a). The reference in the text to regulations is to those made by the Welsh Ministers by virtue of s 73(5) (see para 169 ante) or s 74 (see para 170 ante). As to the Welsh Ministers see para 155 ante.

2 ie under regulations made by virtue of *ibid* s 74: see para 170 ante.

3 *Ibid* s 75(1)(b). As to contempt of court see CONTEMPT OF COURT.

4 *Ibid* s 75(2).

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#### **174. Working with the Commission for Older People in Wales.**

Where it appears to the Children's Commissioner for Wales that a case which he is examining<sup>1</sup>, or considering whether to examine, relates to or raises a matter which could be the subject of an examination by the Commissioner for Older People in Wales<sup>2</sup>, and he considers it appropriate, he must inform the Commissioner for Older People in Wales about that matter<sup>3</sup>. Where the Children's Commissioner for Wales considers that the case also relates to or raises a matter which he is entitled to examine himself, he must also, if he considers it appropriate, inform and consult with the Commissioner for Older People in Wales about his proposals for the examination of the case<sup>4</sup>.

Where the Children's Commissioner for Wales and the Commissioner for Older People in Wales consider that they are both entitled to examine matters relating to the case they may<sup>5</sup>:

- 177 (1) co-operate with each other in the separate examination of each of those matters<sup>6</sup>;
- 178 (2) act together in the examination of those matters<sup>7</sup>; and
- 179 (3) prepare and publish a joint report containing their respective conclusions in relation to the matters they have each examined<sup>8</sup>.

Where the Children's Commissioner for Wales considers that the case is not one which relates to or raises a matter that he is entitled to examine himself, and that it is appropriate to do so, he must inform the person whose case it is, or another person interested in it that he thinks fit, about how to secure the referral to the Commissioner for Older People in Wales of the connected matter<sup>9</sup>.

1    Ie in accordance with regulations made under the Care Standards Act 2000 s 74 (ie the Children's Commissioner for Wales Regulations 2001, SI 2001/2787): see para 170 ante.

2    Care Standards Act 2000 s 75ZA(1) (s 75ZA added by the Commissioner for Older People (Wales) Act 2006 s 22, Sch 4 para 1(1), (2)). As to the Commissioner for Older People in Wales see SOCIAL SERVICES AND COMMUNITY CARE.

3    Care Standards Act 2000 s 75ZA(2) (as added: see note 2 supra).

4    Ibid s 75ZA(3) (as added: see note 2 supra).

5    Ibid s 75ZA(4) (as added: see note 2 supra).

6    Ibid s 75ZA(4)(a) (as added: see note 2 supra).

7    Ibid s 75ZA(4)(b) (as added: see note 2 supra).

8    Ibid s 75ZA(4)(c) (as added: see note 2 supra). As to reports see further para 172 note 14 ante.

9    Ibid s 75ZA(5) (as added: see note 2 supra).

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### **175. Restrictions on the powers of the Children' Commissioner for Wales.**

Part V of the Care Standards Act 2000<sup>1</sup> does not authorise the Children's Commissioner for Wales to inquire into or report on any matter so far as it is the subject of legal proceedings before, or has been determined by, a court or tribunal<sup>2</sup>. Nor does Part V authorise the Commissioner to exercise any function which by virtue of an enactment<sup>3</sup> is also exercisable by a prescribed<sup>4</sup> person<sup>5</sup>.

1    Ie the Care Standards Act 2000 Pt V (ss 72-78) (as amended).

2    Ibid s 77(1).

3    'Enactment' includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978: see STATUTES vol 44(1) (Reissue) para 1232): Care Standards Act 2000 s 121(1).

4    'Prescribed' means prescribed by regulations: ibid s 121(1).

5    Ibid s 77(2). The Children and Family Court Advisory and Support Service ('CAFCASS') and the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government (in relation to their functions under the Children Act 2004 s 35 (see para 230 post)) are prescribed for the purposes of the Care Standards Act 2000 s 77(2): Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 17 (amended by SI 2005/774; and by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). As to the Welsh Ministers see para 155 ante. As to the First Minister for Wales and the Counsel General to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.



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### **(iii) The Office of the Children's Commissioner and the Children's Commissioner for Wales**

#### **176. Status of the Commissioners.**

The Children's Commissioner<sup>1</sup> and the Children's Commissioner for Wales<sup>2</sup> are both corporations sole<sup>3</sup>. Neither is to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown, and their property is not to be regarded as property of, or property held on behalf of, the Crown<sup>4</sup>.

1 As to the Children's Commissioner see para 164 et seq ante.

2 As to the Children's Commissioner for Wales see para 167 et seq ante.

3 Care Standards Act 2000 s 72(2), Sch 2 para 1(1); Children Act 2004 s 1(2), Sch 1 para 1(1).

4 Care Standards Act 2000 Sch 2 para 1(2); Children Act 2004 Sch 1 para 1(2).

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### **177. Appointment of the Children's Commissioner.**

The Children's Commissioner<sup>1</sup> is appointed by the Secretary of State<sup>2</sup>, who must, to such extent and in such manner as he thinks fit, involve children in that appointment<sup>3</sup>. Subject to the following provisions, a person holds and vacates office as the Children's Commissioner in accordance with the terms and conditions of his appointment as determined by the Secretary of State<sup>4</sup>. The term of office is five years<sup>5</sup>, and a person who has held office as the Children's Commissioner is eligible for re-appointment once only<sup>6</sup>. The Children's Commissioner may at any time resign by notice in writing to the Secretary of State<sup>7</sup>. The Secretary of State may remove the Children's Commissioner if he is satisfied that he has become unfit or unable properly to discharge his functions or behaved in such a way as is not compatible with his continuing in office<sup>8</sup>.

1 As to the Children's Commissioner see para 164 et seq ante.

2 Children Act 2004 s 1(2), Sch 1 para 3(1). As to the Secretary of State see para 155 ante.

3 Ibid Sch 1 para 3(2).

4 Ibid Sch 1 para 3(3).

5 Ibid Sch 1 para 3(4).

6 Ibid Sch 1 para 3(5).

7 Ibid Sch 1 para 3(6).

8 Ibid Sch 1 para 3(7).

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### **178. Appointment of the Children's Commissioner for Wales.**

The Children's Commissioner for Wales is appointed by the First Minister for Wales ('y Cynulliad Cenedlaethol')<sup>1</sup>. The appointment of the Commissioner is to be made only after taking account of: (1) the views of relevant children<sup>2</sup> as to any candidates interviewed for the appointment<sup>3</sup>; and (2) the advice of any selection panel, established for the purpose of interviewing candidates, as to their suitability for appointment<sup>4</sup>.

The term of office of the Commissioner is seven years<sup>5</sup>, and the Commissioner is not eligible for re-appointment upon the expiry or earlier termination of the term of office<sup>6</sup>. The First Minister may relieve the Commissioner of office prior to the expiry of the term of office: (a) at the request of the Commissioner<sup>7</sup>; (b) on the ground of misbehaviour<sup>8</sup>; or (c) on being satisfied that the Commissioner is incapable by reason of mental or physical infirmity of performing the Commissioner's functions<sup>9</sup>.

Further provision as to the filling of vacancies in the office of Commissioner<sup>10</sup> and the tenure of office of the Commissioner (including the circumstances in which he ceases to hold office or may be removed or suspended from office) may be made by regulations<sup>11</sup>.

1 Care Standards Act 2000 s 72(2), Sch 2 para 2(a); Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, reg 2(3) (reg 2 substituted by SI 2007/1049). 'The First Minister' ('y Prif Weinidog') means the person appointed from time to time as the First Minister for Wales under the Government of Wales Act 2006 s 46(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, reg 1(2) (definition added by SI 2007/1049). Anything which was done by the First Secretary for Wales (ie the person elected from time to time as the Assembly First Secretary pursuant to the Government of Wales Act 1998 s 53(1) (repealed): Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, reg 1(2)) under the Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, is to be regarded as if done by the First Minister: reg 4(2) (added by SI 2007/1049).

2 'Relevant children' ('plant perthnasol') means such children resident in Wales as are selected for the purposes of a particular appointment in such a manner as the relevant committee may determine in accordance with the terms of reference of the committee, or in the absence of such a determination, as the First Secretary determines: Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, reg 1(2).

3 Ibid reg 2(4)(a) (as substituted: see note 1 ante).

4 Ibid reg 2(4)(b) (as substituted: see note 1 ante).

5 Ibid reg 2(5) (as substituted: see note 1 ante).

6 Ibid reg 2(6) (as substituted: see note 1 ante).

7 Ibid reg 3(1)(a), (2) (reg 3 substituted by SI 2007/1049).

8 Children's Commissioner for Wales (Appointment) Regulations 2000, SI 2000/3121, reg 3(1)(b), (2) (as substituted: see note 7 ante).

9 Ibid reg 3(1)(c), (2) (as substituted: see note 7 ante).

10 Care Standards Act 2000 Sch 2 para 2(b).

- 11 Ibid Sch 2 para 2(c). At the date at which this volume states the law no such regulations had been made.

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### **179. Remuneration and staff.**

The Secretary of State<sup>1</sup> must pay the Children's Commissioner<sup>2</sup> and the Welsh Ministers<sup>3</sup> must pay the Children's Commissioner for Wales<sup>4</sup> such remuneration and allowances, and pay, or make provision for the payment of, such pension or gratuities to or in respect of him, as may be provided for under the terms of his appointment<sup>5</sup>. Each Commissioner may appoint any staff he considers necessary for assisting him in the exercise of his functions, one of whom must be appointed as deputy Commissioner<sup>6</sup>.

During any vacancy in the office of Commissioner or at any time when either Commissioner is for any reason unable to act, the deputy Commissioner must exercise his functions (and any property or rights vested in the Commissioner may accordingly be dealt with by the deputy as if vested in him)<sup>7</sup>.

1 As to the Secretary of State see para 155 ante.

2 As to the Children's Commissioner see para 164 et seq ante.

3 As to the Welsh Ministers see para 155 ante.

4 As to the Children's Commissioner for Wales see para 167 et seq ante.

5 Children Act 2004 s 1(2), Sch 1 para 4; Care Standards Act 2000 s 72(2), Sch 2 para 3 (amended by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (2)). In addition, the Secretary of State may make payments to the Children's Commissioner and the Welsh Ministers may make payments to the Children's Commissioner for Wales of such amounts, at such times and on such conditions (if any) as he considers, or they consider, appropriate: Children Act 2004 Sch 1 para 7; Care Standards Act 2000 Sch 2 para 14 (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, Sch 1 paras 69, 74(1), (8)).

6 Children Act 2004 Sch 1 para 5(1); Care Standards Act 2000 Sch 2 para 4(1).

7 Children Act 2004 Sch 1 para 5(2); Care Standards Act 2000 Sch 2 para 4(2). Without prejudice to these provisions, any member of the Commissioner's staff may, so far as authorised by him, exercise any of his functions: Children Act 2004 Sch 1 para 5(3); Care Standards Act 2000 Sch 2 para 4(3).

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## 180. General powers.

The Children's Commissioner<sup>1</sup> and the Children's Commissioner for Wales<sup>2</sup> (subject in the latter case to any directions given by the Welsh Ministers<sup>3</sup>) may each do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions<sup>4</sup>. This includes, in particular, co-operating with other public authorities in the United Kingdom<sup>5</sup>, acquiring and disposing of land and other property<sup>6</sup>, and entering into contracts<sup>7</sup>. A document purporting to be duly executed under the seal of either Commissioner or to be signed by him or on his behalf is to be received in evidence and, unless the contrary is proved, taken to be so executed or signed<sup>8</sup>.

1 As to the Children's Commissioner see para 164 et seq ante.

2 As to the Children's Commissioner for Wales see para 167 et seq ante.

3 As to the Welsh Ministers see para 155 ante.

4 Children Act 2004 s 1(2), Sch 1 para 2(1); Care Standards Act 2000 s 72(2), Sch 2 para 5(1) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (3)).

5 Children Act 2004 Sch 1 para 2(2)(a); Care Standards Act 2000 Sch 2 para 5(2)(a). For the meaning of 'United Kingdom' see para 102 note 7 ante.

6 Children Act 2004 Sch 1 para 2(2)(c); Care Standards Act 2000 Sch 2 para 5(2)(b).

7 Children Act 2004 Sch 1 para 2(2)(b); Care Standards Act 2000 Sch 2 para 5(2)(c).

8 Children Act 2004 Sch 1 para 9(1); Care Standards Act 2000 Sch 2 para 13.

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### **181. Accounts to be kept by the Children's Commissioner.**

The Children's Commissioner<sup>1</sup> must keep proper accounting records<sup>2</sup>, prepare a statement of accounts for each financial year<sup>3</sup>, and send a copy of each such statement to the Secretary of State<sup>4</sup> and the Comptroller and Auditor General<sup>5</sup> as soon as possible after the end of the financial year to which the statement relates<sup>6</sup>. The Comptroller and Auditor General must examine, certify and report on each statement of accounts sent to him and must lay copies of the statement and of his report before Parliament<sup>7</sup>.

1 As to the Children's Commissioner see para 164 et seq ante.

2 Children Act 2004 s 1(2), Sch 1 para 8(1)(a).

3 Ibid Sch 1 para 8(1)(b). 'Financial year' means the period beginning with the date on which the first Children's Commissioner is appointed and ending with 31 March next following that date; and each successive period of 12 months ending with 31 March: Sch 1 para 8(3).

4 As to the Secretary of State see para 155 ante.

5 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726; PARLIAMENT vol 78 (2010) PARA 945.

6 Children Act 2004 Sch 1 para 8(1)(c).

7 Ibid Sch 1 para 8(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(2) THE CHILDREN'S COMMISSIONER AND THE CHILDREN'S COMMISSIONER FOR WALES/(iii) The Office of the Children's Commissioner and the Children's Commissioner for Wales/182. Estimates of income and expenses by the Children's Commissioner for Wales.

## **182. Estimates of income and expenses by the Children's Commissioner for Wales.**

For each financial year after the first<sup>1</sup>, the Children's Commissioner for Wales<sup>2</sup> must prepare, and submit to the Welsh Ministers<sup>3</sup>, an estimate of his income and expenses<sup>4</sup>. Each such estimate must be submitted to the executive committee at least five months before the beginning of the financial year to which it relates<sup>5</sup>. The Welsh Ministers must examine each such estimate submitted to them and, after having done so, must lay the estimate before the National Assembly for Wales<sup>6</sup> with any such modifications as they think fit<sup>7</sup>.

1 For these purposes, the period from 1 March 2001 to 31 March 2002 is specified in relation to the first financial year, and the period from 1 April to 31 March is specified in relation to each subsequent financial year: Care Standards Act 2000 s 72(2), Sch 2 para 6(4); Children's Commissioner for Wales Regulations 2001, SI 2001/2787, reg 18.

2 As to the Children's Commissioner for Wales see para 167 et seq ante.

3 As to the Welsh Ministers see para 155 ante.

4 Care Standards Act 2000 Sch 2 para 6(1) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (4)).

5 Care Standards Act 2000 Sch 2 para 6(2) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, Sch 1 paras 69, 74(1), (4)).

6 As to the National Assembly for Wales see para 155 ante.

7 Care Standards Act 2000 Sch 2 para 6(3) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, Sch 1 paras 69, 74(1), (4)).



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### **183. Accounts, reports and audits of the Children's Commissioner for Wales.**

The Children's Commissioner for Wales<sup>1</sup> must keep proper accounting records<sup>2</sup>. He must prepare accounts for each financial year in such form as the Welsh Ministers<sup>3</sup> may with the consent of the Treasury determine<sup>4</sup>.

Regulations may provide for the Commissioner to make periodic or other reports to the Welsh Ministers relating to the exercise of his functions and may require the reports to be published in the manner required by the regulations<sup>5</sup>.

The accounts prepared by the Commissioner for any financial year must be submitted by him to the Auditor General for Wales<sup>6</sup> not more than five months after the end of that year<sup>7</sup>. The Auditor General for Wales must examine and certify any accounts submitted to him<sup>8</sup>; and, no later than four months after the accounts are submitted to him, he must lay before the National Assembly for Wales a copy of them as certified by him together with his report on them<sup>9</sup>. In examining any accounts submitted to him, the Auditor General for Wales must, in particular, satisfy himself that the expenditure to which the accounts relate has been incurred lawfully and in accordance with the authority which governs it<sup>10</sup>.

1 As to the Children's Commissioner for Wales see para 167 et seq ante.

2 Care Standards Act 2000 s 72(2), Sch 2 para 7(1).

3 As to the Welsh Ministers see para 155 ante.

4 Care Standards Act 2000 Sch 2 para 7(2) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (5)). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517.

5 Care Standards Act 2000 s 72(2), Sch 2 para 8 (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (6)). See the Children's Commissioner for Wales Regulations 2001, SI 2001/2787, regs 13-16; and para 172 note 14 ante.

6 As to the Auditor General for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

7 Care Standards Act 2000 Sch 2 para 9(1).

8 Ibid Sch 2 para 9(2)(a).

9 Ibid Sch 2 para 9(2)(b).

10 Ibid Sch 2 para 9(3).

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#### **184. The accounting officer for the Children's Commissioner for Wales.**

The accounting officer for the Commissioner's Office<sup>1</sup> is to be the Children's Commissioner for Wales<sup>2</sup>. The accounting officer for the Commissioner has, in relation to the accounts of the Commissioner and the finances of the Commissioner's Office, the responsibilities<sup>3</sup> which are from time to time specified by the Treasury<sup>4</sup>. The responsibilities which may be so specified include responsibilities owed to: (1) the Welsh Ministers<sup>5</sup>, the executive committee<sup>6</sup> or the Audit Committee<sup>7</sup>; or (2) the House of Commons or its Committee of Public Accounts<sup>8</sup>.

If requested to do so by the House of Commons Committee of Public Accounts, the Audit Committee may on behalf of the Committee of Public Accounts take evidence from the accounting officer for the Commissioner's Office<sup>9</sup>, and report to the Committee of Public Accounts and transmit to that Committee any evidence so taken<sup>10</sup>.

1 For the purposes of the Care Standards Act 2000 s 72(2), Sch 2 paras 10, 11 (see para 185 post) and Sch 2 para 12 (see para 186 post), 'the Commissioner's Office' means the Children's Commissioner for Wales and the members of his staff: Sch 2 para 10(6). As to the Children's Commissioner for Wales see para 167 et seq ante.

2 Ibid Sch 2 para 10(1).

3 For the purposes of ibid Sch 2 para 10, references to responsibilities include in particular: (1) responsibilities in relation to the signing of accounts (Sch 2 para 10(3)(a)); (2) responsibilities for the propriety and regularity of the finances of the Commissioner's Office (Sch 2 para 10(3)(b)); and (3) responsibilities for the economy, efficiency and effectiveness with which the resources of the Commissioner's Office are used (Sch 2 para 10(3)(c)).

4 Ibid Sch 2 para 10(2). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517.

5 As to the Welsh Ministers see para 155 ante.

6 The executive committee was constituted under the Government of Wales Act 1998 s 56 (repealed).

7 Care Standards Act 2000 Sch 2 para 10(4)(a) (amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007, SI 2007/1388, art 3, Sch 1 paras 69, 74(1), (5)).

8 Care Standards Act 2000 Sch 2 para 10(4)(b). As to the House of Commons Committee of Public Accounts see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 719.

9 Ibid Sch 2 para 10(5)(a).

10 Ibid Sch 2 para 10(5)(b).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(2) THE CHILDREN'S COMMISSIONER AND THE CHILDREN'S COMMISSIONER FOR WALES/(iii) The Office of the Children's Commissioner and the Children's Commissioner for Wales/185. Examinations into use of resources by the Children's Commissioner for Wales.

### **185. Examinations into use of resources by the Children's Commissioner for Wales.**

The Auditor General for Wales<sup>1</sup> may carry out examinations into the economy, efficiency and effectiveness with which the Children's Commissioner for Wales<sup>2</sup> has used the resources of the Commissioner's Office<sup>3</sup> in discharging his functions<sup>4</sup>. In determining how to exercise these functions, the Auditor General for Wales must take into account the views of the Audit Committee as to the examinations which he should carry out<sup>5</sup>. The Auditor General for Wales may lay before the National Assembly for Wales<sup>6</sup> a report of the results of any examination carried out by him<sup>7</sup>.

The Auditor General for Wales and the Comptroller and Auditor General<sup>8</sup> may co-operate with, and give assistance to, each other in connection with the carrying out of examinations in respect of the Commissioner under these provisions<sup>9</sup> or specified provisions<sup>10</sup> of the National Audit Act 1983<sup>11</sup>.

1 As to the Auditor General for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

2 As to the Children's Commissioner for Wales see para 167 et seq ante.

3 For the meaning of 'the Commissioner's Office' see para 184 note 1 ante.

4 Care Standards Act 2000 s 72(2), Sch 2 para 11(1). However, this provision must not be construed as entitling the Auditor General for Wales to question the merits of the policy objectives of the Commissioner: Sch 2 para 11(2).

5 Ibid Sch 2 para 11(3).

6 As to the National Assembly for Wales see para 155 ante.

7 Care Standards Act 2000 Sch 2 para 11(4).

8 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726; PARLIAMENT vol 78 (2010) PARA 945.

9 Ie the Care Standards Act 2000 Sch 2 para 11.

10 Ie the National Audit Act 1983 s 7 (economy etc examinations): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 717.

11 Care Standards Act 2000 Sch 2 para 11(5).

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**186. Examinations of the Children's Commissioner for Wales by the Comptroller and Auditor General.**

For the purpose of enabling him to carry out examinations into, and report to Parliament on, the finances of the Commissioner's Office<sup>1</sup>, the Comptroller and Auditor General<sup>2</sup>:

- 180 (1) has a right of access at all reasonable times to all such documents in the custody or under the control of the Children's Commissioner for Wales<sup>3</sup>, or of the Auditor General for Wales<sup>4</sup>, as he may reasonably require for that purpose<sup>5</sup>; and
- 181 (2) is entitled to require from any person holding or accountable for any of those documents any assistance, information or explanation which he reasonably thinks necessary for that purpose<sup>6</sup>.

The Comptroller and Auditor General must consult the Auditor General for Wales and take into account any relevant work done or being done by the Auditor General for Wales, before he acts in reliance on the above provisions or carries out an examination in respect of the Commissioner under specified provisions<sup>7</sup> of the National Audit Act 1983<sup>8</sup>.

1 For the meaning of 'the Commissioner's Office' see para 184 note 1 ante.

2 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726; PARLIAMENT vol 78 (2010) PARA 945.

3 As to the Children's Commissioner for Wales see para 167 et seq ante.

4 As to the Auditor General for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

5 Care Standards Act 2000 s 72(2), Sch 2 para 12(1)(a).

6 Ibid Sch 2 para 12(1)(b).

7 Ie the National Audit Act 1983 s 7 (economy etc examinations): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 717.

8 Care Standards Act 2000 Sch 2 para 12(2).

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### **(3) CHILDREN'S SERVICES AUTHORITIES**

#### **(i) Children's Services in England**

##### **187. Improvement of well-being and promotion of welfare.**

Each children's services authority<sup>1</sup> in England must make arrangements<sup>2</sup> to promote co-operation between the authority, each of the authority's relevant partners<sup>3</sup>, and such other persons or bodies as the authority considers appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area<sup>4</sup>. The arrangements are to be made with a view to improving the well-being of children<sup>5</sup> in the authority's area so far as relating to:

- 182 (1) physical and mental health and emotional well-being<sup>6</sup>;
- 183 (2) protection from harm and neglect<sup>7</sup>;
- 184 (3) education, training and recreation<sup>8</sup>;
- 185 (4) the contribution made by them to society<sup>9</sup>; and
- 186 (5) social and economic well-being<sup>10</sup>.

In making such arrangements a children's services authority in England must have regard to the importance of parents and other persons caring for children in improving the well-being of children<sup>11</sup>. The relevant partners of a children's services authority in England must co-operate with the authority in the making of arrangements<sup>12</sup>. A children's services authority in England and each of its relevant partners must in exercising their functions under these provisions have regard to any guidance given to them for the purpose by the Secretary of State<sup>13</sup>.

A children's services authority in England and any of its relevant partners may for the purposes of the arrangements mentioned above provide staff, goods, services, accommodation or other resources<sup>14</sup> and establish and maintain a pooled fund<sup>15</sup>.

Certain persons and bodies<sup>16</sup> must make arrangements for ensuring that their functions<sup>17</sup> are discharged having regard to the need to safeguard and promote the welfare of children, and any services provided by another person pursuant to arrangements made by the person or body in the discharge of his or its functions are provided having regard to that need<sup>18</sup>. Each person and body must in discharging the duty to promote the welfare of children have regard to any guidance given to him or it for the purpose by the Secretary of State<sup>19</sup>.

1 'Children's services authority in England' means (1) a county council in England; (2) a metropolitan district council; (3) a non-metropolitan district council for an area for which there is no county council; (4) a London borough council; (5) the Common Council of the City of London; and (6) the Council of the Isles of Scilly: Children Act 2004 s 65(1). As to local government areas and authorities in England see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

2 'Arrangements' may include arrangements relating to persons aged 18 and 19, persons over the age of 19 who are receiving services under the Children Act 1989 ss 23C-24D (as added) (see para 923 et seq post), and persons over the age of 19 but under the age of 25 who have a learning difficulty within the meaning of the

Learning and Skills Act 2000 s 13 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 1091) and are receiving services under that Act: Children Act 2004 s 10(9).

3 Each of the following is a relevant partner of a children's services authority in England: (1) where the authority is a county council for an area for which there is also a district council, the district council; (2) the police authority and the chief officer of police for a police area any part of which falls within the area of the children's services authority; (3) a local probation board for an area any part of which falls within the area of the authority; (4) a youth offending team for an area any part of which falls within the area of the authority; (5) a strategic health authority and primary care trust for an area any part of which falls within the area of the authority; (6) a person providing services under the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) para 1149) in any part of the area of the authority; (7) the Learning and Skills Council for England: Children Act 2004 s 10(4). As to police authorities see POLICE vol 36(1) (2007 Reissue) para 139 et seq; as to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) paras 136-138. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to strategic health authorities and primary care trusts see HEALTH SERVICES vol 54 (2008) PARAS 94 et seq, 111 et seq.

As from a day to be appointed the following are also relevant partners: (a) the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (functions relating to the provision of probation services), so far as they are exercisable in relation to England; (b) any provider of probation services that is required by arrangements under s 3(2) (not yet in force) to act as a relevant partner of the authority: Children Act 2004 s 10(4)(ca), (cb) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (2)). At the date at which this volume states the law no such day had been appointed.

4 Children Act 2004 s 10(1).

5 For the meaning of 'children' see para 164 note 2 ante.

6 Children Act 2004 s 10(2)(a).

7 Ibid s 10(2)(b).

8 Ibid s 10(2)(c).

9 Ibid s 10(2)(d).

10 Ibid s 10(2)(e).

11 Ibid s 10(3).

12 Ibid s 10(5).

13 Ibid s 10(8). As to the Secretary of State see para 155 ante.

14 Ibid s 10(6)(a).

15 Ibid s 10(6)(b). A 'pooled fund' is a fund which is made up of contributions by the authority and the relevant partner or partners concerned, and out of which payments may be made towards expenditure incurred in the discharge of functions of the authority and of the relevant partner or partners: s 10(7).

16 Ie (1) a children's services authority in England; (2) a district council which is not such an authority; (3) a strategic health authority; (4) a special health authority, so far as exercising functions in relation to England, designated by order made by the Secretary of State for these purposes; (5) a primary care trust; (6) an NHS trust all or most of whose hospitals, establishments and facilities are situated in England; (7) an NHS foundation trust; (8) the police authority and chief officer of police for a police area in England; (9) the British Transport Police Authority, so far as exercising functions in relation to England; (10) a local probation board for an area in England; (11) a youth offending team for an area in England; (12) the governor of a prison or secure training centre in England (or, in the case of a contracted out prison or secure training centre, its director); (13) any person to the extent that he is providing services under the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) para 1149): Children Act 2004 s 11(1). As to special health authorities, NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARAS 136 et seq, 155 et seq, 174 et seq. As to the British Transport Police Authority see POLICE vol 36(1) (2007 Reissue) para 129; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) para 281 et seq. As to prisons and secure training centres see PRISONS.

As from a day to be appointed the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (ie functions relating to the provision of probation services) will

also be required to make appropriate arrangements: Children Act 2004 s 11(1)(ja) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed.

17 In the case of a children's services authority in England, 'functions' does not include functions to which the Education Act 2002 s 175 (see EDUCATION vol 15(1) (2006 Reissue) para 22) applies: Children Act 2004 s 11(3).

18 Ibid s 11(2).

19 Ibid s 11(4).

## UPDATE

### 187 Improvement of well-being and promotion of welfare

TEXT AND NOTES--See also Education and Skills Act 2008 s 85 (co-operation as regards provision of 14-19 education and training); and PARA 187A. The Secretary of State may, in accordance with regulations, set targets for children's services authorities in England for safeguarding and promoting the welfare of children: see Children Act 2004 s 9A (added by Apprenticeships, Skills, Children and Learning Act 2009 s 195(1)).

NOTES 3, 16--Day appointed is 1 April 2008: SI 2008/504. Offender Management Act 2007 ss 2, 3 in force in part in specified areas: SI 2008/504, SI 2009/547.

Children Act 2004 s 10(4) amended: Education and Skills Act 2008 Sch 1 paras 82, 83, Apprenticeships, Skills, Children and Learning Act 2009 s 193(2), Sch 16 Pt 5. Children Act s 10(10) added: Apprenticeships, Skills, Children and Learning Act 2009 s 193(5). Children Act 2004 s 11(1) amended: Education and Skills Act 2008 Sch 1 paras 82, 84.

NOTE 12--For the purposes of arrangements under the 2004 Act s 10 a relevant person or body may (1) provide staff, goods, services, accommodation or other resources to another relevant person or body; and (2) make contributions to a fund out of which relevant payments may be made: Children Act 2004 s 10(5A) (added by Apprenticeships, Skills, Children and Learning Act 2009 s 193(3)). 'Relevant person or body' means a children's services authority in England or a relevant partner of a children's services authority in England; and 'relevant payment', in relation to a fund, means a payment in respect of expenditure incurred by a relevant person or body contributing to the fund in the exercise of its functions: Children Act 2004 s 10(11) (added by Apprenticeships, Skills, Children and Learning Act 2009 s 193(5)).

TEXT AND NOTES 14, 15--Children Act 2004 s 10(6), (7) repealed: Apprenticeships, Skills, Children and Learning Act 2009 s 193(4), Sch 16 Pt 5.

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**187A. Co-operation as regards provision of 14-19 education and training.**

The arrangements made by a children's services authority in England (a 'children's authority') under the Children Act 2004 s 10 (see PARA 187) must include arrangements within the Education and Skills Act 2008 s 85(2) or (3): s 85(1). 'Children's services authority in England' has the meaning given by the Children Act 2004 s 65(1) (see PARA 187): Education and Skills Act 2008 s 85(5). The arrangements within the Education and Skills Act s 85(2) are arrangements to promote co-operation between (1) the children's authority, (2) the authority's relevant partners, and (3) the other persons and bodies (of any nature) who exercise functions, or are engaged in activities, relevant to the provision of 14-19 education or training in the authority's area: s 85(2). 'Relevant partner', in relation to a children's services authority in England, has the meaning given by the Children Act 2004 s 10(4): Education and Skills Act 2008 s 85(5). '14-19 education' and '14-19 training' mean, respectively, education and training suitable to the requirements of persons during the period beginning with the start of the academic year in which they attain the age of 15 and ending when they attain the age of 19: s 85(5). For the purposes of s 85(5) (a) 'education' means full-time or part-time education, but does not include higher education (namely, education provided by means of a course of any description mentioned in the Education Reform Act 1988 Sch 6: see PARA 19); (b) 'training' means full-time or part-time training, and includes vocational, social, physical and recreational training; (c) 'academic year' means any period beginning with 1 August and ending with the next 31 July: Education and Skills Act 2008 s 85(6). The arrangements within s 85(3) are arrangements made jointly by the children's authority and one or more other children's authorities to promote co-operation between (i) the authorities, (ii) the authorities' relevant partners, and (iii) the other persons and bodies (of any nature) who exercise functions, or are engaged in activities, relevant to the provision of 14-19 education or training in each of the authorities' areas: s 85(3).

Section 85(1) is not to be read as affecting the generality of the duty imposed by the Children Act 2004 s 10(1) and (2) so far as relating to education and training: Education and Skills Act 2008 s 85(4).



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### **188. Information databases.**

The Secretary of State<sup>1</sup> may for the purpose of arrangements made for the improvement of well-being and promotion of welfare of children<sup>2</sup>, by regulations require children's services authorities in England to establish and operate databases containing information in respect of persons to whom such arrangements relate<sup>3</sup>; or himself establish and operate, or make arrangements for the operation and establishment of, one or more databases containing such information<sup>4</sup>. Such databases may only include, in relation to a person to whom such arrangements relate, the following information<sup>5</sup>:

- 187 (1) his name, address, gender and date of birth<sup>6</sup>;
- 188 (2) a number identifying him<sup>7</sup>;
- 189 (3) the name and contact details of any person with parental responsibility<sup>8</sup> for him or who has care of him at any time<sup>9</sup>;
- 190 (4) details of any education being received by him (including the name and contact details of any educational institution attended by him)<sup>10</sup>;
- 191 (5) the name and contact details of any person providing primary medical services<sup>11</sup> in relation to him<sup>12</sup>;
- 192 (6) the name and contact details of any person providing to him services of such description as the Secretary of State may by regulations specify<sup>13</sup>;
- 193 (7) information as to the existence of any cause for concern in relation to him<sup>14</sup>;
- 194 (8) information of such other description, not including medical records or other personal records, as the Secretary of State may by regulations specify<sup>15</sup>.

The Secretary of State may by regulations make provision in relation to the establishment and operation of any such database or databases<sup>16</sup>. Such regulations may provide, in particular:

- 195 (a) as to the information which must or may be contained in any such database<sup>17</sup>;
- 196 (b) for requiring the following persons or bodies to disclose information for inclusion in the database<sup>18</sup>:

7

- 18. (i) a children's services authority in England; a district council which is not such an authority; a strategic health authority; a special health authority, so far as exercising functions in relation to England, designated by order made by the Secretary of State for these purposes; a primary care trust; an NHS trust all or most of whose hospitals, establishments and facilities are situated in England; an NHS foundation trust; the police authority and chief officer of police for a police area in England; the British Transport Police Authority, so far as exercising functions in relation to England; a local probation board for an area in England; a youth offending team for an area in England; the governor of a prison or secure training centre in England (or, in the case of a contracted out prison or secure training centre, its director); any person to the extent that he is encouraging, enabling or assisting (directly or indirectly) effective participation by young persons in education or training<sup>19</sup>;
- 19. (ii) the Learning and Skills Council for England<sup>20</sup>;
- 20. (iii) the governing body of a maintained school<sup>21</sup> in England<sup>22</sup>;

- 21. (iv) the governing body of an institution in England within the further education sector<sup>23</sup>;
  - 22. (v) the proprietor of an independent school<sup>24</sup> in England<sup>25</sup>;
  - 23. (vi) a person or body of such other description as the Secretary of State may by regulations specify<sup>26</sup>;
- 8
- 197 (c) for permitting the following persons or bodies to disclose information for inclusion in the database<sup>27</sup>:
- 9
- 24. (i) a person registered under the child care registers<sup>28</sup>;
  - 25. (ii) a voluntary organisation exercising functions or engaged in activities in relation to persons to whom the specified arrangements apply<sup>29</sup>;
  - 26. (iii) the Commissioners for Her Majesty's Revenue and Customs<sup>30</sup>;
  - 27. (iv) a registered social landlord<sup>31</sup>;
  - 28. (v) a person or body of such other description as the Secretary of State may by regulations specify<sup>32</sup>;
- 10
- 198 (d) for permitting or requiring the disclosure of information included in any such database<sup>33</sup>;
  - 199 (e) for permitting or requiring any person to be given access to any such database for the purpose of adding or reading information (including provision for a person of a description specified in the regulations to determine what must or may be done under the regulations)<sup>34</sup>;
  - 200 (f) as to the conditions on which such access must or may be given<sup>35</sup>;
  - 201 (g) as to the length of time for which information must or may be retained<sup>36</sup>;
  - 202 (h) as to procedures for ensuring the accuracy of information included in any such database<sup>37</sup>;
  - 203 (i) in a case where the Secretary of State establishes a database<sup>38</sup>, for requiring children's services authorities in England to participate in the operation of the database<sup>39</sup>.

The Secretary of State may also provide information for inclusion in any such database<sup>40</sup>.

Any person or body establishing or operating a database must in the establishment or operation of the database have regard to any guidance, and comply with any direction, given to that person or body by the Secretary of State<sup>41</sup>.

1 As to the Secretary of State see para 155 ante.

2 le for the purpose of arrangements made under the Children Act 2004 ss 10, 11 (both as amended) (see para 187 ante) or under the Education Act 2002 s 175 (see EDUCATION vol 15(1) (2006 Reissue) para 22): Children Act 2004 s 12(1). For the meaning of 'children' see para 164 note 2 ante.

3 Ibid s 12(1)(a). For the meaning of 'children's services authority in England' see para 187 note 1 ante.

Any power to make regulations or an order under the Children Act 2004 includes power: (1) to make different provision for different purposes; (2) to make different provision for different cases or areas; (3) to make incidental, supplementary, consequential or transitional provision or savings: s 66(1). Any power to make regulations or an order under the Children Act 2004, other than an order under s 42 (see para 245 post) or s 43 (see para 246 post), is exercisable by statutory instrument: s 66(2). The Secretary of State may not make a statutory instrument containing regulations under s 12 or s 45 (see para 1053 post) unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament: s 66(3). The Secretary of State may not make a statutory instrument containing the first order under s 49 (see paras 877, 975 post) unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament: s 66(4). A statutory instrument containing:

76 (a) any regulations made by the Secretary of State under the Children Act 2004 to which s 66(3) does not apply;

77 (b) an order made by the Secretary of State under s 49 to which s 66(4) does not apply; or

78 (c) an order made by the Secretary of State under s 11(1)(d) (see para 187 ante) or s 65(2) (application to the Isles of Scilly),

is subject to annulment in pursuance of a resolution of either House of Parliament: s 66(5). This does not apply to regulations made by the Secretary of State jointly with the Welsh Ministers under s 43(7) (see para 246 post): s 66(6).

4 Ibid s 12(1)(b). The Secretary of State has established such a database, which is to be operated with the assistance of children's services authorities in England: see the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, regs 1, 3.

The Secretary of State may by regulations establish a body corporate to establish and operate one or more such databases: see the Children Act 2004 s 12(2). At the date at which this volume states the law, no such body corporate had been established.

5 Ibid s 12(3).

6 Ibid s 12(4)(a). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 4, Sch 1 paras 1-4.

7 Children Act 2004 s 12(4)(b). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 para 5.

8 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Children Act 2004 s 12(4)(c)).

9 Ibid s 12(4)(c). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 para 6.

10 Children Act 2004 s 12(4)(d). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 para 7.

11 Primary medical services are provided under the National Health Service Act 2006: see HEALTH SERVICES vol 54 (2008) PARA 241.

12 Children Act 2004 s 12(4)(e) (amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 264-265). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 para 8.

13 Children Act 2004 s 12(4)(f). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 paras 9-16.

14 Children Act 2004 s 12(4)(g).

15 Ibid s 12(4)(h). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, Sch 1 paras 17-20.

16 Children Act 2004 s 12(5).

17 Ibid s 12(6)(a). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 4.

18 Children Act 2004 s 12(6)(b). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 11(1)(a), Sch 4.

19 Children Act 2004 ss 11(1), 12(7). See also para 187 note 16 ante. A person is encouraging, enabling or assisting (directly or indirectly) effective participation by young persons in education or training if he is providing services under the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) para 1149): Children Act 2004 s 11(1).

As to local government areas and authorities in England see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq. As to strategic health authorities, primary care trusts, special health authorities, NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARAS 94 et seq, 111 et seq, 136 et seq, 155 et seq, 174 et seq. As to police authorities see POLICE vol 36(1) (2007 Reissue) para 139 et seq; as to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) paras 136-138. As to the British Transport Police Authority see POLICE vol 36(1) (2007

Reissue) para 129; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) para 281 et seq. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to prisons and secure training centres see PRISONS.

20 Ibid s 12(7)(b). As to the Learning and Skills Council for England see EDUCATION vol 15(2) (2006 Reissue) para 1072 et seq.

21 For the meaning of 'maintained school' see the Education Act 2002 s 175; and EDUCATION vol 15(1) (2006 Reissue) para 22 (definition applied by the Children Act 2004 s 12(7)(c)).

22 Ibid s 12(7)(c).

23 Ibid s 12(7)(d). For the meaning of 'further education sector' see the Education Act 2002 s 175; and EDUCATION vol 15(1) (2006 Reissue) para 22 (definition applied by the Children Act 2004 s 12(7)(d)).

24 Ie within the meaning of the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 465): Children Act 2004 s 12(7)(e).

25 Ibid s 12(7)(e).

26 Ibid s 12(7)(f).

27 Ibid s 12(6)(c). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 11(1)(b), Sch 5.

Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: Children Act 2004 s 12(11).

28 Ibid s 12(8)(a) (amended by the Childcare Act 2006 s 103(1), Sch 2 para 43). The child care registers are provided for under the Childcare Act 2006 Pt 3 (ss 32-98) (as amended) (not yet fully in force): see para 1117 et seq post. Regulations may, until the Childcare Act 2006 ss 33, 34, 45, 53 are fully in force, make provision permitting a person registered in England for child minding or the provision of day care under the Children Act 1989 Pt 10A (ss 79A-79X) (as added and amended) (see para 1072 et seq post) to disclose information for inclusion in a database established under the Children Act 2004 s 12 (as amended): Childcare Act 2006 (Commencement No 2 and Savings and Transitional Provisions) Order 2007, SI 2007/1019, art 6, Schedule para 7.

29 Children Act 2004 s 12(8)(b). The specified arrangements are those under s 12(1): see the text to notes 1-4 supra.

30 Ibid s 12(8)(c) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)). As to Her Majesty's Commissioners for Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq.

31 Children Act 2004 s 12(8)(d). As to registered social landlords see HOUSING vol 22 (2006 Reissue) para 67. Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 12(11).

32 Ibid s 12(8)(e).

33 Ibid s 12(6)(d). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 12.

Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: Children Act 2004 s 12(11).

34 Ibid s 12(6)(e), (10). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 9, Sch 2.

Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: Children Act 2004 s 12(11).

35 Ibid s 12(6)(f). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, regs 6, 9, 10, Sch 3.

36 Children Act 2004 s 12(6)(g). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, regs 7, 8.

37 Children Act 2004 s 12(6)(h). See the Children Act 2004 Information Database (England) Regulations 2007, SI 2007/2182, reg 5.

38 le under the Children Act 2004 s 12(1)(b) (see the text and note 4 supra): s 12(6)(i).

39 Ibid s 12(6)(i).

40 Ibid s 12(9).

Anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 12(11).

41 Ibid s 12(12). Guidance or directions may in particular relate to the management of, technical specifications for, or the security of, any such database, the transfer and comparison of information between databases under s 12 (as amended), and the giving of advice in relation to rights under the Data Protection Act 1998 (see CONFIDENCE AND DATA PROTECTION): Children Act 2004 s 12(13).

## **UPDATE**

### **188 Information databases**

TEXT AND NOTES--Provision has been made for the establishment of children's trust boards: see PARA 188A.

NOTE 3--Children Act 2004 s 66(3) amended: Apprenticeships, Skills, Children and Learning Act 2009 s 194(7).

NOTE 6--SI 2007/2182 Sch 1 para 2 amended: SI 2010/1213.

NOTE 9--SI 2007/2182 Sch 1 para 6 amended: SI 2010/1213.

NOTE 13--SI 2007/2182 Sch 1 para 9 amended: SI 2010/1213.

NOTE 17--SI 2007/2182 reg 4 amended: SI 2010/1213.

NOTE 18--SI 2007/2182 Sch 4 amended: SI 2008/912.

NOTE 19--Children Act 2004 s 11(1) amended: Education and Skills Act 2008 Sch 1 para 84.

NOTES 34, 35--SI 2007/2182 reg 9, Sch 2 amended: SI 2010/1213.

NOTE 35--SI 2007/2182 Sch 3 amended: SI 2008/912, SI 2010/1213.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(3) CHILDREN'S SERVICES AUTHORITIES/(i) Children's Services in England/188A. Children's trust boards.

**188A. Children's trust boards.**

Arrangements made by a children's services authority in England under the Children Act 2004 s 10 for improving the well-being of children in its area (see PARA 187) must include arrangements for the establishment of a children's trust board ('CTB') for its area: see Children Act 2004 s 12A (ss 12A-12D added by Apprenticeships, Skills, Children and Learning Act 2009 s 194(2)). The functions of a CTB are those of preparing, publishing and reviewing a children and young people's plan conferred by Children Act 2004 ss 17, 17A (see PARA 190) and any further functions conferred by regulations made by the Secretary of State: Children Act 2004 s 12B. Provision is made for the funding of CTBs (Children Act 2004 s 12C) and members of a CTB are required to supply information to it if requested to do so for the purpose of enabling or assisting it to perform its functions (Children Act 2004 s 12D).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(3) CHILDREN'S SERVICES AUTHORITIES/(i) Children's Services in England/189. Local safeguarding children boards.

### **189. Local safeguarding children boards.**

Each children's services authority in England<sup>1</sup> must establish a local safeguarding children board for its area<sup>2</sup>. A board so established must include such representative or representatives of the authority by which it is established, and each board partner<sup>3</sup> of that authority, as the Secretary of State<sup>4</sup> may by regulations prescribe<sup>5</sup>. A children's services authority in England must take reasonable steps to ensure that the board established by it includes representatives of relevant persons and bodies<sup>6</sup> of such descriptions as may be prescribed by the Secretary of State in regulations<sup>7</sup>. A board may also include representatives of such other relevant persons or bodies as the authority by which it is established considers, after consulting its board partners, should be represented on it<sup>8</sup>. In the establishment and operation of a board, the authority establishing it must co-operate with each of its board partners and each board partner must co-operate with the authority<sup>9</sup>.

The objective of a local safeguarding children board is to co-ordinate what is done by each person or body represented on the board for the purposes of safeguarding and promoting the welfare of children<sup>10</sup> in the area of the authority by which it is established, and to ensure the effectiveness of what is done by each such person or body for those purposes<sup>11</sup>. A board is to have such functions in relation to its objective as the Secretary of State may by regulations prescribe, which may in particular include functions of review or investigation<sup>12</sup>. The Secretary of State may by regulations make provision as to the procedures to be followed by a board<sup>13</sup>.

There are specified persons or bodies<sup>14</sup> who may make payments towards expenditure incurred by, or for purposes connected with, a local safeguarding children board by making the payments directly, or by contributing to a fund out of which the payments may be made<sup>15</sup>. Any specified person or body may provide staff, goods, services, accommodation or other resources for purposes connected with a board<sup>16</sup>.

The Secretary of State may by regulations make provision as to the functions of children's services authorities in England relating to local safeguarding children boards established by them<sup>17</sup>. A children's services authority in England and each of its board partners must, in exercising its functions relating to a local safeguarding children board, have regard to any guidance given to it for the purpose by the Secretary of State<sup>18</sup>.

1 For the meaning of 'children's service authority in England' see para 187 note 1 ante.

2 Children Act 2004 s 13(1). Two or more children's services authorities in England may discharge their respective duties by establishing a local safeguarding children board for their combined area: s 13(8).

3 Each of the following is a board partner of a children's services authority in England: (1) where the authority is a county council for an area for which there is also a district council, the district council; (2) the chief officer of police for a police area any part of which falls within the area of the children's services authority; (3) a local probation board for an area any part of which falls within the area of the authority; (4) a youth offending team for an area any part of which falls within the area of the authority; (5) a strategic health authority and a primary care trust for an area any part of which falls within the area of the authority; (6) an NHS trust and an NHS foundation trust all or most of whose hospitals, establishments and facilities are situated in the area of the authority; (7) a person providing services under the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) para 1149) in any part of the area of the authority; (8) the Children and Family Court Advisory and Support Service ('CAFCASS'); (9) the governor of any secure training centre in the area of the authority, or, in the case of a contracted out secure training centre, its director; (10) the governor of any prison in the area of the authority which ordinarily detains children, or, in the case of a contracted out

prison, its director: Children Act 2004 s 13(3). As to local government areas and authorities in England see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq. As to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) paras 136-138. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to strategic health authorities, primary care trusts, NHS trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARAS 94 et seq, 111 et seq, 155 et seq, 174 et seq. As to CAFCASS see para 230 et seq post. As to prisons and secure training centres see PRISONS. 'Contracted out secure training centre' (and the contractor in relation to such a centre) has the meaning given by the Criminal Justice and Public Order Act 1994 s 15 (see PRISONS vol 36(2) (Reissue) para 658): Children Act 2004 s 65(3)(b). Prison includes a young offender institution: s 65(3)(a). 'Contracted out prison' (and the contractor in relation to such a prison) has the meaning given by the Criminal Justice Act 1991 s 84(4) (see PRISONS vol 36(2) (Reissue) paras 532-533): Children Act 2004 s 65(3)(c).

As from a day to be appointed the following are also board partners: (a) the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (functions relating to the provision of probation services), so far as they are exercisable in relation to England; (b) any provider of probation services that is required by arrangements under s 3(2) (not yet in force) to act as a board partner of the authority: Children Act 2004 s 13(3)(ca), (cb) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (4)). At the date at which this volume states the law no such day had been appointed.

4 As to the Secretary of State see para 155 ante.

5 Children Act 2004 s 13(2). A local safeguarding children board must include at least one representative of: (1) the children's services authority; and (2) each board partner of the authority: Local Safeguarding Children Boards Regulations 2006, SI 2006/90, reg 3(1). Two or more board partners may be represented by the same person: reg 3(2). The authority may, after consulting its board partners, determine that the local safeguarding children board is to include two or more representatives of the authority or of any board partner: reg 3(3). Each board partner appoints its own representative or representatives, while the authority may, after consulting persons providing services under the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) para 1149), determine the person or persons who are to be its representatives: Local Safeguarding Children Boards Regulations 2006, SI 2006/90, reg 3(4), (5). The authority which establishes a local safeguarding children board must, after consulting its board partners, appoint a person to chair the board: reg 4.

6 'Relevant persons and bodies' are persons and bodies of any nature exercising functions or engaged in activities relating to children in the area of the authority in question: Children Act 2004 s 13(6).

7 Ibid s 13(4).

8 Ibid s 13(5).

9 Ibid s 13(7).

10 For the meaning of 'children' see para 164 note 2 ante.

11 Children Act 2004 s 14(1).

12 Ibid s 14(2). The functions of a board are:

79 (1) to develop policies and procedures for safeguarding and promoting the welfare of children in the area of the children's services authority, including policies and procedures in relation to: (a) the action to be taken where there are concerns about a child's safety or welfare, including thresholds of intervention; (b) training of persons who work with children or in services affecting the safety and welfare of children; (c) recruitment and supervision of persons who work with children; (d) investigation of allegations concerning persons who work with children; (e) safety and welfare of children who are privately fostered; and (f) co-operation with neighbouring children's services authorities and their board partners (Local Safeguarding Children Boards Regulations 2006, SI 2006/90 reg 5(1)(a));

80 (2) communicating to persons and bodies in the area of the authority the need to safeguard and promote the welfare of children, raising their awareness of how this can best be done, and encouraging them to do so (reg 5(1)(b));

81 (3) monitoring and evaluating the effectiveness of what is done by the authority and its board partners individually and collectively to safeguard and promote the welfare of children, and advising them on ways to improve (reg 5(1)(c));

82 (4) participating in the planning of services for children in the area of the authority (reg 5(1)(d));



- 83 (5) undertaking reviews of serious cases (that is, cases where abuse or neglect of a child is known or suspected and either the child has died or the child has been seriously harmed and there is cause for concern as to the way in which the authority, its board partners or other relevant persons have worked together to safeguard the child) and advising the authority and its board partners on lessons to be learned (reg 5(1)(e), (2)).

The board may also engage in any other activity that facilitates, or is conducive to, the achievement of its objective: reg 5(3).

From 1 April 2008 each board is to have additional functions in relation to the deaths of children normally resident in the area of the authority: reg 6(1). The board is to be responsible for:

- 84 (i) collecting and analysing information about each death, with a view to identifying: (A) any case giving rise to the need for a review under head (5) supra; (B) any matters of concern affecting the safety and welfare of children in the area of the authority; (C) any wider public health or safety concerns arising from a particular death or from a pattern of deaths in that area (reg 6(1)(a)); and
- 85 (ii) putting in place procedures for ensuring that there is a co-ordinated response by the authority, its board partners and other relevant persons to an unexpected death (reg 6(1)(b)).

A board may carry out these additional functions in the period 1 April 2006 to 31 March 2008: reg 6(2).

13 Children Act 2004 s 14(3).

14 (1) the children's services authority in England by which the board is established; (2) any person who is a board partner of the authority (see note 3 supra); (3) in a case where the governor of a secure training centre or prison is a board partner of the authority, the Secretary of State; and (4) in a case where the director of a contracted out secure training centre or prison is a board partner of the authority, the contractor: *ibid* s 15(3).

15 *Ibid* s 15(1).

16 *Ibid* s 15(2).

17 *Ibid* s 16(1).

18 *Ibid* s 16(2).

## UPDATE

### 189 Local safeguarding children boards

NOTE 3--Children Act 2004 s 13(3) amended: Education and Skills Act 2008 Sch 1 para 85.

Day appointed is 1 April 2008: SI 2008/504. Offender Management Act 2007 ss 2, 3 in force in part in specified areas: SI 2008/504, SI 2009/547.

NOTE 7--See the Local Safeguarding Children Boards Regulations 2006, SI 2006/622 reg 3A (added by SI 2009/622).

NOTE 8--A children's services authority in England must take reasonable steps to ensure that the local safeguarding children board established by them also includes two persons who appear to the authority to be representative of persons living in the authority's area: Children Act 2004 s 13(5A) (s 13(5A), (5B) added by Apprenticeships, Skills, Children and Learning Act 2009 s 196(2)). An authority may pay remuneration, allowances and expenses to persons who are so included: Children Act 2004 s 13(5B).

TEXT AND NOTES 11-13--At least once in every 12-month period, a local safeguarding children board must publish a report about safeguarding and promoting the welfare of children in its local area: Children Act 2004 s 14A(1) (s 14A added by Apprenticeships, Skills, Children and Learning Act 2009 s 197). The board must submit a copy of the report to the local children's trust board (see PARA 188A): Children Act 2004 s 14A(2). For these purposes (1) the local area of a local safeguarding children board is the area

of the children's services authority that established the board; and (2) the local children's trust board, in relation to a local safeguarding children board, is the children's trust board established for the board's local area: Children Act 2004 s 14A(3).

NOTE 11--Children Act 2004 s 14(1) amended: Apprenticeships, Skills, Children and Learning Act 2009 s 196(3).

TEXT AND NOTE 12--If, under the Births and Deaths Registration Act 1953: (1) a registrar of births and deaths registers the death of a person and the registrar believes that the deceased was or may have been under the age of 18 at the time of death, the registrar must, before the period of seven days beginning with the day after the end of the day on which the death was registered, secure that the appropriate local safeguarding children board is notified of the particulars of the death entered in the register (Children and Young Persons Act s 31(1), (2), (7)(a)); (2) an entry in a register kept for a sub-district concerning a death is corrected and the person making the correction believes that the entry relates to a person who was or may have been under the age of 18 at the time of death, the person who makes the correction must, before the period of seven days beginning with the day after the end of the day on which the correction was made, secure that the appropriate local safeguarding children board is notified of the particulars of the death as corrected (s 31(3), (4), (7)(b)); (3) a registrar of births and deaths issues a certificate to the effect that a death is not required by law to be registered in England or Wales but the registrar believes that the deceased was or may have been under the age of 18 at the time of death, the registrar must, before the period of seven days beginning with the day after the end of day on which the certificate was issued, secure that the local safeguarding children board established by the children's services authority within whose area the registrar's sub-district is situated is notified of the issuing of the certificate and of the registrar's belief and the grounds for it (s 31(5), (6), (7)(c)). 'The appropriate local safeguarding children board' means the board established by the children's services authority in England or in Wales within whose area is situated the sub-district for which the register is kept: s 31(10). The requirements of s 31 do not apply if the death occurred before 1 April 2008: s 31(8). Each local safeguarding children board must make arrangements for the receipt by it of notifications under s 31 and publish those arrangements: s 31(9).

NOTE 12--See *R (on the application of Webster) v Swindon Local Safeguarding Children Board* [2009] All ER (D) 233 (Oct) (decision of board to hold limited review following potentially racially motivated attack in school grounds successfully challenged in judicial review proceedings).

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## **190. Local authority administration.**

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> require a children's services authority in England<sup>3</sup> from time to time to prepare and publish a plan<sup>4</sup> setting out the authority's strategy for discharging its functions in relation to children<sup>5</sup> and relevant young persons<sup>6</sup>. Such regulations may in particular make provision as to: (1) the matters to be dealt with in a plan<sup>7</sup>; (2) the period to which a plan is to relate<sup>8</sup>; (3) when and how a plan must be published<sup>9</sup>; (4) keeping a plan under review<sup>10</sup>; (5) consultation to be carried out during preparation of a plan<sup>11</sup>.

A children's services authority in England may, and from 1 January 2008 must, appoint an officer for the purposes of certain functions conferred on or exercisable by the authority<sup>12</sup>, and such other functions conferred on or exercisable by the authority as may be prescribed by the Secretary of State by regulations<sup>13</sup>. An officer so appointed is to be known as its 'director of children's services'<sup>14</sup>. The director of children's services may also have responsibilities relating to such functions conferred on or exercisable by the authority, in addition to those mentioned above, as the authority considers appropriate<sup>15</sup>. A children's services authority in England must have regard to any guidance given to it by the Secretary of State in connection with its director of children's services<sup>16</sup>. Two or more children's services authorities in England may, if they consider that the same person can efficiently discharge, for both or all of them, the responsibilities of director of children's services, concur in the appointment of a person as director of children's services for both or all of them<sup>17</sup>.

1 As to the Secretary of State see para 155 ante.

2 The power to make regulations is, for the purposes of the Local Government Act 2003 s 100(1), to be regarded as included among the powers mentioned in s 100(2) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 789): Children Act 2004 s 17(4).

3 For the meaning of 'children's service authority in England' see para 187 note 1 ante.

4 Each children's services authority in England must prepare and publish such a plan: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 3. However, this requirement (together with regs 4-8 (see notes 7-11 infra)) does not apply to any children's services authority if, at the time when it would otherwise be required to publish a plan, it is categorised as four stars by reason of an order made by the Secretary of State under the Local Government Act 2003 s 99(4) (see LOCAL GOVERNMENT vol 69 (2009) PARA 789): Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 9(1) (amended by SI 2007/57). Where a children's services authority ceases to be categorised as four stars the first plan to be prepared and published after the authority ceased to be so categorised as four stars is to be published on or before 1 April in the second year after the authority ceased to be so categorised: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 9(2), (3) (amended by SI 2007/57). Where a children's services authority was categorised as excellent by reason of the Local Authorities (Categorisation) (England) (No 2) Order 2005, SI 2005/2416 (repealed), and is not categorised as four stars by reason of the Local Authorities (Categorisation) (England) Order 2006, SI 2006/3096 (see LOCAL GOVERNMENT vol 69 (2009) PARA 789), the Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, regs 3-8 apply to the authority so as to require the authority to publish a plan on or before 1 May 2007: reg 9(4) (added by SI 2007/57).

5 For the meaning of 'children' see para 164 note 2 ante.

6 Children Act 2004 s 17(1). 'Relevant young persons' means persons, other than children, in relation to whom arrangements under s 10 (as amended) may be made (see para 187 ante): s 17(5).

7 Ibid s 17(2)(a). The matters for which such provision may be made include in particular the arrangements made or to be made under the Children Act 2004 s 10 (as amended) (see para 187 ante) by a children's

services authority in England, and the strategy or proposals in relation to children and relevant young persons of any person or body with whom a children's services authority in England makes or proposes to make such arrangements: s 17(3).

Each plan must set out the improvements (the 'outcomes') which the authority intends to make during the plan period to the well-being of children and relevant young persons so far as relating to: (1) physical and mental health and emotional well-being; (2) protection from harm and neglect; (3) education, training and recreation; (4) the contribution made by them to society; and (5) social and economic well-being: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 4(1). Each plan must in particular include: (a) a statement as to how the authority intends to achieve the improvements referred to in heads (1)-(5) supra, with specific reference to: (i) the integration of services provided by the authority and its relevant partners to improve the well-being of children and relevant young persons; (ii) arrangements made by the authority under the Children Act 2004 s 11(2) (see para 187 ante); and (iii) arrangements for early intervention and preventative action; (b) a needs assessment against the outcomes; (c) an outline of the key actions planned to achieve the improvements so far as relating to the outcomes; (d) a statement as to how the authority's budget will be used to contribute to those improvements; and (e) a statement as to how the plan relates to the authority's performance management and review of services for children and relevant young persons: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 4(2) (amended by SI 2007/57). Each plan must set out the arrangements which the authority proposes (pursuant to the Children Act 2004 s 10 (as amended): see para 187 ante) to make for working during the plan period with the authority's relevant partners and such other bodies as the authority considers appropriate: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 4(3). 'Plan' means a children and young people's plan setting out the authority's strategy for discharging its functions in relation to children and relevant young persons (reg 2); 'plan period' in relation to any plan means the period (determined by the authority) to which any plan relates (reg 2). See also note 4 supra.

8 Children Act 2004 s 17(2)(b). Subject to the Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 9(2), (3) (see note 4 supra) the first plan must be published on or before 1 April 2006 and each subsequent plan must be published no later than six weeks after the end of the plan period for the previous plan: reg 5. See also note 4 supra.

9 Children Act 2004 s 17(2)(c). The authority must publish the plan by: (1) placing it on the authority's website; (2) sending a copy of the plan to each of the persons and bodies with whom the authority has made arrangements under s 10 (as amended) (see para 187 ante); and (3) depositing sufficient copies of the plan to allow members of the public to take a copy in such public libraries and other places to which the public have access in the area of the authority as it considers appropriate: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 6. See also note 4 supra.

10 Children Act 2004 s 17(2)(d). The authority must review its plan in each year in which it is not required to publish a plan, consulting such persons as it considers appropriate: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 8(1), (2). It must publish the result of the review in such manner as it considers appropriate: reg 8(3). See also note 4 supra.

11 Children Act 2004 s 17(2)(e). During the preparation of the plan the authority must consult: (1) such children, relevant young persons and families (including persons with parental responsibility for, or who have the care of the children) in the area of the authority as the authority considers appropriate; (2) such persons of bodies representing children, relevant young persons or families as the authority considers appropriate; (3) the appropriate diocesan authority for any foundation or voluntary school situated in the authority's area which is a Church of England or Roman Catholic church school; (4) the school organisation committee for the authority's area; (5) persons or bodies providing voluntary services relating to children and relevant young persons in the area of the authority; (6) such groups of persons representing local communities as the authority considers appropriate; (7) the local safeguarding children board for the authority's area; and (8) each of the authority's relevant partners; (9) the proprietor of each school in the authority's area; (10) the schools forum for the authority's area; and (11) the admission forum for the authority's area: Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 7(1) (amended by SI 2007/57).

'Appropriate diocesan authority', 'Church of England school' and 'Roman Catholic church school' have the same meanings as in the School Standards and Framework Act 1998 s 142(1) (see EDUCATION vol 15(2) (2006 Reissue) para 42) (Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 2); 'proprietor' has the same meaning as in the Education Act 1996 s 579 (see EDUCATION vol 15(2) (2006 Reissue) para 60) (Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 2 (definition added by SI 2007/57)); 'school' has the same meaning as in the Education Act 1996 s 4 (see EDUCATION vol 15(2) (2006 Reissue) para 8) (Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 2 (definition added by SI 2007/57)); 'school organisation committee' has the same meaning as in the School Standards and Framework Act 1998 s 24 (see EDUCATION vol 15(2) (2006 Reissue) para 118) (Children and Young People's Plan (England) Regulations 2005, SI 2005/2149, reg 2). See also note 4 supra.

12 The Children Act 2004 s 18(2) (amended by the Childcare Act 2006 ss 16(1), (2)(a), (b), 103(2), Sch 3 Pt 2; and the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 264, 266) provides that the functions are:

- 86 (1) functions conferred on or exercisable by the authority in its capacity as a local education authority;
- 87 (2) functions conferred on or exercisable by the authority which are social services functions (within the meaning of the Local Authority Social Services Act 1970: see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006), so far as those functions relate to children;
- 88 (3) the functions conferred on the authority under the Children Act 1989 ss 23C-24D (as added) (see para 923 et seq post), so far as not falling within head (2) supra;
- 89 (4) the functions conferred on the authority under the Children Act 2004 ss 10-12 (as amended), s 17 (see paras 187, 188 ante; and notes 6-11 supra);
- 90 (5) any functions exercisable by the authority under the National Health Service Act 2006 s 75 or the National Health Service (Wales) Act 2006 s 33 on behalf of an NHS body (within the meaning of those provisions) (see HEALTH SERVICES vol 54 (2008) PARA 233), so far as those functions relate to children; and
- 91 (6) the functions conferred on the authority under the Childcare Act 2006 Pt 1 (ss 1-21) (as amended) (not yet fully in force) (see para 1106 et seq post).

Head (1) supra does not include: (a) functions under the Education Reform Act 1988 s 120(3) (see EDUCATION vol 15(2) (2006 Reissue) para 708); (b) functions under the Further and Higher Education Act 1992 s 85(2), (3) (see EDUCATION vol 15(2) (2006 Reissue) para 710); (c) functions under the Education Act 1996 s 15B (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 28) or the Learning and Skills Act 2000 s 23 (see EDUCATION vol 15(2) (2006 Reissue) para 1112); (d) functions under the Teaching and Higher Education Act 1998 s 22 (see EDUCATION vol 15(2) (2006 Reissue) paras 1046-1047); (e) such other functions conferred on or exercisable by a children's services authority in England in its capacity as a local education authority as the Secretary of State may by regulations prescribe: Children Act 2004 s 18(3). As from a day to be appointed, this provision is amended by the Further Education and Training Act 2007 s 30, Sch 2 so as to remove the reference in head (c) supra to the Learning and Skills Act 2000 s 23. At the date at which this volume states the law, no such day had been appointed. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

13 Children Act 2004 s 18(1); Children Act 2004 (Director of Children's Services) Appointed Day Order 2007, SI 2007/1792.

As from a day to be appointed, a children's services authority in England must, in making arrangements for the discharge of the functions conferred on or exercisable by the authority specified in the Children Act 2004 s 18(1), and such other functions conferred on or exercisable by the authority as the authority considers appropriate, designate one of its members as its 'lead member for children's services': s 19(1) (not yet in force). A children's services authority in England must have regard to any guidance given to it by the Secretary of State for the purposes of s 19(1) (not yet in force): s 19(2) (not yet in force). At the date at which this volume states the law no such day had been appointed.

14 Ibid s 18(4).

15 Ibid s 18(5). The functions include those set out in note 12 heads (a)-(e) supra: s 18(6).

16 Ibid s 18(7).

17 Ibid s 18(8).

## UPDATE

### 190 Local authority administration

TEXT AND NOTES 1-11--The Secretary of State may by regulations require a children's trust board ('CTB') (see PARA 188A) to prepare and publish a children and young people's plan setting out the strategy of its members for co-operating with each other with a view to improving the well-being of children and relevant young persons in the area of the authority that established the CTB: see Children Act 2004 s 17 (substituted by Apprenticeships, Skills, Children and Learning Act 2009 s 194(3)). Where a CTB

prepares a children and young people's plan, its members must have regard to it in exercising their functions and the CTB must (1) monitor the extent to which its members are acting in accordance with it; and (2) publish an annual report: see Children Act 2004 s 17A (added by Apprenticeships, Skills, Children and Learning Act 2009 s 194(3)).

NOTE 12--Head (4). Reference now to the functions conferred on the authority under Children Act 2004 ss 12C, 12D (see PARA 188A), 17A: Children Act 2004 s 18(2) (further amended by Apprenticeships, Skills, Children and Learning Act 2009 s 194(4)). Head (c). Reference to Learning and Skills Act 2000 s 23 omitted: Children Act 2004 s 18(3) (amended by Further Education and Training Act 2007 Sch 2).

NOTE 13--Day appointed is 21 March 2008: SI 2008/752.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(3) CHILDREN'S SERVICES AUTHORITIES/(i) Children's Services in England/191. Inspection of children's services in England.

### **191. Inspection of children's services in England.**

Any two or more of certain persons and bodies<sup>1</sup> must, at the request of the Secretary of State<sup>2</sup>: (1) conduct, in accordance with a timetable drawn up by them and approved by the Secretary of State, a review of children's services<sup>3</sup> provided in the area of every children's services authority in England<sup>4</sup>, or the areas of such children's services authorities in England as may be specified in the request<sup>5</sup>; and (2) conduct a review of such children's services provided in the area of such children's services authority in England as may be specified in the request<sup>6</sup>. Any two or more of such persons and bodies may conduct a review of any children's services provided in the area of a particular children's services authority in England<sup>7</sup>. The purpose of such a review is to evaluate the extent to which, taken together, the children's services being reviewed improve the well-being of children and relevant young persons, and in particular to evaluate how those services work together to improve their well-being<sup>8</sup>.

Reviews are to be conducted in accordance with arrangements made by the Chief Inspector of Education, Children's Services and Skills (the 'Chief Inspector')<sup>9</sup>. Before making arrangements for the purposes of those reviews he must consult such of the other relevant persons and bodies<sup>10</sup> as he considers appropriate<sup>11</sup>.

The Secretary of State may by regulations make provision for the purposes of reviews<sup>12</sup> and, in particular, provision for: (a) requiring or facilitating the sharing or production of information for the purposes of a review (including provision for the creation of criminal offences)<sup>13</sup>; (b) authorising any person or body conducting a review to enter any premises for the purposes of the review (including provision for the creation of criminal offences)<sup>14</sup>; (c) imposing requirements as to the making of a report on each review<sup>15</sup>; (d) for the making by such persons as may be specified in or under the regulations of written statements of proposed action in the light of the report and the period within which any such action must or may be taken<sup>16</sup>; (e) for the provision to members of the public of copies of reports and statements made under heads (c) and (d) above, and for charging in respect of any such provision<sup>17</sup>; (f) for the disapplication, in consequence of a requirement, of any requirement under any other enactment<sup>18</sup> to conduct an assessment or to do anything in connection with an assessment<sup>19</sup>.

The Chief Inspector must devise a Framework for Inspection of Children's Services ('the Framework')<sup>20</sup> which must, in order to ensure that relevant assessments<sup>21</sup> properly evaluate and report on the extent to which children's services improve the well-being of children and relevant young persons<sup>22</sup>, set out principles to be applied by any person or body conducting a relevant assessment<sup>23</sup>. The principles in the Framework may include principles relating to the organisation of the results of any relevant assessment, and make different provision for different cases<sup>24</sup>. The Chief Inspector must publish the Framework, but before doing so must consult such persons and bodies<sup>25</sup> as he thinks fit, and obtain the consent of the Secretary of State<sup>26</sup>.

1 They are: (1) the Chief Inspector of Education, Children's Services and Skills; (2) the Commission for Healthcare Audit and Inspection; (3) the Audit Commission for Local Authorities and the National Health Service in England and Wales; (4) the chief inspector of constabulary; (5) Her Majesty's Chief Inspector of the National Probation Service for England and Wales; (6) Her Majesty's Chief Inspector of Court Administration; and (7) the Chief Inspector of Prisons: Children Act 2004 s 20(4) (amended by the Education and Inspections Act 2006 ss 157, 184, Sch 14 paras 95, 96(1), (2), Sch 18 Pt 5). Note that Her Majesty's Chief Inspector of Education,

Children's Services and Skills is referred to as the 'Chief Inspector of Schools' in the Children Act 2004 ss 20-22: see s 23(5) (definition substituted by the Education and Inspections Act 2006 s 157, Sch 14 paras 95, 97).

2 As to the Secretary of State see para 155 ante.

3 'Children's services' means: (1) anything done for or in relation to children and relevant young persons (alone or with other persons) in respect of which, apart from the Children Act 2004 s 20 (as amended), a person or body listed in note 1 supra conducts any kind of assessment, or secures that any kind of assessment is conducted, and which is specified in, or is of a description prescribed by, regulations made by the Secretary of State; (2) any function under s 10 (as amended) (see para 187 ante) and ss 13-19 (see paras 189-190 ante); (3) any function conferred on a children's services authority under s 12 (see para 188 ante); and (4) any function conferred on a local authority under the Childcare Act 2006 Pt 1 (ss 1-21) (as amended) (not yet fully in force) (see para 1106 et seq post): Children Act 2004 s 23(3) (amended by the Childcare Act 2006 ss 16(1), (3)(a), (b), 103(2), Sch 3 Pt 2). 'Assessment' includes an inspection, review, investigation or study: Children Act 2004 s 23(2). 'Relevant young persons' means persons, other than children, in relation to whom arrangements under s 10 (as amended) may be made: s 23(4).

For the purposes of head (1) supra, the Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, specify or prescribe as 'children's services' anything done for or in relation to children and relevant young persons (alone or with other persons):

- 92 (a) in secure training centres in England within the meaning in the Prison Act 1952 s 43(1)(d) (as added and substituted) (see PRISONS vol 36(2) (Reissue) para 657) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(a));
- 93 (b) pursuant to the Employment Training Act 1973 s 8 (as substituted) (see EMPLOYMENT vol 40 (2009) PARA 567) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(b));
- 94 (c) relating to the provision of child minding within the meaning in the Children Act 1989 Pt 10A (ss 79A-79X) (as added and amended) (see para 1072 et seq post) provided by a person registered under that Part for child minding (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(c));
- 95 (d) relating to the provision of day care within the meaning of the Children Act 1989 Pt 10A (as added and amended) provided on any premises by a person registered under that Part for providing day care on those premises (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(d));
- 96 (e) that may be inspected in pursuance of the Children Act 1989 s 87 (as amended) (see para 1197 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(e));
- 97 (f) in schools within the meaning of the Education Act 1996 s 4(1) and (2) (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 81) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(f));
- 98 (g) relating to the provision of relevant nursery education within the meaning in the Schools Standards and Framework Act 1998 Sch 26 para 1(1) (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 1291) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(g));
- 99 (h) by a local authority or youth offending team under the Crime and Disorder Act 1998 s 39 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(h));
- 100 (i) in a children's home within the meaning of the Care Standards Act 2000 s 1 (see para 983 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(i));
- 101 (j) in an independent hospital within the meaning in the Care Standards Act 2000 s 2(2) and (3) (see para 983 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(j));
- 102 (k) in an independent clinic within the meaning of the Care Standards Act 2000 s 2(4) (see para 983 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(k));
- 103 (l) by an independent medical agency within the meaning of the Care Standards Act 2000 s 2(5) (as amended) (see para 985 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(l));



- 104 (m) in a residential family centre within the meaning of the Care Standards Act 2000 s 4(2) (see para 983 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(m));
- 105 (n) by a fostering agency within the meaning of the Care Standards Act 2000 s 4(4) (see para 985 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(n));
- 106 (o) by a voluntary adoption agency within the meaning of the Care Standards Act 2000 s 4(7) (see para 985 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(o));
- 107 (p) by an adoption support agency within the meaning of the Care Standards Act 2000 s 4(7A) (as added) (see para 985 post) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(p));
- 108 (q) that may be inspected under the Learning and Skills Act 2000 s 118(1) (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 1348) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(r) (substituted by SI 2007/603));
- 109 (r) in schools entered in the register of independent schools kept by the Secretary of State under the Education Act 2002 Pt 10 (ss 157-174) (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 478 et seq) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(s));
- 110 (s) by way of the provision of health care within the meaning of the Health and Social Care (Community Health and Standards) Act 2003 s 45(2) (see HEALTH SERVICES vol 54 (2008) PARA 548) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(u));
- 111 (t) in pursuance of an English local authority social service within the meaning of the Health and Social Care (Community Health and Standards) Act 2003 s 148 (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(v));
- 112 (u) in pursuance of a function conferred on or exercisable by a children's services authority in its capacity as a local education authority other than a function specified in or under the Children Act 2004 s 18(3) (see para 190 ante) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(w));
- 113 (v) that may be inspected under the Education and Inspections Act 2006 s 28 (area inspections), s 124(1) (inspection of education and training to which Pt 8 Ch 3 applies), s 125(1) (inspection of further education institutions), s 143 (inspections of CAFCASS functions) (see EDUCATION) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(wa) (added by SI 2007/603));
- 114 (w) in pursuance of any other function of a children's services authority (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(x));
- 115 (x) in pursuance of a function of a district council in an area for which there is a county council, so far as the function relates to the provision of facilities and recreation (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(1)(y)).

Anything done, pursuant to the following provisions, for or in relation to children and relevant young persons (alone or with other persons) is specified or prescribed for the purposes of head (1) above in so far as it relates to children:

- 116 (i) in prisons within the meaning of the Prisons Act 1952 s 53(1) (see PRISONS vol 36(2) (Reissue) para 542) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(2)(a));
- 117 (ii) in removal centres within the meaning of the Immigration and Asylum Act 1999 s 147 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(2)(b));
- 118 (iii) in pursuance of the arrangements made by a local probation board under the Criminal Justice and Court Services Act 2000 s 5 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 738) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(2)(c));
- 119 (iv) by a police force maintained under the Police Act 1996 s 2 (see POLICE vol 36(1) (2007 Reissue) para 136), the metropolitan police maintained under s 5A (as added) (see POLICE vol

36(1) (2007 Reissue) para 137), or the City of London Police (see POLICE vol 36(1) (2007 Reissue) para 106) (Children Act 2004 (Children's Services) Regulations 2005, SI 2005/1972, reg 2(2)(c)).

4 For the meaning of 'children's service authority in England' see para 187 note 1 ante.

5 Children Act 2004 s 20(1)(a).

6 Ibid s 20(1)(b).

7 Ibid s 20(2).

8 Ibid s 20(3).

9 Ibid s 20(5). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 post; and EDUCATION.

10 Ie the persons and bodies mentioned in note 1 supra.

11 Children Act 2004 s 20(6).

12 Ibid s 20(8). Such regulations may make provision authorising or requiring the doing of anything by reference to the determination of a person of a description specified in the regulations: s 20(11).

13 Ibid s 20(8)(a).

14 Ibid s 20(8)(b).

15 Ibid s 20(8)(c). Where a review has been completed the Chief Inspector must make a report on the review, which must contain a summary that is suitable for children: Children Act 2004 (Joint Area Reviews) Regulations 2005, SI 2005/1973, reg 3(1), (2) (reg 3(1), (3) amended by SI 2007/603). A copy of the report must be sent to the children's services authority for the area to which the review relates and the Secretary of State: Children Act 2004 (Joint Area Reviews) Regulations 2005, SI 2005/1973, reg 3(3) (as so amended). The children's services authority to which the report relates must, within 30 working days of receiving the report: (1) send a copy to: (a) each of the authority's relevant partners under the Children Act 2004 s 10 (as amended) (see para 187 ante); (b) any person or body with whom the authority has made arrangements under s 10(1)(c); (c) each of the authority's board partners under s 13 (see para 189 ante); (d) at least one newspaper circulating in the area of the authority; and (e) at least one radio station serving that area; (2) make a copy of the report available for inspection free of charge at the offices of the authority; and (3) supply a copy of the report to a member of the public on demand on payment of a reasonable charge: Children Act 2004 (Joint Area Reviews) Regulations 2005, SI 2005/1973, reg 3(4).

16 Children Act 2004 s 20(8)(d). A children's services authority which has received a report under the Children Act 2004 (Joint Area Reviews) Regulations 2005, SI 2005/1973, reg 3 (as amended) (see note 15 supra) must make a written statement of proposed action in the light of the report within 70 working days of receiving it: reg 4(1). The written statement must include a statement of the period within which the action is proposed to be taken: reg 4(2). In compiling the written statement the authority must consult the persons and bodies to whom a copy of the report of the review was sent by virtue of the provisions set out in note 15 heads (1)(a)-(c) supra: reg 4(3). The authority must: (1) send a copy of the written statement to the Chief Inspector and the Secretary of State; (2) send a copy of the written statement to the persons or bodies to whom a copy of the report of the review was sent by virtue of the provisions set out in note 15 head (1) ante; (3) make a copy of the written statement available for inspection free of charge at the offices of the authority; and (4) supply a copy of the written statement to a member of the public on demand on payment of a reasonable charge: Children Act 2004 (Joint Area Reviews) Regulations 2005, SI 2005/1973, reg 4(4) (amended by SI 2007/603).

17 Children Act 2004 s 20(8)(e).

18 Ie enactments relating to the powers of persons and bodies listed in note 1 supra for the purposes of assessments other than reviews: ibid s 20(10).

19 Ibid s 20(8)(f).

20 Ibid s 21(1).

21 A 'relevant assessment' is an assessment conducted under any enactment in relation to any children's services: ibid s 21(5). Each person or body with functions under any enactment of conducting assessments of children's services must for the purposes of those assessments co-operate with other persons or bodies with such functions: s 22(1). A person or body with functions under any enactment of conducting assessments of

children's services may delegate any of those functions to any other person or body with such functions: s 22(2).

22 Ibid s 21(3).

23 Ibid s 21(2). When devising the Framework, the Chief Inspector of Education, Children's Services and Skills must consult the persons and bodies listed in note 1 supra: s 21(6). He may at any time revise the Framework, and the provisions of s 21(6) and s 21(7) (see the text and note 26 infra) apply in relation to revisions to the Framework as to the original Framework: s 21(8).

24 Ibid s 21(4).

25 Ie other than those listed in note 1 supra.

26 Children Act 2004 s 21(7).

## **UPDATE**

### **191 Inspection of children's services in England**

NOTE 1--2004 Act s 20(4) further amended: Local Government and Public Involvement in Health Act 2007 Sch 9 para 1(2)(x), Sch 18 Pt 9; Health and Social Care Act 2008 Sch 5 para 78; SI 2008/912.

NOTE 3--Head (2) now refers to any function under Children Act 2004 s 10 and ss 12B-19: Children Act 2004 s 23(2) (further amended by Apprenticeships, Skills, Children and Learning Act 2009 s 194(5)). SI 2005/1972 amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(3) CHILDREN'S SERVICES AUTHORITIES/(ii) Children's Services in Wales/192. Improvement of well-being and promotion of welfare.

## **(ii) Children's Services in Wales**

### **192. Improvement of well-being and promotion of welfare.**

Each children's services authority in Wales<sup>1</sup> must make arrangements<sup>2</sup> to promote co-operation between the authority, each of the authority's relevant partners<sup>3</sup>, and such other persons or bodies as the authority considers appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children<sup>4</sup> in the authority's area<sup>5</sup>. The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to:

- 204 (1) physical and mental health and emotional well-being<sup>6</sup>;
- 205 (2) protection from harm and neglect<sup>7</sup>;
- 206 (3) education, training and recreation<sup>8</sup>;
- 207 (4) the contribution made by them to society<sup>9</sup>;
- 208 (5) social and economic well-being<sup>10</sup>.

In making arrangements a children's services authority in Wales must have regard to the importance of parents and other persons caring for children in improving the well-being of children<sup>11</sup>. The relevant partners of a children's services authority in Wales must co-operate with the authority in the making of arrangements<sup>12</sup>. A children's services authority in Wales and any of its relevant partners may for the purposes of arrangements provide staff, goods, services, accommodation or other resources, and establish and maintain a pooled fund<sup>13</sup>. A children's services authority in Wales and each of its relevant partners must in exercising the above functions have regard to any guidance given to it for the purpose by the Welsh Ministers<sup>14</sup>.

The Welsh Ministers may by regulations require a children's services authority in Wales from time to time to prepare and publish a plan setting out the authority's strategy for discharging its functions in relation to children and relevant young persons<sup>15</sup>. Regulations may in particular make provision as to:

- 209 (a) the matters to be dealt with in a plan<sup>16</sup>;
- 210 (b) the period to which a plan is to relate<sup>17</sup>;
- 211 (c) when and how a plan must be published<sup>18</sup>;
- 212 (d) keeping a plan under review<sup>19</sup>;
- 213 (e) consultation to be carried out before a plan is published<sup>20</sup>;
- 214 (f) implementation of a plan<sup>21</sup>.

They may also require a children's services authority in Wales to obtain the approval of the Welsh Ministers before publishing a plan; and may provide that the Welsh Ministers may modify a plan before approving it<sup>22</sup>.

A children's services authority in Wales must have regard to any guidance given to it by the Welsh Ministers in relation to how it is to discharge its functions under such regulations<sup>23</sup>.

A children's services authority in Wales must appoint an officer, to be known as the 'lead director for children and young people's services', for the purposes of co-ordinating and overseeing arrangements made as described above; and it must designate one of its members, to be known as the 'lead member for children and young people's services', to have as his special care the discharge of the authority's functions<sup>24</sup>.

Certain persons and bodies<sup>25</sup> must make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children, and that any services provided by another person pursuant to arrangements made by the person or body in the discharge of his or its functions<sup>26</sup> are provided having regard to that need<sup>27</sup>.

1 'Children's services authority in Wales' means a county council or county borough council in Wales: Children Act 2004 s 65(1). As to local government areas and authorities in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

2 'Arrangements' may include arrangements relating to persons aged 18 and 19, or persons over the age of 19 who are receiving services under the Children Act 1989 ss 23C-24D (as added) (see para 923 et seq post) or youth support services (within the meaning of the Learning and Skills Act 2000 s 123: see EDUCATION vol 15(2) (2006 Reissue) para 1155): Children Act 2004 s 25(10).

3 Each of the following is the relevant partner of a children's services authority in Wales: (1) the police authority and the chief officer of police for a police area any part of which falls within the area of the children's services authority; (2) a local probation board for an area any part of which falls within the area of the authority; (3) a youth offending team for an area any part of which falls within the area of the authority; (4) a local health board for an area any part of which falls within the area of the authority; (5) a national health service trust providing services in the area of the authority; (6) the Welsh Ministers to the extent that they are discharging functions under the Learning and Skills Act 2000 Pt 2 (ss 31-51) (see EDUCATION vol 15(2) (2006 Reissue) para 1113 et seq): Children Act 2004 s 25(4) (amended by the National Council for Education and Training for Wales (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3238, reg 9(1), Sch I paras 89, 90). As to police authorities see POLICE vol 36(1) (2007 Reissue) para 139 et seq; as to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) para 136-138. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74; and as to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

As from a day to be appointed the following are also relevant partners: (a) the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (functions relating to the provision of probation services), so far as they are exercisable in relation to Wales; (b) any provider of probation services that is required by arrangements under s 3(2) (not yet in force) to act as a relevant partner of the authority: Children Act 2004 s 25(4)(ba), (bb) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (5)). At the date at which this volume states the law no such day had been appointed. As to the Secretary of State see para 155 ante.

A local health board must appoint an officer, to be known as the board's 'lead officer for children and young people's services', for the purposes of the board's functions as a relevant partner; and it must designate one of the board's members who is not an officer as its 'lead member for children and young people's services' to have the discharge of those functions as his special care: Children Act 2004 s 27(2).

An NHS trust, as a relevant partner, must appoint an executive director, to be known as the trust's 'lead executive director for children and young people's services', for the purposes of the trust's functions; and it must designate one of the trust's non-executive directors as its 'lead non-executive director for children and young people's services' to have the discharge of those functions as his special care: s 27(3).

Each children's services authority in Wales, local health board and NHS trust to which s 25 applies must have regard to any guidance given to it by the Welsh Ministers in relation to its functions, and the responsibilities of the persons appointed or designated by it under s 27: s 27(4). As to the Welsh Ministers see para 155 ante.

4 For the meaning of 'child' see para 164 note 2 ante.

5 Children Act 2004 s 25(1). As to the inspection of functions under s 25 see para 195 post.

6 Ibid s 25(2)(a). See also note 5 supra.

7 Ibid s 25(2)(b). See also note 5 supra.

8 Ibid s 25(2)(c). See also note 5 supra.

9 Ibid s 25(2)(d). See also note 5 supra.

10 Ibid s 25(2)(e). See also note 5 supra.

11 Ibid s 25(3). See also note 5 supra.

12 Ibid s 25(5). See also note 5 supra.

13 Ibid s 25(6). See also note 5 supra. A pooled fund is a fund which is made up of contributions by the authority and the relevant partner or partners concerned, and out of which payments may be made towards expenditure incurred in the discharge of functions of the authority and functions of the relevant partner or partners: s 25(7).

14 Ibid s 25(8). See also note 5 supra. The Welsh Ministers must obtain the consent of the Secretary of State before giving such guidance at any time after the coming into force of s 25(4)(a)-(c) (see note 3 heads (1)-(3) supra): s 25(9).

15 Ibid s 26(1). As to the inspection of functions under s 26 see para 195 post. 'Relevant young persons' means the persons, in addition to children, in relation to whom arrangements under s 25 (see the text and notes 1-14 supra) may be made: s 26(6). As to the requirements for the publication of such a plan see the Children and Young People's Plan (Wales) Regulations 2007, SI 2007/2316; and EDUCATION.

16 Children Act 2004 s 26(2)(a). See also note 15 supra. The matters for which provision may be so made include in particular the arrangements made or to be made under the Children Act 2004 s 25 (see the text and notes 1-14 supra) by a children's services authority in Wales, and the strategy or proposals in relation to children and relevant young persons of any person or body with whom a children's services authority in Wales makes or proposes to make such arrangements: s 26(3).

17 Ibid s 26(2)(b). See also note 15 supra.

18 Ibid s 26(2)(c). See also note 15 supra.

19 Ibid s 26(2)(d). See also note 15 supra.

20 Ibid s 26(2)(e). See also note 15 supra.

21 Ibid s 26(2)(f). See also note 15 supra.

22 Ibid s 26(4). See also note 15 supra.

23 Ibid s 26(5). See also note 15 supra.

24 Ibid s 27(1). See also note 3 supra.

25 Ie (1) a children's services authority in Wales; (2) a local health board; (3) an NHS trust all or most of whose hospitals, establishments and facilities are situated in Wales; (4) the police authority and chief officer of police for a police area in Wales; (5) the British Transport Police Authority, so far as exercising functions in relation to Wales; (6) a local probation board for an area in Wales; (7) a youth offending team for an area in Wales; (8) the governor of a prison or secure training centre in Wales (or, in the case of a contracted out prison or secure training centre, its director); (9) any person to the extent that he is providing services pursuant to arrangements made by a children's services authority in Wales under the Learning and Skills Act 2000 s 123(1) (b) (see EDUCATION vol 15(2) (2006 Reissue) para 1155); Children Act 2004 s 28(1). As to the inspection of functions under s 28 see para 195 post. As to the British Transport Police Authority see POLICE vol 36(1) (2007 Reissue) para 129; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) para 281 et seq. As to prisons and secure training centres see PRISONS.

As from a day to be appointed the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (ie functions relating to the provision of probation services) will also be required to make appropriate arrangements: Children Act 2004 s 28(1)(fa) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (6)). At the date at which this volume states the law no such day had been appointed.

The persons and bodies in heads (1)-(3) and head (9) supra must in discharging their duty have regard to any guidance given to them for the purpose by the Welsh Ministers; and the persons and bodies in heads (4)-(8) supra must in discharging their duty have regard to any guidance given to them for the purpose by the Secretary of State after consultation with the Welsh Ministers: s 28(4), (5) (amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30).

26 In the case of a children's services authority in Wales, this reference to functions of the authority does not include functions to which the Education Act 2002 s 175 applies (see EDUCATION vol 15(1) (2006 Reissue) para 22); Children Act 2004 s 28(3). See also note 25 supra.

27 Ibid s 28(2). See also note 25 supra.

## **UPDATE**

### **192 Improvement of well-being and promotion of welfare**

NOTES 3, 25--Day appointed is 1 April 2008: SI 2008/504. Offender Management Act 2007 ss 2, 3 in force in part in specified areas: SI 2008/504, SI 2009/547.

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### 193. Information databases.

As from a day to be appointed the Welsh Ministers<sup>1</sup> may for the purpose of arrangements made for the improvement of well-being and promotion of welfare of children<sup>2</sup>, by regulations require children's services authorities in Wales<sup>3</sup> to establish and operate databases containing information in respect of persons to whom such arrangements relate<sup>4</sup>, or themselves establish and operate, or make arrangements for the operation and establishment of, one or more databases containing such information<sup>5</sup>. Such databases may only include, in relation to a person to whom such arrangements relate, the following information<sup>6</sup>:

- 215 (1) his name, address, gender and date of birth<sup>7</sup>;
- 216 (2) a number identifying him<sup>8</sup>;
- 217 (3) the name and contact details of any person with parental responsibility<sup>9</sup> for him or who has care of him at any time<sup>10</sup>;
- 218 (4) details of any education being received by him (including the name and contact details of any educational institution attended by him)<sup>11</sup>;
- 219 (5) the name and contact details of any person providing primary medical services<sup>12</sup> in relation to him<sup>13</sup>;
- 220 (6) the name and contact details of any person providing to him services of such description as the Welsh Ministers may by regulations specify<sup>14</sup>;
- 221 (7) information as to the existence of any cause for concern in relation to him<sup>15</sup>;
- 222 (8) information of such other description, not including medical records or other personal records, as the Welsh Ministers may by regulations specify<sup>16</sup>.

The Welsh Ministers may by regulations make provision in relation to the establishment and operation of any such database or databases<sup>17</sup>. Such regulations may provide in particular:

- 223 (a) as to the information which must or may be contained in any such database<sup>18</sup>;
- 224 (b) for requiring the following persons or bodies to disclose information for inclusion in the database<sup>19</sup>:

11

- 29. (i) a children's services authority in Wales; a local health board; an NHS trust all or most of whose hospitals, establishments and facilities are situated in Wales; the police authority and chief officer of police for a police area in Wales; the British Transport Police Authority, so far as exercising functions in relation to Wales; a local probation board for an area in Wales; a youth offending team for an area in Wales; the governor of a prison or secure training centre in Wales (or, in the case of a contracted out prison or secure training centre, its director); any person to the extent that he is providing services pursuant to arrangements made by a children's services authority in Wales<sup>20</sup>;
- 30. (ii) the National Assembly for Wales to the extent that it is discharging its functions with regard to further and sixth form education<sup>21</sup>;
- 31. (iii) the governing body of a maintained school<sup>22</sup> in Wales<sup>23</sup>;
- 32. (iv) the governing body of an institution in Wales within the further education sector<sup>24</sup>;
- 33. (v) the proprietor of an independent school<sup>25</sup> in Wales<sup>26</sup>;



34. (vi) a person or body of such other description as the Welsh Ministers may by regulations specify<sup>27</sup>;
- 12
- 225 (c) for permitting the following persons or bodies to disclose information for inclusion in the database<sup>28</sup>;
- 13
35. (i) a person registered for child minding or the provision of day care<sup>29</sup>;
36. (ii) a voluntary organisation exercising functions or engaged in activities in relation to persons to whom the specified arrangements apply<sup>30</sup>;
37. (iii) the Commissioners for Her Majesty's Revenue and Customs<sup>31</sup>;
38. (iv) a registered social landlord<sup>32</sup>;
39. (v) a person or body of such other description as the Welsh Ministers may by regulations specify<sup>33</sup>;
- 14
- 226 (d) for permitting or requiring the disclosure of information included in any such database<sup>34</sup>;
- 227 (e) for permitting or requiring any person to be given access to any such database for the purpose of adding or reading information (including provision for a person of a description specified in the regulations to determine what must or may be done under the regulations)<sup>35</sup>;
- 228 (f) as to the conditions on which such access must or may be given<sup>36</sup>;
- 229 (g) as to the length of time for which information must or may be retained<sup>37</sup>;
- 230 (h) as to procedures for ensuring the accuracy of information included in any such database<sup>38</sup>;
- 231 (i) in a case where the Welsh Ministers establish a database<sup>39</sup>, for requiring children's services authorities in Wales to participate in the operation of the database<sup>40</sup>.

The Welsh Ministers and the Secretary of State<sup>41</sup> may provide information for inclusion in any such database<sup>42</sup>.

Any person or body establishing or operating a database under these provisions must in the establishment or operation of the database have regard to any guidance, and comply with any direction, given to that person or body by the Welsh Ministers<sup>43</sup>.

1 As to the Welsh Ministers see para 155 ante.

2 Ie for the purpose of arrangements made under the Children Act 2004 ss 25, 28 (s 28 as amended) (see para 192 ante) or under the Education Act 2002 s 175 (see EDUCATION vol 15(1) (2006 Reissue) para 22).

3 For the meaning of 'children's services authority in Wales' see para 192 note 1 ante.

4 Children Act 2004 s 29(1)(a). Section 29 is to come into force as from a day to be appointed under s 67(3). At the date at which this volume states the law no such day had been appointed. Regulations under s 29(1)(a) may only be made with the consent of the Secretary of State: s 29(12). As to the inspection of functions under s 29 see para 195 post.

5 Ibid s 29(1)(b). The Welsh Ministers may by regulations establish a body corporate to establish and operate one or more such databases: s 29(2). See also note 4 supra.

6 Ibid s 29(3). See also note 4 supra.

7 Ibid s 29(4)(a). See also note 4 supra.

8 Ibid s 29(4)(b). See also note 4 supra.

9 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Children Act 2004 s 29(4)(c)).

10 Ibid s 29(4)(c). See also note 4 supra.

11 Ibid s 29(4)(d). See also note 4 supra.

12 Primary medical services are provided under the National Health Service (Wales) Act 2006: see HEALTH SERVICES vol 54 (2008) PARA 241.

13 Children Act 2004 s 12(4)(e) (amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 264, 267). See also note 4 supra.

14 Children Act 2004 s 29(4)(f). See also note 4 supra.

15 Ibid s 29(4)(g). See also note 4 supra.

16 Ibid s 29(4)(h). See also note 4 supra.

17 Ibid s 29(5). Regulations under s 29(5) may only be made with the consent of the Secretary of State: s 29(12). See also note 4 supra.

18 Ibid s 29(6)(a). See also note 4 supra.

19 Ibid s 29(6)(b). See also note 4 supra.

20 Ibid ss 29(7)(a), 28(1). See also para 192 note 25 ante. The arrangements referred to in the text are those made by a children's services authority in Wales under the Learning and Skills Act 2000 s 123(1)(b) (see EDUCATION vol 15(2) (2006 Reissue) para 1155): Children Act 2004 s 28(1). See also note 4 supra.

As to local health boards and NHS trusts see HEALTH SERVICES vol 54 (2008) PARAS 74, 155 et seq. As to police authorities see POLICE vol 36(1) (2007 Reissue) para 139 et seq; as to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) para 136-138. As to the British Transport Police Authority see POLICE vol 36(1) (2007 Reissue) para 129; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) para 281 et seq. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to prisons and secure training centres see PRISONS.

21 Ibid s 29(7)(b) (substituted by the National Council for Education and Training for Wales (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3238, art 9(1), Sch 1 paras 89, 91). As to the National Assembly for Wales see para 155 ante. The functions referred to in the text are those under the Learning and Skills Act 2000 Pt 2 (ss 31-51): see EDUCATION vol 15(2) (2006 Reissue) para 1113 et seq. See also note 4 supra.

22 For the meaning of 'maintained school' see the Education Act 2002 s 175; and EDUCATION vol 15(1) (2006 Reissue) para 22 (definition applied by the Children Act 2004 s 29(7)(c)).

23 Ibid s 29(7)(c). See also note 4 supra.

24 Ibid s 29(7)(d). For the meaning of 'further education sector' see the Education Act 2002 s 175; and EDUCATION vol 15(1) (2006 Reissue) para 22 (definition applied by the Children Act 2004 s 29(7)(d)). See also note 4 supra.

25 Ie within the meaning of the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue): Children Act 2004 s 29(7)(e). See also note 4 supra.

26 Ibid s 29(7)(e). See also note 4 supra.

27 Ibid s 29(7)(f). See also note 4 supra.

28 Ibid s 29(6)(c). Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 29(11). See also note 4 supra.

29 Ibid s 29(8)(a). The registers referred to in the text are provided for under the Children Act 1989 Pt 10A (ss 79A-79X) (as added and amended): see para 1072 et seq post. See also note 4 supra.

30 Children Act 2004 s 29(8)(b). The specified arrangements are those under s 29(1): see the text to notes 1-5 supra. See also note 4 supra.

31 Ibid s 29(8)(c) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)). See also note 4 supra. As to Her Majesty's Commissioners for Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq.

32 Children Act 2004 s 29(8)(d). As to registered social landlords see HOUSING vol 22 (2006 Reissue) para 67. See also note 4 supra.

33 Ibid s 29(8)(e). See also note 4 supra.

34 Ibid s 29(6)(d). Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 29(11). See also note 4 supra.

35 Ibid s 29(6)(e), (10). Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 29(11). See also note 4 supra.

36 Ibid s 29(6)(f). See also note 4 supra.

37 Ibid s 29(6)(g). See also note 4 supra.

38 Ibid s 29(6)(h). See also note 4 supra.

39 Ie under ibid s 29(1)(b) (see the text and note 5 supra): s 29(6)(i). See also note 4 supra.

40 Ibid s 29(6)(i). See also note 4 supra.

41 As to the Secretary of State see para 155 ante.

42 Children Act 2004 s 29(9). Regulations may provide that anything which may be done under this provision may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information: s 29(11). See also note 4 supra.

43 Ibid s 29(13). Guidance or directions may in particular relate to the management of, technical specifications for, or the security of, any such database, the transfer and comparison of information between databases, and the giving of advice in relation to rights under the Data Protection Act 1998 (see CONFIDENCE AND DATA PROTECTION): Children Act 2004 s 29(14). See also note 4 supra.

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#### **194. Local safeguarding children boards.**

Each children's services authority in Wales<sup>1</sup> must establish a local safeguarding children board for its area<sup>2</sup>. A board so established must include such representative or representatives of the authority by which it is established, and each board partner<sup>3</sup> of that authority, as the Welsh Ministers<sup>4</sup> may by regulations prescribe<sup>5</sup>. A children's services authority in Wales must take reasonable steps to ensure that the board established by it includes representatives of relevant persons and bodies<sup>6</sup> of such descriptions as may be prescribed by the Welsh Ministers in regulations<sup>7</sup>. A board may also include representatives of such other relevant persons or bodies as the authority by which it is established considers, after consulting its board partners, should be represented on it<sup>8</sup>. In the establishment and operation of a board the authority establishing it must co-operate with each of its board partners, and each board partner must co-operate with the authority<sup>9</sup>.

The objective of a local safeguarding children board is to co-ordinate what is done by each person or body represented on the board for the purposes of safeguarding and promoting the welfare of children<sup>10</sup> in the area of the authority by which it is established, and to ensure the effectiveness of what is done by each such person or body for those purposes<sup>11</sup>. A local safeguarding children board is to have such functions in relation to its objective as the Welsh Ministers may by regulations prescribe, which may in particular include functions of review or investigation<sup>12</sup>. The Welsh Ministers may by regulations make provision as to the procedures to be followed by a board<sup>13</sup>.

There are specified persons or bodies<sup>14</sup> who may make payments towards expenditure incurred by, or for purposes connected with, a local safeguarding children board by making the payments directly, or by contributing to a fund out of which the payments may be made<sup>15</sup>. Any specified person or body may provide staff, goods, services, accommodation or other resources for purposes connected with a local safeguarding children board<sup>16</sup>.

The Welsh Ministers may by regulations make provision as to the functions of children's services authorities in Wales relating to local safeguarding children boards established by them<sup>17</sup>. A children's services authority in Wales and each of its board partners must, in exercising its functions relating to a local safeguarding children board, have regard to any guidance given to it for the purpose by the Welsh Ministers<sup>18</sup>.

1 For the meaning of 'children's services authority in Wales' see para 192 note 1 ante.

2 Children Act 2004 s 31(1). Two or more children's services authorities in Wales may discharge their respective duties by establishing a local safeguarding children board for their combined area (and where they do so, any reference in these provisions and ss 32-34 (see notes 10-18 infra) to the authority establishing the board must be read as a reference to the authorities establishing it): s 31(9).

3 Each of the following is a board partner of a children's services authority in Wales: (1) the chief officer of police for a police area any part of which falls within the area of the authority; (2) a local probation board for an area any part of which falls within the area of the authority; (3) a youth offending team for an area any part of which falls within the area of the authority; (4) a local health board for an area any part of which falls within the area of the authority; (5) a national health service trust providing services in the area of the authority; (6) the governor of any secure training centre within the area of the authority, or, in the case of a contracted out secure training centre, its director; (7) the governor of any prison in the area of the authority which ordinarily detains children, or, in the case of a contracted out prison, its director: *ibid* s 31(3).

As to the chief officer of police of any police force in England see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) para 136-138. As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq; and as to youth offending teams see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74; and as to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. As to prisons and secure training centres see PRISONS. For the meaning of 'contracted out secure training centre' and 'contracted out prison' and as to the meaning of 'prison' see para 189 note 3 ante.

As from a day to be appointed the following are also board partners: (a) the Secretary of State in relation to his functions under the Offender Management Act 2007 ss 2, 3 (not yet in force) (functions relating to the provision of probation services), so far as they are exercisable in relation to Wales; (b) any provider of probation services that is required by arrangements under s 3(2) (not yet in force) to act as a board partner of the authority: Children Act 2004 s 31(3)(ba), (bb) (prospectively added by the Offender Management Act 2007 s 39, Sch 3 para 4(1), (7)). At the date at which this volume states the law no such day had been appointed.

As to the Secretary of State see para 155 ante.

4 As to the Welsh Ministers see para 155 ante.

5 Children Act 2004 s 31(2) (amended by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30). Regulations that make provision in relation to a board partner listed in note 3 heads (1)-(3), (6) or (7) supra may only be made with the consent of the Secretary of State: s 31(4). A board must include:

120 (1) the following representatives of the children's services authority:

4. (a) the authority's lead director for children and young people's services or some other officer directly accountable to the director who is of sufficient seniority to represent the authority instead of the director (Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 5(1)(a));  
4
5. (b) unless the authority's lead director for children and young people's services is: (i) the director of social services, the authority's director of social services or some other officer directly accountable to that director who is of sufficient seniority to represent the authority instead of that director; (ii) the chief education officer, the authority's chief education officer or some other officer directly accountable to the chief education officer who is of sufficient seniority to represent the authority instead of the chief education officer; (iii) the officer appointed by the authority with responsibility for the discharge of its functions under the Housing Act 1996 Pt VI (ss 159-174) (as amended) or Pt VII (ss 175-218) (as amended) (see HOUSING), some other officer directly accountable to that person who is of sufficient seniority to represent the authority instead (Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 5(1)(b));  
5

121 (2) the following representatives of the children's services authority's board partners:

6. (a) in respect of the chief officer of police, an officer who: (i) holds at least the rank of inspector; and (ii) whom the chief officer has charged with responsibility for safeguarding and promoting the welfare of children (reg 5(2)(a));  
6
7. (b) in respect of a local probation board, the chief officer or some other person directly accountable to the chief officer who is of sufficient seniority to represent the board instead of the chief officer (reg 5(2)(b));  
7
8. (c) in respect of a youth offending team, the team's manager or the manager's deputy (reg 5(2)(c));  
8
9. (d) in respect of a local health board: (i) the local health board's lead officer for children and young people's services; (ii) a registered medical practitioner charged with specific responsibilities in relation to the protection of children; and (iii) a registered nurse charged with specific responsibilities in relation to the protection of children (reg 5(2)(d));  
9
10. (e) in respect of a national health service trust (other than the Welsh Ambulance Service), the trust's lead executive director for children and young people's services or some other person directly accountable to him who is of sufficient seniority to act as the trust's representative instead of the lead executive director (reg 5(2)(e));  
10

11. (f) in respect of the governor of any secure training centre (or, in the case of a contracted out secure centre, its director), the governor's (or director's) deputy or an individual of higher rank (reg 5(2)(f));

11

12. (g) in respect of the governor of any prison in the area of the board which ordinarily detains children (or, in the case of a contracted out prison, its director), the governor's (or director's) deputy or an individual of higher rank (reg 5(2)(g)).

12

'Area' ('ardal') means the area for which a board is established; 'board' ('bwrdd') means either a local safeguarding children board established for the area of a children's services authority in Wales or a local safeguarding children board established for the area of two or more children's services authorities in Wales; 'chief education officer' ('prif swyddog addysg') means an officer appointed under the Education Act 1996 s 532 (see EDUCATION vol 15(1) (2006 Reissue) para 51); 'children's services authority' ('awdurdod gwasanaethau plant'), in relation to a board, means the authority or authorities by whom the board is established; 'director of social services' ('cyfarwyddwr gwasanaethau cymdeithasol') has the same meaning as in the Local Authority Social Services Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1007); 'registered nurse' ('nyrs gofrestredig') means a nurse or midwife registered with the Nursing and Midwifery Council; 'representative body' ('corff cynrychioliadol') means a body who has appointed a person to act as its representative on the board: Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 2(1). As to the Nursing and Midwifery Council see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 691 et seq; and as to the registration of nurses and midwives see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 716 et seq.

6 'Relevant persons and bodies' are persons and bodies of any nature exercising functions or engaged in activities relating to children in the area of the authority in question: Children Act 2004 s 31(7).

7 Ibid s 31(5) (amended by virtue of the Government of Wales Act 2006 Sch 11 para 30).

8 Children Act 2004 s 31(6).

9 Ibid s 31(8).

10 For the meaning of 'children' see para 164 note 2 ante.

11 Children Act 2004 s 32(1).

12 Ibid s 32(2) (amended by virtue of the Government of Wales Act 2006 Sch 11 para 30). A board is to have the following functions in relation to safeguarding and promoting the welfare of children within the area of the board:

122 (1) to take steps to foster a relationship of mutual trust and understanding amongst the persons or bodies represented on the board (Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 3(1)(a));

123 (2) to take steps to raise awareness throughout the board's area of the need to safeguard and promote the welfare of children and to provide information on how this might be achieved (reg 3(1)(b));

124 (3) to develop policies and procedures whose purpose is to co-ordinate what is done by each representative body, including procedures in relation to: (a) information sharing; (b) actions, including thresholds for intervention, to be taken where there are concerns about a child's safety or welfare; (c) the recruitment and supervision of persons who work with or have regular access to children; and (d) the safety and welfare of children who are privately fostered (reg 3(1)(c));

125 (4) to review the efficacy of measures taken by each person or body represented on the board to co-ordinate what they do and to make whatever recommendations it sees fit to those persons or bodies in the light of such a review (reg 3(1)(d));

126 (5) to undertake serious case reviews (reg 3(1)(e));

127 (6) to monitor the extent to which any recommendations made under head (4) or head (5) supra are being or have been met (reg 3(1)(f));

128 (7) to develop criteria for measuring the performance of the children's services authority against a plan under the Children Act 2004 s 26 (see para 192 ante) (Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 3(1)(g));

- 129 (8) to disseminate information about best practice amongst the representative bodies and such other persons as the board sees fit (reg 3(1)(h));
- 130 (9) to undertake research (reg 3(1)(i));
- 131 (10) to review training needs with a view to identifying training activities (reg 3(1)(j));
- 132 (11) to provide training (reg 3(1)(k));
- 133 (12) to co-operate with other boards (whether in England or Wales) and any similar such bodies in Scotland and Northern Ireland where the board considers that would be of mutual benefit (reg 3(1)(l));
- 134 (13) to seek advice or information where the board considers that to be desirable (reg 3(1)(m)).

A board must undertake a serious case review where, within the area of the board, abuse or neglect of a child is known or suspected, and a child has died, sustained a potentially life-threatening injury, or sustained a serious and permanent impairment of health or development: reg 4(1). A board may undertake such a review where a child suffers harm which does not fall within the types of harm described above: reg 4(2). The purpose of the review is to identify steps that might be taken to prevent a similar death or harm occurring: reg 4(3). For these purposes, 'harm' ('niwed') has the meaning given in the Children Act 1989 s 31(9) (see para 274 post): Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 2(1). In carrying out a serious case review a board must: (i) ask each representative body to provide a written report of its involvement with the child who is the subject of the review, unless the board is of the opinion that such a report is unnecessary in the circumstances; (ii) following receipt of each report, produce a written overview report that identifies steps to be taken to reduce the risk of a similar death or harm occurring and recommends the time by which, and the persons by whom, those steps should be performed; (iii) produce an anonymised summary of each overview report and make it available for inspection: reg 4(4). The board must provide the Welsh Ministers with a copy of each report provided by a representative body, each anonymised summary and each overview report (reg 4(5)), and provide each representative body with a copy of each anonymised report and, unless the board considers it inappropriate, each overview report (reg 4(6)).

13 Children Act 2004 s 32(3) (amended by virtue of the Government of Wales Act 2006 Sch 11 para 30). Subject to the following provisions, a board is to decide on its own procedures: Local Safeguarding Children Boards (Wales) Regulations 2006, SI 2006/1705, reg 6(8).

A board must maintain a list of those persons who hold a current appointment to represent a person or body on the board (the 'members'): reg 6(1). It must take decisions by majority vote of its members unless the decision falls to be taken in connection with a function of developing procedures to co-ordinate the activities of representative bodies (see note 12 head (3) supra), and the chair has a casting vote: reg 6(2). A board may decide that a particular function may to any specified extent (including in its totality), and subject to any specified conditions, be discharged on its behalf by any one or more of its members, unless the function is one of developing procedures to co-ordinate the activities of representative bodies (see note 12 head (3) supra): reg 6(3). Where the function is one of developing procedures to co-ordinate the activities of representative bodies (see note 12 head (3) supra), a decision in connection with that function may only be taken by unanimous vote of the members: reg 6(5). A board must by majority decision appoint one of its members to be its chair; and in making that decision the members must have regard to the need to appoint a chair who has sufficient expertise and standing to command the respect of the representative bodies: reg 6(6). The chair's appointment comes to an end if: (1) he was appointed for a fixed term and that term expires; (2) he resigns; (3) he is no longer a member of the board; (4) the members by majority decision so decide: reg 6(7). A children's services authority must provide a member of its staff to provide administrative services to the board, and the records of a board (in whatever form) are to be treated as if they were records of the children's services authority: reg 7.

14 (1) the children's services authority in Wales by which the board is established; (2) any person mentioned in note 3 heads (1)-(5) supra; (3) in a case where the governor of a secure training centre or prison is a board partner of the authority, the Secretary of State; and (4) in a case where the director of a contracted out secure training centre or prison is a board partner of the authority, the contractor: Children Act 2004 s 33(3).

15 Ibid s 33(1).

16 Ibid s 33(2).

17 Ibid s 34(1) (amended by virtue of the Government of Wales Act 2006 Sch 11 para 30).

18 Children Act 2004 s 34(2) (amended by virtue of the Government of Wales Act 2006 Sch 11 para 30). The Welsh Ministers must obtain the consent of the Secretary of State before giving such guidance at any time after

the coming into force of any of the Children Act 2004 s 31(3)(a)-(c), (f) or (g) (see note 3 heads (1)-(3), (6), (7) supra): s 34(3).

## **UPDATE**

### **194 Local safeguarding children boards**

NOTE 3--Day appointed is 1 April 2008: SI 2008/504. Offender Management Act 2007 ss 2, 3 in force in part in specified areas: SI 2008/504, SI 2009/547.

NOTE 5--SI 2006/1705 reg 5 amended: SI 2008/912.

TEXT AND NOTE 12--If, under the Births and Deaths Registration Act 1953: (1) a registrar of births and deaths registers the death of a person and the registrar believes that the deceased was or may have been under the age of 18 at the time of death, the registrar must, before the period of seven days beginning with the day after the end of the day on which the death was registered, secure that the appropriate local safeguarding children board is notified of the particulars of the death entered in the register (Children and Young Persons Act s 31(1), (2), (7)(a)); (2) an entry in a register kept for a sub-district concerning a death is corrected and the person making the correction believes that the entry relates to a person who was or may have been under the age of 18 at the time of death, the person who makes the correction must, before the period of seven days beginning with the day after the end of the day on which the correction was made, secure that the appropriate local safeguarding children board is notified of the particulars of the death as corrected (s 31(3), (4), (7)(b)); (3) a registrar of births and deaths issues a certificate to the effect that a death is not required by law to be registered in England or Wales but the registrar believes that the deceased was or may have been under the age of 18 at the time of death, the registrar must, before the period of seven days beginning with the day after the end of day on which the certificate was issued, secure that the local safeguarding children board established by the children's services authority within whose area the registrar's sub-district is situated is notified of the issuing of the certificate and of the registrar's belief and the grounds for it (s 31(5), (6), (7)(c)). 'The appropriate local safeguarding children board' means the board established by the children's services authority in England or in Wales within whose area is situated the sub-district for which the register is kept: s 31(10). The requirements of s 31 do not apply if the death occurred before 1 April 2008: s 31(8). Each local safeguarding children board must make arrangements for the receipt by it of notifications under s 31 and publish those arrangements: s 31(9).



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### **195. Inspection of children's services in Wales.**

The provisions relating to the functions of the Welsh Ministers<sup>1</sup> in relation to social services<sup>2</sup> apply to the functions of children's services authorities in Wales as if anything done by such an authority in the exercise of the relevant functions<sup>3</sup> were a Welsh local authority social service<sup>4</sup>.

1 As to the Welsh Ministers see para 155 ante.

2 Ie the Health and Social Care (Community Health and Standards) Act 2003 Pt 2 Ch 6 (ss 92-101) (as amended): see SOCIAL SERVICES AND COMMUNITY CARE.

3 Ie the authority's functions under the Children Act 2004 s 25 or s 26 (see para 192 ante) (except so far as relating to education, training or youth support services (within the meaning of the Learning and Skills Act 2000 s 123: see EDUCATION vol 15(2) (2006 Reissue) para 1155)), the authority's functions under the Children Act 2004 s 28 (as amended) (see para 192 ante), and any function conferred under s 29 (as amended) (not yet in force) (see para 193 ante): s 30(2).

4 Ibid s 30(1). For the meaning of 'Welsh local authority social service' see the Health and Social Care Act 2003 s 148; and SOCIAL SERVICES AND COMMUNITY CARE. See also para 198 post.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/2. CENTRAL GOVERNMENT ADMINISTRATION/(4) THE ROLE OF OFSTED, ESTYN AND CSSIW/196. The Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector of Education, Children's Services and Skills.

#### **(4) THE ROLE OF OFSTED, ESTYN AND CSSIW**

##### **196. The Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector of Education, Children's Services and Skills.**

The Office for Standards in Education, Children's Services and Skills ('OFSTED') and the office of Her Majesty's Chief Inspector of Education, Children's Services and Skills ('the Chief Inspector') were established under Part 8 of the Education and Inspections Act 2006<sup>1</sup>. The new arrangements brought together the existing remit of Her Majesty's Chief Inspector of Schools in England<sup>2</sup>, the children's social care remit of the Commission for Social Care Inspection<sup>3</sup>, the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>4</sup> inspection remit of Her Majesty's Inspectorate of Court Administration<sup>5</sup> and the inspection remit of the former Adult Learning Inspectorate<sup>6</sup>. The office of Her Majesty's Chief Inspector of Schools in England was thereby abolished<sup>7</sup>.

In addition to his functions relating to education and training<sup>8</sup>, and his functions relating to the inspection of secure training centres<sup>9</sup>, the Chief Inspector may inspect and review local authorities' performance of specific statutory functions in England<sup>10</sup>. The Secretary of State may by regulations require the Chief Inspector to arrange for premises which are used by a local authority in England in its performance of relevant adoption and fostering functions<sup>11</sup> to be inspected on such occasions or at such intervals as may be specified in the regulations<sup>12</sup>. The Chief Inspector also has a duty to inspect the performance of CAFCASS functions<sup>13</sup>.

The Chief Inspector works in conjunction with a number of other inspection authorities (including the Commission for Social Care Inspection<sup>14</sup>) and he has power to delegate any of his inspection functions to another public authority<sup>15</sup>.

As well as inspection duties, the Chief Inspector's responsibilities include the preparation and publication of reports<sup>16</sup>.

Information obtained by the Chief Inspector in connection with any of his functions may be used by him in connection with any of his other functions<sup>17</sup>.

1 As to the Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector for Standards in Education, Children's Services and Skills see the Education and Inspections Act 2006 Pt 8 (ss 112-159); and EDUCATION. As to the allocation of rights and liabilities as between OFSTED and the Chief Inspector see the Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector for Standards in Education, Children's Services and Skills (Allocation of Rights and Liabilities) Order 2007, SI 2007/600. As to the power of the Secretary of State to appoint inspectors see the Children and Young Persons Act 1933 s 103 (prospectively repealed by the Children and Young Persons Act 1969 s 72(4), Sch 6); the Children Act 1989 s 80 (as amended); and para 156 ante. As to the Secretary of State see para 155 ante.

2 As to school inspections see EDUCATION vol 15(2) (2006 Reissue) para 1164 et seq.

3 See para 456 post; and SOCIAL SERVICES AND COMMUNITY CARE. The functions of the Commission for Social Care Inspection under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (registration and standards) as the registration authority in relation to: (1) children's homes; (2) residential family centres; (3) fostering agencies; (4) voluntary adoption agencies; and (5) adoption support agencies, were transferred to the Chief Inspector of Education, Children's Services and Skills: see the Education and Inspections Act 2006 s 148(1), (2), (4). As to adoption see para 323 et seq post. As to local authority and voluntary support for children see para 844 et seq post. The functions of the Commission for Social Care Inspection under the Children Act 1989 s 65 (see paras

978, 982 post), ss 87-87D (as added) (see para 1197 et seq post) (functions relating to children's homes, boarding schools and colleges) were also transferred to the Chief Inspector: Education and Inspections Act 2006 s 148(3).

4 As to CAFCASS see para 230 et seq post.

5 See para 244 post.

6 See EDUCATION.

7 See the Education and Inspections Act 2006 s 113(8). As to the transfer of functions of Her Majesty's Chief Inspector of Schools in England see s 122; and EDUCATION.

8 See *ibid* ss 123-134; and EDUCATION.

9 See *ibid* s 146; and PRISONS.

10 See *ibid* ss 135-142; and EDUCATION. He may inspect the overall performance by any local authority in England of the functions to which Ch 4 (ss 135-142) applies, or the performance by any such authority of any particular function or functions comprised in the functions to which Ch 4 applies: see s 136. The functions to which Ch 4 applies are:

- 135 (1) the functions conferred on the local authority under the Childcare Act 2006 Pt 1 (ss 1-21) (as amended) (not yet fully in force) (see para 1106 et seq post) (Education and Inspections Act 2006 s 135(1)(a));
- 136 (2) the functions conferred on or exercisable by the authority in its capacity as a local education authority (see EDUCATION) (s 135(1)(b));
- 137 (3) the functions conferred on the authority under the Children Act 2004 s 10 (as amended), s 12 (as amended), ss 17-19 (s 18 as amended) (see para 187 et seq post) (Education and Inspections Act 2006 s 135(1)(c));
- 138 (4) the social services functions of the authority within the meaning of the Local Authority Social Services Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006), so far as relating to persons aged under 18 (Education and Inspections Act 2006 s 135(1)(d));
- 139 (5) functions conferred on or exercisable by the authority under the Children Act 1989, the Adoption (Intercountry Aspects) Act 1999 or the Adoption and Children Act 2002 and functions continuing to be exercisable by the authority under the Adoption Act 1976 (Education and Inspections Act 2006 s 135(1)(e)); and
- 140 (6) such other functions of the authority as may be prescribed by regulations made by the Secretary of State (s 135(1)(f), (4)).

A 'related activity', in relation to a function listed in heads (1)-(6) *supra*, means anything done in any place by, or pursuant to arrangements made by, the authority under the Local Government Act 2000 s 2(1)(a) or (b) (promotion of economic and social well-being) which is similar in nature to anything which could be done by the authority in the performance of the function in question: Education and Inspections Act 2006 s 135(2). However, in relation to a function within head (3), (4) or (5) *supra*, anything done as mentioned in s 135(2) is a 'related activity' only if it is done in relation to or for the benefit of:

- 141 (a) persons aged under 18 (s 135(3)(a));
- 142 (b) persons aged 18 or over in relation to whom the authority has functions under any of the Children Act 1989 ss 23C-24D (as added) (see para 923 et seq post) (Education and Inspections Act 2006 s 135(3)(b)); or
- 143 (c) persons not within head (a) or head (b) *supra* in connection with adoption or special guardianship (s 135(3)(c)).

As to adoption see para 323 et seq post. As to special guardianship see para 151 et seq ante.

On completing the inspection, the Chief Inspector must make and publish a report: see s 137; the Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007, SI 2007/462; and EDUCATION.

11 'Relevant adoption functions' means functions under the Adoption and Children Act 2002 of making or participating in arrangements for the adoption of children or the provision of adoption support services; and 'relevant fostering functions' means functions under the Children Act 1989 s 23(2)(a) or regulations under any

of Sch 2 para 12(a), (b) or (d)-(f): Care Standards Act 2000 s 43(2), (3) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 103, 112); definition applied by the Education and Inspections Act 2006 s 147(3).

12 Ibid s 147(1). As to the frequency of inspections see the Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2007, SI 2007/694; and EDUCATION. An inspection under the Education and Inspections Act 2006 s 147 is to be regarded for all purposes as undertaken under s 136 (see note 10 supra): s 147(2). As to the security and inspection of premises see further paras 455, 459, 461, 467 post.

13 See ibid ss 143-145; and para 244 post.

14 See ibid s 149, Sch 13 para 1(2)(g). The other authorities with which the Chief Inspector may work are outside the scope of this title: see further EDUCATION; PRISONS.

15 See ibid Sch 13 para 3; and EDUCATION.

16 See ibid ss 150-152; and EDUCATION.

17 See ibid s 153; and EDUCATION.

## **UPDATE**

### **196 The Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector of Education, Children's Services and Skills**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **197. The Children's Rights Director.**

The Children's Rights Director is one of the persons appointed to the staff of the Office for Standards in Education, Children's Services and Skills ('OFSTED')<sup>1</sup>. He has functions relating to the inspection and review of local authorities in England<sup>2</sup>, as well as being concerned with the welfare of children in boarding schools and colleges<sup>3</sup>, and the registration and regulation of agencies<sup>4</sup>. He has such functions in relation to the performance by the Chief Inspector for Standards in Education, Children's Services and Skills ('the Chief Inspector') of these functions<sup>5</sup> as may be prescribed by regulations made by the Secretary of State<sup>6</sup>. In particular, the Children's Rights Director must advise and assist the Chief Inspector in relation to the Chief Inspector's duty when performing his functions<sup>7</sup> to have regard to: (1) the need to safeguard and promote the rights and welfare of children<sup>8</sup>; and (2) views expressed by relevant persons about activities within his remit<sup>9</sup>, in particular by ascertaining the views of children (and, where appropriate, their parents) about those activities, and reporting such views to the Chief Inspector<sup>10</sup>. He must also inform the Chief Inspector of any matters in relation to the rights and welfare of children that he considers significant<sup>11</sup>.

1 The Children's Rights Director is appointed under the Education and Inspections Act 2006 Sch 11 para 6: s 120(1). As to the Children's Rights Director see further the Commission for Social Care Inspection (Children's Rights Director) Regulations 2004, SI 2004/615; and EDUCATION; SOCIAL SERVICES AND COMMUNITY CARE. As to the role of OFSTED see para 196 ante; and EDUCATION vol 15(2) (2006 Reissue) para 1164 et seq.

2 The functions under the Education and Inspections Act 2006 Ch 4 (ss 135-142) in connection with the inspection and review of the performance by such authorities of their functions within s 135(1)(d), (e) (see para 196 note 10 ante): s 120(3)(c).

3 The functions under the Children Act 1989 s 87 (as amended) (see para 1197 post): Education and Inspections Act 2006 s 120(3)(a).

4 The functions under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE): Education and Inspections Act 2006 s 120(3)(b).

5 The functions listed in ibid s 120(3) (see the text and notes 2-4 supra). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see the Education and Inspections Act 2006 s 113; para 196 ante; and EDUCATION.

6 Ibid s 120(2). As to the regulations that have been made see the text and notes 7-11 infra.

7 The functions under ibid s 120(3) (see the text and notes 2-4 supra).

8 Office for Standards in Education, Children's Services and Skills (Children's Rights Director) Regulations 2007, SI 2007/460, regs 1, 2(a)(i).

9 Ibid reg 2(a)(ii).

10 Ibid reg 2(a).

11 Ibid reg 2(b).

### **UPDATE**

### **197 The Children's Rights Director**

NOTE 1--SI 2004/615 revoked: SI 2009/462.

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**198. The Care and Social Services Inspectorate Wales ('CSSIW') and Her Majesty's Inspectorate for Education and Training in Wales ('Estyn').**

In Wales the body responsible for the inspection of children's services is the Care and Social Services Inspectorate Wales ('CSSIW'), which is a division of the Department of Public Services and Performance in the Welsh Assembly Government<sup>1</sup>. The inspection of schools is the responsibility of Her Majesty's Inspectorate for Education and Training in Wales ('Estyn') which is independent of, but funded by, the Welsh Assembly Government<sup>2</sup>.

<sup>1</sup> See <http://new.wales.gov.uk/cssiwsuite/cssiw>. It was launched in April 2007. As to the Welsh Assembly Government see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

<sup>2</sup> As to Her Majesty's Inspectorate for Education and Training in Wales see EDUCATION vol 15(2) (2006 Reissue) para 1164.

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### 3. FAMILY PROCEEDINGS

#### (1) IN GENERAL

##### (i) Nature of Family Proceedings

##### 199. Meaning of 'family proceedings'.

For the purposes of the Children Act 1989, the term 'family proceedings' means: (1) any proceedings under the inherent jurisdiction of the High Court in relation to children<sup>1</sup>; and (2) any proceedings under a number of specified enactments<sup>2</sup>.

<sup>1</sup> Children Act 1989 ss 8(3)(a), 105(1). As to proceedings under the inherent jurisdiction of the High Court see para 200 post.

<sup>2</sup> See *ibid* ss 8(3)(b), 105(1). See further heads (1)-(9) *infra*; and para 205 post. The specified enactments referred to in the text are:

- 144 (1) the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 *et seq ante*), Pt II (ss 8-16A) (as amended) (see para 247 *et seq post*), Pt IV (ss 31-42) (as amended) (see para 271 *et seq post*) (s 8(4)(a));
- 145 (2) the Matrimonial Causes Act 1973 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) (Children Act 1989 s 8(4)(b));
- 146 (3) the Civil Partnership Act 2004 s 72(1), Sch 5 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) (Children Act 1989 s 8(4)(ba) (added by the Civil Partnership Act 2004 s 261(1), Sch 27 para 129(1), (2)));
- 147 (4) the Adoption and Children Act 2002 (see para 323 *et seq post*) (Children Act 1989 s 8(4)(d) (substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 55));
- 148 (5) the Domestic Proceedings and Magistrates' Courts Act 1978 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) (Children Act 1989 s 8(4)(e));
- 149 (6) the Civil Partnership Act 2004 s 72(3), Sch 6 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) (Children Act 1989 s 8(4)(ea) (added by the Civil Partnership Act 2004 Sch 27 para 129(1), (3)));
- 150 (7) the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended) (see CONFLICT OF LAWS) (Children Act 1989 s 8(4)(g));
- 151 (8) the Family Law Act 1996 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) (Children Act 1989 s 8(4)(h) (added by the Family Law Act 1996 s 66(1), (3), Sch 8 Pt III para 60(1), Sch 10)); and
- 152 (9) the Crime and Disorder Act 1998 ss 11, 12 (see para 625 *post*) (Children Act 1989 s 8(4)(i) (added by the Crime and Disorder Act 1998 s 119, Sch 8 para 68)).

Also, proceedings under the Human Fertilisation and Embryology Act 1990 s 30 (as amended) (see para 106 *ante*) are family proceedings for the purposes of the Children Act 1989: see the Human Fertilisation and Embryology Act 1990 s 30(8)(a); and para 106 *ante*.

As from a day to be appointed the Children Act 1989 s 8(5) is added by the Family Law Act 1996 s 66(1), Sch 8 para 37. At the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 *ante*.



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## **200. Proceedings under the inherent jurisdiction of the High Court.**

The inherent jurisdiction of the High Court with respect to children derives from the Royal Prerogative, as *parens patriae*, to take care of those who are not able to take care of themselves<sup>1</sup>. Prior to the implementation of the Children Act 1989 the most frequently seen example of the exercise of the High Court's inherent jurisdiction over children was in wardship, that is to say children who have been made wards of court by virtue of an order to that effect made by the High Court<sup>2</sup>. The Children Act 1989 reduces the need for those concerned with the upbringing of a child to have recourse to the High Court. This has been done by putting many of the beneficial aspects of wardship, such as the so-called 'open door policy'<sup>3</sup> and a variety of orders<sup>4</sup> on a statutory footing<sup>5</sup>. In addition, the Children Act 1989 imposes specific prohibitions against using the inherent jurisdiction and wardship in particular in cases involving a public law element<sup>6</sup>. These limitations upon local authorities have led to a significant reduction of cases coming before the court by way of wardship and a development of the use of the residual inherent jurisdiction of the High Court. For all practical purposes the jurisdiction in wardship and the inherent jurisdiction of the High Court are the same<sup>7</sup> and the inherent jurisdiction is now frequently invoked without wardship. There is, however, one major difference. Where an application is made for a wardship order in respect of a child, the child becomes a ward of court on the making of the application<sup>8</sup>.

1 As to the Royal Prerogative see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 367-372.

2 See the Supreme Court Act 1981 s 41(1); and para 218 post. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

It has been held that the wardship jurisdiction is not exercisable in respect of a foetus: *Re F (in utero)* [1988] Fam 122, [1988] 2 All ER 193, CA. Nor does it extend to a minor who is subject to the statutory jurisdiction established in relation to the armed forces: *Re J S (a minor) (wardship: boy soldier)* [1990] Fam 182, [1990] 2 All ER 861.

3 See para 248 note 8 post.

4 See para 247 et seq post.

5 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.98. As to the guidance and regulations generally see para 163 ante.

6 See para 201 post. Without this prohibition, the 'threshold criteria' (ie the provisions of the Children Act 1989 s 31(2): see para 274 post), which have been designed as the minimum circumstances justifying state intervention, would be undermined, as too would any directions attached to these orders (such as to their duration or other effects): Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.98. As to the imposition of directions and conditions see the Children Act 1989 s 11(7); and para 250 post. No order may be made with the effect of placing or keeping a minor in secure accommodation within the meaning of the Children Act 1989 s 25(1) (see para 1037 post) unless the minor has been made a party to the summons: Family Proceedings Rules 1991, SI 1991/1247, r 5.5 (added by SI 1991/2113; and amended by SI 1992/456).

7 *Re Z (a minor) (freedom of publication)* [1997] Fam 1, [1995] 4 All ER 961, [1996] 1 FLR 191, CA.

8 See para 218 post.

## **UPDATE**

**200 Proceedings under the inherent jurisdiction of the High Court**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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## 201. Limitations on wardship imposed by the Children Act 1989.

The Children Act 1989 restricts the circumstances in which a local authority may apply for the exercise of the court's inherent jurisdiction with respect to children<sup>1</sup>, and provides that no court may exercise the High Court's inherent jurisdiction with respect to children:

- 232 (1) so as to require a child to be placed in the care, or put under the supervision, of a local authority<sup>2</sup>;
- 233 (2) so as to require a child to be accommodated by or on behalf of a local authority<sup>3</sup>;
- 234 (3) so as to make a child who is the subject of a care order a ward of court<sup>4</sup>; or
- 235 (4) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child<sup>5</sup>.

Further, a local authority may not apply for any exercise of the court's inherent jurisdiction with respect to children unless it has obtained the leave of the court<sup>6</sup>. Proceedings on an application for such leave are not family proceedings<sup>7</sup>. Whilst the wardship court may not place the child in the care of a local authority<sup>8</sup> in wardship as in other family proceedings<sup>9</sup>, if a question arises with respect to the welfare of any child, and it appears to the court that it may be appropriate for a care order or supervision order<sup>10</sup> to be made with respect to the child, the court may direct the appropriate authority to undertake an investigation of the child's circumstances<sup>11</sup>, and the authority concerned may in the light of such investigation decide to apply for a care order or supervision order<sup>12</sup>.

The making of a care order with respect to a child who is a ward of court brings that wardship to an end<sup>13</sup>.

1 See the Children Act 1989 s 100(3); and para 218 post.

2 Ibid s 100(2)(a). As to care orders and supervision orders generally see para 270 et seq post.

3 Ibid s 100(2)(b). As to the accommodation of children by local authorities see paras 863-866 post. The effect of s 100 is that when a care order is made, the court has no inherent jurisdiction to impose conditions on the order, nor can it require a local authority to place the child in a particular place of residence: *Re K D T (a minor) (care order: conditions)* [1994] 2 FCR 721, sub nom *Re T (a minor) (care order: conditions)* [1994] 2 FLR 423, CA.

The inherent jurisdiction of the wardship court exists to ensure compliance with its directions; the use of this jurisdiction should be moderate and appropriate: *Re B (minors) (wardship: power to detain)* [1994] 2 FCR 1142, [1994] 2 FLR 479, CA.

4 Children Act 1989 s 100(2)(c).

5 Ibid s 100(2)(d). For the meaning of 'parental responsibility' see para 134 ante.

6 See ibid s 100(3); and para 218 post. As to proceedings on such an application see s 100(4); and para 218 post. As to restrictions on the exercise of the inherent jurisdiction see also paras 218, 202 post.

7 See ibid s 8(3).

8 See *ibid* s 100(2); and the text and notes 1-5 *supra*.

9 As to family proceedings see para 199 *et seq ante*.

10 As to care orders and supervision orders see para 270 *et seq post*.

11 See the Children Act 1989 s 37(1).

12 See *ibid* s 37(2); and para 272 *post*.

13 *Ibid* s 91(4). Children in care who were also wards of court under other enactments prior to 14 October 1991 ceased to be wards on that date: see s 108(6), Sch 14 para 16A (added by the Courts and Legal Services Act 1990 s 116, Sch 16 para 33; amended by the Children Act 1989 (Commencement and Transitional Provisions) Order 1991, SI 1991/928, art 4, Sch para 4).

## **UPDATE**

### **201 Limitations on wardship imposed by the Children Act 1989**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 202. Scope and use of wardship.

Once a child has become a ward of court, the court exercises an extensive and special jurisdiction<sup>1</sup> exercised in a parental and administrative manner<sup>2</sup>. No important step in the life of a ward may be taken without the consent of the court<sup>3</sup>. However, the relevant rules governing the jurisdiction of the court must be satisfied<sup>4</sup>.

Although the courts, when exercising the parental power of the Crown, have theoretically an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward, there are significant limitations on the exercise of this jurisdiction<sup>5</sup>.

Thus, the jurisdiction will not be exercised over a minor who has lawfully been refused admission to the country<sup>6</sup>, or whose parent maintains a claim to diplomatic immunity<sup>7</sup>. It is an abuse of process to exercise the inherent jurisdiction to keep within the jurisdiction a child who has overstayed his leave to enter<sup>8</sup>.

In deciding whether (and how) to exercise its powers over a ward the court may need to consider not only the child's interest but also the rights of outsiders and indeed the public interest<sup>9</sup>. The wardship jurisdiction will not be exercised so as to interfere with the criminal process<sup>10</sup>. More generally, the wardship jurisdiction will not be exercised to interfere with action properly taken under a comprehensive legislative code<sup>11</sup>, or under statutory or inherent powers<sup>12</sup>. It follows that the court will be hesitant to make orders which could not be made in other circumstances<sup>13</sup>.

1 The wardship jurisdiction may only be exercised in respect of a child, ie a person under the age of 18: see *Re B (a minor) (wardship: sterilisation)* [1988] AC 199, [1987] 2 All ER 206, HL; *Re F (mental patient: sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. As to the attainment of full age see para 1 ante.

2 *Scott (otherwise Morgan) v Scott* [1913] AC 417 at 437, HL, per Viscount Haldane LC.

3 See eg *Re S (infants)* [1967] 1 All ER 202, [1967] 1 WLR 396; and see generally *Ex p Whitfield* (1742) 2 Atk 315 at 316; *Clayton v Clarke* (1861) 7 Jur NS 562 at 563.

4 The inherent jurisdiction of the High Court in relation to children was based on the Crown's obligation to protect those who owed allegiance to it: *Re P (G E) (an infant)* [1965] Ch 568, [1964] 3 All ER 977, CA. Accordingly, jurisdiction was exercisable over a British subject, whether within or without the jurisdiction, or a person who was physically present in England and Wales, or a person who was resident in England and Wales. (However, the jurisdiction in these matters has been restricted by the provisions of the Family Law Act 1986 and the Child Abduction and Custody Act 1985: see para 780 et seq post). The English court should refrain from exorbitant jurisdictional claims founded on nationality: *Al-Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951. Even if those restrictions do not apply, it has been held that the court should not assume jurisdiction over a child present in England and Wales before first deciding that the child should not be returned to the country from which he had been brought: *G v G* [1991] FCR 12, [1991] 2 FLR 506, CA. See also *Re B M (a minor) (wardship: jurisdiction)* [1993] 2 FCR 388, [1993] 1 FLR 979.

5 *Re X (a minor) (wardship: jurisdiction)* [1975] Fam 47 at 61, [1975] 1 All ER 697 at 706, CA, per Sir John Pennycuik. See also *Re H (minors) (wardship: surety)* [1991] FCR 45, [1991] 1 FLR 40, CA; *Re K (minors) (wardship: criminal proceedings)* [1988] Fam 1, [1988] 1 All ER 214. See generally *Re M and N (minors) (wardship: publication of information)* [1990] Fam 211, [1990] 1 All ER 205, CA; and *Re T (a minor) (wardship: representation)* (1993) Times, 10 May, CA.

It may be that the court will now express its orders in terms of the statutory powers conferred by the Children Act 1989; but cf *Re W (an infant)* [1964] Ch 202 at 210, sub nom *Re W (J C) (infant)* [1963] 3 All ER 459 at 462,

CA, per Ormrod LJ (there may be a 'real distinction' between orders made in the exercise of an inherent jurisdiction and orders made in the exercise of a statutory jurisdiction).

See also *Re H-S (minors: protection of identity)* [1994] 3 All ER 390, [1994] 1 WLR 1141, CA; *Re Z (a minor) (freedom of publication)* [1997] Fam 1, [1995] 4 All ER 961, CA; *Re T (a minor) (wardship: medical treatment)* [1997] 1 All ER 906, [1997] 1 WLR 242, CA (best interests of child not to be judged solely against medical opinion). See further *Re R J (wardship)* [1999] 3 FCR 646, [1999] 1 FLR 618 (exceptionally, a wardship order may be made vesting care and control of a child in a person, who by virtue of the Foster Placement (Children) Regulations 1991, SI 1991/910, reg 3(4A) (as added) (see now the Fostering Services Regulations 2002, SI 2002/57, in England, and the Fostering Services (Wales) Regulations 2003, SI 2003/237; and para 902 post), is prohibited from being a foster parent because he has been cautioned for a relevant criminal offence).

6 *Re Mohamed Arif (an infant)* [1968] Ch 643, sub nom *Re A (an infant)*, *Hanif v Secretary of State for Home Affairs* [1968] 2 All ER 145, CA.

7 *Re C (an infant)* [1959] Ch 363, [1958] 2 All ER 656.

8 *Re F (a minor)* [1990] Fam 125, [1989] 1 All ER 1155, CA. Wardship should not be used to restrain the removal from the United Kingdom of a child who is subject to immigration control: *R (on the application of Anton) v Secretary of State for the Home Department* [2005] EWHC 2730 (Admin), [2005] EWHC 2731 (Fam), sub nom *Re Anton* [2005] 2 FLR 818.

9 *Re X (a minor) (wardship: jurisdiction)* [1975] Fam 47, [1975] 1 All ER 697, CA; *Re M and N (minors) (wardship: publication of information)* [1990] Fam 211, [1990] 1 All ER 205, CA; *Re C (a minor) (No 2) (wardship: publication of information)* [1990] Fam 39, [1989] 2 All ER 791, CA. The court will be reluctant to exercise jurisdiction in the context of what is in effect a private contractual dispute: *Re C (a minor) (wardship: jurisdiction)* [1991] FCR 1018, [1991] 2 FLR 168, CA. See also *R v Central Independent Television plc* [1994] Fam 192, [1994] 3 All ER 641, CA (parental jurisdiction cannot be invoked to restrain broadcast of television programme which is not concerned with the care or upbringing of a child but merely affects the child indirectly); *Kelly v British Broadcasting Corp* [2001] Fam 59, [2001] 1 All ER 323, [2000] 3 FCR 509 (application to set aside injunction restraining broadcast of a BBC interview with ward of court granted); *Re X (a child) (injunctions restraining publication)* [2001] 1 FCR 541 (see further para 227 post); *A Local Authority v P C (a child) (identification: restrictions on publication)* [2005] EWHC 1832 (Fam), [2005] EMLR 840.

The inherent jurisdiction of the wardship court exists to ensure compliance with its directions; the use of this jurisdiction should be moderate and appropriate: *Re B (minors) (wardship: power to detain)* [1994] 2 FCR 1142, [1994] 2 FLR 479, CA.

10 *Re K (minors) (wardship: criminal proceedings)* [1988] Fam 1, [1988] 1 All ER 214; *Re R (a minor) (wardship: witness in criminal proceedings)* [1991] Fam 56, [1991] 2 All ER 193, CA; and see *Re G (a minor) (witness summons)* [1988] 2 FLR 396, [1989] Fam Law 67. However, the consent of the court is required if a ward is to be interviewed: *Re R, Re G (minors)* [1990] 2 All ER 633, [1990] FCR 495, CA (applied in *Re F (minors) (solicitors' interviews)* [1995] 2 FCR 200, [1995] 1 FLR 819, CA); *Practice Direction* [1988] 1 All ER 223, [1987] 1 WLR 1739; *Practice Direction* [1988] 2 All ER 1015, [1988] 1 WLR 989. As to whether a ward should submit to the administration of a caution in respect of criminal offences see *Re A (a minor) (wardship: criminal proceedings)* [1989] Fam 103, [1989] 3 All ER 610; cf *Re G (a minor) (witness summons)* supra. See also *Re R (a minor) (wardship: restrictions on publication)* [1994] Fam 254, [1994] 3 All ER 658, CA (protection of ward in relation to publicity arising out of criminal proceedings is matter for the criminal courts, not the wardship court).

11 *A v Liverpool City Council* [1982] AC 363, [1981] 2 All ER 385, HL; *Re W (a minor) (wardship: jurisdiction)* [1985] AC 791, sub nom *W v Hertfordshire County Council* [1985] 2 All ER 301, HL. See also *Re C (a minor) (detention for medical treatment)* [1997] 3 FCR 49, [1997] 2 FLR 180 (clinic providing treatment for eating disorders, not 'secure accommodation' within the meaning of the Children Act 1989 s 25 (as amended) (see para 1037 post) and, therefore, court's inherent jurisdiction not ousted); *R v R (private law proceedings: residential assessment)* [2002] 2 FLR 953; *E v X London Borough Council* [2005] EWHC 2811 (Fam), [2006] 1 FLR 730, [2006] Fam Law 187.

12 *Re Mohamed Arif (an infant)* [1968] Ch 643, sub nom *Re A (an infant)*, *Hanif v Secretary of State for Home Affairs* [1968] 2 All ER 145, CA; *Re J S (a minor) (wardship: boy soldier)* [1990] Fam 182, [1990] 2 All ER 861; *Re A (a minor) (wardship: immigration)* [1991] FCR 1013, [1992] 1 FLR 427, CA. For exceptional circumstances in which wardship may be available pending a decision on immigration matters see *Re F (a minor) (immigration: wardship)* [1990] Fam 125, [1989] 1 All ER 1155, CA; and *Re K (minors)* [1992] 1 FCR 385, sub nom *Re K and S (minors) (wardship: immigration)* [1992] 1 FLR 432. See also *Re T (a minor) (wardship: representation)* (1993) Times, 10 May, CA.

13 *Re H (minors) (wardship: surety)* [1991] FCR 45, [1991] 1 FLR 40, CA.

## UPDATE

## **202 Scope and use of wardship**

NOTE 12--While the pendency of wardship proceedings in respect of a child liable to removal cannot prevent his removal, the fact that it will tend to persuade Secretary of State to stay her powers requires the Family Division to exercise its wardship powers with care so as to avoid its processes being used in a way that impermissibly impacts on the Secretary of State's proper exercise of her powers: *S v S* [2008] EWHC 2288 (Fam), [2009] 2 FCR 415.

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### 203. Scope and use of the inherent jurisdiction of the High Court.

The inherent jurisdiction of the High Court has been used:

- 236 (1) upon applications to decide upon the lawfulness of proposed treatment of children, including sterilisation<sup>1</sup>;
- 237 (2) to direct medical treatment<sup>2</sup>;
- 238 (3) to determine what steps should be taken to prolong the life of a child suffering from serious illness<sup>3</sup>;
- 239 (4) to prevent the publication of harmful information or to protect the confidentiality of proceedings<sup>4</sup>;
- 240 (5) to grant exclusion orders<sup>5</sup>;
- 241 (6) to revoke a freeing order<sup>6</sup>.

1 *Re B (a minor) (wardship: sterilisation)* [1988] AC 199, [1987] 2 All ER 206, HL; *S v S, W v Official Solicitor* [1972] AC 24 at 48, [1970] 3 All ER 107 at 115, HL, per Lord MacDermott; *Richards v Richards* [1984] AC 174 at 210, [1983] 2 All ER 807 at 820, HL, per Lord Scarman. But cf *Re F (mental patient: sterilisation)* [1990] 2 AC 1 at 57, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 552, HL, per Lord Brandon of Oakbrook ('so much of the parens patriae jurisdiction as related to minors survives now in the form of the wardship jurisdiction of the High Court, Family Division'). As to the procedure for applying under the court's inherent jurisdiction for leave to perform a sterilisation operation see *Practice Note* [1996] 3 FCR 95, [1996] 2 FLR 111. As to restrictions on the exercise of the court's inherent jurisdiction see also paras 201-202 ante.

2 *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA; *Re A (children) (conjoined twins: surgical separation)* [2001] Fam 147, [2000] 4 All ER 961, CA; *Re B (a minor) (secure accommodation)* [1997] 1 FCR 618, sub nom *A Metropolitan Borough Council v D B* [1997] 1 FLR 767; *Re M (a child: refusal of medical treatment)* [1999] 2 FCR 577, [1999] 2 FLR 1097.

3 *Re B (a minor) (wardship: medical treatment)* [1990] 3 All ER 927, [1981] 1 WLR 1421, CA; *Re C (a minor) (wardship: medical treatment)* [1990] Fam 26, [1989] 2 All ER 782, CA; *Portsmouth NHS Trust v Wyatt* [2004] EWHC 2247 (Fam), [2005] 1 FLR 21; *Wyatt v Portsmouth NHS Trust (No 3)* [2005] EWCA Civ 1181, [2005] 1 WLR 3995, [2006] 1 FLR 554; *Re Wyatt* [2005] EWHC 2293 (Fam), [2005] 4 All ER 1325 (sub nom *Portsmouth NHS Trust v Wyatt* [2006] 1 FLR 652); *An NHS Trust v B* [2006] EWHC 507 (Fam), [2006] 2 FLR 319; *Re K (a child) (withdrawal of medical treatment)* [2006] EWHC 1007 (Fam), [2006] 2 FLR 883.

4 *X County Council v A* [1985] 1 All ER 53, sub nom *Re X (a minor) (wardship: injunction)* [1984] 1 WLR 1422; *Re C (a minor) (wardship: medical treatment) (No 2)* [1990] Fam 39, [1989] 2 All ER 791, CA; *Re M and N (minors) (wardship: publication of information)* [1990] Fam 211 (sub nom *Re M and another (minors) (wardship: freedom of publication)* [1990] 1 All ER 205, CA); *Re W (a minor) (wardship: freedom of publication)* [1992] 1 All ER 794 (sub nom *Re W (a minor) (wardship: publicity)* [1992] 1 FCR 231, CA); *Re W (a minor) (adoption details: disclosure)* [1999] 2 FCR 283, [1998] 2 FLR 625.

5 *Devon County Council v S* [1994] Fam 169, [1995] 1 All ER 243; *Re S (minors) (inherent jurisdiction: ouster)* [1994] 2 FCR 986, [1994] 1 FLR 623 (but see now the Children Act 1989 s 38A (as added); and para 290 post).

6 *Re C (a minor) (adoption: freeing order)* [1999] Fam 240, [1999] 1 FLR 348.



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#### **204. Proceedings under the Children Act 1989.**

The following are family proceedings under Part I of the Children Act 1989<sup>1</sup>:

- 242 (1) applications by the father of an illegitimate child for parental responsibility<sup>2</sup>;
- 243 (2) applications concerning the termination of a parental responsibility order or a parental responsibility agreement<sup>3</sup>;
- 244 (3) applications by an individual to be appointed the guardian of a child<sup>4</sup>; and
- 245 (4) applications to terminate the appointment of a guardian<sup>5</sup>.

Family proceedings under Part II of the Children Act 1989<sup>6</sup> include:

- 246 (a) applications for contact orders<sup>7</sup>, prohibited steps orders<sup>8</sup>, residence orders<sup>9</sup> or specific issues orders<sup>10</sup> ('section 8 orders') by persons who are entitled to apply for the order in question, or have obtained leave of the court to make the application<sup>11</sup>; and
- 247 (b) applications for special guardianship orders<sup>12</sup>;
- 248 (c) applications for financial relief with respect to children<sup>13</sup>.

Family proceedings under Part IV of the Children Act 1989<sup>14</sup> include:

- 249 (i) applications for the grant, variation, discharge or substitution of care orders and supervision orders<sup>15</sup>;
- 250 (ii) applications regarding contact between children in care and specified persons<sup>16</sup>; and
- 251 (iii) applications for education supervision orders<sup>17</sup>.

Proceedings concerned with child assessment orders<sup>18</sup>, emergency protection orders<sup>19</sup>, and other measures for the protection of children<sup>20</sup>, are not family proceedings for the purposes of the Act, unless in the family proceedings court, wherein all proceedings under the Children Act 1989 are treated as family proceedings<sup>21</sup>.

1    Ie the Children Act 1989 Pt I (ss 1-7) (as amended): see para 134 et seq ante.

2    See *ibid* s 4(1)(a); and para 139 ante. For the meaning of 'parental responsibility' see para 134 ante.

3    See *ibid* s 4(3), (4) (as amended); and para 139 ante.

4    See *ibid* s 5(1) (as amended); and para 145 ante.

5    See *ibid* s 6(7); and para 150 ante.

6    Ie *ibid* Pt II (ss 8-16A) (as amended): see para 247 et seq post.

7    See *ibid* s 8(1); and para 251 post.

8    See *ibid* s 8(1); and para 261 post.

9    See *ibid* s 8(1); and para 262 post.

- 10 See *ibid* s 8(1); and para 263 post.
- 11 See *ibid* s 10 (as amended); and para 249 post. An application for leave to make an application under s 10 (as amended) would itself be an application under Pt II (as amended): see para 249 post.
- 12 See *ibid* s 14(A) (as added); and para 151 ante.
- 13 See *ibid* s 15(1), Sch 1 (as amended); and para 540 et seq post.
- 14 See *ibid* Pt IV (ss 31-42) (as amended): see para 271 et seq post.
- 15 See *ibid* s 31 (as amended), ss 32, 39 (as amended); and paras 271-274, 280, 293-294 post.
- 16 See *ibid* s 34 (as amended); and paras 274, 278-279 post. These orders should be distinguished from contact orders under s 8 (as amended): see para 251 post.
- 17 See *ibid* s 36 (as amended); and para 296 post.
- 18 See paras 578-582 post.
- 19 See paras 583-593 post.
- 20 As to child protection generally see para 577 et seq post.
- 21 Children Act 1989 s 92(2). As to the family proceedings court see para 208 post.

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## **205. Family proceedings under other statutory provisions.**

The following proceedings under the Matrimonial Causes Act 1973 are 'family proceedings' for the purposes of the Children Act 1989:

- 252 (1) petitions for divorce, nullity and judicial separation<sup>1</sup>;
- 253 (2) applications for orders on the ground that either party to the marriage has failed to provide reasonable maintenance for the applicant or for any child of the family<sup>2</sup>;
- 254 (3) applications for the alteration by the court of a maintenance agreement during the lives of the parties or after the death of one party<sup>3</sup>;
- 255 (4) applications to avoid transactions intended to prevent or reduce financial relief<sup>4</sup>.

Proceedings in the High Court under the Civil Partnership Act 2004 for financial provision in connection with dissolution, nullity or separation<sup>5</sup> are family proceedings<sup>6</sup>.

Proceedings in the magistrates' courts under the Civil Partnership Act 2004 for financial provision following failure to maintain, for agreed financial provision and for orders when civil partners are living apart by agreement<sup>7</sup> are family proceedings<sup>8</sup>.

Proceedings under the Crime and Disorder Act 1998 for child safety orders<sup>9</sup> are family proceedings<sup>10</sup>.

Proceedings under Part IV of the Family Law Act 1996<sup>11</sup> which empower the court to regulate the rights of occupation of a dwelling house in shared occupation<sup>12</sup>, to prevent molestation of adults and children<sup>13</sup>, and to transfer tenancies<sup>14</sup> are family proceedings<sup>15</sup>.

Proceedings under the Adoption and Children Act 2002 for adoption orders and placement orders are family proceedings<sup>16</sup>.

Applications under the Domestic Proceedings and Magistrates' Courts Act 1978 are often for financial provision on the ground that the respondent, a party to the marriage, has failed to provide reasonable maintenance for the applicant or any child of the family, or has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent, or that the respondent has deserted the applicant<sup>17</sup>. Jurisdiction is conferred on the court to make orders for payments which have been agreed by the parties, and to make an order where the parties are living apart by agreement for periodical payments at a level approximating to the level of payments voluntarily made in the previous three months<sup>18</sup>.

Under Part III of the Matrimonial and Family Proceedings Act 1984<sup>19</sup>, either party to a marriage which has been dissolved or annulled by means of judicial or other proceedings in an overseas country where the divorce or annulment is entitled to be recognised as valid in England and Wales may apply to the court for an order for financial relief<sup>20</sup>. No application for such an order may be made unless the leave of the court has been first obtained in accordance with rules of court. It would appear that applications for the order and for such leave are both within the definition of family proceedings<sup>21</sup>.

The court may make an order providing for a child to be treated in law as the child of the parties to a marriage in certain circumstances in which the child has been carried by a woman

other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination<sup>22</sup>. Proceedings on an application for such an order are family proceedings<sup>23</sup>.

1 See the Children Act 1989 s 8(3)(b), (4)(b); and para 199 ante. As to petitions for divorce, nullity and judicial separation see the Matrimonial Causes Act 1973 ss 1, 11 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 326), s 12 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 331-336, 342-343)), s 17 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 346, 348).

2 See the Children Act 1989 s 8(3)(b), (4)(b); and para 199 ante. As to applications for orders on the ground that either party to the marriage has failed to provide reasonable maintenance see the Matrimonial Causes Act 1973 s 27 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 542 et seq.

3 See the Children Act 1989 s 8(3)(b), (4)(b); and para 199 ante. As to applications for the alteration by the court of a maintenance agreement during the lives of the parties or after the death of one party see the Matrimonial Causes Act 1973 ss 35, 36 (both as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 700-705.

4 See the Children Act 1989 s 8(3)(b), (4)(b); and para 199 ante. As to applications to avoid transactions intended to prevent or reduce financial relief see the Matrimonial Causes Act 1973 s 37 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 586-588.

5 See under the Civil Partnership Act 2004 s 72(1), Sch 5: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

6 See the Children Act 1989 s 8(3)(b), (4)(ba) (as added); and para 199 ante.

7 See under the Civil Partnership Act 2004 s 72(3), Sch 6: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

8 See the Children Act 1989 s 8(3)(b), (4)(ea) (as added); and para 199 ante.

9 See under the Crime and Disorder Act 1998 ss 11, 12 (both as amended): see para 625 post.

10 See the Children Act 1989 s 8(3)(b), (4)(i) (as added); and para 199 ante.

11 See under the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

12 See *ibid* Pt IV (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

13 See *ibid* s 42 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 716-718 et seq.

14 See *ibid* s 53, Sch 7 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 310 et seq.

15 See the Children Act 1989 s 8(3)(b), (4)(h) (as added); and para 199 ante.

16 See *ibid* s 8(3)(b), (4)(d) (as substituted); and para 199 ante. As to applications for adoption orders and placement orders see the Adoption and Children Act 2002 s 21 (as amended), s 46; and para 331 et seq post.

17 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 (as amended; prospectively further amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553.

18 See *ibid* s 6 (as substituted and amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 555), s 7 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 556).

19 See the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended; prospectively further amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq.

20 See *ibid* s 12 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530.

21 See the Children Act 1989 s 8(3)(b), (4)(g); and para 199 ante.

22 See the Human Fertilisation and Embryology Act 1990 s 30(1); and para 106 ante.

23 See *ibid* s 30(8)(a).



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## (ii) Rules of Court

### 206. Introduction.

Procedural matters in relation to family proceedings in the High Court and county court are governed by the Family Proceedings Rules 1991<sup>1</sup>, and in the family proceedings court<sup>2</sup> by the Family Proceedings Courts (Children Act 1989) Rules 1991<sup>3</sup>. Adoption proceedings<sup>4</sup> in the High Court, county court and the family proceedings court are governed by the Family Procedure (Adoption) Rules 2005<sup>5</sup>.

Ordinary civil proceedings in which children are parties are covered elsewhere in this title<sup>6</sup>, and the procedural aspects of such proceedings are generally governed by the Civil Procedure Rules<sup>7</sup>.

<sup>1</sup> See the Family Proceedings Rules 1991, SI 1991/1247 (as amended). As to the allocation of proceedings see para 208 post.

<sup>2</sup> As to magistrates' courts as family proceedings courts see para 208 post.

<sup>3</sup> See the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (as amended). As to the allocation of proceedings see para 208 post.

<sup>4</sup> Family Procedure Rules may make provision in respect of any matter to be prescribed by rules made by virtue of the Adoption and Children Act 2002 and dealing generally with all matters of procedure: s 141(1) (amended by the Courts Act 2003 s 109, Sch 8 para 413(1), (2)). In the case of an application for a placement order, for the variation or revocation of such an order, or for an adoption order, the rules must require any person mentioned below to be notified of the date and place where the application will be heard, and of the fact that, unless the person wishes or the court requires, the person need not attend: Adoption and Children Act 2002 s 141(3). The persons referred to in s 141(3) are:

153 (1) in the case of a placement order, every person who can be found whose consent to the making of the order is required under s 21(3)(a) (see para 336 post) (or would be required but for s 141(3)(b)) or, if no such person can be found, any relative prescribed by rules who can be found;

154 (2) in the case of a variation or revocation of a placement order, every person who can be found whose consent to the making of the placement order was required under s 21(3)(a) (see para 336 post) (or would have been required but for s 21(3)(b));

155 (3) in the case of an adoption order:

13. (a) every person who can be found whose consent to the making of the order is required under s 47(2)(a) (see para 360 post) (or would be required but for s 47(2)(c)) or, if no such person can be found, any relative prescribed by rules who can be found;  
13

14. (b) every person who has consented to the making of the order under s 20 (and has not withdrawn the consent) unless he has given a notice under s 20(4)(a) which has effect;  
14

15. (c) every person who, if leave were given under section 47(5), would be entitled to oppose the making of the order (s 141(4)).  
15

Rules made in respect of magistrates' courts may provide for enabling any fact tending to establish the identity of a child with a child to whom a document relates to be proved by affidavit and for excluding or restricting in relation to any facts that may be so proved the power of a justice of the peace to compel the attendance of

witnesses: s 141(5). Rules may, for the purposes of the law relating to contempt of court, authorise the publication in such circumstances as may be specified of information relating to proceedings held in private involving children: s 141(6) (added by the Children Act 2004 s 62(6)).

5     le the Family Procedure (Adoption) Rules 2005, SI 2005/2795. As to adoption generally see para 323 et seq post.

6     See para 1409 et seq post.

7     The CPR do not apply to family proceedings or adoption proceedings, except to the extent that they are applied to those proceedings by another enactment: see CPR 2.1(2). As to the CPR see para 1409 post.

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**207. What may be provided by rules of court.**

An authority having power to make rules of court<sup>1</sup> may make such provision for giving effect to:

- 256 (1) the Children Act 1989<sup>2</sup>;
- 257 (2) the provisions of any statutory instrument made under that Act<sup>3</sup>; or
- 258 (3) any amendment made by it in any other enactment<sup>4</sup>,

as appears to that authority to be necessary or expedient<sup>5</sup>.

The rules may, in particular, make provision:

- 259 (a) with respect to the procedure to be followed in any relevant proceedings<sup>6</sup>, including the manner in which any application is to be made or other proceedings commenced<sup>7</sup>;
- 260 (b) as to the persons entitled to participate in any relevant proceedings, whether as parties to the proceedings or by being given the opportunity to make representations to the court<sup>8</sup>;
- 261 (c) for children to be separately represented in relevant proceedings<sup>9</sup>;
- 262 (d) with respect to the documents and information to be furnished, and notices to be given, in connection with any relevant proceedings<sup>10</sup>;
- 263 (e) applying, with or without modification, enactments which govern the procedure to be followed with respect to proceedings brought on a complaint made to a magistrates' court to relevant proceedings in such a court brought otherwise than on a complaint<sup>11</sup>;
- 264 (f) with respect to preliminary hearings<sup>12</sup>;
- 265 (g) for the service outside England and Wales, in prescribed<sup>13</sup> circumstances and manner, of any notice of proceedings in a magistrates' court<sup>14</sup>;
- 266 (h) for the exercise by magistrates' courts in prescribed circumstances of prescribed powers, even though a party to the proceedings in question is or resides outside England and Wales<sup>15</sup>;
- 267 (i) enabling the court, in prescribed circumstances, to proceed on any application even though the respondent has not been given notice of the proceedings<sup>16</sup>;
- 268 (j) authorising a single justice to discharge the functions of a magistrates' court with respect to prescribed relevant proceedings<sup>17</sup>;
- 269 (k) authorising a magistrates' court to order any of the parties to such prescribed relevant proceedings, in prescribed circumstances, to pay the whole or part of the costs of all or any of the other parties<sup>18</sup>.

When making such rules, an authority is subject to the same requirements as to consultation (if any) as apply when the authority makes rules under its general rule-making power<sup>19</sup>. The power under the Children Act 1989 to make rules of court in no way limits any other power of the authority to make rules of court<sup>20</sup>. In addition, rules of court make provision as to attendance at the directions appointments and hearings<sup>21</sup>, as to the procedure at the hearing<sup>22</sup>, and as to expert evidence arising from the examination of the child<sup>23</sup> and oral evidence given at the hearing or directions appointment<sup>24</sup>. Provision is also made in respect of the amendment of any



document filed or served in the proceedings<sup>25</sup>, the setting aside of an order on failure of service<sup>26</sup> and as to the disclosure of addresses<sup>27</sup>.

Subject to the provisions of the Family Proceedings Rules 1991<sup>28</sup>, the County Court Rules 1981 (CCR) and the Rules of the Supreme Court 1965 (RSC) continue to apply, with the necessary modifications, to family proceedings in a county court and the High Court<sup>29</sup>.

Family Procedure Rules may make provision in respect of any matter to be prescribed by rules made by virtue of the Adoption and Children Act 2002 and dealing generally with all matters of procedure<sup>30</sup>.

1 The power to make rules of court in magistrates' courts is exercisable by the magistrates' courts rule committee. The Lord Chancellor has the power to appoint a rule committee for magistrates' courts: Magistrates' Courts Act 1980 s 144(A1) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 99, 102(1), (2)). The Lord Chief Justice may, on the advice of or after consultation with the rule committee, and with the concurrence of the Lord Chancellor, make rules for regulating and prescribing (except in relation to any criminal cause or matter or any family proceedings) the procedure and practice to be followed in magistrates' courts and by justices' clerks and designated officers for magistrates' courts: see the Magistrates' Courts Act 1980 s 144(1) (amended by the Constitutional Reform Act 2005 Sch 4 paras 99, 102(1), (2), (3)(a)). The rule committee consists of the Lord Chief Justice, the President of the Family Division of the High Court, the Senior District Judge (Chief Magistrate) and such number of other persons appointed by the Lord Chancellor as he may, after consulting the Lord Chief Justice, determine: see the Magistrates' Courts Act 1980 s 144(2) (amended by the Access to Justice Act 1999 s 78(2), Sch 11 paras 26, 29; the Courts Act 2003 s 109(1), (3), Sch 8 para 245(1), (3), Sch 10; and the Constitutional Reform Act 2005 Sch 4 paras 99, 102(1), (5)). See further MAGISTRATES. As to magistrates' courts as family proceedings courts see para 208 post.

The power to make rules of court for the purposes of family proceedings in the High Court or county courts is exercisable by a committee known as the Family Proceedings Rule Committee, which consists of the following persons: (1) the President of the Family Division; (2) one puisne judge attached to the Family Division; (3) one district judge of the principal registry of the Family Division; (4) two circuit judges; (5) one district judge appointed under the County Courts Act 1984 (see COUNTY COURTS); (6) two persons who have a Supreme Court (Senior Court) qualification (within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended) (see COURTS vol 10 (Reissue) para 575); and (7) two persons who have been granted by an authorised body, under Pt II (ss 17-70) (as amended) (see COURTS vol 10 (Reissue) para 575), the right to conduct litigation in relation to all proceedings in the Supreme Court (Senior Courts): Matrimonial and Family Proceedings Act 1984 s 40(1) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 50; and the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 379, 380). However, the Matrimonial and Family Proceedings Act 1984 s 40(1) (as amended) is without prejudice to the powers of the following authorities to make rules in respect of the following matters and rules in respect of those matters continue to be made by those authorities and not by the authority constituted by s 40(1) (as amended). The rules and rule-making authorities are: (a) adoption rules made under the Adoption Act 1958 s 9(3) (repealed), the Adoption Act 1968 s 12(1) (repealed) or the Adoption Act 1976 s 66(1) or the Adoption and Children Act 2002 s 141(1) (see the text and note 30 infra); (b) probate rules made under the Supreme Court Act 1981 s 127 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 81); and (c) rules made by the Family Procedure Rule Committee in respect of (i) all causes and matters (whether at first instance or appeal) relating to adoption including the exercise of the inherent jurisdiction of the High Court with respect to minors; and (ii) all proceedings for the purpose of enforcing an order made in proceedings described in para (i) supra: see the Matrimonial and Family Proceedings Act 1984 s 40(2) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 44; the Constitutional Reform Act 2005 ss 12(2), 146, Sch 1 para 18(a), (b), Sch 18 Pt 1; and the Courts Act 2003 (Commencement No 11 and Transitional Provision) Order 2005, SI 2005/2744, art 3.). Note that the Matrimonial and Family Proceedings Act 1984 s 40 (as amended) is prospectively repealed by the Courts Act 2003 s 109(1), (3), Sch 8 para 278(a), Sch 10 as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

For these purposes, 'family proceedings' means family business; and 'family business' means business of any description which in the High Court is for the time being assigned to the Family Division and to no other division by or under the Supreme Court Act 1981 s 61, Sch 1 (as amended); Matrimonial and Family Proceedings Act 1984 s 32; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 737; COURTS. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. As to the President of the Family Division see COURTS vol 10 (Reissue) para 515; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 303; COURTS. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

2 Children Act 1989 s 93(1)(a).

3 Ibid s 93(1)(b).

4 Ibid s 93(1)(c).

5 Ibid s 93(1).

6 'Relevant proceedings' means any application made or proceedings brought under the provisions of: (1) the Children Act 1989; (2) any statutory instrument made under the Act; or (3) any other enactment amended by the Children Act 1989: s 93(1), (3).

7 Ibid s 93(2)(a). As to rules which have been made see the Family Proceedings Rules 1991, SI 1991/1247, r 4.3 (amended by SI 1994/3155; SI 2005/2922) (application for leave to commence proceedings), the Family Proceedings Rules 1991, SI 1991/1247, r 4.4 (amended by SI 1991/2113; SI 1992/2067; SI 1994/3155; SI 2004/3375) (application), the Family Proceedings Rules 1991, SI 1991/1247, r 4.5 (amended by SI 2001/821; SI 2007/2187) (withdrawal of application), the Family Proceedings Rules 1991, SI 1991/1247, r 4.6 (amended by SI 1991/2113; SI 1994/3155; SI 2005/2922) (transfer), the Family Proceedings Rules 1991, SI 1991/1247, r 4.7 (amended by SI 1992/2067; SI 1994/3155; SI 2005/2922) (parties), the Family Proceedings Rules 1991, SI 1991/1247, r 4.8 (amended by SI 1992/456; SI 1992/2067; SI 1994/3155; SI 2001/821) (service), the Family Proceedings Rules 1991, SI 1991/1247, r 4.9 (amended by SI 1994/3155; SI 2004/3375; SI 2005/2922) (answer to application); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3 (amended by SI 1994/3156; SI 2001/615; SI 2005/617; SI 2005/2930) (application for leave to commence proceedings), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4 (amended by SI 1994/3156; SI 1992/2068; SI 2001/615; SI 2004/3376; SI 2005/617) (application), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 5 (amended by SI 2001/818; SI 2001/615; SI 2005/617; SI 2005/2930; SI 2007/2188) (withdrawal of application), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 6 (amended by SI 1994/3156; SI 2001/818; SI 2001/615; SI 2005/617; SI 2005/2930) (transfer of proceedings), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7 (amended by SI 1994/3156; SI 2005/617; SI 2005/2930) (parties), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 8 (amended by SI 1994/3156; SI 1992/2068; SI 2001/818; SI 2005/617) (service), the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 9 (substituted by SI 1994/3156; SI 2004/3376; SI 2005/2930) (acknowledgement of application). See *Re F (a minor) (care order: withdrawal of application)* [1993] 1 FCR 389, [1993] 2 FLR 9 (application of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 5). As to the disclosure of addresses see r 33A (added by SI 1994/3156).

8 Children Act 1989 s 93(2)(b). As to the rules which have been made see the Family Proceedings Rules 1991, SI 1991/1247, r 4.7 (as amended: see note 7 *supra*) (parties); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7 (as amended: see note 7 *supra*) (parties).

9 Children Act 1989 s 93(2)(bb) (added by the Adoption and Children Act 2002 s 122(2)).

10 Children Act 1989 s 93(2)(c). As to the rules which have been made see, in particular, the Family Proceedings Rules 1991, SI 1991/1247, r 4.4 (amended by SI 1991/2113; SI 1992/2067; SI 1994/3155; SI 2004/3375) (application), the Family Proceedings Rules 1991, SI 1991/1247, r 4.17 (amended by SI 1992/2067; SI 2001/821; SI 2007/2187) (documentary evidence); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4 (amended by SI 1992/2068; SI 1994/3156; 2001/615; SI 2004/3376; SI 2005/617) (application), Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17 (amended by SI 1992/2068; SI 2001/818; SI 2005/2930; SI 2007/2188) (documentary evidence), Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17A (added by SI 2005/2930) (disclosure of special guardianship report). As to the procedure to be followed for the secure editing of documents to maintain confidentiality see *Re R (children) (secure editing of documents)* [2007] EWHC 876 (Fam), [2007] 1 WLR 1654, [2007] 2 FCR 1.

11 Children Act 1989 s 93(2)(d). As to the rules which have been made see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 33, which applies the Magistrates' Courts Act 1980 s 97 (as amended) (attendance of witnesses); and MAGISTRATES vol 29(2) (Reissue) paras 734, 736.

12 Children Act 1989 s 93(2)(e). As to the rules which have been made see the Family Proceedings Rules 1991, SI 1991/1247, r 4.14 (amended by SI 1994/3155; SI 2001/821; SI 2007/2187) (directions appointments); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 14 (amended by SI 1994/3156; SI 2001/818; SI 2001/615; SI 2005/617; SI 2005/2930; SI 2007/2188) (directions appointments).

13 'Prescribed' means prescribed by the rules: Children Act 1989 s 93(3).

14 Ibid s 93(2)(f) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 22). At the date at which this volume states the law no separate provision for service outside England and Wales had been made. 'Notice of proceedings' means a summons or such other notice of proceedings as is required, and 'given', in relation to a summons, means 'served': Children Act 1989 s 93(3).

15 Ibid s 93(2)(g) (amended by the Courts and Legal Services Act 1990 Sch 16 para 22). At the date at which this volume states the law no provision in this regard had been made.

16 Ibid s 93(2)(h). As to the rules which have been made see the Family Proceedings Rules 1991, SI 1991/1247, r 4.8(8) (substituted by SI 1992/2067) (directions as to service); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 8(8) (substituted by SI 1992/2068) (directions as to service).

17 Children Act 1989 s 93(2)(i). As to the rules which have been made see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(5) (amended by SI 2005/2930) (discharge of functions by a single justice).

18 Children Act 1989 s 93(2)(j). As to the rules which have been made see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 22 (costs). Magistrates may make an order for the unsuccessful party to pay costs of a successful party who is in receipt of assistance from the Community Legal Service Fund in such amount as the Legal Services Commission might assess or they may proceed at once to specify the amount of costs payable: *Sutton London Borough Council v Davis (No 2)* [1995] 1 All ER 65, [1994] 1 WLR 1317. Order for costs is a matter for the discretion of the court: *Re M (local authority's costs)* [1995] 1 FCR 649, [1995] 1 FLR 533. As to costs orders in children cases in county courts see *Re R (a minor) (legal aid: costs)* [1997] 1 FCR 613 (sub nom *R v R (costs: child case)*) [1997] 2 FLR 95, CA; *Re G (costs: child case)* [1999] 3 FCR 463, [1999] 2 FLR 250, CA; *Re B (costs)* [1999] 3 FCR 586, [1999] 2 FLR 221, CA; *Re T (a child) (order for costs)* [2005] EWCA Civ 311, [2005] 1 FCR 625.

19 Children Act 1989 s 93(5); and see note 1 supra.

20 Ibid s 93(4). See also note 1 supra.

21 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.16 (amended by SI 2001/821); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 16 (amended by SI 2001/818).

22 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.21 (amended by SI 1992/456; SI 1992/2067; SI 1994/3155; SI 2001/821); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21 (amended by SI 1992/2068; SI 1994/3156; SI 2001/818; SI 2001/615; SI 2005/617; SI 2005/2930).

23 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.18 (amended by SI 2001/821); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 18 (amended by SI 2001/818).

24 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.20; the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 20.

25 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.19; the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 19 (amended by SI 2005/617).

26 See the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 33B (added by SI 1997/1895).

27 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.21 (amended by SI 1991/2113; 1994/3155); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 33A (added by SI 1994/3156).

28 See the Family Proceedings Rules 1991, SI 1991/1247 (as amended).

29 Ibid r 1.3(1) (amended by SI 1999/1012). See generally CIVIL PROCEDURE; COUNTY COURTS.

30 Adoption and Children Act 2002 s 141(1) (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 413(1), (2), Sch 10).

## UPDATE

### **207-208 What may be provided by rules of court, Jurisdiction generally: allocation and transfer of proceedings**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **207 What may be provided by rules of court**

NOTE 1--Appointed day for commencement of Constitutional Reform Act 2005 Sch 11 para 1 is 1 October 2009: SI 2009/1604.

NOTES 7, 10-12, 17, 21--SI 1991/1395 rr 2(5), 4, 5, 8, 9, 14, 16, 17, 22, 33 modified: SI 2008/2859.

NOTES 7, 10, 12, 21, 22--SI 1991/1247 rr 4.5, 4.8, 4.14, 4.16, 4.17, 4.21 amended: SI 2008/2861.

NOTES 7, 10, 12--SI 1991/1395 rr 4, 5, 14, 17 further amended: SI 2008/2858.

NOTES 7, 10--SI 1991/1247 r 4.4 further amended: SI 2008/2861, SI 2009/636, SI 2009/2027. SI 1991/1247 rr 4.4A, 4.13B added: SI 2008/2861. SI 1991/1395 r 4 further amended: SI 2009/2025.

NOTE 7--SI 1991/1395 r 9 amended: SI 2009/2025. SI 1991/1247 r 4.9 amended: SI 2008/2861, SI 2009/2027.

NOTE 17--SI 1991/1395 r 2(5) further amended: SI 2009/637, SI 2009/2025. A single judge is authorised to discharge the functions of a family proceedings court where an application is made for a warrant under the Childcare Act 2006 s 79: SI 1991/1395 r 2A (added by SI 2009/637).

NOTE 21--SI 1991/1395 r 16 further amended: SI 2008/2858, SI 2009/858. As to restrictions on the presence of persons at directions appointments and hearings, see SI 1991/1395 r 16A (added by SI 2009/858).

NOTE 22--SI 1991/1395 r 21 further amended: SI 2009/637.

NOTE 27--SI 1991/1247 r 10.21 further amended: SI 2008/2446.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/A. ALLOCATION OF PROCEEDINGS/208. Jurisdiction generally: allocation and transfer of proceedings.

### **(iii) The Courts with Jurisdiction in Family Proceedings**

#### **A. ALLOCATION OF PROCEEDINGS**

##### **208. Jurisdiction generally: allocation and transfer of proceedings.**

The jurisdiction of the various courts in relation to proceedings under the Children Act 1989 is concurrent<sup>1</sup>, and 'court' is accordingly defined as the High Court, a county court or a magistrates' court<sup>2</sup>. However, the concurrent jurisdiction of courts is not generally extended to permit them to entertain applications other than those made in proceedings under the Children Act 1989. Thus, in proceedings under Part I of the Domestic Proceedings and Magistrates' Courts Act 1978<sup>3</sup> the court with jurisdiction is a magistrates' court<sup>4</sup>, and under Part III of the Matrimonial and Family Proceedings Act 1984<sup>5</sup> 'the court' means the High Court or, where a county court has jurisdiction by virtue of Part V of the Matrimonial and Family Proceedings Act 1984<sup>6</sup>, a county court<sup>7</sup>. In addition, every matrimonial cause must still be commenced in a divorce county court<sup>8</sup>, and an order making a child a ward of court can only be made by the High Court<sup>9</sup>.

The Children Act 1989 imposes certain restrictions on the powers of the courts. In particular, a magistrates' court<sup>10</sup> is not competent to entertain any application or make any order involving the administration or application of any property belonging to or held in trust for a child<sup>11</sup> or the income of any such property<sup>12</sup>; and a magistrates' court's powers are restricted to periodical payments and lump sums in the case of an application for an order of financial relief<sup>13</sup>.

The Lord Chancellor<sup>14</sup>, after consulting the Lord Chief Justice, may by order specify proceedings under the Children Act 1989 or the Adoption and Children Act 2002 which may only be commenced in a specified level of court<sup>15</sup> or a court which falls within a specified class of court<sup>16</sup> or a particular court determined in accordance with or specified in the order<sup>17</sup>. The Lord Chancellor, after consulting the Lord Chief Justice, may also by order specify circumstances in which specified proceedings under the Children Act 1989 or the Adoption and Children Act 2002 (which might otherwise be commenced elsewhere) may only be commenced in a specified level of court or a court which falls within a specified class of court or a particular court determined in accordance with, or specified in, the order<sup>18</sup>.

Certain proceedings within the jurisdiction of county courts may be allocated to specific judges or descriptions of judge<sup>19</sup>.

The Lord Chancellor, after consulting the Lord Chief Justice, may by order provide that in specified circumstances the whole, or any specified part of, specified proceedings<sup>20</sup> be transferred to a specified level of court, a court which falls within a specified class of court, or a particular court determined in accordance with, or specified in, the order<sup>21</sup>.

1 See *An Introduction to the Children Act 1989* (HMSO, 1989) para 3.8. The Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended) governs the allocation and transfer of cases either vertically between the various tiers, or horizontally within tiers, in order to ensure that cases are directed to the most appropriate court. See further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 1.13. As to the guidance and regulations generally see para 163 ante.

It is intended that all proceedings relating to the same child and his family should be capable of being consolidated and heard together, and that, moreover, the case should, depending upon its complexity or weight, be matched to the right level of court and judge: see Lord Mackay of Clashfern LC 'Joseph Jackson Memorial Lecture 1989' (1989) 139 NLJ 505. Proceedings relating to siblings ought to be heard by the same tribunal and consolidated at the earliest possible stage if started separately: *W v Wakefield City Council* [1994] 2 FCR 564, [1995] 1 FLR 170. In addition, it is intended that in the county courts and the High Court, work relating to children should be concentrated in the hands of judges who have made a special study of children's matters: *An Introduction to the Children Act 1989* (HMSO, 1989) para 1.50.

2 Children Act 1989 s 92(7). This is subject to the provisions of s 92(6), Sch 11 Pt I (see the text and notes 13-21 *infra*) and to any other provision of the Children Act 1989 which makes express provision as to jurisdiction: s 92(8). It is vital that the allocation of cases to the appropriate level of court operate effectively, so that a case which proves more complex than it originally appeared should be swiftly transferred to the appropriate level: *Re H (a minor) (care proceedings: child's wishes)* [1992] 2 FCR 330, [1993] 1 FLR 440. As to magistrates' courts as family proceedings courts see note 10 *infra*.

3 *Ie* the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553 *et seq*.

4 See *ibid* s 30 (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 163; the Family Law Act 1986 s 68(1), Sch 1 para 24; the Courts and Legal Services Act 1990 s 125(7), Sch 20; and the Courts Act 2003 s 109(1), Sch 8 para 194(a), (b)).

5 *Ie* the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 *et seq*.

6 *Ie* *ibid* Pt V (ss 32-44) (as amended): see the text and note 8 *infra*.

7 *Ibid* s 27.

8 *Ibid* s 33(3). Note, however, that a matrimonial cause may be transferred to the High Court under s 39 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 746) or under the County Courts Act 1984 s 41 (as amended) (see CIVIL PROCEDURE vol 11 (2009) PARA 69): Matrimonial and Family Proceedings Act 1984 s 33(3).

9 See the Supreme Court Act 1981 s 41(1); and para 218 *post*. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

As to the practice to be adopted for the time being with regard to applications under the Children Act 1989 directed at the question whether there should be HIV tests for children see *Re X (a minor) (HIV test)* [1994] 2 FCR 1110, sub nom *Note: Re HIV Tests* [1994] 2 FLR 116 (it is better that an application for a child to be tested for HIV be heard by a High Court judge regardless of the court in which proceedings are commenced, with the possibility of a downward transfer of the substantive issue in the light of the decision on the HIV test).

10 Under the Children Act 1989 the name 'domestic proceedings' given to certain proceedings in the magistrates' court was changed to 'family proceedings', and the names 'domestic court' and 'domestic court panel' were changed to 'family proceedings court' and 'family panel' respectively: see s 92(1); Magistrates' Courts Act 1980 s 67(1) (amended by the Courts Act 2003 s 49(1); and the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 99, 101). As to the constitution of family proceedings courts see the Magistrates' Courts Act 1980 s 66 (as substituted), s 67 (as amended); and MAGISTRATES vol 29(2) (Reissue) para 603.

The Family Proceedings Courts (Constitution and Right to Preside) Rules 2007, SI 2007/1610 (amended by SI 2007/2621) provide for the appointment of family panels. They provide for the formation of a Committee, to be known as a family panel, for each local justice area: Family Proceedings Courts (Constitution and Right to Preside) Rules 2007, SI 2007/1610, r 3. The family panel consists of the family justices for the local justice area and any Designated Judge (Magistrates' Courts) who is nominated to hear family proceedings and who acts as a justice of the peace in the local justice area concerned: r 3. The family panel will advise the appropriate body in relation to the number of justices required to sit and preside in family proceedings courts in its local justice area and will liaise with other bodies to share information and represent the views of family justices: r 9. The Rules also make provision for there to be combined family panels: see r 5. The Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (amended by SI 1991/1247; SI 1991/1991; SI 1991/2051; SI 1992/2068; SI 1994/2166; SI 1994/2767; SI 1994/3156; SI 1997/1895; SI 2001/615; SI 2001/818; SI 2001/821; SI 2003/3367; SI 2004/3375; SI 2005/617; SI 2005/2922; SI 2005/2930) govern procedure in the family proceedings court. As to the procedure in proceedings in the High Court or a county court see the Family Proceedings Rules 1991, SI 1991/1247 (as amended).

11 Children Act 1989 s 92(4)(a).

12 Ibid s 92(4)(b).

13 See *ibid* Sch 1 para 1; and para 539 post.

14 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.

15 Children Act 1989 s 92(6), Sch 11 para 1(1)(a) (Sch 11 para 1(1) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 75; and the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 210). In the exercise of this power, the Lord Chancellor has made the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended): see para 209 post. For these purposes, 'specified' means specified by an order made under the Children Act 1989 Sch 11 (as amended): Sch 11 para 4(2).

Any order under Sch 11 para 1 (as amended) (see the text and notes 16-18 *infra*) may make provision as to the effect of commencing proceedings in contravention of any of the provisions of the order: Sch 11 para 4(3). For the purposes of Sch 11 (as amended), the commencement of proceedings under the Children Act 1989 includes the making of any application under that Act in the course of proceedings (whether or not those proceedings are proceedings under that Act); and there are three levels of court, that is to say the High Court, any county court and any magistrates' court: Sch 11 para 4(1).

An order under Sch 11 (as amended) may make such consequential, incidental or transitional provision as the Lord Chancellor considers expedient, including provision amending any other enactment so far as it concerns the jurisdiction of any court or justice of the peace: Sch 11 para 4(5)(a).

16 Ibid Sch 11 para 1(1)(b). See also note 15 *supra*. A class of court may be described by reference to a description of proceedings, and may include different levels of court: Sch 11 para 1(4). In the exercise of this power, the Lord Chancellor has made the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended): see para 209 post.

17 Children Act 1989 Sch 11 para 1(1)(c). See also note 15 *supra*. In the exercise of this power, the Lord Chancellor has made the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended): see para 209 post. The Lord Chancellor may, after consulting the Lord Chief Justice, also make provision that where proceedings under the Children Act 1989, the Adoption and Children Act 2002, the Child Support Act 1991 s 20 (appeals), or under the inherent jurisdiction of the High Court (see para 200 *ante*) with respect to a child, have been commenced in or transferred to any court (whether or not by an order under the Children Act 1989 Sch 11 (as amended)), any other specified family proceedings which may affect, or are otherwise connected with, the child may, in specified circumstances, only be commenced in that court: Sch 11 para 1(3) (amended by the Child Support Act 1991 s 45(5); and the Child Support, Pensions and Social Security Act 2000 s 85, Sch 9 Pt IX; the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 75; and the Constitutional Reform Act 2005 Sch 4 paras 203, 210(1), (2)).

18 Children Act 1989 Sch 11 para 1(2) (amended by the Adoption and Children Act 2002 Sch 3 paras 54, 75; and the Constitutional Reform Act 2005 Sch 4 paras 203, 210(1), (2))). See also note 15 *supra*. In the exercise of this power, the Lord Chancellor has made the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended): see para 209 post. The Children Act 1989 Sch 11 para 1(1), (2) (as amended) also applies in relation to proceedings under the Family Law Act 1986 s 55A (as added) (declarations of parentage) (see para 121 *ante*) or which are to be dealt with in accordance with an order made under the Child Support Act 1991 s 45 (as amended): Children Act 1989 Sch 11 para 1(2A) (added by the Child Support Act 1991 s 45(3), (4); amended by the Child Support, Pensions and Social Security Act 2000 s 83, Sch 8 para 10)).

19 See the *Family Proceedings (Allocation to Judiciary) Directions 1999* [1999] 2 FLR 799 (amended by the *Family Proceedings (Allocation to Judiciary)(Amendment) Directions* [2002] 2 FLR 692; the *Family Proceedings (Allocation to Judiciary)(Amendment) Directions* [2003] 2 FLR 373; the *Family Proceedings (Allocation to Judiciary)(Amendment No 1) Directions* [2006] 1 FLR 1147; and the *Family Proceedings (Allocation to Judiciary) (Amendment No 2) Directions* [2006] 1 FLR 1150); and para 210 post.

20 (1) any proceedings under the Children Act 1989; (2) any proceedings under the Adoption and Children Act 2002; (3) any proceedings under the Family Law Act 1986 s 55A (as added); (4) any proceedings under the Child Support Act 1991 s 20 (appeals); (5) and any other proceedings which: (a) are family proceedings for the purposes of the Children Act 1989 (see para 199 *et seq ante*), other than proceedings under the inherent jurisdiction of the High Court (see para 200 *ante*); and (b) may affect, or are otherwise connected with, the child concerned, may be 'specified proceedings' for this purpose: Sch 11 para 2(3) (amended by the Child Support Act 1991 s 45(3), (4); the Child Support, Pensions and Social Security Act 2000 s 83, Sch 8 para 10, Sch 9 Pt IX; and the Adoption and Children Act 2002 Sch 3 paras 54, 75). However, proceedings under heads (a) and (b) *supra* may only be transferred in accordance with the provisions of an order made under the Children Act 1989 Sch 11 para 2 (as amended) for the purpose of consolidating them with proceedings under the Children Act 1989, the Adoption and Children Act 2002 or the High Court's inherent jurisdiction with respect to children: Children Act 1989 Sch 11 para 2(4) (amended by the Adoption and Children Act 2002 Sch 3 paras 54, 75).

21 Children Act 1989 Sch 11 para 2(1) (amended by the Constitutional Reform Act 2005 Sch 4 paras 203, 210(1), (3)(a)). See also note 15 supra. Any such order may provide for the transfer to be made at any stage, or specified stage, of the proceedings, and whether or not the proceedings, or any part of them, have already been transferred: Sch 11 para 2(2). An order under Sch 11 para 2 (as amended) may make such provision as the Lord Chancellor, after consulting the Lord Chief Justice, thinks appropriate for excluding proceedings to which Sch 11 para 2 (as amended) applies from the operation of any enactment which would otherwise govern the transfer of those proceedings, or any part of them: Sch 11 para 2(5) (amended by the Constitutional Reform Act 2005 Sch 4 paras 203, 210(1), (3)(b)). As to the transfer of proceedings see the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, arts 5-13 (as amended); and paras 212-217 post. Any order under the Children Act 1989 Sch 11 para 2 (as amended) may make provision as to the effect of a failure to comply with any of the provisions of the order: Sch 11 para 4(4). Any order under Sch 11 (as amended) may make provision for treating proceedings which are: (1) in part proceedings of a kind mentioned in note 20 heads (1)-(2) supra; and (2) in part proceedings of a kind mentioned in note 20 head (5) supra, as consisting entirely of proceedings of one or other of those kinds, for the purposes of the application of any order made under Sch 11 para 2 (as amended): Sch 11 para 4(5)(b).

In such circumstances as the Lord Chancellor, after consulting the Lord Chief Justice, may by order specify: (a) the jurisdiction of a magistrates' court to make an emergency protection order (see para 583 et seq post); or (b) any specified question with respect to the transfer of specified proceedings to or from a magistrates' court in accordance with the provisions of an order under Sch 11 para 2 (as amended), may be exercised by a single justice: Sch 11 para 3(1). Any provision made under Sch 11 para 3 is without prejudice to any other enactment or rule of law relating to the functions which may be performed by a single justice of the peace: Sch 11 para 3(2).

## UPDATE

### **207-208 What may be provided by rules of court, Jurisdiction generally: allocation and transfer of proceedings**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

### **208 Jurisdiction generally: allocation and transfer of proceedings**

NOTES--SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 10--SI 1991/1395 further amended: SI 2008/2858, SI 2009/637, SI 2009/2025.

NOTE 19--*Family Proceedings (Allocation to Judiciary) Directions 1999* [1999] 2 FLR 799 further amended: *Practice Direction (family proceedings (allocation to judiciary) (amendment) directions 2008)* [2008] All ER (D) 135 (Oct). See *Practice Direction (allocation and transfer of proceedings)* [2009] 1 FLR 365, [2008] All ER (D) 118 (Nov). See *Practice Direction (family proceedings) (allocation to judiciary)* [2009] 1 WLR 824, [2009] All ER (D) 98 (Feb); and *Practice Direction (appeals) (allocation to judiciary)* [2009] 1 WLR 1107, [2009] All ER (D) 128 (Apr).



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## 209. Commencement of proceedings in magistrates' courts.

Proceedings in relation to the following matters must be commenced in a magistrates' court<sup>1</sup>:

- 270 (1) the use of accommodation for restricting liberty ('secure accommodation')<sup>2</sup>;
- 271 (2) care orders and supervision orders<sup>3</sup>;
- 272 (3) leave to change the name of, or to remove from the United Kingdom<sup>4</sup>, a child in care<sup>5</sup>;
- 273 (4) parental contact<sup>6</sup>;
- 274 (5) education supervision orders<sup>7</sup>;
- 275 (6) child assessment orders<sup>8</sup>;
- 276 (7) emergency protection orders<sup>9</sup>;
- 277 (8) the duration of emergency protection orders<sup>10</sup>;
- 278 (9) applications for emergency protection orders by police officers<sup>11</sup>;
- 279 (10) powers to assist the discovery of children who may be in need of emergency protection<sup>12</sup>;
- 280 (11) recovery orders<sup>13</sup>;
- 281 (12) the protection of children in an emergency<sup>14</sup>;
- 282 (13) appeals against certain steps taken in relation to the registration of child minders<sup>15</sup>;
- 283 (14) powers of constables to assist in searching for children or inspecting premises<sup>16</sup>;
- 284 (15) the approval of arrangements to assist a child to live abroad<sup>17</sup>;
- 285 (16) contribution orders<sup>18</sup>;
- 286 (17) certain appeals in relation to children's homes and private fostering<sup>19</sup>;
- 287 (18) the variation of a placement order<sup>20</sup>;
- 288 (19) certain appeals in relation to child support<sup>21</sup>;
- 289 (20) parental orders in favour of gamete donors<sup>22</sup>.

Notwithstanding the above provisions<sup>23</sup>, in relation to proceedings of a kind set out in heads (2), (5), (6), (7), (9) and (10) above<sup>24</sup>, if the application arises out of an investigation directed by the High Court or county court<sup>25</sup>, the proceedings must be commenced<sup>26</sup>: (a) in the court which directed the investigation, where that court is the High Court or a care centre<sup>27</sup>; or (b) in such care centre as the court which directed the investigation may order<sup>28</sup>. Notwithstanding the above provisions<sup>29</sup> proceedings of a kind set out in heads (1) to (11), (14) or (15) above<sup>30</sup> must be commenced in a court in which are pending other proceedings<sup>31</sup> in respect of the same child<sup>32</sup>.

Proceedings under the Children Act 1989 to extend, vary or discharge an order, or the determination of which would have the effect of varying or discharging an order, must be commenced in the court which made the order<sup>33</sup>. Proceedings under the Adoption and Children Act 2002, save for proceedings to vary a placement order<sup>34</sup>, to vary or revoke an order shall be commenced in the court which made the order<sup>35</sup>.

Proceedings under the Children Act 1989 are treated as family proceedings in relation to magistrates' courts<sup>36</sup>.

1 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1) (amended by SI 1993/624; SI 1994/2164; SI 2005/2797). As to magistrates' courts as family proceedings courts see para 208 ante.

Except for the provisions described in this paragraph and para 208 ante, there are no statutory restrictions on the courts to which applications concerning children may be made. It follows that proceedings not excluded by those provisions may be commenced in a magistrates' court, a county court or the High Court: see para 208 ante.

2 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(a). As to secure accommodation see the Children Act 1989 s 25 (as amended); and para 1037 et seq post. Proceedings of a kind mentioned in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(a) must not be transferred from a magistrates' court which is not a family proceedings court within the meaning of the Children Act 1989 s 92(1) (see para 208 note 10 ante), notwithstanding the provisions set out in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 1 (as amended), art 3: art 7(4).

3 Ibid art 3(1)(b). As to care orders and supervision orders see the Children Act 1989 s 31 (as amended); and para 270 et seq post.

4 For the meaning of 'United Kingdom' see para 102 note 7 ante.

5 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(c). For the meaning of 'child' see para 3 ante. As to leave to change the name of, or to remove from the United Kingdom, a child in care see the Children Act 1989 s 33(7); and para 276 post.

6 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(d). As to parental contact see the Children Act 1989 s 34; and paras 278-279 post.

7 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(e). As to education supervision orders see the Children Act 1989 s 36 (as amended); and paras 296-298 post.

8 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(f). As to child assessment orders see the Children Act 1989 s 43; and para 578 post.

9 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(g). As to emergency protection orders see the Children Act 1989 ss 44, 44A, 44B (ss 44A, 44B both as added); and para 583 et seq post.

10 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(h). As to the duration of emergency protection orders see the Children Act 1989 s 45 (as amended); and para 590 post.

11 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(i). As to applications for emergency protection orders by police officers see the Children Act 1989 s 46(7); and para 595 post.

12 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(j). As to powers to assist discovery of children who may be in need of emergency protection see the Children Act 1989 s 48 (as amended); and para 588 post.

13 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(k). As to recovery orders see the Children Act 1989 s 50 (as amended); and para 606 post.

14 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(l). The reference in the text is to the Children Act 1989 s 75 (now repealed).

15 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(m). The reference in the text to certain steps taken in relation to the registration of child minders is to those under the Children Act 1989 s 77(1) (now repealed).

16 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(n). As to powers of constables to assist in searching for children see the Children Act 1989 s 102 (as amended); and para 285 post.

17 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(o). As to the approval of arrangements to assist a child to live abroad see the Children Act 1989 s 23(9), Sch 2 para 19 (as amended); and para 875 post.

18 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(p). As to contribution orders see the Children Act 1989 s 29(6), Sch 2 para 23; and para 537 post.

19 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(q). The appeals referred to in the text are those under the Children Act 1989 s 66(5), Sch 8 para 8: see para 1068 post.

20 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(r) (substituted by SI 2005/2797). As to the variation of a placement order see the Adoption and Children Act 2002 s 23; and para 338 post.

21 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(t) (added by SI 1993/624). The appeals referred to in the text are those under the Child Support Act 1991 s 20 (prospectively substituted) where the proceedings are to be dealt with in accordance with the Child Support Appeals (Jurisdiction of Courts) Order 2002, SI 2002/1915: see para 560 post.

22 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(u) (added by SI 1994/2164). As to parental orders in favour of gamete donors see the Human Fertilisation and Embryology Act 1990 s 30 (as amended); and para 106 ante.

23 Ie notwithstanding the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1) (as amended): see the text and notes 1-22 supra.

24 Ie ibid art 3(1)(b),(e), (f), (g), (i) and (j): see the text and notes 3, 7-11 supra.

25 Ie under the Children Act 1989 s 37(1): see paras 201 ante; 272 post.

26 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(2), which is expressed to be subject to art 3(3) (as amended) (see the text to note 32 infra).

27 Ibid art 3(2)(a). As to care centres see para 211 post.

28 Ibid art 3(2)(b).

29 Ie ibid art 3(1), (2) (as amended): see the text and notes 1-28 supra.

30 Ie ibid art 3(1)(b)-(1)(k), (1)(n) or art 3(1)(o): see the text and notes 3-13, 16, 17 supra.

31 Ie proceedings which are also of a kind set out in heads (1)-(11), or (14) or (15) in the text.

32 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(3) (amended by SI 1993/624).

33 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 4(1) (amended by SI 1993/624; SI 2005/2729). However, this does not apply to: (1) an application for an order under the Children Act 1989 s 8 (as amended) (see para 247 et seq post), s 14A or 14D (both as added) (special guardianship orders: see paras 151, 153 ante) which would have the effect of varying or discharging an order made by a county court in accordance with s 10(1)(b), s 14A(6)(b) (as added) or s 14D(2) (as added) (orders by court on its own motion) (see para 153 ante) in which case the application must be made to a designated county court (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 4(2) (amended by SI 2005/2797)); or (2) an application to extend, vary or discharge an order made by a county court under the Children Act 1989 s 38 (interim orders) (see para 288 post), or for an order having that effect, which must be made to a care centre (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 4(3) (amended by SI 1993/624; SI 2005/2797)).

34 Ie under the Adoption and Children Act 2002 s 23: see para 338 post.

35 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 4(1A) (added by SI 2005/2729). Proceedings commenced in accordance with the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 4(1A) (as added) may be transferred to any other court in accordance with the provisions of arts 5-13: art 4(4).

36 See the Children Act 1989 s 92(2). This provision is subject to the Magistrates' Courts Act 1980 s 65(1), (2) (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 739): Children Act 1989 s 92(3).

## UPDATE

### 208-217 Allocation and Transfer of Proceedings

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

### 209 Commencement of proceedings in magistrates' courts

TEXT AND NOTES--SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

TEXT AND NOTES 1-22--Head (13) omitted; head (12) now relates to proceedings under the Children Act 1989 s 79K; head (20) now relates to proceedings under the Human Fertilisation and Embryology Act 2008 s 54; and further heads (21) certain adoption orders under the Adoption and Children Act 2002 s 50 or 51; (22) acquisition of parental responsibility by a father under the Children Act 1989 s 4; and (23) acquisition of parental responsibility by a step-parent under the 1989 Act s 4A, added: SI 2008/2836 art 5. Proceedings of a kind set out in heads (12) and (16)-(21) must be started in a magistrates' court: art 5(1). Proceedings of a kind set out in heads (1)-(11), (14), (15), (22), and (23) which concern a child who is the subject of proceedings that are pending in a county court or the High Court, and arise out of the same circumstances as give rise to those proceedings, may be started in the court in which those proceedings are pending: art 5(3).

Proceedings under heads (22) and (23) that are started at the same time as proceedings in a county court or the High Court for an order under the Children Act 1989 s 8 in relation to the same child must be started in the court in which proceedings under s 8 are started: art 5(4). Certain proceedings must now be started in a county court or in a specified class of county court: arts 6, 9-11. Proceedings may be started in the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason: art 7. Where specified proceedings under the Adoption Act 2002 are pending, certain related proceedings concerning the same child must be started in the same court: art 8. See further PARA 211A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/A. ALLOCATION OF PROCEEDINGS/210. Proceedings which are within the jurisdiction of county courts.

## **210. Proceedings which are within the jurisdiction of county courts.**

The President of the Family Division may, after consulting the Lord Chancellor<sup>1</sup>, give directions that in such circumstances as may be specified any family proceedings<sup>2</sup> which are within the jurisdiction of county courts<sup>3</sup> or any specified description of such proceedings<sup>4</sup> are to be allocated to specified judges<sup>5</sup> or to specified descriptions of judge<sup>6</sup>. However, where such directions have been given allocating any proceedings to specified judges, the validity of anything done by a judge in, or in relation to, the proceedings may not be called into question by reason only of the fact that he was not a specified judge<sup>7</sup>.

The following directions (made in 1999 and subsequently amended) take effect regardless of any rules of court<sup>8</sup>. Proceedings in respect of non-contentious or common form probate business<sup>9</sup> are in all circumstances allocated to a judge<sup>10</sup>.

Proceedings under any provisions of Part IV of the Family Law Act 1996<sup>11</sup> can in all circumstances be allocated to a circuit judge or deputy circuit judge nominated for private or public family law proceedings, or a recorder nominated for public family law proceedings, a district judge of the principal registry of the Family Division of the High Court or a district judge; and, except where the proceedings are to enforce an order under Part IV, to a recorder nominated for private family law proceedings, a recorder or a deputy district judge<sup>12</sup>.

The hearing of a contested petition for a decree of divorce, nullity of marriage or judicial separation is allocated to a circuit judge, deputy circuit judge or a recorder nominated<sup>13</sup> for private or public family law proceedings<sup>14</sup>. The hearing of a contested petition for an order of dissolution, nullity of civil partnership or separation is allocated to a circuit judge, deputy circuit judge or a recorder nominated for private or public family law proceedings<sup>15</sup>.

Proceedings under the Adoption and Children Act 2002 in relation to the following matters can in all circumstances be allocated to a circuit judge, deputy circuit judge or recorder nominated for adoption proceedings or to a district judge of the Principal Registry of the Family Division<sup>16</sup>: (1) applications for placement orders<sup>17</sup>; (2) revocation of a placement order<sup>18</sup>; (3) applications for contact<sup>19</sup>; (4) variation or revocation of a contact order<sup>20</sup>; (5) change of child's surname or removal from the United Kingdom<sup>21</sup>; (6) leave to apply for a placement order<sup>22</sup>; (7) restrictions on the removal of a child<sup>23</sup>; (8) recovery orders<sup>24</sup>; (9) leave to make an application for an adoption order<sup>25</sup>; (10) leave to oppose the making of an adoption order<sup>26</sup>; (11) adoption by a couple<sup>27</sup>; (12) adoption by one person<sup>28</sup>; (13) revocation of adoption on legitimation<sup>29</sup>; (14) disclosure of information kept by the Registrar General<sup>30</sup>; (15) application for a residence order in specified circumstances<sup>31</sup>; (16) application for a special guardianship order in specified circumstances<sup>32</sup>.

Proceedings under heads (1) to (16) above can also be allocated to a circuit judge nominated for public family law proceedings where proceedings for a placement order<sup>33</sup> are heard in conjunction with an application for a care order<sup>34</sup> and relate to the same child<sup>35</sup>.

Interlocutory matters in relation to heads (1) to (16) above can also be dealt with by a district judge or deputy district judge nominated for adoption proceedings<sup>36</sup>. Interlocutory matters in relation to heads (1) to (16) above where proceedings for a placement order are heard in conjunction with an application for a care order and relate to the same child can also be dealt with by a district judge nominated for public family law proceedings<sup>37</sup>.

Proceedings in relation to: (a) applications for parental responsibility by the father and applications for parental responsibility by a step-parent<sup>38</sup>; (b) the termination of parental responsibility<sup>39</sup>; (c) the appointment of a guardian<sup>40</sup>; (d) the termination of guardianship<sup>41</sup>; and (e) the discharge of existing custody orders<sup>42</sup>, can in all circumstances, including final hearings, be allocated to a circuit judge nominated for private or public family law proceedings, or a deputy circuit judge or recorder nominated for private or public family law proceedings, a district judge of the Principal Registry of the Family Division of the High Court or a district judge nominated for private or public family law proceedings<sup>43</sup>. Interlocutory matters or unopposed hearings in relation to heads (a) to (e) above can also be dealt with by a district judge or deputy district judge<sup>44</sup>.

Proceedings in relation to: (i) the change of a child's name or the removal of a child from the jurisdiction<sup>45</sup>; (ii) special guardianship orders<sup>46</sup>; (iii) the change of a child's name or removal from the jurisdiction<sup>47</sup>; (iv) variation and discharge of special guardianship orders<sup>48</sup>; (v) the reference of a question of the variation or discharge of a contact, residence, specific issue or prohibited steps order<sup>49</sup>; and (vi) applications for a contact, residence, specific issue or prohibited steps order<sup>50</sup>, can in all circumstances, including final hearings, be allocated to a circuit judge nominated for private or public family law proceedings or a deputy circuit judge or recorder nominated for private or public family law proceedings, or a district judge of the principal registry of the Family Division of the High Court, or a district judge nominated for private or public family law proceedings<sup>51</sup>. Interlocutory matters, unopposed hearings or opposed hearings<sup>52</sup> where the application is for a contact order and the principle of contact with the applicant is unopposed or the order is (or is one of a series of orders which is) to be limited in time until the next hearing or order, and the substantive application is returnable before a judge<sup>53</sup> who has full jurisdiction in all circumstances, may be allocated to a district judge<sup>54</sup>. Where the matter is unopposed or it is an interlocutory matter it may also be allocated to a deputy district judge<sup>55</sup>.

Proceedings in relation to: (A) secure accommodation<sup>56</sup>; (B) care orders and supervision orders<sup>57</sup>; (C) the change of a child's name or the removal of the child from the jurisdiction where a care order is in force<sup>58</sup>; (D) the discharge and variation of care orders and supervision orders<sup>59</sup>; (E) supervision orders<sup>60</sup>; (F) parental contact with a child in care<sup>61</sup>; and (G) arrangements to assist a child to live abroad<sup>62</sup>, can in all circumstances, including final hearings, be allocated to a circuit judge nominated for public family law proceedings, a district judge of the principal registry of the Family Division of the High Court, a district judge nominated for public family law proceedings and who is also nominated to hear and determine all proceedings described in heads (A) to (G) above, or a recorder nominated for public family law proceedings<sup>63</sup>. Interlocutory matters, unopposed hearings or opposed hearings in relation to heads (A) to (G) above where the application is for a contact order and the principle of contact is unopposed can also be allocated to a district judge nominated for public family law proceedings<sup>64</sup>.

Proceedings in relation to interim care orders or supervision orders<sup>65</sup> can, in all circumstances, including final hearings, be allocated to a circuit judge nominated for public family law proceedings or a district judge of the principal registry of the Family Division of the High Court, a district judge nominated for public family law proceedings or a recorder nominated for public family law proceedings<sup>66</sup>.

Proceedings in relation to the variation of a supervision order<sup>67</sup>, the extension and discharge of an education supervision order<sup>68</sup>, child assessment orders<sup>69</sup>, an order for emergency protection of a child<sup>70</sup>, recovery orders<sup>71</sup>, applications for leave to issue further applications<sup>72</sup>, applications to vary placement orders<sup>73</sup>, can in all circumstances be allocated to a circuit judge nominated for public family law proceedings, a district judge of the principal registry of the Family Division of the High Court, a district judge nominated for public family law proceedings or a recorder nominated for public law family proceedings<sup>74</sup>.

Proceedings in relation to child support appeals<sup>75</sup> can in all circumstances be allocated to a circuit judge nominated for private or public family law proceedings, or a district judge of the principal registry of the Family Division of the High Court<sup>76</sup>.

Where, under these directions relating to the allocation of proceedings a person capable of sitting as a judge of a county court district and nominated for private or public family law proceedings would have been able to hear the matter at first instance, then that person may hear appeals under the Family Proceedings Rules 1991<sup>77</sup>, the County Court Rules 1981<sup>78</sup> and the Children (Allocation of Proceedings) (Appeals) Order 1991<sup>79</sup>.

Proceedings in relation to parental orders in favour of gamete donors<sup>80</sup> can be allocated to a circuit judge nominated for private or public family law proceedings in all circumstances and, in relation to interlocutory matters, can also be allocated to a district judge of the principal registry of the Family Division of the High Court or a district judge<sup>81</sup>.

Proceedings in relation to the power to order disclosure of a child's whereabouts<sup>82</sup>, the recovery of a child<sup>83</sup>, and the surrender of passports<sup>84</sup> can in all circumstances be allocated to a circuit judge nominated for private or public family law proceedings, or a district judge of the principal registry of the Family Division of the High Court, or a district judge nominated for private or public family law proceedings<sup>85</sup>.

Proceedings in relation to a declaration of marital status<sup>86</sup>, declarations of parentage<sup>87</sup>, declarations of legitimacy or legitimation<sup>88</sup> and declarations as to adoptions effected overseas<sup>89</sup> can in all circumstances be allocated to a circuit judge nominated for private or public family law proceedings and, in relation to interlocutory matters, can also be allocated to a district judge of the principal registry of the Family Division of the High Court or a district judge<sup>90</sup>.

Proceedings for declarations under the Civil Partnership Act 2004<sup>91</sup> can in all circumstances be allocated to a circuit judge nominated for private or public family law proceedings and, in relation to interlocutory matters, can also be allocated to a district judge of the principal registry of the Family Division of the High Court or a district judge<sup>92</sup>.

Family proceedings for which no express provision is made<sup>93</sup> can be allocated in all circumstances to a circuit judge, deputy circuit judge or recorder nominated for private or public family law proceedings, or a district judge of the principal registry of the Family Division of the High Court, or a district judge or deputy district judge<sup>94</sup>.

Without prejudice to the 1999 directions described above<sup>95</sup>, any of the above allocated proceedings<sup>96</sup> may be allocated to:

- 290 (aa) a judge of the Family Division of the High Court<sup>97</sup>;
- 291 (bb) a person acting as a judge of the Family Division of the High Court in pursuance of a request<sup>98</sup> other than a former judge of the Court of Appeal or a former puisne judge of the High Court, but public family law proceedings must only be allocated to a judge or recorder who has been nominated for them<sup>99</sup>;
- 292 (cc) a person sitting as a recorder who has been authorised to act as a judge of the Family Division of the High Court<sup>100</sup>;
- 293 (dd) a person sitting as recorder who is a district judge (Magistrates' Courts) and who is nominated for public law proceedings in the county court<sup>101</sup>;
- 294 (ee) a person sitting as a recorder who is a district judge of the Principal Registry of the Family Division<sup>102</sup>.

When a person sitting as a recorder is also a district judge nominated for public law proceedings, any proceedings may be allocated to him which, under the 1999 directions<sup>103</sup>, may be allocated to a district judge nominated for public family law proceedings<sup>104</sup>.

- 1 As to the President of the Family Division see COURTS vol 10 (Reissue) para 515; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 303; COURTS. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.
- 2 For these purposes, 'family proceedings' has the same meaning as in the Matrimonial and Family Proceedings Act 1984 (see s 32; and para 207 note 1 ante), and also includes any other proceedings which are family proceedings for the purposes of the Children Act 1989 (see para 199 et seq ante): Courts and Legal Services Act 1990 s 9(5).
- 3 See ibid s 9(1)(a). For the purposes of s 9(1)(a), 'county court' includes the principal registry of the Family Division of the High Court in so far as it is treated as a county court: s 9(4). See further para 211 post.
- 4 See ibid s 9(1)(b).
- 5 'Judge' means any person who: (1) is capable of sitting as a judge for a county court district; (2) is a district judge, an assistant district judge or a deputy district judge; or (3) is a district judge of the principal registry of the Family Division of the High Court: ibid s 9(5). 'Specified' means specified in the directions: s 9(5).
- 6 Ibid s 9(1) (amended the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 211, 213).
- 7 Courts and Legal Services Act 1990 s 9(3).
- 8 Ibid s 9(2). As to such directions see the *Family Proceedings (Allocation to Judiciary) Directions 1999* [1999] 2 FLR 799 (amended by the *Family Proceedings (Allocation to Judiciary) (Amendment) Directions* [2002] 2 FLR 692; the *Family Proceedings (Allocation to Judiciary) (Amendment) Directions* [2003] 2 FLR 373; the *Family Proceedings (Allocation to Judiciary) (Amendment No 1) Directions* [2006] 1 FLR 1147; and the *Family Proceedings (Allocation to Judiciary) (Amendment No 2) Directions* [2006] 1 FLR 1150); and the text and notes 9-104 infra. The provisions in the *Family Proceedings (Allocation to Judiciary) Directions 1999* supra continue to apply to the following applications as if the *Family Proceedings (Allocation to Judiciary) (Amendment No 2) Directions* supra had not been made: (1) applications under the following sections of the Adoption Act 1976: (a) an adoption order (s 12 (repealed with savings)); a freeing order (s 18 (repealed with savings)); revocation of a s 18 order (s 20 (repealed with savings)); variation of a s 18 order (s 21 (repealed with savings)); restriction on removal of a child where adoption pending or application made under s 18 (s 27(1), (2) (repealed with savings)); return of a child taken away in breach of s 27 (s 29 (repealed with savings)); annulment of overseas adoptions (s 53 (repealed with savings)); adoption of children abroad (s 55 (repealed with savings)) (see para 331 et seq post); and (2) applications for parental responsibility by a father under the Children Act 1989 s 4(1) (a) made before 1 December 2003 (see para 139 ante): see the *Family Proceedings (Allocation to Judiciary) (Amendment No 2) Directions* supra at para 2.
- 9 Ie within the meaning of the Supreme Court Act 1981 s 128: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 74. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.
- 10 *Family Proceedings (Allocation to Judiciary) Directions 1999* paras 3, 4, Sch 1 para (b) (as amended: see note 8 supra).
- 11 Ie the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.
- 12 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (c) (as amended: see note 8 supra).
- 13 'Nominated' in relation to a judge means a judge who has been approved as one to whom family proceedings may be allocated by the President of the Family Division: *Family Proceedings (Allocation to Judiciary) Directions 1999* para 2 (as amended: see note 8 supra).
- 14 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (d) (as amended: see note 8 supra).
- 15 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (da) (as added: see note 8 supra).
- 16 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (e) (as amended: see note 8 supra).
- 17 Ie under the Adoption and Children Act 2002 s 22: see para 335 post.
- 18 Ie under ibid s 24: see para 338 post.



- 19    Ie under ibid s 26 (prospectively amended): see para 339 post.
- 20    Ie under ibid s 27: see para 336 post.
- 21    Ie under ibid s 28(2): see para 341 post. For the meaning of 'United Kingdom' see para 102 note 7 ante.
- 22    Ie under ibid s 29: see para 337 post.
- 23    Ie under ibid ss 30(2), 37, 38, 39: see paras 344, 353-355 post.
- 24    Ie under ibid s 41: see para 357 post.
- 25    Ie under ibid ss 42(6), 44(4): see paras 364-365 post.
- 26    Ie under ibid s 47(3), (5): see para 360 post.
- 27    Ie under ibid s 50: see para 362 post.
- 28    Ie under ibid s 51 (as amended): see para 363 post.
- 29    Ie under ibid s 55 (as amended): see para 363 post.
- 30    Ie under ibid s 79(4): see para 385 post.
- 31    Ie under ibid s 28(1) (application by a parent or guardian where child is placed for adoption with parental consent; see para 340 post) or s 29(4) (application for residence order where a placement order is in force; see para 337 post).
- 32    Ie under ibid s 28(1) (application by a parent or guardian where child is placed for adoption with parental consent; see para 340 post) or s 29(5) (application for special guardianship order where a placement order is in force; see para 337 post).
- 33    Ie under the Adoption and Children Act 2002 s 21: see para 337 post.
- 34    Ie under the Children Act 1989 s 31: see para 271 post.
- 35    *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (e) (as amended: see note 8 supra).
- 36    *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (e) (as amended: see note 8 supra).
- 37    *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (e) (as amended: see note 8 supra).
- 38    Ie under the Children Act 1989 ss 4(1)(a), 4A(1)(b) (as added): see paras 139-140 ante.
- 39    Ie under ibid s 4(3): see para 139 ante.
- 40    Ie under ibid s 5(1) (as amended): see para 145 ante.
- 41    Ie under ibid s 6(7): see para 150 ante.
- 42    Ie under ibid s 108(6), Sch 14 para 11(3).
- 43    *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (f) (as amended: see note 8 supra).
- 44    *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (f) (as amended: see note 8 supra). For the purposes of Sch 1 paras (f), (g) and (h), where unopposed proceedings become opposed during the course of the hearing and the judge before whom the hearing takes place does not fall within a description of judge to whom the proceedings would have been allocated if the proceedings had been opposed at the commencement of trial, he must adjourn the hearing to a judge to whom such a hearing would be allocated by these directions: *Family Proceedings (Allocation to Judiciary) Directions 1999* para 7.
- 45    Ie under the Children Act 1989 s 13(1): see para 262 post.

- 46 le under ibid s 14A (as added): see para 151 ante.
- 47 le under ibid s 14C(3) (as added): see para 152 ante.
- 48 le under ibid s 14D (as added): see para 153 ante.
- 49 le under ibid s 16(6) (as substituted): see para 267 post.
- 50 le under ibid s 10 (as amended): see para 247 post.
- 51 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (g) (as amended: see note 8 supra).
- 52 'Opposed hearing' includes an application made ex parte: *Family Proceedings (Allocation to Judiciary) Directions 1999* para 2.
- 53 le a circuit judge nominated for private or public law proceedings or a deputy circuit judge or recorder nominated for private or public family law proceedings, or a district judge of the principal registry of the Family Division of the High Court, or a district judge nominated for private or public family law proceedings: see *Family Proceedings (Allocation to Judiciary) Directions 1999* para 2.
- 54 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (g).
- 55 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (g). As to where unopposed proceedings become opposed during the course of the hearing see note 44 supra.
- 56 le under the Children Act 1989 s 25 (as amended): see para 1037 et seq post.
- 57 le under ibid s 31 (as amended): see para 271 post.
- 58 le under ibid s 33(7): see para 276 post.
- 59 le under ibid s 39(1), (2) or s 39(4): see paras 293-294 post.
- 60 le under ibid s 35, Sch 3 para 6: see para 287 post.
- 61 le under ibid s 34 (as amended): see paras 276, 278-279 post.
- 62 le under ibid ss 17, 23, 29, Sch 2 para 19(1) (all as amended): see para 875 post.
- 63 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (h) (as amended: see note 8 supra).
- 64 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (h). As to where unopposed proceedings become opposed during the course of the hearing see note 44 supra.
- 65 le under the Children Act 1989 s 38: see para 288 post.
- 66 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (i) (as amended: see note 8 supra).
- 67 le under the Children Act 1989 s 39(3): see para 293 post.
- 68 le under ibid Sch 3 para 15(2) or Sch 3 para 17(1): see para 296 post.
- 69 le under ibid s 43: see para 578 post.
- 70 le under ibid ss 44, 45(4), (8), 46(7), 48(9): see paras 583, 588, 590, 595 post.
- 71 le under ibid s 50 (as amended): see para 606 post.
- 72 le under ibid s 91(14) (see para 223 post), s 91(15) (see para 293 post), or s 91(17) (see para 279 post).
- 73 le under the Adoption and Children Act 2002 s 23: see para 338 post.
- 74 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (j) (as amended: see note 8 supra).

75 le appeals under the Child Support Act 1991 s 20 (as substituted and amended): see para 557 post.

76 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (k) (as amended: see note 8 supra).

77 le the Family Proceedings Rules 1991, SI 1991/1247, r 8.1 (as amended): see para 305 post.

78 le CCR Ord 37 r 6 as applied by the Family Proceedings Rules 1991, SI 1991/1247, r 8.1: see para 305 post. As to the CPR see para 1409 post.

79 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (l) (as amended: see note 8 supra). This provision is subject to the exception contained in the Children (Allocation of Proceedings) (Appeals) Order 1991, SI 1991/1801, art 2(b).

80 le proceedings under the Human Fertilisation and Embryology Act 1990 s 30 (as amended): see para 106 ante.

81 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (m) (as amended: see note 8 supra).

82 le under the Family Law Act 1986 s 33 (as amended) (see para 840 post) in respect of proceedings or orders made under the Children Act 1989 s 8 (as amended) (see para 247 et seq post).

83 le under the Family Law Act 1986 s 34 (as amended) (see para 841 post) in respect of proceedings or orders made under the Children Act 1989 s 8 (as amended) (see para 247 et seq post).

84 le under the Family Law Act 1986 s 37 (see para 842 post) in respect of proceedings or orders made under the Children Act 1989 s 8 (as amended) (see para 247 et seq post).

85 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (n) (as amended: see note 8 supra).

86 le under the Family Law Act 1986 s 55 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 421-422; .MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 1000.

87 le under ibid s 55A (as added): see para 121 ante.

88 le under ibid s 56 (as substituted and amended): see para 122 ante.

89 le under ibid s 57 (as amended): see para 381 post.

90 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (o) (as added: see note 8 supra).

91 le under the Civil Partnership Act 2004 s 58: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 441, 442.

92 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (p) (as added: see note 8 supra).

93 le under the *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 (as amended).

94 *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 para (a).

95 See note 93 supra.

96 le the proceedings referred to in the text to notes 8-92 supra.

97 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5(a).

98 le a request made under the Supreme Court Act 1981 s 9(1) (as amended): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 486. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

99 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5(b) (as amended: see note 8 supra).

100 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5(c). The reference in the text to a person who has been authorised to act as a judge of the Family Division of the High Court is to one authorised under the Supreme Court Act 1981 s 9(4): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 486.

101 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5(d).

102 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5(e) (as added: see note 8 supra).

103 *le the Family Proceedings (Allocation to Judiciary) Directions 1999* (as amended): see note 8 supra.

104 *Family Proceedings (Allocation to Judiciary) Directions 1999* para 5A. Where any family proceedings include proceedings of more than one class specified in the *Family Proceedings (Allocation to Judiciary) Directions 1999* Sch 1 paras (a)-(p) (see the text and notes supra), Sch 1 applies to those classes as if they did not form part of the same proceedings: *Family Proceedings (Allocation to Judiciary) Directions 1999* para 6.

## UPDATE

### 208-217 Allocation and Transfer of Proceedings

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

### 210 Proceedings which are within the jurisdiction of county courts

TEXT AND NOTES--See *Practice Direction (public law proceedings) (guide to case management) (April 2010)* [2010] All ER (D) 276 (Mar) (which applies to care and supervision proceedings and, in so far as practicable, is to be applied to all other public law proceedings). *Family Proceedings (Allocation to Judiciary) Directions 1999* [1999] 2 FLR 799 further amended: *Practice Direction (family proceedings (allocation to judiciary) (amendment) Directions 2008)* [2008] All ER (D) 135 (Oct). See *Practice Direction (family proceedings) (allocation to judiciary)* [2009] 1 WLR 824, [2009] All ER (D) 98 (Feb); and *Practice Direction (appeals) (allocation to judiciary)* [2009] 1 WLR 1107, [2009] All ER (D) 128 (Apr).

NOTES 9, 98--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTE 79--SI 1991/1801 art 2(b) now Allocation and Transfer of Proceedings Order 2008, SI 2008/2836 art 26.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/A. ALLOCATION OF PROCEEDINGS/211. Classification of county courts as designated county courts, family hearing centres and care centres.

## **211. Classification of county courts as designated county courts, family hearing centres and care centres.**

For the purposes of the provisions governing the allocation and transfer<sup>1</sup> of proceedings<sup>2</sup>, county courts are classified as: (1) designated county courts<sup>3</sup>; (2) family hearing centres<sup>4</sup>; (3) care centres<sup>5</sup>; (4) adoption centres<sup>6</sup>; and (5) intercountry adoption centres<sup>7</sup>. Certain proceedings started in, or transferred to, a county court, are allocated to a designated county court, family hearing centre, care centre, adoption centre or intercountry adoption centre<sup>8</sup>.

For the purposes of the provisions governing the allocation and transfer of proceedings<sup>9</sup>, the principal registry of the Family Division of the High Court is treated as if it were a designated county court, a family hearing centre, a care centre, an adoption centre and an intercountry adoption centre<sup>10</sup>.

Applications under the Children Act 1989<sup>11</sup> which are to be made to a county court, must be made to a designated county court, save that:

- 295 (a) where an application has been made for an adoption order<sup>12</sup> and has not been disposed of, an application for (i) a residence order<sup>13</sup> where leave to make an application is required<sup>14</sup> or (ii) a special guardianship order<sup>15</sup> where leave to make an application is required<sup>16</sup>, must be made in the court in which the adoption proceedings are pending<sup>17</sup>;
- 296 (b) applications under Parts III, IV and V of the Children Act 1989<sup>18</sup> must be made to a care centre<sup>19</sup>;
- 297 (c) where a cause is pending, an application by a party to the cause or by any other person for an order under Part I or II of the Children Act 1989 in relation to a child of the family must be made in the cause<sup>20</sup>.

Applications under the Adoption and Children Act 2002 which are to be made to a county court must be commenced in an adoption centre<sup>21</sup> save that an application for a Convention adoption order<sup>22</sup> or an application for an adoption order made where restrictions on bringing a child into the United Kingdom apply<sup>23</sup> must be commenced in the High Court<sup>24</sup> or an intercountry adoption centre<sup>25</sup>.

Where an application has been made for an adoption order<sup>26</sup> and has not been disposed of, an application for (A) leave to apply for a residence order<sup>27</sup>; (B) leave to apply for a special guardianship order<sup>28</sup>; (C) leave to remove a child<sup>29</sup>; or (D) leave to oppose the making of an adoption order<sup>30</sup>, must be commenced in the court in which the proceedings are pending<sup>31</sup>. Where an application has been made for a placement order<sup>32</sup> and has not been disposed of, an application for leave to remove a child from accommodation provided by the local authority<sup>33</sup> must be commenced in the court where the proceedings for the placement order are pending<sup>34</sup>. Where an application has been made by adopters for leave in relation to the period that the child has lived with them<sup>35</sup> and has not been disposed of, an application for leave to remove the child must be commenced in the court in which the proceedings for leave are pending<sup>36</sup>.

Where a special guardianship order<sup>37</sup> is in force in respect of a child, an application for leave to change the child's name or to remove him from the United Kingdom must be commenced in

the court which made the special guardianship order<sup>38</sup>. Where a placement order<sup>39</sup> is in force in respect of a child, an application for (*aa*) leave to revoke the placement order<sup>40</sup>; (*bb*) leave to place the child for adoption<sup>41</sup>; (*cc*) leave to apply for a contact order<sup>42</sup>; (*dd*) leave to apply to change the child's name or remove him from the United Kingdom<sup>43</sup>; or (*ee*) a contact order<sup>44</sup>, must be commenced in the court which made the placement order<sup>45</sup>.

1 As to the transfer of proceedings to and from county courts see paras 212-217 post.

2 *le* the provisions of the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended).

3 Designated county courts are those courts designated for the time being as: (1) divorce county courts by an order made under the Matrimonial and Family Proceedings Act 1984 s 33 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 732); (2) civil partnership proceedings county courts by an order under the Matrimonial and Family Proceedings Act 1984 s 36A (as added); (3) both divorce county courts and civil partnership proceedings county courts by such orders: Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(a) (substituted by SI 2005/2797).

4 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(b). The family hearing centres are listed in art 2(b), Sch 1 (amended by SI 1994/3138; SI 1995/1649; SI 1997/1897; SI 1999/524; SI 2000/2670; SI 2001/775; SI 2001/1656; SI 2005/529; SI 2006/1541).

5 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(c). The care centres are listed in Sch 2 (substituted by SI 2005/520; and amended by SI 2006/1541; SI 2007/1099).

6 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(d) (added by SI 2005/2797). The adoption centres are listed in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, Sch 3 (added by SI 2005/2797; amended by SI 2007/1099).

7 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(e) (added by SI 2005/2797). The intercountry adoption centres are listed in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, Sch 4 (added by SI 2005/2797; amended by SI 2007/1099).

8 See paras 215, 217 post.

9 *le* the provisions of the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended).

10 Children Act 1989 s 92(9), (10) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 205(1)-(3)); Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 19 (amended by SI 2005/2797).

11 *le* except under the Children Act 1989 Pt III (ss 17-30) (as amended), Pt IV (ss 31-42) (as amended) and Pt V (ss 43-52) (as amended) and in relation to cases where proceedings are pending or where orders are already in force.

12 *le* under the Adoption and Children Act 2002 s 46: see para 359 post.

13 *le* under the Children Act 1989 s 8 (as amended): see para 247 et seq post.

14 *le* under the Adoption and Children Act 2002 s 28(1)(a) or s 29(4)(b): see paras 337, 340 post.

15 *le* under the Children Act 1989 s 14A (as added): see para 151 ante.

16 *le* under the Adoption and Children Act 2002 s 28(1)(b) or s 29(5)(b): see paras 337, 340 post.

17 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3B(1)(c), (d) (arts 3A, 3B, 3C added by SI 2005/2797).

18 *le* the Children Act 1989 Pt III (as amended) (local authority support for children and families) (see para 851 et seq post), Pt IV (as amended) (care and supervision) (see para 271 et seq post), Pt V (as amended) (the protection of children) (see para 577 et seq post).

19 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 18(1) (amended by SI 1993/624). As to applications under the Children Act 1989 Pts III, IV, V (all as amended) which are to be transferred to a county court see paras 213, 215 post.

- 20 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 14(1) (amended by SI 2005/2797) applying the Family Proceedings Rules 1991, SI 1991/1247, r 2.40.
- 21 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 14(2) (added by SI 2005/2797).
- 22 Ie an adoption made under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see para 483 et seq post.
- 23 Ie under the Adoption and Children Act 2002 s 83: see para 499 post. For the meaning of 'United Kingdom' see para 102 note 7 ante.
- 24 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3A (as added: see note 17 supra).
- 25 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 14(3) (added by SI 2005/2797).
- 26 Ie under the Adoption and Children Act 2002 s 46: see para 359 post.
- 27 Ie under ibid s 29(4)(b): see para 337 post.
- 28 Ie under ibid s 29(5)(b): see para 337 post.
- 29 Ie under ibid s 37(a): see para 353 post.
- 30 Ie under ibid s 47(3) or s 47(5): see para 360 post.
- 31 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3B(1) (as added: see note 17 supra).
- 32 Ie under the Adoption and Children Act 2002 s 21: see para 335 post.
- 33 Ie under ibid s 30(2)(b): see para 342 post.
- 34 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3B(2) (as added: see note 17 supra).
- 35 Ie under the Adoption and Children Act 2002 s 42(6): see para 364 post.
- 36 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3B(3) (as added: see note 17 supra).
- 37 See note 15 supra.
- 38 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3C(1) (as added: see note 17 supra).
- 39 See note 32 supra.
- 40 Ie under the Adoption and Children Act 2002 s 24(2): see para 338 post.
- 41 Ie under ibid s 24(5): see para 338 post.
- 42 Ie under ibid s 26(3)(f): see para 339 post.
- 43 Ie under ibid s 28(2)(b): see para 340 post.
- 44 Ie under ibid s 26: see para 339 post.
- 45 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3C(2) (as added: see note 17 supra).

## **UPDATE**

### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/A. ALLOCATION OF PROCEEDINGS/211A. Allocation and transfer of proceedings.

### **211A. Allocation and transfer of proceedings.**

The Allocation and Transfer of Proceedings Order 2008, SI 2008/2836 (amended by SI 2009/871, SI 2009/3319, SI 2010/986), provides for the allocation and transfer of certain proceedings concerning children and proceedings under the Family Law Act 1996 Pts IV (ss 30-63) and IVA (ss 63A-63S). For the purposes of the provisions governing the allocation and transfer of proceedings, county courts are now classified as (1) family hearing centres; (2) care centres; (3) adoption centres; (4) intercountry adoption centres; and (5) forced marriage county courts (art 2), and the principal registry of the Family Division is treated as if it were one of these classes of county court: art 3(1) (renumbered by SI 2009/871). The principle registry of the Family Division of the High Court is also treated as if it were a county court for the purposes of appeals from decisions of a magistrates' court under the Children Act 1989 s 94 and the 1996 Act s 61: SI 2008/2836 art 3(2) (added by SI 2009/871). As to forced marriage protection proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 723 et seq.

When making a decision about the transfer of proceedings the court must have regard to the need to avoid delay, and a transfer may be made at any stage and whether or not the proceedings have already been transferred: SI 2008/2836 art 13. As to the transfer of proceedings to specified levels of court see arts 14-19 (see also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 964A). A county court may transfer proceedings to the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason (art 18), and the High Court must transfer proceedings to a county court or a magistrates' court if none of these criteria apply (art 19). As to the transfer of proceedings under the Children Act 1989 and the Adoption and Children Act 2002 to a specified class of county court see arts 20, 21; and as to applications following a refusal to order the transfer of proceedings from a magistrates' court to a county court see art 25. Where a county court orders the transfer of proceedings to a magistrates' court, an appeal may be made against that decision where (a) the decision was made by a district judge or deputy district judge of a county court, to a circuit judge, or (b) the decision was made by a district judge or deputy district judge of the principal registry of the Family Division, to a judge of the Family Division: art 26. See also *Practice Direction (allocation and transfer of proceedings)* [2009] 1 FLR 365, [2008] All ER (D) 118 (Nov); *Practice Direction (family proceedings) (allocation to judiciary)* [2009] 1 WLR 824, [2009] All ER (D) 98 (Feb); and *Practice Direction (appeals) (allocation to judiciary)* [2009] 1 WLR 1107, [2009] All ER (D) 128 (Apr) *Practice Direction (appeals) (allocation to judiciary)* [2009] All ER (D) 128 (Apr).

### **UPDATE**

#### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/B. TRANSFER OF PROCEEDINGS/212. Transfer of proceedings from one magistrates' court to another.

## **B. TRANSFER OF PROCEEDINGS**

### **212. Transfer of proceedings from one magistrates' court to another.**

A magistrates' court must transfer certain proceedings<sup>1</sup> to another magistrates' court<sup>2</sup> where: (1) having regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>3</sup> (and, in adoption cases, to the principle that the court or adoption agency must at all times in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare<sup>4</sup>), the transferring court considers that the transfer is in the interest of the child because it is likely significantly to accelerate the determination of the proceedings<sup>5</sup>, or because it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in the receiving court<sup>6</sup>, or for some other reason<sup>7</sup>; and (2) the receiving court by its justices' clerk<sup>8</sup> consents to the transfer<sup>9</sup>.

1    le proceedings:

- 156   (1)   under the Children Act 1989 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(2)(a) (art 6(2) added by SI 1993/624));
- 157   (2)   under the Adoption and Children Act 2002 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(2)(b) (art 6(2) as so added; art 6(2)(a) amended by SI 2005/2797));
- 158   (3)   of the kind referred to in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(t), (u) (see para 209 heads (19)-(20) ante) and under the Family Law Act 1986 s 55A (as added) (see para 121 ante) (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(2)(c) (art 6(2) as so added; art 6(2)(b) amended by SI 1994/2164; SI 2001/775)); or
- 159   (4)   under the Crime and Disorder Act 1998 s 11 (child safety orders: see para 625 post) (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(2)(d) (art 6(2) as so added; art 6(2)(d) added by SI 1998/2166)).

As to magistrates' courts as family proceedings courts see para 208 ante.

2    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(1) (amended by SI 1993/624).

3    le the principle laid down by the Children Act 1989 s 1(2): see para 301 post.

4    le the principle laid down by the Adoption and Children Act 2002 s 1(3): see para 328 post.

5    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(1)(a)(i) (art 6(1)(a) amended by SI 1993/624; SI 2005/2797).

6    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(1)(a)(ii).

7    Ibid art 6(1)(a)(iii). See eg *L v Berkshire County Council* [1992] 1 FCR 481, [1992] Fam Law 544.

8    le as defined by the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2). 'Justices' clerk' includes any person who performs a justices' clerk's functions by virtue of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 32 (as amended): r 1(2); and see MAGISTRATES vol 29(2) (Reissue) para 631 et seq.

9    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 6(1)(b). As to the power of a magistrates' court to transfer proceedings to a court of another member state see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, rr 21K, 21L (both added by SI 2005/229).

**UPDATE**

**208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/B. TRANSFER OF PROCEEDINGS/213. Transfer from magistrates' court to county court; refusal of magistrates' court to transfer.

**213. Transfer from magistrates' court to county court; refusal of magistrates' court to transfer.**

Subject to certain restrictions, a magistrates' court may, upon application by a party or of its own motion, transfer proceedings of a specified kind<sup>1</sup> or certain proceedings under the Family Law Act 1986<sup>2</sup> to a county court<sup>3</sup>. This discretion is exercisable where the court considers it in the interest of the child to do so, having regard first to the general principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>4</sup> (and, in adoption cases, to the principle that the court or adoption agency should bear in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare<sup>5</sup>) and secondly to the following questions<sup>6</sup>:

- 298 (1) whether the proceedings are exceptionally grave, important or complex<sup>7</sup>, in particular: (a) because of complicated or conflicting evidence about the risks involved to the child's physical or moral well-being or about other matters relating to the welfare of the child<sup>8</sup>; (b) because of the number of parties<sup>9</sup>; (c) because of a conflict with the law of another jurisdiction<sup>10</sup>; (d) because of some novel and difficult point of law<sup>11</sup>; or (e) because of some question of general public interest<sup>12</sup>;
- 299 (2) whether it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in another court<sup>13</sup>; and
- 300 (3) whether transfer is likely significantly to accelerate the determination of the proceedings, where no other method of doing so, including transfer to another magistrates' court, is appropriate<sup>14</sup>, and delay would seriously prejudice the interests of the child who is the subject of the proceedings<sup>15</sup>.

A magistrates' court may transfer to a county court other proceedings<sup>16</sup> under the Children Act 1989 or the Adoption and Children Act 2002 where, having regard to the delay principle<sup>17</sup>, it considers that in the interests of the child the proceedings could be more appropriately heard in that county court<sup>18</sup>.

Where a magistrates' court refuses to transfer proceedings<sup>19</sup>, a party to the proceedings may apply to the relevant care centre for an order that the proceedings be transferred to itself<sup>20</sup>. Upon hearing such an application the court may transfer the proceedings to itself where, having regard to the delay principle and to the questions set out in heads (1) to (3) above, it considers that it is in the interests of the child to do so<sup>21</sup>, or the court may transfer the proceedings to the High Court where, having regard to the delay principle, it considers that the proceedings are appropriate for determination in the High Court and that such determination would be in the interests of the child<sup>22</sup>.

1 The proceedings of a kind mentioned in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(a)-(f), (k), (n), (o), (r), (t)-(u) (see para 209 ante): art 7(1), (2). In addition, proceedings under art 3(1)(a), (n) (see para 209 ante) may only be transferred in order to be heard together with other family proceedings which arise out of the same circumstances and which are pending in another court (art 7(3)); and proceedings under art 3(1)(a) (see para 209 ante) may not be transferred from a magistrates' court which is not a family proceedings court: art 7(4). As to magistrates' courts as family proceedings courts see para 208 ante.

2 le proceedings commenced after April 1 2001 under the Family Law Act 1986 s 55A (as added): see para  
121 ante.

3 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1) (amended by SI 2001/775).

4 le the principle laid down by the Children Act 1989 s 1(2): see para 301 post.

5 le the principle laid down by the Adoption and Children Act 2002 s 1(3): see para 328 post.

6 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1) (amended by SI 2005/2797).

7 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1)(a).

8 Ibid art 7(1)(a)(i).

9 Ibid art 7(1)(a)(ii).

10 Ibid art 7(1)(a)(iii).

11 Ibid art 7(1)(a)(iv). A case should not be transferred to the county court simply because a party raises a human rights argument; human rights arguments should not be treated as a discrete issue to be hived off for hearing at a higher court: see *Re L (care proceedings: human rights claims)* [2003] EWHC 665 (Fam), [2004] 1 FCR 289, [2003] 2 FLR 160; *Re V (a child) (care proceedings: human rights claims)* [2004] EWCA Civ 54, [2004] 1 All ER 997, [2004] 1 FLR 944.

12 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1)(a)(v).

13 Ibid art 7(1)(b).

14 Ibid art 7(1)(c)(i).

15 Ibid art 7(1)(c)(ii). See *Re L (care proceedings: transfer)* [1993] 1 FCR 689, sub nom *Essex County Council v L (minors)* [1993] Fam Law 458 (protracted hearing in magistrates' court on non-consecutive days was not in child's best interests; proceedings should be transferred to county court). See also *Re A (a minor) (procedure)* [1993] Fam Law 619. As to the return of proceedings to the magistrates' court see para 214 post.

16 le other than proceedings to which the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7 (as amended) applies: see the text and note 1 supra.

17 See the text and notes 4-5 supra.

18 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 8 (amended by SI 2005/2797). This power is subject to the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, arts 15-18: see para 217 post. As to the construction of art 8 see *R v South East Hampshire Family Proceedings Court, ex p D* [1994] 2 All ER 445, [1994] 1 WLR 611 (although the magistrates' court is to have regard to the question of delay, its main function is to consider which court is most appropriate and what would be in the interests of the child).

19 le under the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7: see the text and notes 1-15 supra.

20 Ibid art 9(1), (2) (amended by SI 2005/520; SI 2005/2797). The reference in the text to the relevant care centre is to the care centre listed in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 9(1), Sch 2 for the local justice area or London commission area in which the magistrates' court is situated: see para 211 note 5 ante.

21 Ibid art 9(2).

22 Ibid art 9(3). See *Re H (a minor) (care proceedings: child's wishes)* [1992] 2 FCR 330, [1993] 1 FLR 440 (transfer from magistrates' court to High Court of complex proceedings involving the wishes and capacity of intelligent but emotionally disturbed child). The Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 9 (as amended) applies (with the necessary modifications) to proceedings brought under the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante), Pt II (ss 8-16A) (as amended) (see para 247 et seq post) as it applies where a magistrates' court refuses to transfer proceedings under Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7: art 9(4) (added by SI 1997/1897).

## UPDATE

### 208-217 Allocation and Transfer of Proceedings

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/B. TRANSFER OF PROCEEDINGS/214. Transfer of proceedings from county court to magistrates' court.

#### **214. Transfer of proceedings from county court to magistrates' court.**

A county court may transfer to a magistrates' court before trial proceedings which were transferred to it<sup>1</sup> where the county court, having regard to the principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>2</sup> (and, in adoption cases, to the principle that the court or adoption agency should bear in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare<sup>3</sup>) and the interests of the child, considers that<sup>4</sup>:

- 301 (1) if the proceedings were transferred by the magistrates' court as being exceptionally grave, important or complex<sup>5</sup>, that criterion does not apply<sup>6</sup>;
- 302 (2) if they were transferred because it would be appropriate for them to be heard with other family proceedings<sup>7</sup>, that criterion no longer applies because the proceedings with which the transferred proceedings were to be heard have been determined<sup>8</sup>; or
- 303 (3) if they were transferred in order to accelerate the determination of the proceedings<sup>9</sup>, that criterion no longer applies<sup>10</sup>.

1    Ie under the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1): see para 213 ante.

2    Ie the principle laid down by the Children Act 1989 s 1(2): see para 301 post. As to magistrates' courts as family proceedings courts see para 208 ante.

3    Ie the principle laid down by the Adoption and Children Act 2002 s 1(3): see para 328 post.

4    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 11(1) (amended by SI 1997/1897; SI 2005/2797). The Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 11(1) (as amended) applies (with the necessary modifications) to proceedings under the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante), Pt II (ss 8-16A) (as amended) (see para 247 et seq post) brought in, or transferred to, a county court as it applies to proceedings transferred to a county court under Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1): art 11(2) (added by SI 1997/1897).

5    Ie under the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 7(1)(a): see para 213 ante.

6    Ibid art 11(1)(a).

7    Ie under ibid art 7(1)(b): see para 213 ante.

8    Ibid art 11(1)(b).

9    Ie under ibid art 7(1)(c): see para 213 ante.

10   Ibid art 11(1)(c).

#### **UPDATE**

#### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/B. TRANSFER OF PROCEEDINGS/215. Transfer from one county court to another: transfer to High Court.

## 215. Transfer from one county court to another: transfer to High Court.

A county court must transfer certain proceedings<sup>1</sup> to another county court<sup>2</sup> where it considers, having regard to the principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>3</sup> (and, in adoption cases, to the principle that the court or adoption agency should bear in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare<sup>4</sup>), that such a transfer is in the interests of the child<sup>5</sup>. The receiving court must be of the same class or classes<sup>6</sup> as the transferring court<sup>7</sup>, or must be presided over by a judge or district judge who is specified by directions<sup>8</sup> for the same purposes as the judge or district judge of the transferring court<sup>9</sup>.

A county court may transfer proceedings of the same kinds<sup>10</sup> to the High Court if it considers, having regard to the delay principle<sup>11</sup>, that the proceedings are appropriate for determination in the High Court, and that such determination would be in the interests of the child<sup>12</sup>.

1 le proceedings:

- 160 (1) under the Children Act 1989 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(2)(a) (art 10(2) added by SI 1993/624);
- 161 (2) under the Adoption and Children Act 2002 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(2)(b) (art 10(2) as so added; art 10(2)(b) amended by SI 2005/2797);
- 162 (3) of the kind referred to in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(t), (u) (see para 209 heads (19)-(20) ante) and under the Family Law Act 1986 s 55A (as added) (see para 121 ante) (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(2)(c) (art 10(2) as so added; art 10(2)(c) amended by SI 1994/2164; SI 2001/775)).

2 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(1) (amended by SI 1993/624; SI 2005/2797). This provision is subject to the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, arts 15, 16: see para 217 post.

3 le the principle laid down by the Children Act 1989 s 1(2): see para 301 post.

4 le the principle laid down by the Adoption and Children Act 2002 s 1(3): see para 328 post.

5 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(1)(a) (as amended: see note 2 supra).

6 As to the classes of county court for this purpose see para 211 ante.

7 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(1)(b)(i).

8 le specified by directions made under the Courts and Legal Services Act 1990 s 9 (as amended): see the *Family Proceedings (Allocation to Judiciary) Directions 1999* as set out in [1999] 2 FLR 799 (as amended); and para 210 ante.

9 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 10(1)(b)(ii).

10 le proceedings listed in note 1 supra.

11 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 12(2) (added by SI 1993/624; amended by SI 1994/2164; SI 2001/775; SI 2005/2797). See the text and notes 3-4 supra.



12 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 12(1) (amended by SI 1993/624; SI 2005/2797). The Matrimonial and Family Proceedings Act 1984 s 39 (transfer of family proceedings to High Court from county court) (see para 208 ante) does not apply to proceedings under the Children Act 1989 or under the Adoption and Children Act 2002: Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 5 (amended by SI 2005/2797).

## **UPDATE**

### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

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## **216. Transfer from High Court to county court.**

The High Court may transfer certain proceedings<sup>1</sup> to a county court if it considers, having regard to the principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>2</sup> (and, in adoption cases, to the principle that the court or adoption agency should bear in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare<sup>3</sup>), that the proceedings are appropriate for determination in such court and that such a determination would be in the interests of the child<sup>4</sup>.

1    le proceedings:

- 163   (1)   under the Children Act 1989 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 13(2)(a) (art 13(2) added by SI 1993/624);
- 164   (2)   under the Adoption and Children Act 2002 (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 13(2)(b) (art 13(2) as so added; art 13(2)(b) amended by SI 2005/2797);
- 165   (3)   of the kind referred to in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1)(t), (u) (see para 209 heads (19)-(20) ante) and under the Family Law Act 1986 s 55A (as added) (see para 121 ante) (Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 13(2)(c) (art 13(2) as so added; art 13(2)(c) amended by SI 1994/2164; SI 2001/775)).

2    le the principle laid down by the Children Act 1989 s 1(2): see para 301 post.

3    le the principle laid down by the Adoption and Children Act 2002 s 1(3): see para 328 post.

4    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 13(1) (amended by SI 1993/624; SI 2005/2797). This power is subject to the provisions of the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, arts 15-18: see para 217 post. The Matrimonial and Family Proceedings Act 1984 s 38 (as amended) (transfer of family proceedings from High Court to county court) (see para 208 ante) does not apply to proceedings under the Children Act 1989 or under the Adoption and Children Act 2002: Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 5 (amended by SI 2005/2797).

## **UPDATE**

### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iii) The Courts with Jurisdiction in Family Proceedings/B. TRANSFER OF PROCEEDINGS/217. Transfer of proceedings to particular county courts.

## **217. Transfer of proceedings to particular county courts.**

Where an application under the private law provisions of the Children Act 1989<sup>1</sup> is to be transferred from a magistrates' court to a county court, or from the High Court to a county court, it must be transferred to a designated county court<sup>2</sup>. However, where such an application (other than an application for a contact order, a prohibited steps order, a residence order, a specific issue order or a special guardianship order<sup>3</sup>) is to be transferred to a county court for the purpose of consolidation with other proceedings, it must be transferred to the court in which those other proceedings are pending<sup>4</sup>.

Where proceedings under the Adoption and Children Act 2002, other than proceedings for a placement order<sup>5</sup>, are to be transferred from the High Court or a magistrates' court to a county court, they must be transferred to an adoption centre<sup>6</sup>. However, where proceedings for a Convention adoption order<sup>7</sup> or an adoption order where restrictions on bringing a child into the United Kingdom apply<sup>8</sup>, are to be transferred from the High Court to a county court, they must be transferred to an intercountry adoption centre<sup>9</sup>.

An application for a contact order, a prohibited steps order, a residence order, a specific issue order or a special guardianship order<sup>10</sup> in a designated county court which is not also a family hearing centre, must, if the court is notified that the application will be opposed, be transferred for trial to a family hearing centre<sup>11</sup>. Where an application for such an order is to be transferred from the High Court to a county court it must also be transferred to a family hearing centre<sup>12</sup>. However, where an application for such an order is to be transferred to a county court for the purpose of consolidation with other proceedings, it may be transferred to the court in which those other proceedings are pending whether or not it is a family hearing centre<sup>13</sup>.

Applications under the public law provisions of the Children Act 1989<sup>14</sup> which are to be transferred from the High Court or from a magistrates' court to a county court must be transferred to a care centre<sup>15</sup>.

1    Ie under the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante), Pt II (ss 8-16A) (as amended) (see para 247 et seq post), or s 15(1), Sch 1 (as amended) (see para 540 et seq post).

2    Children (Allocation of Proceedings) Order, SI 1991/1677, art 15(1), (2) (amended by SI 2005/2797). This provision is subject to the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 15(3) (as amended): see the text and notes 3-4 infra. As to designated county courts see para 211 ante.

3    Ie an order under the Children Act 1989 s 8 (as amended) (see para 251 et seq post) or s 14A (as added) (see para 151 ante).

4    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 15(3) (amended by SI 2005/2797).

5    Ie under the Adoption and Children Act 2002 s 23: see para 338 post.

6    Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 17(1) (art 17 substituted by SI 2005/2797).

7    Ie an adoption made under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see para 483 et seq post.

8    Ie under the Adoption and Children Act 2002 s 83: see para 499 post. For the meaning of 'United Kingdom' see para 102 note 7 ante.

9 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 17(2) (as substituted: see note 6 supra).

10 See note 3 supra.

11 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 16(1) (amended by SI 2005/2797). As to family hearing centres see para 211 ante.

12 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 16(2) (amended by SI 2005/2797).

13 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 16(3) (amended by SI 2005/2797). However, the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 16(1) (as amended) (see the text and note 11 supra) applies to the application following the transfer: art 16(3).

14 I.e. the Children Act 1989 Pt III (ss 17-30) (as amended) (local authority support for children and families) (see para 851 et seq post), Pt IV (ss 31-42) (as amended) (care and supervision) (see para 271 et seq post), Pt V (ss 43-52) (as amended) (the protection of children) (see para 577 et seq post).

## **UPDATE**

## **UPDATE**

### **208-217 Allocation and Transfer of Proceedings**

SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A.

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#### **(iv) Initiating, and Participation in, Family Proceedings**

#### **A. THE INHERENT JURISDICTION OF THE HIGH COURT AND WARDSHIP**

##### **218. In general.**

The inherent jurisdiction of the High Court with respect to children may be invoked with or without making the child a ward of court<sup>1</sup>; the wardship jurisdiction is merely one manifestation of that jurisdiction<sup>2</sup>.

No minor can become a ward of court except by virtue of an order of the High Court to that effect<sup>3</sup>, but where an application is made for such an order in respect of a minor<sup>4</sup>, the minor becomes a ward of court on the making of the application<sup>5</sup>, unless he is the subject of a care order<sup>6</sup>.

Any person used to be able to issue a summons for this purpose<sup>7</sup> but now the applicant must state his interest in or relationship to the minor<sup>8</sup> and of each party to the proceedings<sup>9</sup>. If there is any doubt about the propriety of the application, the matter will be referred to the district judge, who may dismiss the summons forthwith if he considers that it is an abuse of the process of the court<sup>10</sup>.

No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority has obtained the leave of the court<sup>11</sup>. The court may only grant such leave if it is satisfied that:

- 304 (1) the result which the authority wishes to achieve could not be achieved through the making of any order<sup>12</sup> made otherwise than in the exercise of the court's inherent jurisdiction and for which the authority is entitled to apply for (assuming, in the case of an application which may only be made with leave of the court, that leave is granted)<sup>13</sup>; and
- 305 (2) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm<sup>14</sup>.

Where it is necessary, an injunction may be granted<sup>15</sup> before the institution of wardship proceedings under the court's inherent jurisdiction to make an order for the protection of a minor<sup>16</sup>.

<sup>1</sup> See para 200 et seq ante.

<sup>2</sup> *Re N (infants)* [1967] Ch 512, [1967] 1 All ER 161; *Re L* [1968] P 119, [1968] 1 All ER 20, CA; *Re M and N (minors) (wardship: publication of information)* [1990] Fam 211, [1990] 1 All ER 205, CA; *Re J (a minor) (child in care: medical treatment)* [1993] Fam 15, [1992] 4 All ER 614, CA; *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA; *South Glamorgan County Council v W and B* [1993] 1 FCR 626, [1993] 1 FLR 574; *Re M (a minor) (wardship documents: disclosure)* [1993] 1 FCR 476, CA. See also *Re H-S (minors: protection of identity)* [1994] 3 All ER 390, [1994] 1 WLR 1141, CA; *R v Central Independent Television plc* [1994] Fam 192, [1994] 3 All ER 641, CA; *Re Z (a minor) (freedom of publication)* [1997] Fam 1, [1995] 4 All ER 961, CA. As to proceedings under the inherent jurisdiction see para 200 et seq ante.

3 Supreme Court Act 1981 s 41(1). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

4 As to the terms 'infant', 'minor' and 'child' see paras 1-3 ante.

5 Supreme Court Act 1981 s 41(2). Where a child is staying in a refuge which is certified under the Children Act 1989 s 51(1) (as amended) or s 51(2) (see para 609 post), the person who is providing that refuge must be given notice of any application under the Family Proceedings Rules 1991, SI 1991/1247, Pt V (rr 5.1-5.6) (as amended) in respect of that child: r 5.6 (added by SI 1991/2113). As to termination of wardship see para 222 post.

6 Supreme Court Act 1981 s 41(2A) (added by the Children Act 1989 s 108(5), Sch 13 para 45(2)). The reference in the text to a care order is to one as defined by the Children Act 1989 s 105: see para 271 note 4 post. As to care orders see para 270 et seq post.

7 Eg an educational psychologist at a school attended by the ward: *Re D (a minor) (wardship: sterilisation)* [1976] Fam 185, [1976] 1 All ER 326, CA; and see *Re O (a minor) (wardship: adopted child)* [1978] Fam 196, [1978] 2 All ER 27, CA.

8 Family Proceedings Rules 1991, SI 1991/1247, r 5.1(6). See also *Practice Direction* [1967] 1 All ER 828, [1967] 1 WLR 623, which was made to prevent abuse: see eg *Re Dunhill (an infant)* (1967) 111 Sol Jo 113 (application by plaintiff night-club owner to ward infant heiress in order to obtain publicity). See now *Practice Direction* [1983] 2 All ER 672, [1983] 1 WLR 790.

9 See *Practice Direction* [1967] 1 All ER 828, [1967] 1 WLR 623; *Practice Direction* [1983] 2 All ER 672, [1983] 1 WLR 790.

10 *Practice Direction* [1967] 1 All ER 828, [1967] 1 WLR 623. See also *Re C T (a minor) (wardship: representation)* [1993] 3 WLR 602, [1993] 2 FLR 278, CA. As to district judges see the Courts and Legal Services Act 1990 s 74 (as amended); and COURTS vol 10 (Reissue) para 728 et seq.

11 Children Act 1989 s 100(3). The Family Proceedings Rules 1991, SI 1991/1247, r 4.3 (as amended) (application for leave to commence proceedings), so far as applicable, applies to an application by a local authority for the leave of the court under the Children Act 1989 s 100(3): Family Proceedings Rules 1991, SI 1991/1247, r 5.1(2).

12 In any order of a kind to which the Children Act 1989 s 100(5) applies.

13 Ibid s 100(4)(a), (5). An example of an order for which a local authority is entitled to apply is a prohibited steps order under s 8 (as amended): see para 261 post. Where no one else invokes the court's protection, the local authority should not be excluded from doing so by a restrictive construction of the Children Act 1989 s 100: *Devon County Council v S* [1994] Fam 169, [1994] 2 FCR 409. Wardship may be appropriate where no other power is available to protect the interests of children and enable a local authority to put in to effect a plan which is in the best interests of the children: *Re W and X (wardship: relatives rejected as foster carers)* [2003] EWHC 2206 (Fam), [2004] 1 FLR 415. Wardship should not be used to by-pass or interfere with a local authority assessment but may be used to conduct an enquiry preliminary to the court's exercise of its wardship jurisdiction (age testing): *E v X London Borough Council* [2005] EWHC 2811 (Fam), [2006] 1 FLR 730.

14 Children Act 1989 s 100(4)(b). For restrictions on the exercise of the court's inherent jurisdiction see para 200 et seq ante. For the meaning of 'harm' see para 274 post. In the case of a request for an order for delivery up of confidential documents relating to a child, where there is in force an injunction prohibiting publication of the child's identity, that injunction will continue to protect the child from the risk of significant harm: *Essex County Council v Mirror Group Newspapers Ltd* [1996] 2 FCR 831. See also *Re K (wardship: foreign child)* [1997] 2 FCR 398, [1997] 2 FLR 221 (wardship jurisdiction used to monitor transfer of care of foreign child from foster parents in United Kingdom to surviving members of her natural family in her native country).

15 An injunction granted before the issue of the wardship summons should be entitled 'In the matter of an intended action to make ... a ward of court': *Re N (infants)* [1967] Ch 512 at 531, [1967] 1 All ER 161 at 169.

16 *Re N (infants)* [1967] Ch 512, [1967] 1 All ER 161. The application is made in chambers.

## UPDATE

### 218 In general

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

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## **219. Procedure: originating summons.**

The procedure in wardship is set out in Part V of the Family Proceedings Rules 1991<sup>1</sup>.

An application to make a minor<sup>2</sup> a ward of court must be made by originating summons<sup>3</sup>. Unless the court otherwise directs, the originating summons must state the date of the minor's birth<sup>4</sup> and the minor's whereabouts, or that the plaintiff is unaware of his whereabouts<sup>5</sup>.

Upon being served with the summons, every defendant other than the minor must forthwith lodge in the registry out of which the summons issued a notice stating the address of the defendant and the whereabouts of the minor, or as the case may be, that the defendant is unaware of his whereabouts and, unless the court otherwise directs, serve a copy of the same upon the plaintiff<sup>6</sup>. Where any party other than the minor changes his address or becomes aware of any change in the whereabouts of the minor after the issue or, as the case may be, service of the summons, he must, unless the court otherwise directs, forthwith lodge notice of the change in the registry out of which the summons issued and serve a copy of the notice on every other party<sup>7</sup>.

Proceedings under the residual inherent jurisdiction of the High Court are assigned to the Family Division of the High Court<sup>8</sup> and must be commenced by the issue of an originating summons<sup>9</sup>.

1 See the Family Proceedings Rules 1991, SI 1991/1247, r 5.1 (application to make a minor a ward of court), r 5.2 (enforcement of order), r 5.3 (where the minor ceases to be a ward of court), r 5.4 (amended by SI 2005/2922) (adoption of minor who is a ward of court), Family Proceedings Rules 1991, SI 1991/1247, r 5.5 (added by SI 1991/2113; amended by SI 1992/456) (orders of use of secure accommodation), Family Proceedings Rules 1991, SI 1991/1247, r 5.6 (added by SI 1991/2113) (notice to provider of refuge).

2 As to the term 'minor' see paras 1-3 ante.

3 Family Proceedings Rules 1991, SI 1991/1247, r 5.1(1). The plaintiff must file an affidavit in support of the application when the originating summons is issued: r 5.1(1). See further para 220 post.

4 Ibid r 5.1(5). The plaintiff must: (1) on issuing the summons, or before or at the first hearing, lodge in the registry out of which the summons issued a certified copy of the entry in the Register of Births or, as the case may be, in the Adopted Children Register, relating to the minor (r 5.1(5)(a)); or (2) at the first hearing of the summons, apply for directions as to proof of birth of the minor in some other manner (r 5.1(5)(b)). As to the Register of Births see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) paras 504-505. As to the Adopted Children Register see para 383 et seq post.

5 Ibid r 5.1(7). Any reference to the whereabouts of a minor is a reference to the address at which and the person with whom he is living and any other information relevant to the question where he may be found: r 5.1(11). The summons must also contain a notice to the defendant informing him of the requirements of r 5.1(8), (9) to notify the court of his and the minor's whereabouts (see the text and notes 6-7 infra); r 5.1(10).

6 Ibid r 5.1(8). The power of the High Court to secure, through an officer attending upon the court, compliance with any direction relating to a ward of court may be exercised by an order addressed to the tipstaff: r 5.2. As to the powers of the tipstaff see CONTEMPT OF COURT vol 9(1) (Reissue) para 518.

7 Ibid r 5.1(9).

8 Supreme Court Act 1981 Sch 1 para 3(b)(ii) (substituted by the Children Act 1989 s 108(5), (6), Sch 13 para 45(3), Sch 14 para 1). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior



Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

9 *Re F (mental patient: sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL.

## **UPDATE**

### **219 Procedure: originating summons**

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(iv) Initiating, and Participation in, Family Proceedings/A. THE INHERENT JURISDICTION OF THE HIGH COURT AND WARDSHIP/220. Parties to the application.

## **220. Parties to the application.**

The name of each party to wardship proceedings must be qualified by a brief description in the body of the summons<sup>1</sup> of his interest in, or relation to, the minor<sup>2</sup>. In an appropriate case, a minor may apply for an order making himself a ward of court<sup>3</sup>.

Where the purpose of the application is to resolve a dispute, the persons who are parties to that dispute should be joined as defendants on the summons. However, a person with whom a minor has formed, or is seeking to form, an undesirable association should not be made a party to the proceedings, but only a defendant to the application for an injunction or committal within the wardship proceedings<sup>4</sup>.

Where there is no other person other than the minor who is a suitable defendant, an application may be made ex parte to a district judge for leave to issue either an ex parte originating summons or an originating summons with the minor as defendant, and except where such leave is granted, the minor must not be made a defendant to an originating summons in the first instance<sup>5</sup>. Although there are circumstances in which an ex parte application may be justified<sup>6</sup> the guiding rule is that such applications should only be allowed where there is an urgent necessity for them<sup>7</sup>.

The minor should only be joined in special circumstances<sup>8</sup>. If a minor is joined as a defendant he must have a guardian ad litem to conduct proceedings on his behalf<sup>9</sup> but in certain circumstances he may act without a guardian with the leave of the court<sup>10</sup>. The Official Solicitor may be authorised to act for the minor<sup>11</sup>.

It is not clear whether the Crown may be made a defendant in wardship proceedings<sup>12</sup>. Any person who has not been joined as a party to the proceedings may apply to be joined by way of summons with an affidavit in support setting out the reasons why he wishes to be involved in the proceedings<sup>13</sup>.

In certain circumstances documents lodged in wardship proceedings may be used in other proceedings by or on behalf of the ward<sup>14</sup>.

1 See para 219 ante.

2 Family Proceedings Rules 1991, SI 1991/1247, r 5.1(6). Where an adoption order has been made, a natural parent whose parental responsibility has thereby been terminated will have to show a strong prima facie case to justify continuation of the proceedings: *Re O (a minor) (wardship: adopted child)* [1978] Fam 196 at 208, [1978] 2 All ER 27 at 31, CA, per Ormrod LJ; *Re C (a minor) (wardship: adopted child)* [1985] FLR 1114 at 1117, CA, per Browne-Wilkinson LJ. See also *Re F (a minor) (adoption order: injunction)* [1990] Fam 189, [1990] 3 All ER 580 (decision overruled on a different point by *Re D (a minor) (adoption)* [1991] Fam 137, [1991] 3 All ER 461, CA). Cf *Re E (an infant)* [1963] 3 All ER 874, [1964] 1 WLR 51. For the meaning of 'parental responsibility' see para 134 ante. As to the terms 'infant', 'minor' and 'child' see paras 1-3 ante.

3 Such an application will normally be made by the minor's next friend (see para 249 post), or the minor may in certain circumstances, sue without a next friend (see the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A (as added and amended); and para 225 post.

4 *Practice Direction* [1983] 2 All ER 672, [1983] 1 WLR 790.

5 Family Proceedings Rules 1991, SI 1991/1247, r 5.1(3). Particulars of any summons issued under r 5.1 in a district registry must be sent by the proper officer to the principal registry for recording in the register of wards: r 5.1(4).

6 Eg where the police wish to interview a ward, and a party to the proceedings may be the subject of police investigation: see *Practice Direction* [1988] 2 All ER 1015, [1988] 1 WLR 989.

7 *Re H (a minor) (wardship: application)* [1985] 3 All ER 1 at 3, [1985] 1 WLR 1164 at 1166, CA, per Sir George Waller; *Re O (proposed wardship proceedings)* [1990] FCR 599.

8 *Practice Direction* [1982] 1 All ER 319, [1982] 1 WLR 118.

9 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2(1) (amended by SI 1992/456).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A (as added and amended); and para 225 post. See *Re S (a minor) (independent representation)* [1993] Fam 263, [1993] 3 All ER 36, CA (court must have regard to sufficiency of understanding of the child in the context of the proceedings). See also *Re T (a minor) (child: representation)* [1994] Fam 49, [1993] 4 All ER 518, CA (wardship cannot be used as a means of imposing a guardian ad litem on a child against her will).

11 As to the Official Solicitor see para 322 post.

12 See *Re J S (a minor) (wardship: boy soldier)* [1990] Fam 182, [1990] 2 All ER 861, where it was accepted that a submission to the effect that a Minister of the Crown should not be made a party to wardship proceedings, because the Crown cannot be impleaded in its own courts, was said to be 'probably well founded'. However, in a case in which it is desired that the Crown be represented, the appropriate course of action would seem to be to make a third party (eg the father of the ward) the defendant, and then invite the Attorney General to represent the interests of the Crown: see *Re J S (a minor) (wardship: boy soldier)* supra at 185, 863 per Hollis J.

13 See *A v Berkshire County Council* [1989] FCR 184 at 189, [1989] 1 FLR 273 at 281, CA, per Sir Gervase Sheldon.

14 *Re Manda* [1993] Fam 183, [1993] 1 All ER 733, CA (the circumstances must be that the ward's interests and the public interest that all the relevant information should be available outweigh any public interest in the confidentiality of the evidence).

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## 221. Adoption of wards of court.

The consent of the court is required to place a minor<sup>1</sup> who is a ward of court for adoption, to start proceedings to adopt such a minor, or to free him for adoption<sup>2</sup>. An application for leave to commence proceedings<sup>3</sup> to adopt, place or free for adoption, a minor who is a ward may be made *ex parte* to a district judge<sup>4</sup>. Where, however, a local authority has been granted leave to place a minor who is a ward with foster parents with a view to adoption it is not necessary for an application to be made for leave under these provisions unless the court otherwise directs<sup>5</sup>. If the applicant for leave<sup>6</sup>, or a local authority which has applied for leave<sup>7</sup>, or a foster parent so requests, the district judge may direct that any subsequent proceedings must be conducted with a view to securing that the proposed adopter is not seen by or made known to any respondent or prospective respondent who is not already aware of his identity, except with his consent<sup>8</sup>.

1 As to the terms 'infant', 'minor' and 'child' see paras 1-3 ante.

2 See *F v S* [1973] Fam 203, [1973] 1 All ER 722, CA. The test to be applied in this, as in other applications, is whether the application is in the best interests of the ward. See also *Re W (a minor) (adoption agency: wardship)* [1990] Fam 156, [1990] 2 All ER 463. As to adoption see generally para 323 et seq post.

3 'Proceedings' means proceedings in the High Court or a county court: Family Proceedings Rules 1991, SI 1991/1247, r 5.4(4).

4 Ibid r 5.4(1) (amended by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 5.4(2).

6 Ie under ibid r 5.4(1) (as amended): see the text and note 4 supra.

7 Ie under ibid r 5.4(2): see the text and note 5 supra.

8 Ibid r 5.4(3).

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## 222. Termination of wardship.

A minor<sup>1</sup> who has become a ward of court<sup>2</sup> on the issue of a summons ceases to be a ward of court:

- 306 (1) if an application for an appointment for the hearing of the summons is not made within the period of 21 days after the issue of the summons, at the expiration of that period<sup>3</sup>;
- 307 (2) if an application for such an appointment is made within that period, on the determination of the application made by the summons unless the court hearing it orders that the minor be made a ward of court<sup>4</sup>.

The court may, at any time, either upon an application in that behalf or without such an application, order that a minor who is for the time being a ward of court is to cease to be a ward<sup>5</sup>. This, in common with other issues relating to wards, will be decided by reference to the welfare principle<sup>6</sup>.

Once a ward has attained full age, the court's wardship jurisdiction ceases and it cannot thereafter interfere with the ward's marriage or require a settlement of the ward's property, unless the marriage involves a contempt of court<sup>7</sup>. Undertakings given to the court and intended to apply to a court order while the court had jurisdiction to make the order lapse when the ward attains full age<sup>8</sup>.

1 As to the terms 'infant', 'minor' and 'child' see paras 1-3 ante.

2 I.e. by virtue of the Supreme Court Act 1981 s 41(2): see para 200 ante. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 ss 59(5), 148(1), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

3 Supreme Court Act 1981 s 41(2); Family Proceedings Rules 1991, SI 1991/1247, r 5.3(1)(a) (r 5.3(1) prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1).

4 Family Proceedings Rules 1991, SI 1991/1247, r 5.3(1)(b). This does not affect the general power of the court under the Supreme Court Act 1981 s 41(3) to order that any minor who is for the time being a ward of court ceases to be a ward of court (see the text and note 5 infra): Family Proceedings Rules 1991, SI 1991/1247, r 5.3(2). If no application for an appointment for the hearing of a summons under r 5.1 (see paras 218-219 ante) is made within the period of 21 days after the issue of the summons, a notice stating whether the applicant intends to proceed with the application made by the summons must be left at the registry in which the matter is proceeding immediately after the expiration of that period: r 5.3(3).

5 Supreme Court Act 1981 s 41(3).

6 I.e. under the Children Act 1989 s 1(1) (which provides that when a court determines any question with respect to the upbringing of a child or the administration of a child's property or any income arising from it, the child's welfare must be the court's paramount consideration); see para 300 post.

7 *Bolton v Bolton* [1991] 3 Ch 270, CA. As to the attainment of full age see para 1 ante.

8 *Bolton v Bolton* [1991] 3 Ch 270, CA. See also *Re D (a minor) (adoption order: validity)* [1991] Fam 137, [1991] 3 All ER 461, CA.

**UPDATE**

**222 Termination of wardship**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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## ***B. PROCEEDINGS INSTITUTED UNDER STATUTE***

### **223. Right to initiate family proceedings.**

The following family proceedings<sup>1</sup> may be initiated as described below:

- 308 (1) proceedings under the Matrimonial Causes Act 1973 may be initiated by a party to a marriage (including a void marriage)<sup>2</sup>;
- 309 (2) proceedings under the Civil Partnership Act 2004 may be initiated by civil partners<sup>3</sup>;
- 310 (3) proceedings under the Family Law Act 1996 may be initiated: (a) for occupation orders, by spouses, civil partners, parties where an agreement to marry or a civil partnership agreement has been terminated within the last three years, or cohabitants<sup>4</sup>; and (b) for molestation orders, by persons who are 'associated persons' or are a party to family proceedings<sup>5</sup>;
- 311 (4) an application for an adoption order is made by the prospective adopters<sup>6</sup>, while an application for a placement order is made by a local authority<sup>7</sup>;
- 312 (5) proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 may be instituted by either party to a marriage<sup>8</sup>;
- 313 (6) proceedings under Part III of the Matrimonial and Family Proceedings Act 1984<sup>9</sup> may be started by either party to a marriage which has been dissolved or annulled by means of judicial or other proceedings in an overseas country (or parties to the marriage who have been legally separated), where the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales<sup>10</sup>;
- 314 (7) an application for a child safety order is made by a local authority<sup>11</sup>; and
- 315 (8) applications for parental orders under the Human Fertilisation and Embryology Act 1990 must be made by both parties to a marriage<sup>12</sup>.

Entitlement to initiate proceedings under the Children Act 1989 depends on the nature of the order being sought, and on the applicants satisfying various conditions<sup>13</sup>.

1 As to what are family proceedings see paras 204-205 ante.

2 See the Matrimonial Causes Act 1973; paras 307, 310 post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 See the Civil Partnership Act 2004; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

4 See the Family Law Act 1996 ss 33-40 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292 et seq.

5 See *ibid* s 42 (as amended), s 42A (as added); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 716-718 et seq.

6 See the Adoption and Children Act 2002 s 49; and para 361 post.

7 See *ibid* s 22; and para 335 post.

8 See the Domestic Proceedings and Magistrates' Courts Act 1978; and paras 309-310 post. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW; MAGISTRATES.

9 See the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended; prospectively further amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 938 et seq.

10 See *ibid* s 12(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530.

11 See the Crime and Disorder Act 1998 s 11; and para 625 post.

12 See the Human Fertilisation and Embryology Act 1990 s 30 (as amended); and para 106 ante.

13 See the Children Act 1989 s 4 (as amended), s 4A (as added) (parental responsibility orders and agreements: see paras 139-140 ante), ss 5, 6 (both as amended) (guardianship applications: see para 144 et seq ante), s 31 (as amended) (care orders and supervision orders: see para 271 post), s 10 (as amended) (orders under s 8 (as amended): see para 248 post), s 14A (as added) (special guardianship orders: see para 151 ante). When any application for an order under the Children Act 1989 is disposed of, the court may order that no further application for any order under the Act of any specified kind be made by the person named in the order without the leave of the court: s 91(14); and see para 266 post. This power should be used sparingly, after giving the person concerned an opportunity of being heard: *Re F* [1992] 2 FCR 433, sub nom *F v Kent County Council* [1993] 1 FLR 432. In general, the power should only be exercised where there have been repeated applications, but may in exceptional circumstances be exercised in the absence of repeated applications if the welfare of the child makes it necessary: see *Re M (care orders: restricting applications)* [1999] 3 FCR 400, sub nom *Re M (section 91(14) order)* [1999] 2 FLR 553, CA; *Re P (a child) (residence order: restriction order)* [2000] Fam 15, [1999] 3 All ER 734, sub nom *Re P (section 91(14) guidelines) (residence and religious heritage)* [1999] 2 FLR 573, CA; *Re P (Children Act 1989, sections 22 and 26: local authority compliance)* [2000] 2 FLR 910; *Re F (children) (restriction on applications)* [2005] EWCA Civ 499, [2005] 2 FCR 176, [2005] 2 FLR 950. See *Re C-E (children) (care proceedings: contact)* [2007] EWCA Civ 555, [2007] All ER (D) 273 (May) (proceedings lasting for over four years).

In making an order under the Children Act 1989 s 91(14), the court must balance the interests of the child with the fundamental right of freedom of access to the courts: *Re R (a minor) (leave to make applications)* [1998] 2 FCR 129, sub nom *Re R (residence: contact: restricting applications)* [1998] 1 FLR 749, CA. An order under the Children Act 1989 s 91(14) may be imposed even when the applicant's conduct cannot be criticised, if it is in the best interests of the child to do so: *Re M (care orders: restricting applications)* supra. However, the prohibition made needs to be compatible with the primary objective of the court to restore the relationship between parent and child: *Re B (section 91(14) order: duration)* [2003] EWCA Civ 1966, [2004] 1 FLR 871, sub nom *Re B (a child) (order restricting applications)* [2003] All ER (D) 149 (Nov). See also *Re F (minors) (contact: restraint order)* [1996] 1 FCR 81, [1995] 1 FLR 956, CA (an order under the Children Act 1989 s 91(14) is draconian and appropriate only where there is a real fear that children may become distressed or have their security disturbed through vexatious, ill-judged or obsessive pursuit of applications by a party); *Re Y (child orders: restricting applications)* [1994] 2 FCR 367, [1994] 2 FLR 699 (if the circumstances of a case are sufficiently exceptional, the court may order that no further application for a contact order may be made without leave of the court, even if it is the first such application), followed in *Re G and M (child orders: restricting applications)* [1995] 3 FCR 514, [1995] 2 FLR 416 (order made under the Children Act 1989 s 91(14) against father who was sex offender); *Re G (child case: parental involvement)* [1996] 2 FCR 1, [1996] 1 FLR 857, CA (when making an order under the Children Act 1989 s 91(14), it had to be shown that the parent was acting unreasonably or was likely to act unreasonably in the future); *Re N (a minor) (residence order: appeal)* [1996] 2 FCR 377, sub nom *Re N (section 91(14) order)* [1996] 1 FLR 356, CA (where an order under the Children Act 1989 s 91(14) has been made, it is highly undesirable that any application for leave be made ex parte). As to the guidelines, drawn from the relevant authorities, for making an order under s 91(14) see *Re P (minor) (residence order: child's welfare)* [2000] Fam 15, sub nom *Re P (a child) (residence order: restriction order)* [1999] 3 All ER 734, CA; *Re E (permission to seek relief)* [2006] EWCA Civ 1190, [2006] 3 FCR 50, [2007] 1 FLR 482. See also *Re P (a child) (Children Act 1989 ss 22 and 26: local authority compliance)* [2000] 2 FLR 910, [2000] Fam Law 792; *Re J (a child) (restriction on applications)* [2007] EWCA Civ 906, [2007] 3 FCR 123, [2007] All ER (D) 260 (Jul).

## UPDATE

### 223 Right to initiate family proceedings

NOTE 13--See *Re C (litigant in person: s 91(14) order)* [2009] EWCA Civ 674, [2009] 2 FLR 1461, [2009] All ER (D) 52 (Sep) (order under s 91(14) set aside where unrepresented party affected had no notice of the application and her right to seek an adjournment was not explained to her).





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## **224. The right to participate in family proceedings.**

Rules of court<sup>1</sup> make provision as to entitlement to party status in family proceedings, entitlement to notice of such proceedings and intervention, and also for the circumstances in which an application may be made *ex parte*<sup>2</sup>.

Where a matrimonial cause is pending, an application by a party to the cause or by any other person for an order under any provision of Part I or Part II of the Children Act 1989<sup>3</sup> in relation to a child of the family must be made in the cause; and where the applicant is not a party to the cause and has obtained such leave as is required<sup>4</sup> to make the application, no leave to intervene in the cause is necessary<sup>5</sup>.

In the case of proceedings in the High Court and county court under the Children Act 1989<sup>6</sup> rules prescribe those persons who must be made respondents to proceedings, or must be given notice of them<sup>7</sup>.

In the case of proceedings in the family proceedings court under the Children Act 1989, further rules prescribe those persons who must be made respondents to proceedings, or must be given notice of them<sup>8</sup>.

The rules permit a person to file a request in Form C2 that he or another person be joined as a party or cease to be a party<sup>9</sup>. On considering such a request the court must:

- 316 (1) grant it without a hearing or representations, but only where the request is to be joined as a party<sup>10</sup>;
- 317 (2) order that a date be fixed for the consideration of the request<sup>11</sup>; or
- 318 (3) invite the parties or any of them to make written representations, within a specified period, as to whether the request should be granted<sup>12</sup>.

However, where a person with parental responsibility requests that he be joined, the court must grant his request<sup>13</sup>.

The court also has a general power to direct that a person who would not otherwise be a respondent under the rules<sup>14</sup> is to be joined as a party to the proceedings, or that a party to the proceedings is to cease to be a party<sup>15</sup>.

1 See the Family Proceedings Rules 1991, SI 1991/1247 (as amended); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (as amended); and paras 206-207 ante.

2 See eg the Family Proceedings Rules 1991, SI 1991/1247, r 2.7 (parties to matrimonial causes), r 2.12 (as amended) (filing of answer to petition), r 2.16 (allegation against third person in pleading), r 2.40 (as amended) (applications relating to children of the family: see the text and note 5 infra), r 2.54 (as amended) (application by parent, guardian etc for ancillary relief in respect of children), r 3.8 (as substituted and amended) (applications under the Family Law Act 1996 Pt IV (ss 30-63) (as amended) (family homes and domestic violence)), Family Proceedings Rules 1991, SI 1991/1247, r 3.9 (as substituted and amended) (hearing of applications under the Family Law Act 1996 Pt IV), Family Proceedings Rules 1991, SI 1991/1247, r 3.9A (as added and amended) (enforcement of orders made on applications under the Family Law Act 1996 Pt IV), Family Proceedings Rules 1991, SI 1991/1247, r 3.20 (applications for consent to marriage of a minor). As to participation in family proceedings under the Children Act 1989 see the text and notes 6-13 infra.

3 le under the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante), Pt II (ss 8-16A) (as amended) (see para 247 et seq post).

4 le under ibid s 10 (as amended): see para 247 post.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.40(1).

6 The relevant proceedings are specified by ibid r 4.1(2) (amended by SI 1991/2113, SI 2003/2839; SI 2005/2992).

7 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(3) (substituted by SI 1994/3155), Family Proceedings Rules 1991, SI 1991/1247, r 4.7(1) (amended by SI 1992/2067), Family Proceedings Rules 1991, SI 1991/1247, Appendix 3 (amended by SI 1991/2113; SI 1992/2067; SI 1994/2165; SI 2003/2839; SI 2005/2922). See *Re B (a child) (parentage: knowledge of proceedings)* [2003] EWCA Civ 1842, [2004] 1 FCR 473, sub nom *Re A B (care proceedings: service on husband ignorant of child's existence)* [2004] 1 FLR 527 (mother seeks to exclude father from knowledge of care proceedings).

8 See the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1)(b) (amended by SI 1994/3156; SI 2004/3376; SI 2005/617), Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(1), Sch 2 (amended by SI 1992/2068; SI 1994/2166; SI 2003/2840; SI 2005/2930).

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.7(2) (amended by SI 1994/3155); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(2). Form C2 is set out in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 (amended by SI 1994/3155; SI 1997/1893; SI 2003/2840; SI 2004/3375; SI 2005/412); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 1 (amended by SI 2003/2840; SI 2004/3376; SI 2005/413; SI 2005/2930).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(a) (amended by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(a) (amended by SI 2005/617; SI 2005/2930). The proper officer must inform the parties and any local authority that is preparing or has prepared a report under the Children Act 1989 s 14A(8) (as added) or s 14A(9) (as added) (see para 151 ante), and the person making the request of that decision: Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(a) (as so amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(a) (as so amended).

11 Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(b) (amended by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(b) (amended by SI 2005/617; SI 2005/2930). The proper officer must give notice of the date so fixed, together with a copy of the request: (1) in the case of a request to be joined as a party, to the applicant and any local authority that is preparing or has prepared a report under the Children Act 1989 s 14A(8) (as added) or s 14A(9) (as added) (see para 151 ante) and; (2) in the case of a request to cease to be a party, to the parties and any local authority that is preparing or has prepared a report under the Children Act 1989 s 14A(8) or s 14A(9) (as added) (see para 151 ante): Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(b) (as so amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(b) (as so amended).

12 Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(c); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(c). Upon expiry of the specified period the court must act in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(a) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(a) (as amended) (see the text and note 10 supra), or in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(b) (as amended) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(b) (as amended) (see the text and note 11 supra): Family Proceedings Rules 1991, SI 1991/1247, r 4.7(3)(c); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(3)(c).

13 Family Proceedings Rules 1991, SI 1991/1247, r 4.7(4); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(4). For the meaning of 'parental responsibility' see para 134 ante.

14 le the Family Proceedings Rules 1991, SI 1991/1247, r 4.7 (as amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7 (as amended): see the text and notes 7-13 supra.

15 Family Proceedings Rules 1991, SI 1991/1247, r 4.7(5); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(5). As to the factors to be considered on applications for joinder see para 249 post. See also *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA; *Re A (minors) (residence order)* [1992] Fam 182, sub nom *Re A and W (minors) (residence order: leave to apply)* [1992] 2 FLR 154, CA; *Re S (a minor) (independent representation)* [1993] Fam 263, [1993] 3 All ER 36, CA (applied in *Re H (a minor) (guardian ad litem: requirement)* [1994] Fam 11, [1994] 4 All ER 762, sub nom *Re H (a minor) (independent representation)* [1993] 2 FCR 437); *North Yorkshire County Council v G* [1994] 1 FCR 737, [1993] 2 FLR 732; *Re P (care proceedings: father's application to be joined as party)* [2001] 1 FLR 781; *Re W (a child) (care proceedings: leave to issue application)* [2004] EWHC 3342 (Fam), [2005] 2 FLR 468. As to the court's

discretion to discharge a father from care proceedings to which he automatically became a party under the Family Proceedings Rules 1991, SI 1991/1247, r 4.7 (as amended) see *Re W (discharge of party to proceedings)* [1997] 2 FCR 190, [1997] 1 FLR 128; *G v Kirklees Metropolitan Borough Council* [1993] 1 FCR 257, [1993] 1 FLR 805. For the position of interveners see *Re S (child case: intervener)* [1997] 2 FCR 272, sub nom *Re S (care: residence: intervener)* [1997] 1 FLR 497, CA; *Re B J (care: third party intervention)* [1999] Fam Law 613, CA; *Re H (care proceedings: intervener)* [2000] 2 FCR 53, [2000] 1 FLR 775, CA.

## UPDATE

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NOTE 6--SI 1991/1247 r 4.1(2) further amended: SI 2008/2861, SI 2009/636, SI 2009/2027.

NOTE 7--SI 1991/1247 Appendix 3 further amended: SI 2008/2861, SI 2009/636, 2027. See SI 1991/1247 rr 4.4(3A), 4.4A, 4.13B (added by SI 2008/2861).

NOTE 8--SI 1991/1395 Sch 2 further amended: SI 2009/637, SI 2009/2025. SI 1991/1395 Sch 2 modified: SI 2008/2859.

NOTE 9--SI 1991/1395 Sch 1 further amended: SI 2008/2858, SI 2009/637, SI 2009/2025. SI 1991/1395 Sch 1 modified: SI 2008/2859. SI 1991/1247 Appendix 1 further amended: SI 2009/2027.

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## **(v) Involvement of Children in Certain Proceedings**

### **225. The child as a party to family proceedings.**

A child may begin and prosecute any family proceedings only by his next friend, and defend any such proceedings only by his guardian ad litem<sup>1</sup>. No person's name may be used in any proceedings as a next friend unless he is the Official Solicitor or some other person whose consent has been filed, along with a statement by the child's solicitor that the person has no interest adverse to the child's and is a fit and proper person to act as next friend<sup>2</sup>. However, these provisions do not apply to specified proceedings<sup>3</sup>.

In respect of proceedings under the Children Act 1989 in the High Court or county court or under the inherent jurisdiction of the High Court in relation to children, where a person entitled to begin, prosecute or defend any proceedings is a child, he may begin, prosecute or defend as the case may be without a next friend or guardian ad litem (1) where he has obtained the leave of the court<sup>4</sup>; or (2) where a solicitor considers that the child is able, having regard to his understanding, to give instructions in relation to the proceedings, and has accepted instructions from the child to act for him in the proceedings, and, where the proceedings have begun, is so acting<sup>5</sup>. A child is entitled to apply for such leave from the court without a next friend or guardian ad litem by filing a written request for leave setting out the reasons for the application, or by making an oral request for leave at any hearing in the proceedings<sup>6</sup>. Where a child has a next friend or guardian ad litem in proceedings and the child wishes to prosecute or defend the remaining stages of the proceedings without a next friend or guardian ad litem, the child may apply to the court for leave for that purpose and for the removal of the next friend or guardian ad litem<sup>7</sup>.

Where a court is considering whether to grant leave<sup>8</sup> and remove the next friend or guardian ad litem it must grant the leave sought and, as the case may be, remove the next friend or guardian ad litem if it considers that the child concerned has sufficient understanding to participate as a party in the proceedings concerned or proposed without a next friend or guardian ad litem<sup>9</sup>. Possession of sufficient understanding does not, however, compel a child to act without a next friend or guardian ad litem<sup>10</sup>.

The court may revoke any leave granted where it considers that the child does not have sufficient understanding to participate as a party to the proceedings without a next friend or guardian ad litem<sup>11</sup>. Where a solicitor is acting for a child in proceedings which the child is prosecuting or defending without a next friend or guardian ad litem by virtue of head (2) above and either of the conditions specified in head (2) above ceases to be fulfilled, he must forthwith inform the court<sup>12</sup>. Where the court revokes leave<sup>13</sup> or either of the conditions in head (2) above is no longer fulfilled the court may, if it considers it necessary in order to protect the interests of the child concerned, order that some proper person be appointed his next friend or guardian ad litem<sup>14</sup>.

1 See the Family Proceedings Rules 1991, SI 1991/1247, rr 9.1(1), 9.2(1) (amended by SI 1992/456; SI 2007/2187). For the meaning of 'child' see para 3 ante.

2 See the Family Proceedings Rules 1991, SI 1991/1247, rr 9.1(1), 9.2(2), (7) (amended by SI 2007/2187).

3 Family Proceedings Rules 1991, SI 1991/1247, r 9.1(2) (amended by SI 1991/2113). The reference in the text to specified proceedings is to those within the meaning of the Children Act 1989 s 41(6): see para 311 note 3 post. As to the Official Solicitor see para 322 post. For the procedure where a petition, answer, originating application or originating summons has been served on a child see the Family Proceedings Rules 1991, SI 1991/1247, r 9.2(5). As to who may give a notice of intention to defend, or file an answer or affidavit on behalf of a child see r 9.2(6).

4 See *ibid* r 9.1(3) (added by SI 1992/456), Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(1)(a) (r 9.2A added by SI 1992/456).

5 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.1(3) (as added: see note 4 *supra*), Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(1)(b) (as added (see note 4 *supra*); amended by SI 2007/2187).

6 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(2) (as added (see note 4 *supra*); amended by SI 2007/2187). As to the court procedure on considering a written request for leave see the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(3), (7) (as so added). The test to be applied is a one stage test: does the child have sufficient understanding to participate in the proceedings as a party?: *Re N (contact: minor seeking leave to defend and removal of guardian ad litem)* [2003] 1 FLR 652. In making the decision the question of welfare is relevant but not paramount, *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, [2005] 2 FCR 354.

7 Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(4) (as added (see note 4 *supra*); amended by SI 2007/2187). The provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(2) (as added and amended) apply to such an application as if it were an application under r 9.2A(1)(a) (as added) (see the text and note 4 *supra*): r 9.2A(4) (as so added and amended). As to the court procedure on such a request for leave see r 9.2A(5), (7) (as so added).

8 *Ie* under *ibid* r 9.2A(1) (as added) (see the text and notes 4-5 *supra*) or under r 9.2A(4) (as added) (see the text and note 7 *supra*).

9 See *ibid* r 9.2A(6) (as added (see note 4 *supra*); amended by SI 2007/2187). In exercising its powers under the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(6) (as added and amended) the court may order the next friend or guardian ad litem to take such part in the proceedings as the court may direct: see r 9.2A(6A) (as so added; r 9.2A(6A) added by SI 1997/1893).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(11) (as added (see note 4 *supra*); amended by SI 2007/2187). See also *Re S (a minor) (independent representation)* [1993] Fam 263, [1993] 3 All ER 36, CA.

11 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(8) (as added (see note 4 *supra*); amended by SI 2007/2187).

12 See the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(9) (as added (see note 4 *supra*); amended by SI 2007/2187).

13 *Ie* under the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A(8) (as added and amended): see the text and note 11 *supra*.

14 *Ibid* r 9.2A(10) (as added (see note 4 *supra*); amended by SI 2007/2187).

## UPDATE

### 225 The child as a party to family proceedings

TEXT AND NOTE 4--SI 1991/1247 r 9.1(3) amended: SI 2008/2446.

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## **226. Attendance of child at certain proceedings.**

In any proceedings in which a court is hearing an application for an order relating to the care and supervision of a child<sup>1</sup>, or to the protection of children<sup>2</sup>, or is considering whether to make any such order, it may order the child concerned to attend such stage or stages of the proceedings as may be specified in the order<sup>3</sup>. Where such an order has not been complied with or the court has reasonable cause to believe that it will not be complied with, the court may make an order authorising a constable or such person as may be specified in the order to take charge of the child and bring him to court, and to enter and search any premises specified in the order if he has reasonable cause to believe that the child may be found on the premises<sup>4</sup>. The court may also order any person who is in a position to do so to bring the child to court<sup>5</sup>, and where the court has reason to believe that a person has information about the whereabouts of the child it may order him to disclose it to the court<sup>6</sup>.

1    Ie an order under the Children Act 1989 Pt IV (ss 31-42) (as amended): see para 271 et seq post. For the meaning of 'child' see para 3 ante.

2    Ie an order under ibid Pt V (ss 43-52) (as amended): see para 577 et seq post.

3    Ibid s 95(1). This power must be exercised in accordance with rules of court: s 95(2). As to rules of court see para 206 ante. Proceedings must take place in the absence of any party, including the child if the court considers it is in the interests of the child (having regard to the matters to be discussed and the evidence likely to be given) and the party is represented by a children's guardian or solicitor; and when considering the interests of the child the court must give the children's guardian, the solicitor for the child and, if he is of sufficient understanding, the child an opportunity to make representations: Family Proceedings Rules 1991, SI 1991/1247, r 4.16 (amended by SI 2001/821), Family Proceedings Courts (Children Act) Rules 1991, SI 1991/1395, r 16(2). It has been held that guardians should consider carefully whether it is appropriate for children to be present in High Court proceedings: *Re G (a minor) (appeal)* [1993] 1 FCR 810, sub nom *Re C (a minor: care: child's wishes)* [1993] 1 FLR 832. A court will only allow a child to attend if satisfied that it is in his interests: *Re W (secure accommodation order: attendance at court)* [1994] 3 FCR 248, [1994] 2 FLR 1092 (child's welfare prevails above all other considerations).

4    Children Act 1989 s 95(3), (4).

5    Ibid s 95(5).

6    Ibid s 95(6).

### **UPDATE**

## **226 Attendance of child at certain proceedings**

NOTE 3--SI 1991/1247 r 4.16 further amended: SI 2008/2861.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(1) IN GENERAL/(v) Involvement of Children in Certain Proceedings/227. Privacy for children in proceedings.

## **227. Privacy for children in proceedings.**

Rules<sup>1</sup> may provide for a magistrates' court to sit in private in proceedings in which any powers of the court under the Children Act 1989 or the Adoption and Children Act 2002 may be exercised with respect to a child<sup>2</sup>.

No person may publish<sup>3</sup> to the public at large or any section of the public any material<sup>4</sup> intended or likely to identify: (1) any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under the Children Act 1989 or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or (2) an address or school as being that of a child so involved<sup>5</sup>.

Anyone who contravenes this prohibition is guilty of an offence<sup>6</sup>. It is a defence for the accused to prove that he did not know and had no reason to suspect that the published material was intended or likely to identify the child<sup>7</sup>. However, the court or the Lord Chancellor (if the Lord Chief Justice agrees) may, if satisfied that the welfare of the child so requires it, dispense by order with these requirements<sup>8</sup> to such extent as may be specified<sup>9</sup>.

1 The rules made under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588). At the date at which this volume states the law, no rules had been made for the purposes of the Children Act 1989 s 97(1). As from a day to be appointed, references in s 97 to rules made under the Magistrates' Courts Act 1980 s 144 are repealed, and in s 97(1) are replaced by the words 'Family Procedure Rules' by the Courts Act 2003 s 109(1), Sch 8 para 337(1), (2). At the date at which this volume states the law no such day had been appointed.

2 Children Act 1989 s 97(1) (amended by the Adoption and Children Act 2002 s 101(3)). This is without prejudice to the generality of the rule-making power for proceedings in magistrates' courts in the Magistrates' Courts Act 1980 s 144 (as amended) (see para 207 ante), or to any other power of a magistrates' court to sit in private: Children Act 1989 s 97(7) (prospectively amended: see note 1 supra). The Magistrates' Courts Act 1980 s 69 (as amended) (sittings of magistrates' courts for family proceedings) and s 71 (as amended) (newspaper reports of certain proceedings) apply in relation to any proceedings before a magistrates' court to which the Children Act 1989 s 97 (as amended) applies, subject to the provisions of s 97 (as amended): s 97(8) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 24; and the Access to Justice Act 1999 s 72(b)). See MAGISTRATES. For the meaning of 'child' see para 3 ante.

3 'Publish' includes: (1) include in a programme service within the meaning of the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 352); or (2) cause to be published: Children Act 1989 s 97(5) (amended by the Broadcasting Act 1990 s 203(1), Sch 20 para 53). A children and family reporter does not publish material by reporting to the social services his concerns about a child's welfare: *Re M (a child) (children and family reporter: disclosure)* [2002] EWCA Civ 1199, [2003] Fam 26, [2002] 4 All ER 401. There is no objection in principle to disclosure of court documents to a public authority with a proper interest in the subject matter of the disclosure, such as the local government ombudsman or the police: *Re O (children) (hearing in private: assistance)* [2005] EWCA Civ 759, [2006] Fam 1, [2005] 2 FCR 563.

4 'Material' includes any picture or representation: Children Act 1989 s 97(5).

5 Ibid s 97(2) (amended by the Access to Justice Act 1999 s 72(a); the Adoption and Children Act 2002 s 101(3); and the Children Act 2004 s 62(1)). The Children Act 1989 s 97(2) (as amended) is compatible with the European Convention on Human Rights: *P v B W* [2003] EWHC 1541 (Fam), [2004] Fam 22, [2003] 3 FCR 523; affd *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] Fam 155, [2004] 2 FLR 823. No contempt of court is committed by the media interviewing a child who is known to be a ward of court, or the broadcasting of such an interview, provided there is no breach of the restraints imposed by the Administration of Justice Act 1960 s 12 (as amended) (see CONTEMPT OF COURT vol 9(1) (Reissue) para 431) and the Children Act 1989 s 97(2) (as amended): see *Kelly v BBC* [2001] Fam 59, [2001] 1 All ER 323, [2000] 3 FCR 509; *Re X (a child) (injunctions restraining publication)* [2001] 1 FCR 541. While the prohibition on publication contained in the Children Act



1989 s 97 (as amended) prevents identification of children involved in proceedings while those proceedings are continuing, such prohibition ends when the proceedings are concluded (although this does not preclude other measures being taken): *Clayton v Clayton* [2006] EWCA Civ 878, [2006] Fam 83, [2007] 1 All ER 1197. See also *Re L M (a child) (reporting restrictions: coroner's inquest)* [2007] EWHC 1902 (Fam), [2007] 3 FCR 44 (applying *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, [2005] 1 AC 593, [2004] 4 All ER 683; and *Local Authority v W* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1, sub nom *Re W (children) (identification: restriction on publication)* [2005] All ER (D) 206 (Jul)).

6 Children Act 1989 s 97(6). The offence is punishable on summary conviction by a fine not exceeding level 4 on the standard scale: s 97(6). As to the standard scale see para 132 note 2 ante.

7 Ibid s 97(3).

8 Ie the requirements of ibid s 97(2): see the text and note 5 supra.

9 Ibid s 97(4) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 208(1)-(3)). The welfare of the child is one of a non-exhaustive list of circumstances in which the discretion can be exercised: *Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, [2006] All ER (D) 32 (Nov). See also *Re K (child) (adoption: permission to advertise)* [2007] EWHC 544 (Fam), [2007] 2 FLR 326, [2007] Fam Law 681 (it was not open to a local authority to place an advertisement advertising a particular child as being available for adoption, or to apply to a court for permission to do so, until the authority had obtained the necessary recommendation from its adoption panel).

The Lord Chief Justice may nominate a judicial office holder to exercise his functions under the Children Act 1989 s 97(4) (as amended): s 97(9) (added by the Constitutional Reform Act 2005 Sch 4 paras 203, 208(1)-(3)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.

## UPDATE

### 227 Privacy for children in proceedings

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 5--See also *Practice Direction (family proceedings: media representatives)* [2009] 1 WLR 1111; *Practice Direction (family proceedings: media representatives: magistrates' courts)* [2009] 1 WLR 1115; *Practice Direction (family proceedings: media representatives: applications)* [2009] 1 WLR 1119.

NOTE 9--*Re K (child)*, cited, reported at [2007] 1 WLR 2531. *Norfolk*, cited, reported at [2008] 1 FCR 440.

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## (vi) Evidence

### 228. Evidence by or with respect to children.

Where a child<sup>1</sup> who is called as a witness in any civil proceedings<sup>2</sup> does not, in the opinion of the court, understand the nature of an oath, the child's evidence may be heard by the court if, in its opinion, he understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence being heard<sup>3</sup>.

The Lord Chancellor, with the concurrence of the Lord Chief Justice, may by order make provision for the admissibility of evidence which would otherwise be inadmissible as hearsay under any rule of law relating to hearsay<sup>4</sup>. Such an order may only be made with respect to:

- 319 (1) civil proceedings in general, or such civil proceedings or proceedings, or class of civil proceedings, as may be prescribed; and
- 320 (2) evidence in connection with the upbringing, maintenance or welfare of a child<sup>5</sup>.

Such an order may (a) in particular, provide for the admissibility of statements which are made orally or in a prescribed form<sup>6</sup> or which are recorded by any prescribed method of recording<sup>7</sup>; (b) make different provision for different purposes and in relation to different descriptions of court<sup>8</sup>; and (c) make such amendments and repeals in any enactment relating to evidence, other than in the Children Act 1989, as the Lord Chancellor considers necessary or expedient in consequence of the provision made by the order<sup>9</sup>.

Experts may be called to give evidence in the usual way on matters requiring expert analysis or opinion<sup>10</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For these purposes, 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties, and references to 'the court' are to be construed accordingly: Children Act 1989 s 96(7) (definition substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 16). As to evidence given by children in criminal proceedings see paras 1277-1281 post. As to the procedure in relation to video recordings of interviews with children in child abuse cases see *Re R (child abuse: video and expert evidence)* [1995] 2 FCR 573, [1995] 1 FLR 451; *Re N (a minor) (sexual abuse: video evidence)* [1996] 4 All ER 225, [1997] 1 WLR 153, CA; *Re B (allegation of sexual abuse: child's evidence)* [2006] EWCA Civ 773, [2006] 2 FCR 386, [2006] 2 FLR 1071.

3 Children Act 1989 s 96(1), (2). It is generally not desirable for children to be called as witnesses in family cases: *R v B County Council, ex p P* [1991] 2 All ER 65, [1991] 1 WLR 221, CA; *Re M (a child) (care proceedings: witness summons)* [2007] EWCA Civ 9, [2007] 1 FCR 253. As to a child's understanding of the oath see *R v Hayes* [1977] 2 All ER 288, [1977] 1 WLR 234, CA.

4 Children Act 1989 s 96(3) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 207). For the order made under this power see the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.

5 Children Act 1989 s 96(4). As to the civil proceedings which have been prescribed by order see the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, art 2. However, see *Re D (sexual abuse allegations: evidence of adult victim)* [2002] 1 FLR 723 (social worker's opinion evidence as to alleged victim's credibility should not have been accepted). Evidence is admissible, notwithstanding any rule of law relating to

hearsay, if given in connection with the upbringing, maintenance or education of a child: see *Re C (minors) (hearsay evidence: contempt proceedings)* [1993] 4 All ER 690, sub nom *C v C (contempt: evidence)* [1993] 1 FLR 220, CA.

6 For these purposes, 'prescribed' means prescribed by an order under the Children Act 1989 s 96(3) (see the text and note 4 supra): s 96(7).

7 Ibid s 96(5)(a).

8 Ibid s 96(5)(b). Section 96(5)(b) is expressed to be without prejudice to s 104(4) (see para 161 ante): s 96(6).

9 Ibid s 96(5)(c).

10 As to expert evidence see further CIVIL PROCEDURE vol 11 (2009) PARA 835 et seq. See *Re S (a child) (contact: expert evidence)* [2007] EWCA Civ 356, [2007] All ER (D) 369 (Mar) (expert should have been called to give oral evidence).

## UPDATE

### 228 Evidence by or with respect to children

NOTE 3--See also *SW v Portsmouth City Council; Re W (children) (concurrent care and criminal proceedings)* [2009] EWCA Civ 644, [2009] 3 FCR 1.

NOTE 10--See *Re S (expert evidence)* [2008] EWCA Civ 365, [2008] 2 FLR 1163, [2008] All ER (D) 51 (Mar), (allegations of father's sexual misconduct, not subject to criminal or family proceedings, excluded from expert's report in relation to care order); *Practice Direction (experts in family proceedings relating to children)* [2008] All ER (D) 18 (May) (use of expert evidence and instruction of experts in family proceedings relating to children).

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## **229. Self-incriminating evidence.**

In any proceedings in which a court is hearing an application for an order in relation to the care or supervision of a child<sup>1</sup>, or to the protection of a child<sup>2</sup>, no person is excused from giving evidence on any matter or answering any question put to him in the course of his giving such evidence on the ground that doing so might incriminate him or his spouse or civil partner of an offence<sup>3</sup>. However, a statement or admission made in such proceedings is not admissible in evidence against the person making it or his spouse or civil partner in proceedings for an offence other than perjury<sup>4</sup>.

1    Ie an order under the Children Act 1989 Pt IV (ss 31-42) (as amended): see para 271 et seq post. For the meaning of 'child' see para 3 ante.

2    Ie an order under ibid Pt V (ss 43-52) (as amended): see para 577 et seq post.

3    Ibid s 98(1) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 132). Refusal to give evidence without lawful excuse amounts to contempt of court: see CONTEMPT OF COURT vol 9(1) (Reissue) para 407. As to confidentiality in care proceedings see also *Oxfordshire County Council v P* [1995] Fam 161, [1995] 2 All ER 225; *Cleveland County Council v F* [1995] 2 All ER 236, [1995] 1 WLR 785; *Re T (disclosure)* [1995] Fam Law 603; *Re A (care proceedings: disclosure of information)* [1996] 1 FCR 533, [1996] 1 FLR 221, CA; *Re G (a minor) (social worker: disclosure)* [1996] 2 All ER 65, [1996] 1 WLR 1407, CA; *Re L (care proceedings: disclosure to third party)* [2000] 1 FLR 913, [2000] Fam Law 397; *A Health Authority v X* [2001] EWCA Civ 2014, [2002] 2 All ER 780, [2002] 2 FCR 357, [2002] 1 FLR 1045.

4    Children Act 1989 s 98(2) (amended by the Civil Partnership Act 2004 Sch 27 para 132). A statement or admission may include a written statement of evidence filed in the proceedings, a statement made to the children's guardian or a statement made to an expert witness undertaking an assessment: see *Oxfordshire County Council v P* [1995] Fam 161, [1995] 2 All ER 225; *A B (care proceedings: disclosure of medical evidence to police)* [2002] EWHC 2198 (Fam), [2003] 1 FLR 579.

The court may order disclosure of documents to the police: see *Re C (a minor) (care proceedings: disclosure)* [1997] Fam 76, sub nom *Re E C (disclosure of material)* [1996] 2 FLR 725, CA; *Re M (disclosure: police investigation)* [2002] 1 FCR 655, [2001] 2 FLR 1316 (no disclosure ordered of letter containing mother's admissions of responsibility for child's injuries). See also *A Borough Council v A (Chief Constable of Thames Valley Police intervening)* [2006] EWHC 1465 (Fam), [2007] 1 All ER 293, [2007] 1 FCR 105.

## **UPDATE**

### **229 Self-incriminating evidence**

NOTE 4--See *Re X (children) (disclosure for purposes of criminal proceedings)* [2008] EWHC 242 (Fam), [2008] 3 All ER 958.

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## **(2) THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE**

### **(i) Introduction**

#### **230. CAFCASS: a unified advisory and support service for family courts.**

The Children and Family Court Advisory and Support Service ('CAFCASS') is a non-departmental public body, and was set up under the Criminal Justice and Court Services Act 2000<sup>1</sup> to incorporate the work of the family court welfare services, the guardian ad litem and reporting officer service and the children's work of the Official Solicitor's Department<sup>2</sup>.

Consequently, various changes were made to the terminology used in the legislation. The family proceedings rules<sup>3</sup> were revised to make the necessary amendments arising from the establishment of CAFCASS and to clarify the powers and duties of officers of the Service when appointed in any family or related proceedings<sup>4</sup>. The Official Solicitor still retains certain functions<sup>5</sup>. 'Officer of the Service'<sup>6</sup> is the collective term used by the Criminal Justice and Court Services Act 2000 in place of the terms 'guardian ad litem', 'reporting officer' and 'court welfare officer'<sup>7</sup>. Under the revised family proceedings rules and the adoption rules<sup>8</sup>, guardians ad litem have become 'children's guardians'<sup>9</sup> in respect of care and secure accommodation order proceedings and adoption and placement order proceedings<sup>10</sup>. Guardians ad litem under the Human Fertilisation and Embryology Act 1990 were re-named 'parental order reporters'<sup>11</sup>. However, the term 'reporting officer' in adoption proceedings remains unchanged<sup>12</sup>. 'Welfare officers' were renamed 'children and family reporters'<sup>13</sup> except where they are local authority officers reporting under the Children Act 1989<sup>14</sup>.

On 1 April 2005 CAFCASS functions in Wales were transferred to a division of the National Assembly for Wales known as CAFCASS CYMRU<sup>15</sup>. CAFCASS is now only responsible for proceedings in England; the Welsh Ministers and Welsh family proceedings officers are responsible for proceedings in Wales<sup>16</sup>. In respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question, it is a function of the Welsh Ministers to: (1) safeguard and promote the welfare of the children; (2) give advice to any court about any application made to it in such proceedings; (3) make provision for the children to be represented in such proceedings; (4) provide information, advice and other support for the children and their families<sup>17</sup>. They must also make provision for the performance of the functions conferred on Welsh family proceedings officers by virtue of any enactment (whether or not they are exercisable for the purposes heads (1) to (4) above<sup>18</sup>. The Welsh Ministers and CAFCASS may provide any information to each other for the purposes of their respective functions<sup>19</sup>. Similarly, a Welsh family proceedings officer and an officer of the Service may provide any information to each other for the purposes of their respective functions<sup>20</sup>.

1 It was set up on 1 April 2001 under the Criminal Justice and Court Services Act 2000 s 11 (see para 233 post): see the Criminal Justice and Court Services Act 2000 (Commencement No 4) Order 2001, SI 2001/919, art 2. The Criminal Justice and Court Services Act 2000 ss 19-22 came into force on 30 November 2000: see s 80(3). The Children and Family Court Advisory and Support Service is referred to in the Criminal Justice and Court Services Act 2000 as 'the Service' (see para 233 post) but is commonly known as 'CAFCASS'.

2 See *ibid* ss 11-16, Sch 2 (as amended); and para 231 *et seq post*. As to the transfer of property and staff of CAFCASS see paras 245-246 *post*.

3 *Ie* the Family Proceedings Rules 1991, SI 1991/1247 (as amended); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (as amended).

4 See the Family Proceedings (Amendment) Rules 2001, SI 2001/821; the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818.

5 As to the allocation of children's work currently handled by the Official Solicitor see para 322 *post*.

6 References in the Criminal Justice and Court Services Act 2000 or any other enactment to an 'officer of the Service' are references to: (1) any member of the staff of CAFCASS appointed under Sch 2 para 5(1)(a) (see para 236 *post*); and (2) any other individual exercising functions of an officer of the Service by virtue of s 13(2) or s 13(4) (see para 241 *post*): s 11(3); Children Act 1989 s 105(1) (definition added by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 95); Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (definition added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2) (definition added by SI 2001/818).

7 See the consequential amendments made by the Criminal Justice and Court Services Act 2000 s 74, Sch 7.

8 *Ie* the Family Procedure (Adoption) Rules 2005, SI 2005/2795.

9 'Children's guardian' means an officer of the Service or a Welsh family proceedings officer appointed under the Children Act 1989 s 41 (as amended) for the child with respect to whom the proceedings are brought, but does not include such an officer appointed in relation to proceedings specified by the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21A (as added and amended) (see para 106 *ante*): r 1(2) (definition added by SI 2001/818; and amended by SI 2005/585). 'Welsh family proceedings officer' means (1) any member of the staff of the Welsh Assembly appointed to exercise the functions of a Welsh family proceedings officer; and (2) any other individual exercising functions of a Welsh family proceedings officer by virtue of the Children Act 2004 s 36(2) or s 36(4): s 35(4); definition applied by the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2) (definition added by SI 2005/585).

10 See the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 16; the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818, r 4. As to care orders see para 270 *et seq post*. As to secure accommodation orders see para 1037 *et seq post*. As to adoption orders see para 359 *et seq post*. As to placement orders see para 331 *et seq post*.

11 See the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 27; the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818, r 13. As to proceedings under the Human Fertilisation and Embryology Act 1990 see para 101 *et seq ante*.

12 'Reporting officer' means an officer of the Service or a Welsh family proceedings officer appointed to witness the documents which signify a parent or guardian's consent to the placing of the child for adoption or to the making of an adoption order or an order giving parental responsibility prior to placement abroad under the Adoption and Children Act 2002 s 84 (see para 502 *post*): Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 6(1).

13 'Children and family reporter' means an officer of the Service or a Welsh family proceedings officer who has been asked to prepare a welfare report under the Children Act 1989 s 7(1)(a) (as amended) (see para 311 *post*): Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2) (definition added by SI 2001/818; and amended by SI 2005/585).

14 See the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 16; the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818, r 4. The reference in the text to local authority officers reporting under the Children Act 1989 is to them reporting under s 7 (as amended): see para 311 *post*. As to welfare officers and children and family reporters see paras 317-318 *post*.

15 See the Children Act 2004 s 35; Children Act 2004 (Commencement No 2) Order 2005, SI 2005/700, art 2(2). See para 231 note 9 *post*. As to the National Assembly for Wales and the Welsh Ministers see para 155 *ante*.

16 See the text and notes 17-20 *infra*.

17 Children Act 2004 s 35(1), (3).

18 *Ibid* s 35(2).

19 Ibid s 41(1). As to the functions of the Welsh Ministers and CAFCASS see para 239 post.

20 Ibid s 41(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/3. FAMILY PROCEEDINGS/(2) THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE/(i) Introduction/231. Children as parties to proceedings.

### **231. Children as parties to proceedings.**

The proper conduct and disposal of proceedings concerning a child which are not specified proceedings<sup>1</sup> may require the child to be made a party<sup>2</sup>. The Family Proceedings Rules 1991<sup>3</sup> provide for the appointment of a guardian ad litem (a guardian) for a child party unless the child is of sufficient understanding and can participate as a party in the proceedings as a party without a guardian<sup>4</sup>. Making the child a party is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur only in a minority of cases<sup>5</sup>. The decision to make the child a party will be exclusively that of the judge, made in the light of the facts and circumstances of the case<sup>6</sup>. In cases proceeding in a county court, the court may, at the same time as deciding whether to join a child as a party, consider whether the nature of the case or the complexity or importance of the issues require transfer of the case to the High Court<sup>7</sup>.

Where the court has decided to appoint a guardian, the court should endeavour to send the order on the day of the hearing<sup>8</sup>. In cases proceeding in the county court, the order making the appointment should be sent to the CAFCASS or CAFCASS CYMRU<sup>9</sup> office responsible for private law cases in the area in which the child is currently living<sup>10</sup>.

In private law cases proceeding in the High Court where a guardian is appointed, the case will be referred either to the CAFCASS High Court Team<sup>11</sup> (where the child is resident in England), the Assembly lawyers<sup>12</sup> (where the child is resident in Wales) or to the relevant local CAFCASS office<sup>13</sup>. In proceedings brought under the Child Abduction and Custody Act 1985<sup>14</sup> referrals should be made to the CAFCASS team based at the Principal Registry (where the child is usually resident in England) and to the relevant regional office of CAFCASS CYMRU (where the child is usually resident in Wales)<sup>15</sup>. CAFCASS Legal<sup>16</sup> or Assembly lawyers may be invited to act or instruct counsel as advocate to the court in family proceedings in which the welfare of children is or may be in question<sup>17</sup>.

1 As to the specified proceedings see the Children Act 1989 s 41 (as amended); and para 311 note 4 post.

2 *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 1.

3 *le the Family Proceedings Rules 1991*, SI 1991/1247, r 9.5 (amended by SI 2001/821; SI 2005/2922).

4 *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 1. A guardian need not be appointed if the child is of sufficient understanding and can participate as a party to the proceedings without a guardian, as permitted by the Family Proceedings Rules 1991, SI 1991/1247, r 9.2A (as added): see para 225 ante.

5 *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 2. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of CAFCASS (see para 230 ante) to carry out further work or by making a referral to social services or possibly, by obtaining expert evidence: *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 2. Separate representation of the child may result in delay. When deciding whether to direct that a child be made a party, the court must take into account the risk of delay or other factors adverse to the welfare of the child. The court's primary consideration will be the best interests of the child: *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 4.



6 *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3. By way of guidance, the following circumstances may justify making an order:

- 166 (1) where a CAFCASS officer has notified the court that in his opinion the child should be made a party (see the Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(6) (as added) (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.1);
- 167 (2) where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.2);
- 168 (3) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.3). It is highly desirable for a guardian ad litem to be appointed in private family law proceedings where there is a conflict of interest between the parents and the child: *Re A (a child) (separate representation in contact proceedings)* [2001] 2 FCR 55, sub nom *Re A (contact: separate representation)* [2001] 1 FLR 715, CA;
- 169 (4) where the views and wishes of the child cannot be adequately met by a report to the court (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.4);
- 170 (5) where an older child is opposing a course of action (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.5);
- 171 (6) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.6);
- 172 (7) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.7);
- 173 (8) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are other allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.8);
- 174 (9) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.9);
- 175 (10) where there is a contested issue about blood testing (*President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 3.10).

7 *President's Direction (Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, rule 9.5)* [2004] 1 FLR 1188 para 6.

8 *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 4. The order should simply state that: '[name of child] is made party to the proceedings and pursuant to the Family Proceedings Rules 1991, SI 1991/1247, r 9.5 an officer of CAFCASS/a Welsh family proceedings officer be appointed as his/her guardian': *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 3. The decision about which particular officer to allocate is a matter for CAFCASS or CAFCASS CYMRU (see note 9 infra) as appropriate. However, it is helpful if the court records whether there is any reason why and officer who has dealt with the matter so far should not continue to deal with it in the role of guardian: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 5.

9 The Children and Family Court Advisory and Support Service ('CAFCASS'). 'CAFCASS CYMRU' refers to the division of the National Assembly for Wales to whom the functions of the Assembly under the Children Act 2004 Pt 4 (ss 35-43) (as amended) have been delegated: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 2; and see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

10 *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 6. For county court cases proceeding in the Principal Registry, the order and the court file should be sent to the CAFCASS office and the Principal Registry for referral to the relevant local office or directly to CAFCASS CYMRU: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 6.

11 'The CAFCASS High Court Team' refers to the team of CAFCASS practitioners known by that name at the offices of the High Court team, London: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 paras 2, 8, 11. The CAFCASS High Court Team does not undertake work proceeding in the county court: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 7. If the officer appointed as guardian is a member of the CAFCASS High Court Team there may be no need for a solicitor for the child also to be appointed as the litigation may be conducted in house pursuant to the Criminal Justice and Court Services Act 2000 s 15: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 15.

12 'The Assembly Lawyers' refers to lawyers employed by the National Assembly for Wales to provide legal advice, support and representation to Welsh family proceedings officers; *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 2.

13 *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 8. The following categories of case should be referred to the CAFCASS High Court Team or Assembly lawyers as appropriate:

- 176 (1) reporting restriction orders arising in a children's case (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.1);
- 177 (2) exceptionally complex adoption cases including exceptionally complex cases involving inter-country adoption (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.2);
- 178 (3) all medical treatment cases where the child is old enough to have views which need to be taken into account, or where there are particularly difficult ethical issues such as the withdrawal of treatment, unless the issue arises in existing proceedings already being handled locally when the preferred arrangement will usually be for the matter to continue to be dealt with locally but with additional advice provided by CAFCASS Legal or Assembly lawyers if necessary (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.3);
- 179 (4) any free-standing human rights applications pursuant to the Human Rights Act 1998 s 7(1) (a) (see JUDICIAL REVIEW vol 61 (2010) PARA 650) in which it is thought that it may be possible and appropriate for any part to be played by CAFCASS or CAFCASS CYMRU or its officers (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.4);
- 180 (5) exceptionally complex international cases particularly where there is a dispute as to which country's courts should have jurisdiction over the child's affairs (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.5);
- 181 (6) applications in wardship and applications made under the court's inherent jurisdiction (*CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 10.6).

If CAFCASS feels unable to represent a child, it is appropriate to consider whether it is necessary for him to be represented by a local guardian and a local solicitor: *Re W (contact proceedings: joinder of child)* [2001] EWCA Civ 1830, [2003] 2 FCR 175.

14 See para 799 et seq post.

15 *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 9.

16 'CAFCASS Legal' refers to the CAFCASS in-house lawyers: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 2. CAFCASS Legal operate a duty system so that they can be contacted any day of the year by the High Court out of hours duty judge if their help is needed, for instance in relation to a medical treatment emergency: see *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 18. Guidance as to practice in urgent and out-of-hours applications in medical treatment and welfare cases is set out in *Practice Note (Official Solicitor, CAFCASS and the National Assembly for Wales: Urgent and Out of Hours Cases in the Family Division of the High Court)* [2006] 2 FLR 354.

17 *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 16. CAFCASS Legal and Assembly lawyers are available to offer advice to judges and other professionals engaged in family proceedings in which the welfare of children is or may be in question without necessarily being appointed as advocate to the court: *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings)* [2006] 2 FLR 143 para 17.

## UPDATE

### 231 Children as parties to proceedings

TEXT AND NOTES--An order made in the county court joining a child as a party in private law Children Act proceedings and directing the appointment of a guardian under SI 1991/1247 r 9.5 may be made by any appropriately nominated judge or district judge: see *President's Guidance (appointment of guardians in accordance with r 9.5: President's Guidance dated 25 February 2005: revocation)* [2008] 2 FCR 184.

NOTE 6--See *Re C (children) (abduction: separate representation of children)* [2008] EWHC 517 (Fam), [2009] 1 FCR 194 (father sought return of four children under age of 16 under Hague Convention and 16-year old child under court's inherent jurisdiction; older child's case separate representation would be extended to his siblings because their cases so interrelated).

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### 232. The role of the Official Solicitor in children's proceedings.

The Official Solicitor no longer represents children who are the subject of family proceedings (other than in very exceptional circumstances and after liaison with the Children and Family Court Advisory and Support Service ('CAFCASS'))<sup>1</sup>. The Official Solicitor will, in the absence of any other willing and suitable person, act as next friend or guardian ad litem of a child party whose welfare is not the subject of family proceedings<sup>2</sup>. The most common examples will be:

- 321 (1) a child<sup>3</sup> who is also the parent of a child, and who is a respondent to a Children Act 1989 or an adoption application<sup>4</sup>;
- 322 (2) a child who wishes to make an application for an order under the Children Act 1989 naming another child (typically a contact order naming a sibling)<sup>5</sup>;
- 323 (3) a child witness to some disputed factual issue in a children case and who may require intervener status<sup>6</sup>;
- 324 (4) a child party to a petition for a declaration of status under Part III of the Family Law Act 1986<sup>7</sup>;
- 325 (5) a child intervener in divorce or ancillary relief proceedings<sup>8</sup>;
- 326 (6) a child applicant for, or respondent to, an application for an order under Part IV of the Family Law Act 1996<sup>9</sup>.

Officers of CAFCASS will not be able to represent anyone over the age of 18 and the Official Solicitor may therefore be the more appropriate next friend or guardian ad litem of a child who is also a patient and whose disability will persist beyond his or her eighteenth birthday, especially in non-emergency cases where the substantive hearing is unlikely to take place before the child's eighteenth birthday<sup>10</sup>. The Official Solicitor may also be the more appropriate next friend or guardian ad litem in medical treatment cases such as sterilisation or vegetative state cases, in which his staff have particular expertise deriving from their continuing role for adult patients<sup>11</sup>.

The Official Solicitor may be invited to act or instruct counsel as a friend of the court if it appears to the court that such an invitation is more appropriately addressed to him rather than (or in addition to) CAFCASS Legal<sup>12</sup>.

In cases of doubt or difficulty, staff of the Official Solicitor's office will liaise with staff of CAFCASS Legal to avoid duplication and ensure the most suitable arrangements are made<sup>13</sup>.

<sup>1</sup> This change took effect from 1 April 2001: see *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 2. As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. Since there are no provisions for parties under disability in the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1365, the Official Solicitor can only act in the High Court or county court, pursuant to the Family Proceedings Rules 1991, SI 1991/1247, Pt IX (rr 9.1-9.5) (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) para 703); *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 3. The Official Solicitor will continue to act as next friend or guardian ad litem of an adult party under disability, 'a patient', in the absence of any other willing and suitable person: *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 4; Family Proceedings Rules 1991, SI 1991/1247, r 9.2; and MENTAL HEALTH vol 30(2) (Reissue) para 703.

2 See *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5; and the Family Proceedings Rules 1991, SI 1991/1247, r 2.57 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 510), r 9.2 (see para 225 ante), r 9.5 (as amended) (see para 231 ante).

3 For the meaning of 'child' see para 3 ante.

4 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(a). If a child respondent is already represented by a CAFCASS officer in pending proceedings of which he or she is the subject, then the Official Solicitor will liaise with CAFCASS to agree the most appropriate arrangements: *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(a). As to adoption see para 323 et seq post.

5 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(b). The Official Solicitor will need to satisfy himself that the proposed proceedings would benefit the child applicant before proceeding: *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(b).

6 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(c). In such circumstances the need for party status and legal representation should be weighed in the light of *Re H (care proceedings: intervenor)* [2000] 2 FCR 53, [2000] 1 FLR 775, CA: see *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(c).

7 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(d). The reference in the text to declarations of status is a reference to those made under the Family Law Act 1986 Pt III (ss 55-62) (as amended): see para 121 et seq ante.

8 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(e); the Family proceedings Rules 1991, SI 1991/1247, rr 2.57, 9.5; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 510.

9 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(f). The reference in the text to an application under the Family Law Act 1996 is to one under Pt IV (ss 30-63) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq. In the case of a child applicant, the Official Solicitor will need to satisfy himself that the proposed proceedings would benefit the child before pursuing them, with leave under the Family Law Act 1996 s 43 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 289; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 717) if required: *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 5(f).

10 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 7.

11 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 7.

12 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 8. As to CAFCASS Legal see para 231 note 16 ante.

13 *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 9. As to applications to the Official Solicitor by solicitors who have been consulted by a child see *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 10. As to invitations by the court to the Official Solicitor to act in pending proceedings see *The Official Solicitor: Appointment in Family Proceedings Practice Note* [2001] 2 FLR 155 para 11. As to the Official Solicitor's continuing responsibility for the Lord Chancellor's International Child Abduction and Contact Unit (ICACU) see para 803 post.

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## **(ii) Establishment, Constitution and Functions**

### **233. Constitution of CAFCASS.**

The body corporate known as the Children and Family Court Advisory and Support Service ('CAFCASS') exercises the functions conferred on it by virtue of<sup>1</sup> the Criminal Justice and Court Services Act 2000 and any other enactment<sup>2</sup>.

CAFCASS consists of a chairman, and not less than nine other members, appointed by the Secretary of State<sup>3</sup>. CAFCASS is not to be regarded as the servant or agent of the Crown, or as enjoying any status, privilege or immunity of the Crown; and its property is not to be regarded as property of, or property held on behalf of, the Crown<sup>4</sup>. Regulations<sup>5</sup> may provide: (1) for the appointment of the chairman and other members and for the co-option by CAFCASS for particular purposes of additional members (including the number, or limits on the number, of persons who may be appointed or co-opted and any conditions to be fulfilled for appointment or co-option)<sup>6</sup>; (2) for the tenure of office of the chairman and other members and any co-opted members (including the circumstances in which they cease to hold office or may be removed or suspended from office)<sup>7</sup>.

CAFCASS may arrange for the chairman or any other member to discharge functions of CAFCASS on its behalf<sup>8</sup>.

1 'By virtue of' includes 'by' or 'under': Criminal Justice and Court Services Act 2000 s 25.

2 Ibid s 11(1). As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

3 Ibid s 11(2), Sch 2 para 1 (amended by the Children Act 2004 s 40, Sch 3 paras 12, 14; and the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4). As to the Secretary of State see para 155 ante.

4 Criminal Justice and Court Services Act 2000 Sch 2 para 16.

5 'Regulations' means, in the case of regulations made under ibid s 15, regulations made by the Lord Chancellor, and in any other case, regulations made by the Secretary of State: ibid s 25 (definition amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, art 6, Schedule para 4).

6 Criminal Justice and Court Services Act 2000 Sch 2 para 2(1)(a). The Children and Family Court Advisory and Support Service (Membership, Committee and Procedure) Regulations 2005, SI 2005/433, make provision as to: (1) the appointment of the chairman and members of CAFCASS (see reg 4); (2) eligibility for membership (see reg 6); (3) co-opted members (see reg 5); and (4) the position of deputy chairman (see reg 7).

7 Criminal Justice and Court Services Act 2000 Sch 2 para 2(1)(b). The Children and Family Court Advisory and Support Service (Membership, Committee and Procedure) Regulations 2005, SI 2005/433, make provision as to: (1) members' tenure of office (see reg 8); (2) resignation of office (see reg 9); and (3) removal from office by the Secretary of State (see regs 10, 11, 12). References in the Criminal Justice and Court Services Act 2000 Sch 2 to members of the Service (ie the Children and Family Court Advisory and Support Service) do not include co-opted members: Sch 2 para 2(2).

8 Ibid Sch 2 para 7.

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#### **234. Remuneration of members and payments to CAFCASS.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> may pay, or make provision for paying, to or in respect of any person who is or has been the chairman or another member: (1) any remuneration, fees or expenses; (2) any pension, allowance or gratuity, determined by the Secretary of State<sup>2</sup>. CAFCASS may, to any extent determined by the Secretary of State, reimburse any co-opted members for any expenses or loss of earnings<sup>3</sup>.

Where a person ceases to be chairman or another member of CAFCASS otherwise than on the expiry of his term of office and it appears to the Secretary of State that there are circumstances which make it right for that person to receive compensation, CAFCASS may pay that person an amount determined by the Secretary of State<sup>4</sup>.

The Secretary of State may, at any time, pay to CAFCASS any amount he considers appropriate<sup>5</sup>, and if he considers it appropriate, he may make any payment on conditions<sup>6</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

2 Criminal Justice and Court Services Act 2000 s 11(2), Sch 2 para 3(1) (para 3 amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4). As to the Secretary of State see para 155 ante.

3 Criminal Justice and Court Services Act 2000 Sch 2 para 3(2) (as amended: see note 2 supra).

4 Ibid Sch 2 para 3(3) (as amended: see note 2 supra).

5 Ibid Sch 2 para 8(1) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4).

6 Criminal Justice and Court Services Act 2000 Sch 2 para 8(2).

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### **235. Procedure and directions.**

Regulations<sup>1</sup> may provide for:

- 327 (1) the establishment and functions of committees (including committees which include persons who are not the chairman or another member of the Children and Family Court Advisory and Support Service ('CAFCASS'))<sup>2</sup>;
- 328 (2) the procedure of CAFCASS and of any of its committees (including quorum and the validation of proceedings in the event of vacancies or defects in appointment)<sup>3</sup>.

Different directions may be given for different purposes<sup>4</sup>. Such directions may be either general or special<sup>5</sup>.

1 For the meaning of 'regulations' see para 233 note 5 ante. As to the regulations made see note 3 infra.

2 Criminal Justice and Court Services Act 2000 s 11(2), Sch 2 reg 4(a). As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

3 Ibid Sch 2 para 4(b). The Children and Family Court Advisory and Support Service (Membership, Committee and Procedure) Regulations 2005, SI 2005/433, make provision as to the frequency of meetings (see reg 13), the chairing of meetings (see reg 15), quorum and voting (see regs 14, 16), restrictions on participation and declaration of members' interests (see regs 17-19), the validity of proceedings (see reg 20), minutes of meetings (see reg 21), admission of the public to certain meetings (see reg 22), the attendance of the Secretary of State's representative at meetings (see reg 23), the attendance of the chief executive (see reg 24), and the composition, functions and procedure of the audit committee (see regs 25-30).

4 Criminal Justice and Court Services Act 2000 Sch 2 para 11(1).

5 Ibid Sch 2 para 11(2).



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### **236. Staff and other officers.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> may appoint: (1) staff to perform the functions of officers of the Service<sup>2</sup>; and (2) other staff<sup>3</sup>. Regulations<sup>4</sup> may make provision as to the qualifications, experience or training to be required of officers of the Service (whether or not appointed under head (1) above)<sup>5</sup>. One of the staff appointed under head (2) above is the chief executive<sup>6</sup>. CAFCASS must not appoint a person as chief executive, or as a member of the staff of a description specified in a direction given by the Secretary of State, without the approval of the Secretary of State<sup>7</sup>.

Staff of CAFCASS are to be appointed on terms and conditions determined by CAFCASS as to: (a) any remuneration, fees or expenses<sup>8</sup>; and (b) any pension, allowance or gratuity<sup>9</sup>. It is for CAFCASS to determine the terms and conditions of any arrangements under which individuals perform the functions of officers of the Service<sup>10</sup>. However, such a determination requires the approval of the Secretary of State<sup>11</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

2 Criminal Justice and Court Services Act 2000 s 11(2), Sch 2 para 5(1)(a). For the meaning of 'officer of the Service' see para 230 ante.

3 Ibid Sch 2 para 5(1)(b).

4 For the meaning of 'regulations' see para 233 note 5 ante.

5 Criminal Justice and Court Services Act 2000 Sch 2 para 5(2).

6 Ibid Sch 2 para 5(3).

7 Ibid Sch 2 para 5(4) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4). As to the Secretary of State see para 155 ante.

8 Criminal Justice and Court Services Act 2000 Sch 2 para 6(1)(a).

9 Ibid Sch 2 para 6(1)(b).

10 Ibid Sch 2 para 6(2). The reference in the text to any arrangements under which individuals perform the functions of officers of the Service is to those under s 13(4): see para 241 post.

11 Ibid Sch 2 para 6(3) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4).

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### **237. Supervision and complaints.**

Functions and other powers of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup>, and functions of any officer of the Service<sup>2</sup>, must be performed in accordance with any directions given by the Secretary of State<sup>3</sup>. In particular, the directions may make provision for the purpose of ensuring that the services provided are of appropriate quality and meet appropriate standards<sup>4</sup>. CAFCASS must provide the Secretary of State with any information relating to the performance of its functions which he may from time to time require<sup>5</sup>.

CAFCASS must make and publicise a scheme for dealing with complaints made by or on behalf of prescribed<sup>6</sup> persons in relation to the performance by CAFCASS and its officers of their functions<sup>7</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

2 For the meaning of 'officer of the Service' see para 230 ante.

3 Criminal Justice and Court Services Act 2000 s 11(2), Sch 2 para 9(1) (para 9 amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4). As to the Secretary of State see para 155 ante.

4 Criminal Justice and Court Services Act 2000 Sch 2 para 9(2).

5 Ibid Sch 2 para 9(3) (as amended: see note 3 supra).

6 'Prescribed' means prescribed by regulations: *ibid* s 25. At the date at which this volume states the law no such regulations had been made.

7 Ibid Sch 2 para 15.

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### **238. Reports and accounts.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> must make a report to the Secretary of State<sup>2</sup> in respect of each financial year on the performance of its functions<sup>3</sup>. The Secretary of State may give directions as to the information to be given in the report and the form in which it is to be given, and the time by which the report is to be given<sup>4</sup>. The Secretary of State must lay a copy of the report before each House of Parliament, and arrange for the report to be published in a manner he considers appropriate<sup>5</sup>.

CAFCASS must: (1) keep proper accounts and proper records in relation to the accounts<sup>6</sup>; (2) prepare in respect of each financial year<sup>7</sup> of CAFCASS a statement of accounts<sup>8</sup>; and (3) send copies of the statement to the Secretary of State and to the Comptroller and Auditor General before the end of the month of August next following the financial year to which the statement relates<sup>9</sup>. The statement of accounts must comply with any directions given by the Secretary of State as to: (a) the information to be contained in it; (b) the manner in which the information contained in it is to be presented; (c) the methods and principles according to which the statement is to be prepared, and must contain any additional information the Secretary of State may require to be provided for the information of Parliament<sup>10</sup>.

CAFCASS must, in accordance with directions given by the Secretary of State appoint an auditor who is not a member of staff of CAFCASS, and ensure that the auditor makes a report to the Secretary of State about the preparation of the accounts and about the statement of accounts<sup>11</sup>. The Comptroller and Auditor General must examine, certify and report on the statement of accounts and must lay copies of the statement and of his report before each House of Parliament<sup>12</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

2 As to the Secretary of State see para 155 ante.

3 Criminal Justice and Court Services Act 2000 Sch 2 para 12(1) (paras 12, 13 amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4).

4 Criminal Justice and Court Services Act 2000 Sch 2 para 12(2) (as amended: see note 3 supra).

5 Ibid Sch 2 para 12(3) (as amended: see note 3 supra).

6 Ibid Sch 2 para 13(1)(a).

7 For the purposes of ibid Sch 2 (as amended), 'financial year' means the period beginning with the date on which the Service is established and ending with the next following 31 March, and each successive period of 12 months: Sch 2 para 14.

8 Ibid Sch 2 para 13(1)(b).

9 Ibid Sch 2 para 13(1)(c) (as amended: see note 3 supra). As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726.

10 Ibid Sch 2 para 13(2) (as amended: see note 3 supra).

11 Ibid Sch 2 para 13(3) (as amended: see note 3 supra).

12 Ibid Sch 2 para 13(4) (as amended: see note 3 supra).

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### **239. Functions relating to family proceedings.**

In respect of family proceedings<sup>1</sup> in which the welfare of children<sup>2</sup> is or may be in question, it is a function of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>3</sup> or, as the case may be, CAFCASS CYMRU<sup>4</sup>, to:

- 329 (1) safeguard and promote the welfare of the children<sup>5</sup>;
- 330 (2) give advice to any court about any application made to it in such proceedings<sup>6</sup>;
- 331 (3) make provision for the children to be represented in such proceedings<sup>7</sup>;
- 332 (4) provide information, advice and other support for the children and their families<sup>8</sup>.

CAFCASS must also make provision for the performance of any functions conferred on officers of the Service<sup>9</sup> by virtue of the Criminal Justice and Court Services Act 2000 or any other enactment<sup>10</sup>. Similarly, CAFCASS CYMRU must make provision for the performance of any functions conferred on Welsh family proceedings officers<sup>11</sup> by virtue of the Children Act 2004 or any other enactment<sup>12</sup>.

Regulations may provide for grants to be paid by CAFCASS to any person for the purpose of furthering the performance of any function of CAFCASS<sup>13</sup>. The regulations may provide for the grants to be paid on conditions, including conditions regulating the purposes for which the grant or any part of it may be used, requiring repayment to CAFCASS in specified circumstances<sup>14</sup>.

Subject to any directions given by the Secretary of State<sup>15</sup>, CAFCASS may do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, the exercise of its functions<sup>16</sup>. That includes, in particular: (a) holding land and other property; (b) entering into contracts; (c) investing sums not immediately required for the purpose of performing its functions; and (d) accepting gifts<sup>17</sup>. However, CAFCASS may not borrow money, whether by way of overdraft or otherwise, without the approval of the Secretary of State<sup>18</sup>.

1 For these purposes, 'family proceedings' has the same meaning as in the Matrimonial and Family Proceedings Act 1984 (see para 207 note 1 ante) and also includes any other proceedings which are family proceedings for the purposes of the Children Act 1989 (see para 199 ante), but references to family proceedings include (where the context allows) family proceedings which are proposed or have been concluded: Criminal Justice and Court Services Act 2000 s 12(5) (amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 para 118, Sch 5), Children Act 2004 s 35(3).

2 In the case of children ordinarily resident in Wales, the functions of CAFCASS are carried out by CAFCASS CYMRU, a division of the National Assembly for Wales: see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

3 As to CAFCASS see para 230 et seq ante.

4 See note 2 supra.

5 Criminal Justice and Court Services Act 2000 s 12(1)(a); Children Act 2004 s 35(1)(a).

6 Criminal Justice and Court Services Act 2000 s 12(1)(b); Children Act 2004 s 35(1)(b).

7 Criminal Justice and Court Services Act 2000 s 12(1)(c); Children Act 2004 s 35(1)(c).

8 Criminal Justice and Court Services Act 2000 s 12(1)(d); Children Act 2004 s 35(1)(d).

9 For the meaning of 'officer of the Service' see para 230 ante.

10 Criminal Justice and Court Services Act 2000 s 12(2). This provision applies whether or not those functions are exercisable for the purposes of the functions conferred on CAFCASS by s 11(1); see the text and note 1 supra. The obligation under s 12(2) does not require an immediate response from CAFCASS on a request from the court to appoint a guardian: *R v Children and Family Advisory Support Service* [2003] EWHC 235 (Admin), [2003] 1 FLR 953.

11 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

12 Children Act 2004 s 35(2).

13 Criminal Justice and Court Services Act 2000 s 12(3). The Children and Family Court Advisory and Support Service (Provision of Grants) Regulations 2001, SI 2001/697, have been made under this provision.

14 Criminal Justice and Court Services Act 2000 s 12(4). As to the regulations which have been made see the Children and Family Court Advisory and Support Service (Provision of Grants) Regulations 2001, SI 2001/697, regs 1-4.

15 As to the Secretary of State see para 155 ante.

16 Criminal Justice and Court Services Act 2000 Sch 2 para 10(1) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4).

17 Criminal Justice and Court Services Act 2000 Sch 2 para 10(2).

18 Ibid Sch 2 para 10(3) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4).

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#### **240. Extension of functions in respect of referred cases.**

The functions of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> and of CAFCASS CYMRU<sup>2</sup> in respect of family proceedings<sup>3</sup> are extended so that they can be exercised in respect of any:

- 333 (1) proceedings under the Human Rights Act 1998<sup>4</sup> against a public authority claiming that it has acted unlawfully in contravention of a Convention right<sup>5</sup>;
- 334 (2) claim for judicial review<sup>6</sup>; and
- 335 (3) other proceedings<sup>7</sup>,

in connection with a referral by an independent reviewing officer<sup>8</sup>. On referral of a case by an independent reviewing officer, the functions of an officer of the Service<sup>9</sup> or a Welsh family proceedings officer<sup>10</sup> must be performed in the manner prescribed by regulations<sup>11</sup>. Following receipt of a referral by an independent reviewing officer, CAFCASS or CAFCASS CYMRU must appoint an officer to assess the case and who must then decide on a course of action and submit a written report to the prescribed persons<sup>12</sup>. Proceedings may be brought as a result of this decision<sup>13</sup>. Notwithstanding whether proceedings have been issued or not, the officer of the Service or the Welsh family proceedings officer may seek to settle the case by alternative dispute resolution or other means<sup>14</sup>. On the conclusion of every case, whether following judgment of the court or settlement before or after proceedings were brought, the officer of the Service or the Welsh family proceedings officer must provide a written report to the persons prescribed by regulations<sup>15</sup>.

1 As to CAFCASS see para 230 et seq ante. In the case of children ordinarily resident in Wales the functions of CAFCASS are carried out by CAFCASS CYMRU, which was formed as a division of the National Assembly for Wales: see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

2 See note 1 supra.

3 Ie within the meaning of the Criminal Justice and Court Services Act 2000 s 12: see para 239 note 1 ante.

4 Ie under the Human Rights Act 1998 s 7(1): see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

5 Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, reg 3(a).

6 Ibid reg 3(b). As to judicial review see JUDICIAL REVIEW.

7 Ibid reg 3(c).

8 Ibid reg 3 (amended by SI 2005/605). As to the review of cases see para 936 et seq post. For the meaning of 'independent reviewing officer' see para 936 note 12 post.

9 For the meaning of 'officer of the Service' see para 230 ante.

10 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

11 Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, reg 4.

12 See *ibid* regs 5, 5A (reg 5A added by SI 2005/605). The relevant persons are: (1) the independent reviewing officer; (2) the Chief Executive of the local authority which appointed the independent reviewing officer; (3) any person specified by the independent reviewing officer in the referral; and (4) any other person the officer of the Service considers should be informed: see the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, regs 5(2), 5A(2) (as so added). As to the inappropriate referral of a case see reg 6 (amended by SI 2005/605).

13 See the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, reg 7 (amended by SI 2005/605).

14 See the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, reg 8 (amended by SI 2005/605).

15 See the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187, reg 9 (amended by SI 2005/605).



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## **241. Delegation of functions.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> and CAFCASS CYMRU<sup>2</sup> may make arrangements with organisations<sup>3</sup> under which the organisations perform functions of CAFCASS or CAFCASS CYMRU on their behalf<sup>4</sup>. Such arrangements may provide for the organisations to designate individuals who may perform functions of officers of the Service or of Welsh family proceedings officers<sup>5</sup>, but they may only make such an arrangement if they are of the opinion that the functions in question will be performed efficiently and to the required standard, and, that the arrangement represents good value for money<sup>6</sup>. They also have power to make similar arrangements with individuals<sup>7</sup>.

CAFCASS may commission, or assist the conduct of, research by any person into matters concerned with the exercise of its functions<sup>8</sup>.

1 As to CAFCASS see para 230 et seq ante. In the case of children ordinarily resident in Wales the functions of CAFCASS are carried out by CAFCASS CYMRU, a division of the National Assembly for Wales: see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

2 See note 1 supra.

3 'Organisation' includes a public body and a private or voluntary organisation: Criminal Justice and Court Services Act 2000 s 25; Children Act 2004 s 36(8).

4 Criminal Justice and Court Services Act 2000 s 13(1); Children Act 2004 s 36(1). Arrangements which CAFCASS CYMRU makes with an organisation under s 36(1) must provide safeguards for the protection of children: see s 39. Section 39 is prospectively repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10 as from a day to be appointed. At the date at which this volume states the law, no such day had been appointed.

5 Criminal Justice and Court Services Act 2000 s 13(2); Children Act 2004 s 36(2). For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

6 Criminal Justice and Court Services Act 2000 s 13(3); Children Act 2004 s 36(3).

7 Criminal Justice and Court Services Act 2000 s 13(4); Children Act 2004 s 36(4).

8 Criminal Justice and Court Services Act 2000 s 13(5).

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## **242. Provision of staff or services to other organisations.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> and CAFCASS CYMRU<sup>2</sup> may make arrangements with an organisation<sup>3</sup> or individual under which staff of CAFCASS or CAFCASS CYMRU may work for the organisation or individual<sup>4</sup>. CAFCASS and CAFCASS CYMRU may make arrangements with an organisation or individual under which any services provided to CAFCASS or CAFCASS CYMRU by its staff are also made available to the organisation or individual<sup>5</sup>. CAFCASS and CAFCASS CYMRU may charge for anything done under these arrangements<sup>6</sup>.

1 As to CAFCASS see para 230 et seq ante. In the case of children ordinarily resident in Wales the functions of CAFCASS are carried out by CAFCASS CYMRU, a division of the National Assembly for Wales: see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

2 See note 1 supra.

3 As to the meaning of 'organisation' see para 241 note 3 ante.

4 Criminal Justice and Court Services Act 2000 s 14(1); Children Act 2004 s 36(5).

5 Criminal Justice and Court Services Act 2000 s 14(2); Children Act 2004 s 36(6).

6 Criminal Justice and Court Services Act 2000 s 14(3); Children Act 2004 s 36(7).

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### **243. Right to conduct litigation; right of audience.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> and CAFCASS CYMRU<sup>2</sup> may authorise an officer of the Service or a Welsh family proceedings officer<sup>3</sup> of a prescribed description<sup>4</sup>:

- 336 (1) to conduct litigation in relation to any proceedings in any court<sup>5</sup>;
- 337 (2) to exercise a right of audience<sup>6</sup> in any proceedings before any court<sup>7</sup>,

in the exercise of his functions<sup>8</sup>.

An officer of the Service and a Welsh family proceedings officer may, subject to rules of court, be cross-examined in any proceedings to the same extent as any witness<sup>9</sup>, but he may not be cross-examined merely because he is exercising a right to conduct litigation or a right of audience granted in accordance with heads (1) and (2) above<sup>10</sup>.

1 As to CAFCASS see para 230 et seq ante. In the case of children ordinarily resident in Wales the functions of CAFCASS are carried out by CAFCASS CYMRU, a division of the National Assembly for Wales: see para 230 ante. As to the National Assembly for Wales and the Welsh Ministers see para 155 ante.

2 See note 1 supra.

3 For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

4 'Prescribed' means prescribed by regulations: Criminal Justice and Court Services Act 2000 s 25; Children Act 2004 s 37(1). The prescribed description of an officer of the Service is one who is: (1) a barrister or solicitor of the Supreme Court; or (2) employed (whether wholly or in part), or is otherwise engaged to conduct litigation and is doing so in conjunction with an officer of the Service described in head (1) supra: see the Children and Family Court Advisory and Support Service (Conduct of Litigation and Exercise of Rights of Audience) Regulations 2001, SI 2001/698, regs 1, 2; National Assembly for Wales (Conduct of Litigation and Exercise of Rights of Audience) Regulations 2005, SI 2005/607, regs 1, 2.

5 Criminal Justice and Court Services Act 2000 s 15(1)(a); Children Act 2004 s 37(1)(a). An officer of the Service or Welsh family proceedings officer exercising a right to conduct litigation by virtue of the Criminal Justice and Court Services Act 2000 s 15(1)(a) or the Children Act 2004 s 37(1)(a) who would otherwise have such a right by virtue of the Courts and Legal Services Act 1990 s 28(2)(a) (see LEGAL PROFESSIONS vol 65 (2008) PARA 498) is to be treated as having acquired that right solely by virtue of the Criminal Justice and Court Services Act 2000 s 15 (in the case of an officer of the service) or the Children Act 2004 s 37(1)(a) (in the case of a Welsh family proceedings officer): Criminal Justice and Court Services Act 2000 s 15(2); Children Act 2004 s 37(2). In the Criminal Justice and Court Services Act 2000 ss 15, 16 and the Children Act 2004 s 37(2), (5), 'right to conduct litigation' has the same meaning as in the Courts and Legal Services Act 1990 s 119 (see LEGAL PROFESSIONS vol 65 (2008) PARA 495): Criminal Justice and Court Services Act 2000 s 15(4); Children Act 2004 s 37(6).

6 For the purposes of the Criminal Justice and Court Services Act 2000 ss 15, 16 and the Children Act 2004 s 37(3), (5), 'right of audience' has the same meaning as in the Courts and Legal Services Act 1990 s 119 (see LEGAL PROFESSIONS vol 65 (2008) PARA 495): Criminal Justice and Court Services Act 2000 s 15(4); Children Act 2004 s 37(6).

7 Criminal Justice and Court Services Act 2000 s 15(1)(b); Children Act 2004 s 37(1)(b). An officer of the Service or Welsh family proceedings officer exercising a right of audience by virtue of the Criminal Justice and Court Services Act 2000 s 15(1)(b) or the Children Act 2004 s 37(1)(b) who would otherwise have such a right by virtue of the Courts and Legal Services Act 1990 s 27(2)(a) (see LEGAL PROFESSIONS vol 65 (2008) PARA 495) is

to be treated as having acquired that right solely by virtue of the Criminal Justice and Court Services Act 2000 s 15 (in the case of an officer of the service) or the Children Act 2004 s 37(1)(b) (in the case of a Welsh family proceedings officer): Criminal Justice and Court Services Act 2000 s 15(3); Children Act 2004 s 37(3).

8 Criminal Justice and Court Services Act 2000 s 15(1); Children Act 2004 s 37(1).

9 Criminal Justice and Court Services Act 2000 s 16(1); Children Act 2004 s 37(4).

10 Criminal Justice and Court Services Act 2000 s 16(2); Children Act 2004 s 37(5).

## **UPDATE**

### **243 Right to conduct litigation; right of audience**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 5, 7--Children Act 2004 s 37(2), (3) amended: Legal Services Act 2007 Sch 21 para 149).

NOTE 5--Criminal Justice and Court Services Act 2000 s 15(2) amended: Legal Services Act 2007 Sch 21 para 133.

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#### **244. Inspection by Her Majesty's Chief Inspector of Education, Children's Services and Skills.**

Her Majesty's Chief Inspector of Education, Children's Services and Skills ('the Chief Inspector')<sup>1</sup> must inspect the performance of CAFCASS functions (meaning functions of the Children and Family Court Advisory and Support Service and its officers)<sup>2</sup>. On completing an inspection, the Chief Inspector must make a written report on it<sup>3</sup> and send copies of the report to the Secretary of State and CAFCASS<sup>4</sup>.

Where such an inspection is conducted by the Chief Inspector, he may, at any reasonable time, enter for the purposes of the inspection: (1) any premises occupied by CAFCASS<sup>5</sup>; (2) any premises occupied by any organisation with whom arrangements have been made<sup>6</sup> in respect of the performance of any CAFCASS functions, and so occupied in connection with the performance of any such functions<sup>7</sup>; or (3) any premises occupied by any individual in connection with the performance of functions of an officer of the Service in accordance with such arrangements<sup>8</sup>. However, this does not confer a power of entry to any part of any domestic premises<sup>9</sup>.

If the Chief Inspector considers it necessary or expedient for the purposes of the inspection<sup>10</sup>, he may inspect, take copies of, or take away any documents kept by CAFCASS, or otherwise relating to the performance of CAFCASS functions, which are on any premises in relation to which he exercises his power of entry, or which are kept by an officer of the Service on domestic premises<sup>11</sup>. In connection with inspecting any such documents the Chief Inspector may obtain access to, and inspect and check the operation of, any computer<sup>12</sup> which he considers is or has been in use in connection with the documents<sup>13</sup>. He may require the person by whom (or on whose behalf) the computer is or has been used, or the person having charge of, or otherwise concerned with the operation of, the computer<sup>14</sup> to afford him such reasonable assistance as he may require for the purpose of inspection<sup>15</sup>. Where any such computer<sup>16</sup> is kept on domestic premises the Chief Inspector does not have power to obtain access to, and inspect and check the operation of, a computer, but he may require the person mentioned above to give him possession of it for the purpose of inspecting it and checking its operation<sup>17</sup>. The power to inspect documents and computers<sup>18</sup> may be exercised by the Chief Inspector at reasonable times only, and a person may not be required to do anything otherwise than at a reasonable time<sup>19</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 Education and Inspections Act 2006 s 143(1), (5). As to CAFCASS see para 230 et seq ante.

3 Ibid s 143(2).

4 Ibid s 143(3). As to the Secretary of State see para 155 ante. The Chief Inspector must arrange for the report to be published in such manner as he considers appropriate: s 143(4).

5 Ibid s 144(1), (2)(a).

6 Ie under the Criminal Justice and Court Services Act 2000 s 113: see the Education and Inspections Act 2006 s 144(5).

7 Ibid s 144(2)(b).

8 Ibid s 144(2)(c); and see note 6 supra. For the meaning of 'officer of the Service' see para 230 ante; definition applied by s 144(4).

9 Ibid s 144(3).

10 Ie where an inspection is carried out under ibid s 143 (see the text and notes 1-4 supra): s 145(1).

11 Ibid s 145(2). This power includes:

182 (1) power to require any person holding or accountable for any documents kept on the premises to produce them (s 145(3)(a)); and

183 (2) in relation to documents kept by means of a computer, power to require them to be produced in a form in which they are legible and can be taken away (s 145(3)(b)).

12 This also extends to associated apparatus or material: see ibid s 145.

13 Ibid s 145(4)(a).

14 See note 12 supra.

15 Education and Inspections Act 2006 s 145(4)(b), (6).

16 See note 12 supra.

17 Education and Inspections Act 2006 s 145(5). Where the Chief Inspector takes possession of anything under s 145(5):

184 (1) he may retain it for as long as he considers that it is necessary to retain it for the purposes of the inspection under s 143 (s 145(7)(a)); but

185 (2) once he considers that it is no longer necessary to retain it for those purposes, he must arrange for it to be returned to the person from whose possession it was taken (s 145(7)(b)).

18 Ie the powers conferred by ibid s 145: see the text and notes 10-17 supra.

19 Ibid s 145(8).

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### **(iii) Property and Staff Transfer Schemes**

#### **245. Power to make property transfer schemes.**

The Secretary of State<sup>1</sup> may by order make a scheme<sup>2</sup>:

- 338 (1) for the transfer to the Secretary of State or the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>3</sup> of any property<sup>4</sup> belonging to the old employer<sup>5</sup>;
- 339 (2) for the transfer to the Secretary of State or CAFCASS of any liabilities to which the old employer is subject<sup>6</sup>;
- 340 (3) for the transfer of property or liabilities to a new employer<sup>7</sup> after an initial transfer to the Secretary of State under head (1) or head (2) above<sup>8</sup>;
- 341 (4) for CAFCASS to have any rights or interests which the Secretary of State considers appropriate in relation to any property transferred to the Secretary of State under the scheme<sup>9</sup>.

Stamp duty is not chargeable in respect of any transfer or grant to CAFCASS effected by virtue of heads (1) to (4) above<sup>10</sup>.

A scheme may, in particular: (a) provide for the creation of rights or interests, or the imposition of liabilities or conditions, in relation to property transferred, or rights or interests acquired, by virtue of<sup>11</sup> the scheme<sup>12</sup>; (b) provide for any property, liabilities or conditions to be determined under the scheme<sup>13</sup>. A scheme is to have effect in relation to any property or liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the transfer of the property or liabilities<sup>14</sup>. A right of pre-emption, right of reverter or other similar right is not to operate or become exercisable as a result of any transfer of property by virtue of the scheme<sup>15</sup>. In the case of such a transfer, any such right is to have effect as if the transferee were the same person in law as the transferor and as if no transfer of the property had taken place<sup>16</sup>.

A certificate issued by the Secretary of State that any property or liability has, or has not, been transferred by virtue of a scheme is conclusive evidence of the transfer or (as the case may be) the fact that there has not been a transfer<sup>17</sup>.

Arrangements for similar schemes for the transfer of property, rights and liabilities from CAFCASS to CAFCASS CYMRU may be made by order jointly by the Secretary of State and the Welsh Ministers<sup>18</sup>. Such a scheme may specify the property, rights and liabilities to be transferred by the scheme, or provide for the determination of them<sup>19</sup>. It may include provision for the creation of rights, or the imposition of liabilities, in relation to property transferred by the scheme<sup>20</sup> and it has effect in relation to any property, rights and liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict their transfer<sup>21</sup>. A right of pre-emption or reverter or other similar right does not operate or become exercisable as a result of any transfer under a scheme<sup>22</sup>. Compensation is payable in certain circumstances<sup>23</sup> and a scheme may provide for the determination of any disputes relating to such compensation<sup>24</sup>. A certificate issued by the Secretary of State and the Welsh Ministers jointly that any property, rights or liabilities have or have not been transferred by

such a scheme is conclusive evidence as to whether they have or have not been so transferred<sup>25</sup>.

1 As to the Secretary of State see para 155 ante.

2 Criminal Justice and Court Services Act 2000 s 19(1) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3, 6, Schedule para 4).

3 As to CAFCASS see para 230 et seq ante.

4 'Property' includes rights and interests of any description, other than: (1) those under a contract of employment; or (2) land, in the case of transfers to a local board: Criminal Justice and Court Services Act 2000 s 18(5).

5 Ibid s 19(1)(a) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4).

6 Criminal Justice and Court Services Act 2000 s 19(1)(b). 'Old employer', for this purpose, means a local authority, the Official Solicitor or the Receiver for the Metropolitan Police District: s 18(4).

7 'New employer', for this purpose, means CAFCASS: ibid s 18(3).

8 Ibid s 19(1)(c) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4).

9 Ibid s 19(1)(d) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4).

10 Criminal Justice and Court Services Act 2000 s 19(2). No instrument made or executed under or in pursuance of the scheme for the purposes of such a transfer or grant is to be treated as duly stamped unless it is stamped with the duty to which it would, but for s 19 (as amended), be liable, or it has, in accordance with the provisions of the Stamp Act 1891 s 12 (as substituted) (see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) para 1111), been stamped with a particular stamp denoting that it is not chargeable with any duty or that it has been duly stamped: s 19(3). The provisions of the Criminal Justice and Court Services Act 2000 s 19, Sch 3 (contents of schemes) (see the text and notes 12-17 infra) apply in relation to a scheme under s 19: s 19(4). For the purposes of stamp duty land tax, a land transaction effected by virtue of s 19, under which the purchaser is CAFCASS, is exempt from charge and relief must be claimed in a land transaction return or an amendment of such a return: see s 19(5)-(7) (added by the Stamp Duty Land Tax (Consequential Amendment of Enactments) Regulations 2003, SI 2003/2867, reg 2, Schedule para 30).

11 For the meaning of 'by virtue of' see para 233 note 1 ante.

12 Criminal Justice and Court Services Act 2000 Sch 3 para 1(a).

13 Ibid Sch 3 para 1(b).

14 Ibid Sch 3 para 2(1).

15 Ibid Sch 3 para 2(2).

16 Ibid Sch 3 para 2(3). Such compensation as is just is to be paid to any person in respect of any right which would, apart from Sch 3 para 2, have operated in favour of, or become exercisable by, that person but which, in consequence of the operation of Sch 3 para 2, cannot subsequently operate in his favour or (as the case may be) become exercisable by him: Sch 3 para 3(1). Any compensation payable by virtue of Sch 3 para 3(1) is to be paid by the transferor or by the transferee or by both: Sch 3 para 3(2). A scheme may provide for the determination of any disputes as to whether and, if so, how much, compensation is payable by virtue of Sch 3(1) and as to the person to whom or by whom it is to be paid: Sch 3 para 3(3). The provisions of Sch 3 paras 2, 3 apply in relation to the creation of rights or interests, or the doing of anything else, in relation to property as they apply in relation to a transfer of property; and references to the transferor and transferee are to be read accordingly: Sch 3 para 4.

17 Ibid Sch 3 para 5 (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3, 6, Schedule para 4).

18 See the Children Act 2004 s 42(1). At the date at which this volume states the law no order had been made under this provision. As to the Welsh Ministers see para 155 ante. As to CAFCASS CYMRU see para 230



ante. The reference to rights and liabilities does not include rights and liabilities under a contract of employment: s 42(2).

19 Ibid s 42(3).

20 Ibid s 42(4).

21 Ibid s 42(5), (9).

22 Ibid s 42(6), (9). In the case of such a transfer, any such right has effect as if CAFCASS CYMRU were the same person in law as CAFCASS and as if the transfer had not taken place: s 42(6).

23 The Welsh Ministers must pay such compensation as is just to any person in respect of any right which would, apart from ibid s 42(5), (6), have operated in favour of, or become exercisable by, that person but which, in consequence of the operation of those subsections, cannot subsequently operate in his favour or become exercisable by him: s 42(7), (9).

24 Ibid s 42(8), (9).

25 Ibid s 42(10).

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## **246. Transfer of staff.**

The Secretary of State<sup>1</sup> may by order make a scheme for the transfer to a new employer<sup>2</sup> of any eligible employee<sup>3</sup>. A scheme may apply to all, or any description of, eligible employees or persons so employed, or to any individual eligible employee or person so employed<sup>4</sup>. A scheme may be made only if any directions about consultation given by the Secretary of State have been complied with in relation to each of the eligible employees to be transferred or appointed in pursuance of the scheme<sup>5</sup>.

The contract of employment of an employee transferred under a scheme<sup>6</sup> is not terminated by the transfer, and has effect from the date of transfer<sup>7</sup> as if originally made between the employee and the transferee<sup>8</sup>. Where an employee is transferred under a scheme all the rights, powers, duties and liabilities of the old employer<sup>9</sup> under or in connection with the contract of employment are transferred<sup>10</sup> to the transferee on the date of transfer, and anything done before that date by or in relation to the old employer in respect of that contract or the employee is to be treated from that date as having been done by or in relation to the transferee<sup>11</sup>.

Where, by reason of the implementation or termination of any arrangements<sup>12</sup>, any functions exercisable by any person (the 'old employer') become exercisable by another person (whether on behalf, or instead, of the old employer), the Secretary of State may by order make a scheme for the transfer to the other person (the 'transferee') of any person (an 'eligible employee') employed under a contract of employment with the transferor on work which would have continued but for the implementation or termination of the arrangements<sup>13</sup>. A scheme may apply to all, or any description of, eligible employees, or to any individual eligible employee<sup>14</sup>. A scheme may be made only if any directions about consultation given by the Secretary of State have been complied with in relation to each of the eligible employees to be transferred in pursuance of the scheme<sup>15</sup>.

Arrangements for similar schemes for the transfer of employees from CAFCASS to CAFCASS CYMRU may be made by order jointly by the Secretary of State and the Welsh Ministers<sup>16</sup>. Such a scheme may apply to any description of employees of CAFCASS or to any individual employee of CAFCASS<sup>17</sup>. A contract of employment of an employee transferred under a scheme is not terminated by the transfer, and has effect from the date of the transfer as if originally made between the employee and CAFCASS CYMRU<sup>18</sup>. Where an employee is so transferred, all the rights, powers, duties and liabilities of CAFCASS under or in connection with the contract of employment are thereby transferred to CAFCASS CYMRU on the transfer date, and anything done before that date by or in relation to CAFCASS in respect of that contract or the employee is to be treated from that date as having been done by or in relation to CAFCASS CYMRU<sup>19</sup>. These provisions do not prejudice any right of an employee to terminate his contract of employment if (apart from the change of employer) a substantial change is made to his detriment in his working conditions<sup>20</sup>. A scheme may be made only if any requirements about consultation prescribed in regulations made by the Secretary of State and the Welsh Ministers jointly have been complied with in relation to each of the employees of CAFCASS to be transferred under the scheme<sup>21</sup>.

1 As to the Secretary of State see para 155 ante.

2 For the meaning of 'new employer' see para 245 note 7 ante.

3 Criminal Justice and Court Services Act 2000 s 20(1) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, arts 3, 6, Schedule para 4). 'Eligible employee' means, in relation to a local authority or the Official Solicitor or the Receiver for the Metropolitan Police District, a person who is employed under a contract of employment with the authority, the solicitor or the receiver on work which would have continued but for the operation of the Criminal Justice and Court Services Act 2000 Pt I (ss 1-25): see s 18(2).

4 Ibid s 20(3).

5 Ibid s 20(4) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4).

6 'Scheme' means a scheme made by virtue of the Criminal Justice and Court Services Act 2000 s 20 (as amended) (see the text and notes 1-5 supra): s 21(7).

7 'Date of transfer' means the date of transfer determined under the scheme in relation to the employee: ibid s 21(7).

8 Ibid s 21(1). 'Transferee' means the new employer to whom the employee is or would be transferred under the scheme: s 21(7).

9 For the meaning of 'old employer' see para 245 note 6 ante.

10 Ie by virtue of the Criminal Justice and Court Services Act 2000 s 21(2): see the text and note 11 infra.

11 Ibid s 21(2). But if the employee informs the old employer or the transferee that he objects to the transfer, s 21(1), (2) does not transfer his contract of employment, or the rights, powers, duties and liabilities under or in connection with it, and the contract of employment is terminated immediately before the date of transfer: s 21(3). An employee is not to be treated, for the purposes of the Employment Rights Act 1996 (see EMPLOYMENT), as having been dismissed by the old employer by reason of the transfer of his contract of employment under a scheme, or the termination of his contract of employment by virtue of the Criminal Justice and Court Services Act 2000 s 21(3): s 21(4).

Section 21 does not prejudice any right of an employee to terminate his contract of employment if a substantial change is made to his detriment in his working conditions: s 21(6). But no such right arises by reason only that, by virtue of s 21, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment: s 21(6).

12 Ie under ibid s 5, s 8 or s 13 (see para 241 ante).

13 Ibid s 23(1), (2) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4). The Criminal Justice and Court Services Act 2000 s 23 (as amended) is prospectively repealed by the Offender Management Act 2007 s 39, Sch 5 as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

14 Criminal Justice and Court Services Act 2000 s 23(1), (3) (prospectively repealed: see note 13 supra).

15 Ibid s 23(1), (4) (amended by the Transfer of Functions (Children, Young People and Families) Order 2003, SI 2003/3191, Schedule para 4) (prospectively repealed: see note 13 supra). The Criminal Justice and Court Services Act 2000 s 21 (as amended) (with the exception of s 21(5) and the definitions of 'scheme' and 'transferee') applies to a scheme made by virtue of s 23 (as amended) as it applies to a scheme made by virtue of section 20, and as if 'old employer' and 'transferee' had the same meanings as in s 23: s 23(5) (prospectively repealed: see note 13 supra).

16 Children Act 2004 s 43(1), (8). As to CAFCASS see para 230 et seq ante. As to CAFCASS CYMRU see para 230 ante. As to the Welsh Ministers see para 155 ante.

17 Ibid s 43(2).

18 Ibid s 43(3), (5)

19 Ibid s 43(4), (5).

20 Ibid s 43(6).

21 Ibid s 43(7).



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## **4. PROCEEDINGS RELATING TO THE UPBRINGING OF CHILDREN**

### **(1) ORDERS UNDER**

#### **(i) Introduction to Section 8 Orders**

##### **247. Power of the court to make section 8 orders.**

In any family proceedings<sup>1</sup> in which a question arises with respect to the welfare of any child<sup>2</sup>, the court<sup>3</sup> may make orders<sup>4</sup> with respect to the child if: (1) an application for the order has been made by a person who is entitled to apply for such an order, or who has obtained the leave of the court<sup>5</sup> to make the application<sup>6</sup>; or (2) the court considers that the order should be made even though no such application has been made<sup>7</sup>. In any other circumstance, the court may also make such an order with respect to any child on the application of a person who is entitled to apply for an order with respect to the child or who has obtained the leave of the court<sup>8</sup> to make the application<sup>9</sup>.

Child cases should generally be held in private<sup>10</sup>.

1 For the meaning of 'family proceedings' see para 199 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'the court' see para 145 note 2 ante.

4 The orders under the Children Act 1989 s 8 (as amended) with respect to the child. These are often called 'section 8 orders' and are defined as any of the orders mentioned in s 8(1), namely, contact orders, prohibited steps orders, residence orders or specific issue orders (see para 251 et seq post), or any order varying or discharging such an order: see s 8(2). The general power of a magistrates' court under the Magistrates' Courts Act 1980 s 63(2) to suspend or rescind orders does not apply in relation to orders under the Children Act 1989: s 92(5). For the circumstances in which the court may make care orders or supervision orders under the Children Act 1989 see para 274 post.

5 As to the matters to be considered by the court before granting leave see para 249 post.

6 Children Act 1989 s 10(1)(a).

7 Ibid s 10(1)(b). See *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA.

8 See note 4 supra.

9 Children Act 1989 s 10(2). It is thus not necessary for the application to be made in the course of other family proceedings: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.37. As to the guidance and regulations generally see para 163 ante. An application for leave to apply for a residence order does not raise a question as to the child's upbringing, so the child's welfare is not the paramount consideration: *Re A (minors) (residence orders: leave to apply)* [1992] Fam 182, [1992] 3 All ER 872, CA. As to the welfare principle see para 300 post.

10 *Re P-B (a minor) (child cases: hearings in open court)* [1997] 1 All ER 58, sub nom *Re P B (a minor) (hearing in private)* [1996] 3 FCR 705, CA (although the Family Proceedings Rules 1991, SI 1991/1247, r 4.16(7) confers a discretion to hear all or part of a case in public). All orders relating to children made by the Court of Appeal automatically include a restriction on the publication of the child's identity: *Re R (minor) (Court of*

*Appeal: order against identification*) [1999] 3 FCR 213, [1999] 2 FLR 145, CA. Hearing children cases in private, without public pronouncement of judgment does not breach Art 6 of the European Convention on Human Rights: *B v United Kingdom*; *P v United Kingdom (Application 36337/97)* [2000] 2 FCR 97, [2001] 2 FLR 261; *P v B W* [2003] EWHC 1541 (Fam), [2004] Fam 22, [2003] 4 All ER 1074; affd sub nom *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] Fam 155. As to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the European Convention on Human Rights) see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 149 et seq.

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## **248. Persons entitled to apply for section 8 orders.**

Any parent<sup>1</sup> or guardian, or special guardian of a child<sup>2</sup>, or any person who has parental responsibility by virtue of the provision of the Children Act 1989 bestowing such responsibility upon step-parents<sup>3</sup>, or any person in whose favour there is a residence order<sup>4</sup> in force with respect to a child, may apply to the court for a contact order<sup>5</sup>, a prohibited steps order<sup>6</sup>, a residence order or a specific issue order<sup>7</sup>, or an order varying or discharging any of those orders, in respect of that child<sup>8</sup>.

The following persons are entitled to apply for a residence or contact order with respect to a child (but not for a prohibited steps or specific issue order)<sup>9</sup>:

- 342 (1) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family<sup>10</sup>;
- 343 (2) any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family<sup>11</sup>;
- 344 (3) any person with whom the child has lived for a period of at least three years<sup>12</sup>;
- 345 (4) any person who has the consent: (a) in any case where a residence order is in force with respect to the child, of each of the persons in whose favour the order was made, (b) in any case where the child is in the care of a local authority, of that authority, or (c) in any other case, of each of those (if any) who have parental responsibility for the child<sup>13</sup>.
- 346 A local authority foster parent is entitled to apply for a residence order with respect to a child if the child has lived with him for a period of at least one year immediately preceding the application<sup>14</sup>.

Any person who falls within a category of person prescribed by rules of court is entitled to apply for such of the above orders as may be prescribed in relation to that category of person<sup>15</sup>.

A person who would not otherwise be entitled under the foregoing provisions to apply for the variation or discharge of an order is entitled to do so if the order was made on his application, or in the case of a contact order, he is named in the order<sup>16</sup>.

An application for a contact order or a residence order must be referred for conciliation, but an application for a prohibited steps order or a specific issue order may be so referred at the request of the applicant<sup>17</sup>.

1 The word 'parent' must be interpreted in accordance with the Family Law Reform Act 1987 s 1 (see para 125 ante): see the Children Act 1989 ss 2(2), 105(2). Accordingly an unmarried father is within the definition of 'parent' whether or not he has parental responsibility for the child: see *Re C (minors) (adoption: residence order)* [1994] Fam 1, sub nom *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505, CA; cf *J v J (property transfer application)* [1993] 1 FCR 471, [1993] 2 FLR 56. The term also generally includes the adoptive father and mother, and excludes the natural parents, of an adopted child: see para 376 post. As to illegitimacy see para 125 ante. For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'guardian of a child' see para 144 note 5 ante. For the meaning of 'special guardian' see para 151 ante. For the meaning of 'child' see para 3 ante.

3 le by virtue of the Children Act 1989 s 4A (as added): see para 140 ante.

4 As to residence orders see para 262 post.

5 As to contact orders see para 251 et seq post.

6 As to prohibited steps orders see para 261 post.

7 As to specific issue orders see para 263 post.

8 Children Act 1989 s 10(4) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 56). This applies in respect both of applications made in the course of family proceedings and of free-standing applications: see para 247 ante. The provisions of the Children Act 1989 Pt II (ss 8-16A) (as amended), by defining the persons entitled to apply for orders thereunder, seek to define the category of persons who are thought to have an interest in the child's upbringing sufficient to justify their bringing the matter before the court. The right of any person to apply for a section 8 order with the leave of the court is known as the 'open door' policy: see the Department of Health publication *An Introduction to The Children Act 1989* (HMSO, 1989) para 3.41.

9 Children Act 1989 s 10(5).

10 Ibid s 10(5)(a). 'Child of the family', in relation to the parties to a marriage, or to two people who are civil partners of each other, means a child of both of them or any other child (not being a child placed with those parties as foster parents by a local authority or voluntary organisation) who has been treated by both of them as a child of their family: s 105(1) (definition substituted by the Civil Partnership Act 2004 s 75(1), (3)). Step-parents would be able to apply for contact or residence orders under the Children Act 1989 s 10(5)(a) (see head (1) in the text). 'Local authority' means in relation to England the council of a county, a metropolitan district, a London Borough or the Common Council of the City of London, and in relation to Wales means the council of a county or county borough: s 105(1) (definition amended by the Local Government (Wales) Act 1994 ss 22(4), 66(8), Sch 10 para 13, Sch 18). 'Voluntary organisation' means a body (other than a public or local authority) whose activities are not carried on for profit: Children Act 1989 s 105(1).

11 Ibid s 10(5)(aa) (added by the Civil Partnership Act 2004 s 77). The fact that one parent is both biological and psychological parent to a child has significance which must be assessed and considered in the circumstances of the case: *Re G (children) (residence: same-sex parent)* [2006] UKHL 43, [2006] 4 All ER 241, [2006] 3 FCR 1.

12 Children Act 1989 s 10(5)(b). The period of three years need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application: s 10(10).

13 Ibid s 10(5)(c).

14 Ibid s 10(5A) (added by the Adoption and Children Act 2002 Sch 3 paras 54, 56).

15 Children Act 1989 s 10(7). It appears that this provision was included to facilitate the making of applications by such persons as grandparents if it were found that the need to apply for leave served no useful purpose: see the Department of Health Publication *An Introduction to The Children Act 1989* (HMSO, 1989) para 3.40. At the date at which this volume states the law no such categories of person had been prescribed by order.

16 Children Act 1989 s 10(6).

17 *Practice Direction (child: custody: conciliation)* [2004] 2 All ER 463 (superseding *Practice Direction* [1992] 1 All ER 421, [1992] 1 WLR 147).

## UPDATE

### 248 Persons entitled to apply for section 8 orders

TEXT AND NOTE 14--A relative of a child is entitled to apply for a residence order with respect to the child if the child has lived with the relative for a period of at least one year immediately preceding the application: Children Act 1989 s 10(5B) (added by Children and Young Persons Act 2008 s 36).





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## **249. Applications for leave to apply for section 8 orders.**

Where the person applying for leave to make an application for a contact order<sup>1</sup>, a prohibited steps order<sup>2</sup>, a residence order<sup>3</sup> or a specific issue order<sup>4</sup>, or an order varying or discharging any of those orders, is the child concerned<sup>5</sup>, the court<sup>6</sup> may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the order<sup>7</sup>. Where the person applying for leave is not the child concerned, the court in deciding whether or not to grant such leave must have particular regard to:

- 347 (1) the nature of the proposed application<sup>8</sup>;
- 348 (2) the applicant's connection with the child<sup>9</sup>;
- 349 (3) any risk there might be of the proposed application disrupting the child's life to such an extent that he would be harmed by it<sup>10</sup>; and
- 350 (4) where the child is being looked after by a local authority<sup>11</sup>, the authority's plans for the child's future and the wishes and feelings of the child's parents<sup>12</sup>.

A person who is, or was, at any time within the last six months, a local authority foster-parent<sup>13</sup> of a child may not apply for leave to apply for such an order<sup>14</sup> with respect to the child unless he has the consent of the local authority, or he is a relative<sup>15</sup> of the child, or the child has lived with him for at least one year preceding the application<sup>16</sup>. If a special guardianship order is in force with respect to a child, leave will be required before an application can be made for a residence order<sup>17</sup>.

A person seeking leave must file a written request for leave<sup>18</sup> setting out the reasons for the application, and a draft of the application<sup>19</sup> for the making of which leave is sought together with sufficient copies for one to be served on each respondent<sup>20</sup>. On considering a request for leave, the court may either grant the request (whereupon the proper officer must inform the person making the request and any local authority that is preparing a report, of this decision) or direct that a date be fixed for the hearing of the request (whereupon the proper officer must fix such a date and give such notice as the court directs to the person making the request, any local authority preparing a report and to such other persons as the court requires to be notified, of the date so fixed)<sup>21</sup>.

A person who is not a party to proceedings for a residence or contact order, against whom allegations of abuse have been made may, in certain circumstances and to a limited extent, intervene in the proceedings<sup>22</sup>.

1 As to contact orders see para 251 et seq post.

2 As to prohibited steps orders see para 261 post.

3 As to residence orders see para 262 post.

4 As to specific issue orders see para 263 post.

5 For the meaning of 'child' see para 3 ante. On an application by one adopted sibling for contact with another sibling, who has been adopted by a different family, the 'child concerned' is the child who would be the subject of any order granted: *Re S (a minor) (adopted child: contact)* [1999] Fam 283, [1999] 1 All ER 648. As to

the application by a child for a residence order see *Re H (residence order: child's application for leave)* [2000] 1 FLR 780.

6 For the meaning of 'the court' see para 145 note 2 ante. Applications for leave by a child should be made in the High Court: *Practice Direction (family proceedings orders: applications by children)* [1993] 1 All ER 820, [1993] 1 WLR 313.

7 Children Act 1989 s 10(8). The court will have discretion as to whether to grant leave and the best interests of the child will be considered: *Re C (residence: child's application for leave)* [1996] 1 FCR 461, [1995] 1 FLR 927, [1996] 1 FCR 461. The court will also consider the likelihood of success of the proposed application: *Re S C (a minor) (leave to seek residence order)* [1994] 1 FLR 96, [1994] 1 FCR 837. For guidance on test for prospects of success see *Re M (care: contact: grandmother's application for leave)* [1995] 2 FLR 86, sub nom *Re M (a minor) (contact: leave to apply)* [1995] 3 FCR 550. As to the child as party to family proceedings see para 225 ante. See also *Re H (a minor) (guardian ad litem: requirement)* [1994] Fam 11, [1994] 4 All ER 762, sub nom *Re H (a minor) (independent representation)* [1993] 2 FCR 437 (removal of Official Solicitor as guardian ad litem and appointment as amicus curiae). As to principles on an application by a child for leave to apply for a residence order to live away from parents, and a specific issue order to go abroad with a friend and family see *Re C (minor: leave to apply for order)* [1994] 1 FCR 837, sub nom *Re C (a minor) (leave to seek section 8 orders)* [1994] 1 FLR 26.

8 Children Act 1989 s 10(9)(a).

9 Ibid s 10(9)(b).

10 Ibid s 10(9)(c).

11 For the meaning of 'local authority' see para 248 note 10 ante.

12 Children Act 1989 s 10(9)(d). As to the meaning of 'parent' see para 248 note 1 ante. On such an application the court is not determining a question with regard to the upbringing of the child concerned, and the child's welfare is not the court's paramount consideration: *Re A (minors) (residence orders: leave to apply)* [1992] Fam 182, [1992] 3 All ER 872, CA; *Re A (a minor) (residence order: leave to apply)* [1993] Fam Law 193; *Re S (a minor) (adopted child: contact)* [1999] Fam 283, sub nom *Re S (contact: application by a sibling)* [1998] 2 FLR 897. As to the application of the criteria in the Children Act 1989 s 10(9) (see heads (1)-(4) in the text) see *Re P (a minor) (leave to apply: foster-parents)* [1994] 2 FCR 1093, sub nom *C v Salford City Council* [1994] 2 FLR 926, CA; *G v F (shared residence: parental responsibility)* [1998] 3 FCR 1, [1998] 2 FLR 799 (application for leave to apply for shared residence order after breakdown of lesbian relationship). See also *Re A (section 8 order: grandparent application)* [1996] 1 FCR 467, [1995] 2 FLR 153, CA (after leave to apply granted, no presumption that substantive order would be granted); *Re W (contact: application by grandparent)* [1997] 2 FCR 643, [1997] 1 FLR 793 (once leave granted and a case for contact has been established, the respondent to an application must show why a contact order should not be made). In considering risk of disruption under the Children Act 1989 s 10(9)(c), the court will also consider risk of disruption if application succeeds: *Re M (care: contact: grandmother's application for leave)* [1995] 2 FLR 86, sub nom *Re M (minors) (contact: leave to apply)* [1995] 3 FCR 550. See *Re R (adoption: contact)* [2005] EWCA Civ 1128, [2007] 1 FCR 149, [2006] 1 FLR 373 (half-sister's application for contact).

As to the importance of applying the statutory test under the Children Act 1989 s 10(9) as opposed to considering the prospects of success see *Re J (leave to issue application for residence order)* [2002] EWCA Civ 1346, [2003] 1 FLR 114.

An application under the Children Act 1989 s 91(14) (see para 223 ante) is not subject to the criteria set out in s 10(9): *Re A (a minor) (contact: parent's application for leave)* [1999] 1 FCR 127, [1998] 1 FLR 1, CA.

As to the refusal of leave see *C v W (a minor) (contact: leave to apply)* [1998] 1 FCR 618 (father repeatedly failed to attend hearings; not in child's best interests to allow him to continue litigating).

13 A 'local authority foster parent' is a person with whom a child has been placed under the Children Act 1989 s 23(2)(a) (as amended) (see para 877 post), unless he is a parent of the child, a person who is not a parent of the child but who has parental responsibility for him or where the child is in care and there was a residence order in force with respect to him immediately before the care order was made, a person in whose favour the residence order was made: see s 23(3), (4); and para 900 post. See further the Department of Health Publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.45. As to the guidance and regulations generally see para 163 ante. For the meaning of 'parental responsibility' see para 134 ante.

14 Ie a section 8 order: see paras 251-263 post.

15 'Relative' in relation to a child, means grandparent, brother, sister, uncle or aunt (whether of the full-blood or half-blood or by marriage or civil partnership), or step-parent: Children Act 1989 s 105(1) (definition

amended by the Civil Partnership Act 2004 s 75(4)). These terms must be interpreted in accordance with the provisions of the Family Law Reform Act 1987 s 1: see para 125 ante.

16 Children Act 1989 s 9(3) (amended by the Adoption and Children Act 2002 s 113(a)). Where a local authority acts as both a social services authority and an adoption agency, it is the consent of the social services authority accommodating a child which is required, as the local authority's role as an adoption agency is not part of that consent for the purposes of the Children Act 1989 s 9(3) (as amended): *Re P (a minor) (leave to apply: foster-parents)* [1994] 2 FCR 1093, sub nom *C v Salford County Council* [1994] 2 FLR 926, CA.

17 Children Act 1989 s 10(7A) (added by the Adoption and Children Act 2002 Sch 3 para 56).

18 Written request for leave must be made in Form C2: see the Family Proceedings Rules 1991, SI 1991/1247, r 1.2(4), Appendix 1 (as amended).

19 Ie being the documents referred to in Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1A) (added by SI 1994/3155; and amended by SI 2004/3375).

20 Family Proceedings Rules 1991, SI 1991/1247, r 4.3(1) (amended by SI 1994/3155; SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3(1) (amended by SI 1994/3156).

The written request may be dispensed with in an emergency: see *Re O (minors) (leave to seek residence order)* [1993] 2 FCR 482, [1994] 1 FLR 172.

21 Family Proceedings Rules 1991, SI 1991/1247, r 4.3(2) (amended by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3(2) (amended by SI 2005/2930). Where leave is granted to bring any relevant proceedings, the application must proceed in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.4 or, as the case may be, the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4, but the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1)(a) or, as the case may be, the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1)(a) (filing of documents) does not apply: Family Proceedings Rules 1991, SI 1991/1247, r 4.3(3); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3(3). 'Proper officer' means in relation to the principal registry, the family proceedings department manager, and in relation to any other court or registry, the court manager, or other officer of the court or registry acting on his behalf in accordance with directions given by the Lord Chancellor: Family Proceedings Rules 1991, SI 1991/1247, r 1.2 (definition amended by SI 1997/1056). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. Where proceedings are taken under the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, the proper officer is the 'designated officer for the court' see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3(2) (amended by SI 2005/617). It will rarely be appropriate for such an application to be dealt with ex parte: *Re A (minors) (residence orders: leave to apply)* [1992] Fam 182, [1992] 3 All ER 872, CA. It is not generally appropriate for a court to despatch applications for leave to apply for contact orders summarily, so that neither party attends court, no order is drawn up and no reasons for the decision are given: *Re W (contact application: procedure)* [2000] 1 FLR 263, sub nom *Re W (a child) (contact: leave to apply)* [2000] 1 FCR 185. The applicant's prospects of success in the substantive application were leave to be granted is a highly material factor: *G v Kirklees Metropolitan Borough Council* [1993] 1 FCR 357, [1993] 1 FLR 805. See also *Re S C (a minor) (leave to seek residence order)* [1994] 1 FLR 96, but note this does not outweigh consideration of the statutory test see *Re J (leave to issue application for residence order)* [2002] EWCA Civ 1346, [2003] 1 FLR 114.

Where at any time after an application under the Family Proceedings Rules 1991, SI 1991/1247, r 4.4 (as amended) is made, it appears to the court that, under arts 16-19 of the EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000, the court does not have jurisdiction to hear the application and is required or may be required to stay the proceedings, the court must stay the proceedings and fix a date for a hearing to determine the questions of jurisdiction and whether there should be a stay or other order and must serve notice of the hearing on the parties to the proceedings: Family Proceedings Rules 1991, SI 1991/1247, r 4.27A(2) (r 4.27A added by SI 2005/264). The court must give reasons for its decision under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) arts 16-19 and, where it makes a finding of fact, state such finding of fact: Family Proceedings Rules 1991, SI 1991/1247, r 4.27A(3) (as so added). An application for an order under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 19 must be made to the district judge, who may determine the application or refer the application, or any question arising on it, to a judge for his decision; and a declaration under art 17 that the court has no jurisdiction over the proceedings must be recorded by the court or proper officer in writing: Family Proceedings Rules 1991, SI 1991/1247, r 4.27A(1), (4) (as so added). The court may, if all parties agree, deal with any question about the jurisdiction of the court without a hearing: r 4.27A(5) (as so added).

22 *Re S (care: residence: intervener)* [1997] 2 FCR 272, [1997] 1 FLR 497, CA. See also *Re H (care proceedings: intervener)* [2000] 2 FCR 53, [2000] 1 FLR 775, CA.

## **UPDATE**

### **249 Applications for leave to apply for section 8 orders**

NOTE 12--See also *Re H (a child) (leave to apply for residence order)* [2008] EWCA Civ 503, [2008] 3 FCR 392 (insufficient weight given to fact that applicants for residence order cared for child's half-brother).

NOTE 13--Children Act 1989 s 23 replaced by ss 22A-22G: see PARA 877. 'Local authority foster parent' means a person who is approved as a local authority foster parent in accordance with regulations made by virtue of Children Act 1989 Sch 2 para 12F (see PARA 877): s 22C(12) (not yet in force).

NOTE 19--SI 1991/1247 r 4.4(1A) further amended: SI 2008/2861, SI 2009/2027.

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## **250. Directions and conditions.**

A contact order<sup>1</sup>, a prohibited steps order<sup>2</sup>, a residence order<sup>3</sup> or a specific issue order<sup>4</sup>, or an order varying or discharging any of those orders<sup>5</sup>, may contain directions<sup>6</sup> about how it is to be carried into effect<sup>7</sup>, and may impose conditions to be complied with by any person:

- 351 (1) in whose favour the order is made; or
- 352 (2) who is a parent of the child<sup>8</sup> concerned; or
- 353 (3) who is not a parent of his but who has parental responsibility<sup>9</sup> for him; or
- 354 (4) with whom the child is living, and to whom the conditions are expressed to apply<sup>10</sup>.

An order may also be made to have effect for a specified period, or contain provisions which are to have effect for a specified period<sup>11</sup>, and may make such incidental, supplemental or consequential provision as the court thinks fit<sup>12</sup>.

1 As to contact orders see para 251 et seq post.

2 As to prohibited steps orders see para 261 post.

3 As to residence orders see para 262 post.

4 As to specific issue orders see para 263 post.

5 All the orders mentioned in the text are known as 'section 8 orders': see the Children Act 1989 s 8(2); and para 247 note 4 ante.

6 Eg an interim residence order may direct that, pending a full hearing, the child be returned to a parent from whom that child has been abducted: *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA.

7 Children Act 1989 s 11(7)(a). The provisions of s 11(7) are intended to enable the orders to be as flexible as possible and so to reduce or remove the need to resort to wardship: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.22. As to the guidance and regulations generally see para 163 ante.

The court cannot use a prohibited steps order as a means to oust a spouse from the matrimonial home, as an ouster order (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 290) may be made only if the criteria in the Family Law Act 1996 are satisfied: *D v D (ouster order)* [1996] 2 FCR 496, sub nom *Re D (prohibited steps order)* [1996] 2 FLR 237, CA (at which time the Matrimonial Homes Act 1983 was in force). Where a previous contact order by consent was based on compliance with an ante-nuptial agreement, the court may, under the Children Act 1989 s 11(7), refuse to hear an application for contact until the agreement has been honoured: *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745.

Where a residence order is granted to a person having the care of the child, it is an unwarranted imposition on the rights of that person for the court to impose conditions of residence under the Children Act 1989 s 11(7): *Re E (minors) (residence: conditions)* [1997] 3 FCR 245, [1997] 2 FLR 638, CA. See also *Re S (a child) (residence order: condition)* [2001] EWCA Civ 847, [2001] 3 FCR 154, [2001] All ER (D) 159 (May); and *B v B (a child) (residence order: condition)* [2004] 2 FLR 979, [2004] All ER (D) 387 (May).

In order to make indirect contact more meaningful the court can impose conditions on the residential parent to provide detailed information to the absent parent: *Re O (a minor) (contact: indirect contact)* [1995] 2 FLR 124, CA.

8 For the meaning of 'child' see para 3 ante.

9 For the meaning of 'parental responsibility' see para 134 ante.

10 Children Act 1989 s 11(7)(b). See *Re M (judge's discretion)* [2001] EWCA Civ 1428, [2002] 1 FLR 730.

11 Children Act 1989 s 11(7)(c). See *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA (on appeal from [1993] 2 WLR 406); *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA. See also *Re M (minors) (interim residence order)* [1997] 2 FCR 28, CA.

12 Children Act 1989 s 11(7)(d).

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## (ii) Contact Orders

### 251. Contact orders.

A contact order is an order requiring the person with whom a child<sup>1</sup> lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other<sup>2</sup>.

The usual order will no doubt often be phrased in terms that one parent allow the other reasonable contact with the child, but it may be desirable to be more specific directing that the child should be made available for contact at certain times with the person named in the order, and the court may make directions as to the carrying into effect of the order or attach conditions to it<sup>3</sup>. Contact may range from long or short visits to contact by letter or by telephone<sup>4</sup>. Contact may be ordered with any person<sup>5</sup> named in the order<sup>6</sup>, not merely with a parent. A contact order may not be made in respect of a child who is in the care of a local authority<sup>7</sup>, and a local authority may not apply for, nor be granted, a contact order<sup>8</sup>.

A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise have contact with, his other parent, ceases to have effect if the parents live together for a continuous period of more than six months<sup>9</sup>.

Contact orders of this kind should be distinguished from orders for contact with a child in care<sup>10</sup>. The making of a care order with respect to a child who is the subject of a contact order automatically discharges that order<sup>11</sup>.

1 For the meaning of 'child' see para 3 ante.

2 Children Act 1989 ss 8(1), 105(1). A contact order is one of the 'section 8 orders' referred to in the Children Act 1989, as is an order varying or discharging a contact order: see s 8(2); and para 247 ante. Such an order enables the court to give effect to the general principle that it is in the child's best interests for him to preserve links with both parents: see para 869 post.

Contact orders replaced access orders which in the past were commonly made on divorce and provided for a parent to have access to the child. The fact that the contact order provides for the child to visit or stay with the person named in the order shifts the emphasis from the adult to the child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.29. As to the guidance and regulations generally see para 163 ante. However, contact orders cannot be made without having first determined with whom the child lives, as it is the responsibility of the person with whom the child lives to make the child available for contact to the named person in the order: *Re B (a child: contact)* [2001] EWCA Civ 1968, [2001] All ER (D) 349 (Nov).

Where a father makes concurrent applications for a contact order and a parental responsibility order (see para 139 ante), the court must consider each application separately: *Re C and V (minors) (parental responsibility order)* [1998] 1 FCR 52, [1998] 1 FLR 392, CA. See also *Application 60457/00 Kosmopoulou v Greece* [2004] 1 FCR 427, [2004] 1 FLR 800, ECtHR (mother had a right to be involved in decision making process on her access to child); *Re S (children) (contact order)* [2004] EWCA Civ 597, [2004] 2 FLR 710.

As to the reasonableness of the length of time a court takes to hear contact order proceedings and the adequacy of evidence presented in such proceedings see *Marshall v Toothill (formerly Marshall)* [2005] All ER (D) 49 (May), (2005) Times, 17 June, CA.

The unusual step of making an order that no order for defined contact be made may be taken if it is in the best interests of the child to do so: *M v M (defined contact application)* [1998] 2 FLR 244, [1998] Fam Law 456; *Re M (handicapped child: parental responsibility)* [2001] 3 FCR 454 (in best interest of handicapped child to be free from acrimony relating to her care: contact with father drastically reduced); *Re D (contact: reasons for refusal)*



[1998] 1 FCR 321, [1997] 2 FLR 48, CA (judge entitled to conclude that mother's fear of father was reasonable and justified, and to deny direct contact accordingly), applied in *Re M (minors) (contact: violent parent)* [1999] 2 FCR 56, [1999] 2 FLR 321 (consideration of whether violent father fit person to have contact). Domestic violence does not constitute an absolute bar to contact: *Re H (contact: domestic violence)* [1998] 3 FCR 385, [1998] 2 FLR 42, CA; *Re L (a child) (contact: domestic violence)* [2001] Fam 260, [2000] 4 All ER 609, sub nom *Re L, V, M and H (contact: domestic violence)* [2000] 2 FLR 334, applied in *Re F (a child) (contact order)* [2001] 1 FCR 422, CA; see, however, *Re G (domestic violence: direct contact)* [2001] 2 FCR 134, [2000] 2 FLR 865 (domestic violence does not constitute an absolute bar, but an awareness on the part of the violent parent of the effect of the violence on the child (even if the child was not directly involved in the violence) and a demonstration that he was a fit person to exercise contact were an important consideration in assessing whether contact should be granted). See also the Lord Chancellor's Department publication *A Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (2000); and *Contact and Domestic Violence: Report* by Dr Sturge and Dr Glaser [2000] Fam Law 615. Issues of domestic violence that might have an impact on the outcome of the application for contact should be dealt with as a preliminary issue and findings about bad conduct may be considered by the court when considering whether and to what extent contact is appropriate: *M v A (contact: domestic violence)* [2002] 2 FLR 921. The importance of this approach was stressed in *Re H (contact: domestic violence)* [2005] EWCA Civ 1404, [2006] 1 FLR 943. See *Re C (children) (appointment of guardian)* [2006] EWCA Civ 1765, [2007] 1 FLR 1642 (where the father had gender re-assignment, a moratorium on direct contact was not sanctioned).

In deciding whether to make a contact order where there were allegations of sexual abuse by the father, the judge must have the best evidence available to him including, where appropriate, video and audio recordings of the child's allegations to the police: *Re S (contact: evidence)* [1998] 3 FCR 70, [1998] 1 FLR 798, CA. When the court is evaluating evidence of sexual abuse it must be satisfied on a balance of probabilities that the evidence is credible: *Re R (children) (sexual abuse: standard of proof)* [2001] 1 FCR 86, CA; following *Re H (minors) (sexual abuse: standards of proof)* [1996] AC 563, sub nom *Re H and R (child sexual abuse)* [1996] 1 FCR 509, [1996] 1 FLR 80, HL. See also *Re W (a minor) (staying contact)* [1998] 2 FCR 453, [1998] 2 FLR 450, CA (an order for staying contact is not appropriate if it is claimed the child has made allegations of sexual abuse and further investigation is needed). Where a 16-year-old child in care expressed a wish to return to her home where she was at risk of sexual abuse, her conduct did not amount to 'seriously irresponsible conduct' within the definition of mental impairment in the Mental Health Act 1983 s 1(1), and the more appropriate course would be to apply for the child to be made a ward of court so that she could be separately represented: *Re F (Mental Health Act guardianship)* [2000] 1 FCR 11, [2000] 1 FLR 192, (1999) 51 BMLR 128 CA.

In a case where the child is alienated from the non-resident parent, early consideration should be given to the instruction of a consultant child psychiatrist to investigate the source of the child's alienation: *Re T (a child: contact)* [2003] EWCA Civ 1736, [2003] 1 FCR 303, [2003] 1 FLR 531. The court may also consider ordering the local authority to investigate the children's circumstances under Children Act 1989 s 37 (as amended) (see para 272 post): see *Re F (family proceedings: section 37 investigation)* [2005] EWHC 2935 (Fam), [2006] 1 FLR 1122. Consideration could also be given to the joinder of the child: see *President's Practice Direction (representation of children in family proceedings pursuant to Family Proceedings Rules 1991 r 9.5)* 5 April 2004 [2004] 1 FLR 1188; *CAFCASS Practice Note (representation of children in family proceedings pursuant to the Family Proceedings Rules 1991, r 9.5)* [2004] 1 FLR 1190; *Re W (contact proceedings: joinder of child)* [2001] EWCA Civ 1830, [2003] 2 FCR 175, [2003] 1 FLR 681.

Breach of a contact order may result in an order for committal, which must state both the nature of the contact order and the nature of the breach that has taken place: *F v F (contact: committal)* [1999] 2 FCR 42, [1998] 2 FLR 237, CA. For guidelines as to when a judge, by his own motion, may commit a parent who is in open defiance of a contact order for contempt of court see *Re M (a minor) (contempt of court: committal of court's own motion)* [1999] Fam 263, sub nom *Re M (a minor) (contact order: committal)* [1999] 2 All ER 56, CA. The welfare of the child is a material, but not a paramount, consideration when deciding whether to commit a mother to prison for breach of a contact order: *A v N (committal: refusal of contact)* [1997] 2 FCR 475, [1997] 1 FLR 533, CA. See also *Re S (a child) (contact order: committal)* [2004] EWCA Civ 1790, [2005] 1 FLR 812, [2005] Fam Law 206 (judge entitled to impose suspended custodial sentence in view of defiant refusal to comply with contact order). As to the welfare principle see para 300 post. See also *Re F (contact: enforcement: representation of a child)* [1998] 3 FCR 216, [1998] 1 FLR 691, CA (where a judge has refused to attach a penal notice to a contact order he may properly reserve the case to himself to prevent a party applying to another judge, instead of appealing against the decision); *Re M (contact: long-term best interests)* [2005] EWCA Civ 1090, [2006] 1 FLR 627 (order for indirect contact inappropriate where father had biased children against mother).

3 As to directions and conditions in relation to section 8 orders see the Children Act 1989 s 11(7); and para 250 ante. As to contact activity directions and contact activity conditions (giving the court the power to attach directions and conditions to contact orders requiring a party to take part in an activity that promotes contact with the child concerned) see para 252 et seq post. See eg *Re R (a child) (contact)* [2007] All ER (D) 46 (Aug), CA (directions given for preliminary contact sessions).

Contact with a parent is a fundamental right of a child (although see Thorpe LJ in *Re L (a child) (contact: domestic violence)* [2000] 4 All ER 609 at 636, sub nom *Re L, V, M and H (contact: domestic violence)* [2000] 2 FLR 334 at 362) save in wholly exceptional circumstances: *Re W (a minor) (contact)* [1994] 2 FCR 1216, [1994]

2 FLR 441, CA (the fact that a parent asserts an intention to disobey a contact order is not a relevant consideration for the court). See also *Re S (a minor) (contact: grandparents)* [1996] 3 FCR 30, [1996] 1 FLR 158, CA; *P (a child) (contact order)* [2001] EWCA Civ 147, [2001] All ER (D) 244 (Jan); *Re H (a child) (contact: mother's opposition)* [2001] 1 FCR 59, CA.

4 Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.29. As to the guidance and regulations generally see para 163 ante. See *Re P (contact: indirect contact)* [1999] 2 FLR 893, [1999] Fam Law 751 (father who had just served a lengthy prison sentence was granted indirect contact limited to the sending of cards); *Re F (a child) (indirect contact through a third party)* [2006] EWCA Civ 1426, [2006] 3 FCR 553 (mother and child had been given new identities to protect them from the father; indirect contact ordered through CAFCASS Legal). As to CAFCASS see para 230 et seq ante.

5 Eg a grandparent or a named friend.

6 See the Children Act 1989 s 8(1).

7 See ibid s 9(1). See also the text and note 10 infra. For the meaning of 'local authority' see para 248 note 10 ante.

8 Ibid s 9(2). This also operates to prevent an authority from obtaining an order having the same effect as a contact order: *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA. See also *F v Cambridgeshire County Council* [1995] 2 FCR 804, [1995] 1 FLR 516.

9 Children Act 1989 s 11(6).

10 As to contact with a child in care see ibid s 34 (as amended); and para 278 post.

11 Ibid s 91(2). As to care orders see para 270 et seq post.

## UPDATE

### 251 Contact orders

NOTE 2--For guidance on applications for a residence or a contact order where a child is at risk of experiencing domestic violence or harm: see *Practice Direction (residence and contact orders: domestic violence and harm)* [2009] 2 WLR 251. *Re H (minors) (sexual abuse: standards of proof)*, cited, followed in *Re B (children) (sexual abuse: standard of proof)* [2008] UKHL 35, [2008] 4 All ER 1. See *Re P (a child) (committal proceedings: breach of contact order)* [2006] EWCA Civ 1792, [2008] 2 FCR 517 (judge entitled to proceed with committal proceedings in absence of mother in light of history of non-attendance); *Re B (a child) (contact order: enforcement)* [2009] EWCA Civ 143, [2010] 1 WLR 419, [2009] All ER (D) 286 (Feb) (county court judge had jurisdiction to enforce contact order relating to child in local authority care by way of committal proceedings); *Re P (children) (contact order)* [2008] EWCA Civ 1431, [2009] 2 FCR 402. A judge cannot short-circuit the fact-finding process in contact proceedings and must give the parties a full and fair opportunity to make their submissions: *Re Z (children) (fact finding hearing: domestic violence)* [2009] EWCA Civ 430, [2009] All ER (D) 222 (Jun).

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## **252. Contact activity directions.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. In proceedings in which the court is considering whether to make provision about contact with a child by making either a contact order<sup>2</sup> with respect to the child, or an order varying or discharging a contact order with respect to the child, the court may make a contact activity direction in connection with that provision about contact<sup>3</sup>. A contact activity direction is a direction requiring an individual who is a party to the proceedings to take part in an activity that promotes contact with the child concerned, and it must specify the activity and the person providing the activity<sup>4</sup>. The activities that may be so required include, in particular:

- 355 (1) programmes, classes and counselling or guidance sessions of a kind that may assist a person as regards establishing, maintaining or improving contact with a child or may by addressing a person's violent behaviour, enable or facilitate contact with a child<sup>5</sup>;
- 356 (2) sessions in which information or advice is given as regards making or operating arrangements for contact with a child, including making arrangements by means of mediation<sup>6</sup>.

However, no individual may be required by a contact activity direction to undergo medical or psychiatric examination, assessment or treatment or to take part in mediation<sup>7</sup>.

In considering whether to make a contact activity direction, the welfare of the child concerned is to be the court's paramount consideration<sup>8</sup>.

Contact activity directions may not be made in certain circumstances. A court may not on the same occasion both make a contact activity direction and dispose finally of the proceedings as they relate to contact with the child concerned<sup>9</sup>. Nor may a court make a contact activity direction in any proceedings unless there is a dispute as regards the provision about contact that the court is considering whether to make in the proceedings<sup>10</sup>. A court may not make a contact activity direction requiring an individual who is a child to take part in an activity unless the individual is a parent of the child in relation to whom the court is considering provision about contact<sup>11</sup>. A court may not make a contact activity direction in connection with the making, variation or discharge of a contact order, if the contact order is, or would if made be, an excepted order<sup>12</sup>. Nor may a court make a contact activity direction in relation to an individual unless the individual is habitually resident in England and Wales; and a direction ceases to have effect if the individual subject to the direction ceases to be habitually resident in England and Wales<sup>13</sup>.

<sup>1</sup> At the date at which this volume states the law the Children and Adoption Act 2006 s 1, which inserts the Children Act 1989 ss 11A-11G, had not been brought into force.

<sup>2</sup> As to contact orders see para 251 ante.

<sup>3</sup> Children Act 1989 s 11A(1), (2), (8) (s 11A prospectively added by the Children and Adoption Act 2006 s 1).

<sup>4</sup> Children Act 1989 s 11A(3), (4) (as prospectively added: see note 3 supra). Regulations may be made authorising financial payments to assist individuals who are required to take part in an activity paying relevant

fees and charges: see s 11F (prospectively added by the Children and Adoption Act 2006 s 1). At the date at which this volume states the law no such regulations had been made.

- 5 Children Act 1989 s 11A(5)(a) (as prospectively added: see note 3 supra).
- 6 Ibid s 11A(5)(b) (as prospectively added: see note 3 supra).
- 7 Ibid s 11A(6) (as prospectively added: see note 3 supra).
- 8 Ibid s 11A(9) (as prospectively added: see note 3 supra). As to the welfare principle see para 300 post.
- 9 Ibid s 11A(7) (as prospectively added: see note 3 supra).
- 10 Ibid s 11B(1) (s 11B prospectively added by the Children and Adoption Act 2006 s 1).
- 11 Children Act 1989 s 11B(2) (as prospectively added: see note 10 supra).
- 12 Ibid s 11B(3) (as prospectively added: see note 10 supra). An excepted order is one that:
  - 186 (1) is made in proceedings that include proceedings on an application for a relevant adoption order (as to which see *infra*) in respect of the child (s 11B(4)(a) (as so prospectively added)); or
  - 187 (2) makes provision as regards contact between the child and a person who would be a parent or relative of the child but for the child's adoption by:
16. (a) a relevant adoption order (s 11B(4)(b), (5)(a) (as so prospectively added)); or  
16
17. (b) an adoption order, within the meaning of the Adoption Act 1976 s 72(1), other than an order made by virtue of s 14 on the application of a married couple one of whom is the mother or the father of the child (Children Act 1989 s 11B(4)(b), (5)(b) (as so prospectively added)); or  
17
18. (c) a Scottish adoption order, within the meaning of the Adoption and Children Act 2002, other than an order made (i) by virtue of the Adoption (Scotland) Act 1978 s 14 on the application of a married couple one of whom is the mother or the father of the child, or (ii) by virtue of s 15(1)(aa) (as added) (Children Act 1989 s 11B(4)(b), (5)(c) (as so prospectively added)); or  
18
19. (d) a Northern Irish adoption order, within the meaning of the Adoption and Children Act 2002, other than an order made by virtue of the Adoption (Northern Ireland) Order 1987 art 14 on the application of a married couple one of whom is the mother or the father of the child (Children Act 1989 s 11B(4)(b), (5)(d) (as so prospectively added)).  
19

A relevant adoption order is an adoption order, within the meaning of the Adoption and Children Act 2002 s 46(1) (see para 359 post), other than an order made (A) on an application under s 50 (see para 362 post) by a couple one of whom is the mother or the father of the person to be adopted; or (B) on an application under s 51(2) (see para 363 post): Children Act 1989 s 11B(6) (as so prospectively added).

- 13 Ibid s 11B(7) (prospectively added: see note 10 supra).

## UPDATE

### 252-260 Contact activity directions ... Compensation for financial loss

These provisions have effect from 8 December 2008: SI 2008/2870.

### 252 Contact activity directions

NOTE 4--Children Act 1989 s 11F in force 7 November 2008: SI 2008/2870. As to regulations made thereunder see the Children Act 1989 (Contact Activity Directions and Conditions: Financial Assistance) (Wales) Regulations 2008, SI 2008/2943.

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### **253. Contact activity conditions.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. If in any family proceedings the court makes a contact order with respect to a child, or makes an order varying a contact order with respect to a child<sup>2</sup>, the contact order may impose (or the contact order may be varied so as to impose) a condition requiring an individual<sup>3</sup> to take part in an activity that promotes contact with the child concerned<sup>4</sup>. Such a condition is called a 'contact activity condition'<sup>5</sup>, and it must specify the activity and the person providing the activity<sup>6</sup>. The activities that may be so required include, in particular:

- 357 (1) programmes, classes and counselling or guidance sessions of a kind that may assist a person as regards establishing, maintaining or improving contact with a child or may, by addressing a person's violent behaviour, enable or facilitate contact with a child<sup>7</sup>;
- 358 (2) sessions in which information or advice is given as regards making or operating arrangements for contact with a child, including making arrangements by means of mediation<sup>8</sup>.

However, no individual may be required by a contact activity condition to undergo medical or psychiatric examination, assessment or treatment or to take part in mediation<sup>9</sup>.

Contact activity conditions may not be imposed in certain circumstances. A contact order may not impose a contact activity condition on an individual who is a child unless the individual is a parent of the child concerned<sup>10</sup>. If a contact order is an excepted order, it may not impose (and it may not be varied so as to impose) a contact activity condition<sup>11</sup>. A contact order may not impose a contact activity condition on an individual unless the individual is habitually resident in England and Wales; and a condition ceases to have effect if the individual subject to the condition ceases to be habitually resident in England and Wales<sup>12</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 1, which inserts the Children Act 1989 ss 11A-11G, had not been brought into force.

2 Ibid s 11C(1) (s 11C prospectively added by the Children and Adoption Act 2006 s 1). As to contact orders see para 251 ante.

3 I.e. an individual who falls within the Children Act 1989 s 11C(3) (as prospectively added). An individual falls within this provision if he is:

188 (1) for the purposes of the contact order so made or varied, the person with whom the child concerned lives or is to live (s 11C(3)(a) (as prospectively added: see note 2 supra);

189 (2) the person whose contact with the child concerned is provided for in that order (s 11C(3)(b) (as so prospectively added); or

190 (3) a person upon whom that order imposes a condition under s 11(7)(b) (see para 250 ante) (s 11C(3)(c) (as so prospectively added)).

4 Ibid s 11C(2), (6) (as prospectively added: see note 2 supra).

5 See ibid s 11C(2) (as prospectively added); and the text and notes 1-4 supra.

6 Ibid s 11C(4) (as prospectively added: see note 2 supra). Regulations may be made authorising financial payments to assist individuals who are required to take part in an activity paying relevant fees and charges: see s 11F (prospectively added by the Children and Adoption Act 2006 s 1). At the date at which this volume states the law no such regulations had been made.

7 Children Act 1989 ss 11A(5)(a), 11C(5) (as prospectively added: see note 2 supra).

8 Ibid ss 11A(5)(b), 11C(5) (as prospectively added: see note 2 supra).

9 Ibid ss 11A(6), 11C(5) (as prospectively added: see note 2 supra).

10 Ibid s 11D(1) (s 11D prospectively added by the Children and Adoption Act 2006 s 1).

11 Children Act 1989 s 11D(2) (as prospectively added: see note 10 supra). As to excepted orders see para 252 note 12 ante.

12 Ibid s 11D(3) (as prospectively added: see note 10 supra).

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

### **253 Contact activity conditions**

NOTE 6--Children Act 1989 s 11F in force 7 November 2008: SI 2008/2870. As to regulations made thereunder see PARA 252 NOTE 4.

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#### **254. Matters to be considered before making contact activity directions and conditions.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Before making a contact activity direction<sup>2</sup> (or imposing a contact activity condition<sup>3</sup> by means of a contact order<sup>4</sup>), the court must satisfy itself as to the following matters<sup>5</sup>:

- 359 (1) the first matter is that the activity proposed to be specified is appropriate in the circumstances of the case<sup>6</sup>;
- 360 (2) the second matter is that the person proposed to be specified as the provider of the activity is suitable to provide the activity<sup>7</sup>;
- 361 (3) the third matter is that the activity proposed to be specified is provided in a place to which the individual who would be subject to the direction (or the condition) can reasonably be expected to travel<sup>8</sup>.

Before making such a direction (or such an order), the court must obtain and consider information about the individual who would be subject to the direction (or the condition) and the likely effect of the direction (or the condition) on him<sup>9</sup>.

The court may ask an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer<sup>10</sup> to provide the court with information as to the matters described above<sup>11</sup> and it is the duty of the officer to comply with any such request<sup>12</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 1, which inserts the Children Act 1989 ss 11A-11G, had not been brought into force.

2 For the meaning of 'contact activity direction' see para 252 ante.

3 For the meaning of 'contact activity condition' see para 253 ante.

4 As to contact orders see para 251 ante.

5 Children Act 1989 s 11E(1) (s 11E prospectively added by the Children and Adoption Act 2006 s 1).

6 Children Act 1989 s 11E(2) (as prospectively added: see note 5 supra). For these purposes, 'specified' means specified in a contact activity direction (or in a contact activity condition): s 11E(8) (as so prospectively added).

7 Ibid s 11E(3) (as prospectively added: see note 5 supra).

8 Ibid s 11E(4) (as prospectively added: see note 5 supra).

9 Ibid s 11E(5) (as prospectively added: see note 5 supra). Information about the likely effect of the direction (or the condition) may, in particular, include information as to: (1) any conflict with the individual's religious beliefs; (2) any interference with the times (if any) at which he normally works or attends an educational establishment: s 11E(6) (as so prospectively added).

10 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

11 le the matters in the Children Act 1989 s 11E(2)-(5) (as prospectively added): see the text and notes 1-9 *supra*.

12 Ibid s 11E(7) (as prospectively added: see note 5 *supra*).

### **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.



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## **255. Monitoring compliance with contact activity directions and conditions.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where in any family proceedings the court: (1) makes a contact activity direction<sup>2</sup> in relation to an individual; or (2) makes a contact order<sup>3</sup> that imposes, or varies a contact order so as to impose, a contact activity condition<sup>4</sup> on an individual<sup>5</sup>, then the court may on making the direction (or imposing the condition by means of a contact order) ask an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>6</sup> or a Welsh family proceedings officer<sup>7</sup> to:

- 362 (a) monitor, or arrange for the monitoring of, the individual's compliance with the direction (or the condition)<sup>8</sup>;
- 363 (b) report to the court on any failure by the individual to comply with the direction (or the condition)<sup>9</sup>.

It is the duty of the officer of the Service<sup>10</sup> or Welsh family proceedings officer to comply with any such request<sup>11</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 1, which inserts the Children Act 1989 ss 11A-11G, had not been brought into force.

2 For the meaning of 'contact activity direction' see para 252 ante.

3 As to contact orders see para 251 ante.

4 For the meaning of 'contact activity condition' see para 253 ante.

5 Children Act 1989 s 11G(1) (s 11G prospectively added by the Children and Adoption Act 2006 s 1).

6 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

7 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

8 Children Act 1989 s 11G(2)(a) (as prospectively added: see note 5 supra).

9 Ibid s 11G(2)(b) (as prospectively added: see note 5 supra).

10 For the meaning of 'officer of the Service' see para 230 ante.

11 Children Act 1989 s 11G(3) (as prospectively added: see note 5 supra).

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

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## 256. Monitoring contact.

As from a day to be appointed the following provisions have effect<sup>1</sup>. If in any family proceedings the court makes: (1) a contact order<sup>2</sup> with respect to a child in favour of a person; or (2) an order varying such a contact order<sup>3</sup>, then the court may request an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>4</sup> or a Welsh family proceedings officer<sup>5</sup> to:

- 364 (a) monitor whether an individual complies with the contact order (or the contact order as varied)<sup>6</sup>;
- 365 (b) report to the court on such matters relating to the individual's compliance as the court may specify in the request<sup>7</sup>.

The court may make the request either on making the contact order (or the order varying the contact order), or at any time during the subsequent course of the proceedings as they relate to contact with the child concerned<sup>8</sup>. In making the request, the court must specify the period for which the officer of the Service<sup>9</sup> or Welsh family proceedings officer is to monitor compliance with the order (and the period specified may not exceed 12 months)<sup>10</sup>.

It is the duty of the officer of the Service or Welsh family proceedings officer to comply with the court's request<sup>11</sup>. The court may order an individual<sup>12</sup> to take such steps as may be specified in the order with a view to enabling the officer to comply with the court's request<sup>13</sup>, but it may not do so with respect to an individual who is a child unless he is a parent of the child with respect to whom the order mentioned in head (1) or (2) above was made<sup>14</sup>.

If the contact order (or the contact order as varied) includes a contact activity condition<sup>15</sup>, the court's request for monitoring is to be treated as relating to the provisions of the order other than the contact activity condition<sup>16</sup>. A court may not make a request in relation to a contact order that is an excepted order<sup>17</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 2, which inserts the Children Act 1989 s 11H, had not been brought into force.

2 As to contact orders see para 251 ante.

3 Children Act 1989 s 11H(1) (s 11H prospectively added by the Children and Adoption Act 2006 s 2).

4 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

5 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

6 Children Act 1989 s 11H(2)(a) (as prospectively added: see note 3 supra). An individual falls within this provision if the contact order so made (or the contact order as so varied): (1) requires the individual to allow contact with the child concerned; (2) names the individual as having contact with the child concerned; or (3) imposes a condition under s 11(7)(b) (see para 250 ante) on the individual: s 11H(3) (as so prospectively added).

7 Ibid s 11H(2)(b) (as prospectively added: see note 3 supra).

8 Ibid s 11H(5) (as prospectively added: see note 3 supra).

- 9 For the meaning of 'officer of the Service' see para 230 ante.
- 10 Children Act 1989 s 11H(6) (as prospectively added: see note 3 supra).
- 11 Ibid s 11H(7) (as prospectively added: see note 3 supra).
- 12 As to the individual referred to in the text see note 6 supra.
- 13 Children Act 1989 s 11H(8) (as prospectively added: see note 3 supra).
- 14 Ibid s 11H(9) (as prospectively added: see note 3 supra).
- 15 For the meaning of 'contact activity condition' see para 253 ante.
- 16 Children Act 1989 s 11H(4) (as prospectively added: see note 3 supra).
- 17 Ibid s 11H(10) (as prospectively added: see note 3 supra). As to excepted orders see s 11B(4) (as prospectively added); and para 252 ante.

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

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## **257. Consequences of non-compliance with contact orders.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where the court makes (or varies) a contact order<sup>2</sup>, it must attach to the contact order (or the order varying the contact order) a notice warning of the consequences of failing to comply with the contact order<sup>3</sup>.

If a contact order with respect to a child has been made<sup>4</sup> and the court is satisfied beyond reasonable doubt that a person has failed to comply with it, the court may make an enforcement order imposing on the person an unpaid work requirement<sup>5</sup>. However, the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the contact order<sup>6</sup>. The burden of proof lies on the person claiming to have had a reasonable excuse, and the standard of proof is the balance of probabilities<sup>7</sup>.

The court may make an enforcement order in relation to the contact order only on the application of:

- 366 (1) the person who is, for the purposes of the contact order, the person with whom the child concerned lives or is to live<sup>8</sup>;
- 367 (2) the person whose contact with the child concerned is provided for in the contact order<sup>9</sup>;
- 368 (3) any individual subject to condition<sup>10</sup>; or
- 369 (4) the child concerned<sup>11</sup>.

The court is not prevented from making more than one enforcement order in relation to the same person on the same occasion<sup>12</sup>. The court may suspend an enforcement order for such period as it thinks fit<sup>13</sup>.

There are certain restrictions on the making of enforcement orders. The court may not make an enforcement order against a person in respect of a failure to comply with a contact order unless it is satisfied that before the failure occurred the person had been given a copy of, or otherwise informed of the terms of any warning notices<sup>14</sup>. The court may not make an enforcement order against a person in respect of any failure to comply with a contact order occurring before the person attained the age of 18<sup>15</sup>. The court may not make an enforcement order against a person in respect of a failure to comply with a contact order that is an excepted order<sup>16</sup>. Nor may the court make an enforcement order against a person unless he is habitually resident in England and Wales; and an enforcement order ceases to have effect if he ceases to be habitually resident in England and Wales<sup>17</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 3, which inserts the Children Act 1989 s 11I, had not been brought into force.

2 As to contact orders see para 251 et seq ante. For transitional provisions applicable where a contact order is already in force on the date at which the Children and Adoption Act 2006 ss 3-5 come into force see s 8 (not yet in force).

3 Children Act 1989 s 11I (prospectively added by the Children and Adoption Act 2006 s 3).

4 Children Act 1989 s 11J(1) (prospectively added by the Children and Adoption Act 2006 s 4).

5 Children Act 1989 s 11J(2), (8) (as prospectively added: see note 4 supra). As to the unpaid work requirement see s 11J(12), Sch A1 Pt I (prospectively added by the Children and Adoption Act 2006 s 4, Sch 1). Enforcement orders may be amended or revoked: see the Children Act 1989 Sch A1 Pt 2 (as so prospectively added).

6 Ibid s 11J(3) (as prospectively added: see note 4 supra).

7 Ibid s 11J(4) (as prospectively added: see note 4 supra).

8 Ibid s 11J(5)(a) (as prospectively added: see note 4 supra).

9 Ibid s 11J(5)(b) (as prospectively added: see note 4 supra).

10 Ibid s 11J(5)(c) (as prospectively added: see note 4 supra). The condition referred to in the text is one under s 11(7)(b) (see para 250 ante) or a contact activity condition (see para 253 ante): s 11J(5)(c) (as so prospectively added).

11 Ibid s 11J(5)(d) (as prospectively added: see note 4 supra). Where the person proposing to apply for an enforcement order is the child concerned, the child must obtain the leave of the court before making such an application: s 11J(6) (as so prospectively added). The court may grant leave to the child concerned only if it is satisfied that he has sufficient understanding to make the proposed application: s 11J(7) (as so prospectively added).

12 Ibid s 11J(10) (as prospectively added: see note 4 supra).

13 Ibid s 11J(9) (as prospectively added: see note 4 supra).

14 Ibid s 11K(1) (s 11K prospectively added by the Children and Adoption Act 2006 s 4). The reference in the text to warning notices is a reference, in the case of a failure to comply with a contact order that was varied before the failure occurred, to a warning notice under the Children Act 1989 s 11I (as prospectively added) (see the text and notes 1-3 supra) relating to the order varying the contact order or, where more than one such order has been made, to the last order preceding the failure in question, and in any other case, a notice under s 11I (as prospectively added) relating to the contact order.: s 11K(1) (as so prospectively added).

15 Ibid s 11K(2) (as prospectively added: see note 14 supra).

16 Ibid s 11K(3) (as prospectively added: see note 14 supra). As to excepted orders see s 11B(4) (as prospectively added); and para 252 ante.

17 Ibid s 11K(4) (as prospectively added: see note 14 supra).

## UPDATE

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

### **257-259 Consequences of non-compliance with contact orders ... Monitoring compliance with enforcement orders**

See also *Practice Direction (contact orders) (disclosure of information to officers of the National Probation Service)* [2009] 1 FLR 373, [2008] All ER (D) 94 (Nov).

### **257 Consequences of non-compliance with contact orders**

NOTE 5--As to service of enforcement orders, see the Family Proceedings Rules 1991, SI 1991/1247, r 4.21AA (added by SI 2008/2861).

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## **258. Matters to be considered before making enforcement orders.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Before making an enforcement order<sup>2</sup> as regards a person in breach of a contact order<sup>3</sup>, the court must be satisfied that:

- 370 (1) making the enforcement order proposed is necessary to secure the person's compliance with the contact order or any contact order that has effect in its place<sup>4</sup>;
- 371 (2) the likely effect on the person of the enforcement order proposed to be made is proportionate to the seriousness of the breach of the contact order<sup>5</sup>;

The court must also be satisfied that provision for the person to work under an unpaid work requirement imposed by an enforcement order can be made in the local justice area in which the person in breach resides or will reside<sup>6</sup>. Before making the order, the court must obtain and consider information about the person and the likely effect of the enforcement order on him<sup>7</sup>. If the court proposes to make an enforcement order it may ask an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>8</sup> or a Welsh family proceedings officer<sup>9</sup> to provide the court with such information<sup>10</sup> and it is the duty of the officer to comply with the request<sup>11</sup>.

In making an enforcement order, the court must take into account the welfare of the child who is the subject of the contact order<sup>12</sup>. Where the court makes an enforcement order, it must attach to the order a notice warning of the consequences of failing to comply with the order<sup>13</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 4, which inserts the Children Act 1989 ss 11J-11N, had not been brought into force.

2 As to enforcement orders see para 257 ante.

3 As to contact orders see para 251 et seq ante.

4 Children Act 1989 s 11L(1)(a) (s 11L prospectively added by the Children and Adoption Act 2006 s 4).

5 Children Act 1989 s 11L(1)(b) (as prospectively added: see note 4 supra).

6 Ibid s 11L(2) (as prospectively added: see note 4 supra).

7 Ibid s 11L(3) (as prospectively added: see note 4 supra). Information about the likely effect of the enforcement order may, in particular, include information as to: (1) any conflict with the person's religious beliefs; (2) any interference with the times (if any) at which he normally works or attends an educational establishment: s 11L(4) (as so prospectively added).

8 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

9 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

10 Children Act 1989 s 11L(5) (as prospectively added: see note 4 supra).

11 Ibid s 11L(6) (as prospectively added: see note 4 supra).

12 Ibid s 11L(7) (as prospectively added: see note 4 supra). As to the welfare principle see para 300 post.

13 Ibid s 11N (prospectively added by the Children and Adoption Act 2006 s 4).

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

### **257-259 Consequences of non-compliance with contact orders ... Monitoring compliance with enforcement orders**

See also *Practice Direction (contact orders) (disclosure of information to officers of the National Probation Service)* [2009] 1 FLR 373, [2008] All ER (D) 94 (Nov).

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### **259. Monitoring compliance with enforcement orders.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. On making an enforcement order<sup>2</sup> in relation to a person, the court must ask an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>3</sup> or a Welsh family proceedings officer<sup>4</sup> to:

- 372 (1) monitor, or arrange for the monitoring of, the person's compliance with the unpaid work requirement imposed by the order<sup>5</sup>;
- 373 (2) report to the court (if a report on the failure to comply with the unpaid work requirement is made in relation to the person)<sup>6</sup>;
- 374 (3) report to the court on such other matters relating to the person's compliance as may be specified in the request<sup>7</sup>;
- 375 (4) report to the court if the person is, or becomes, unsuitable to perform work under the requirement<sup>8</sup>.

It is the duty of the officer of the Service<sup>9</sup> or Welsh family proceedings officer to comply with any such request<sup>10</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 4, which inserts the Children Act 1989 ss 11J-11N, had not been brought into force.

2 As to enforcement orders see para 257 ante.

3 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante.

4 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

5 Children Act 1989 s 11M(1)(a) (s 11M prospectively added by the Children and Adoption Act 2006 s 4). As to the unpaid work requirement see para 257 note 5 ante.

6 Children Act 1989 s 11M(1)(b) (as prospectively added: see note 5 supra). As to warnings and reports following breaches of the unpaid work requirement see Sch A1 para 8 (prospectively added by the Children and Adoption Act 2006 s 4, Sch 1).

7 Children Act 1989 s 11M(1)(c) (as prospectively added: see note 5 supra).

8 Ibid s 11M(1)(d) (as prospectively added: see note 5 supra).

9 For the meaning of 'officer of the Service' see para 230 ante.

10 Children Act 1989 s 11M(2) (as prospectively added: see note 5 supra).

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.



**257-259 Consequences of non-compliance with contact orders ... Monitoring compliance with enforcement orders**

See also *Practice Direction (contact orders) (disclosure of information to officers of the National Probation Service)* [2009] 1 FLR 373, [2008] All ER (D) 94 (Nov).

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## **260. Compensation for financial loss.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. If a contact order with respect to a child has been made<sup>2</sup> and the court is satisfied that:

- 376 (1) an individual has failed to comply with the contact order; and
- 377 (2) a person who falls within any of heads (a) to (d) below has suffered financial loss by reason of the breach,

the court may make an order requiring the individual in breach to pay the person compensation in respect of his financial loss<sup>3</sup>. The persons referred to in head (2) above are: (a) the person who is, for the purposes of the contact order, the person with whom the child concerned lives or is to live<sup>4</sup>; (b) the person whose contact with the child concerned is provided for in the contact order<sup>5</sup>; (c) an individual subject to a contact order condition<sup>6</sup> or a contact activity condition imposed by the contact order<sup>7</sup>; or (d) the child concerned<sup>8</sup>.

However, the court may not make such a compensation order if it is satisfied that the individual in breach had a reasonable excuse for failing to comply with the contact order<sup>9</sup>. An order may be made only on an application by the person who claims to have suffered financial loss<sup>10</sup>.

The amount of compensation is to be determined by the court, but may not exceed the amount of the applicant's financial loss<sup>11</sup>. In determining the amount of compensation payable by the individual in breach, the court must take into account the individual's financial circumstances<sup>12</sup>.

In exercising these powers, the court must take into account the welfare of the child concerned<sup>13</sup>.

1 At the date at which this volume states the law the Children and Adoption Act 2006 s 5, which inserts the Children Act 1989 ss 11O, 11P, had not been brought into force.

2 Ibid s 11O(1) (s 11O prospectively added by the Children and Adoption Act 2006 s 5).

3 Children Act 1989 s 11O(2), (12) (as prospectively added: see note 2 supra).

The court may not make an order under s 11O(2) (as prospectively added) requiring an individual to pay compensation in respect of a failure by him to comply with a contact order unless it is satisfied that before the failure occurred the individual had been given (in accordance with rules of court) a copy of, or otherwise informed of the terms of:

191 (1) in the case of a failure to comply with a contact order that was varied before the failure occurred, a notice under s 11I (as prospectively added: see para 257 ante) relating to the order varying the contact order or, where more than one such order has been made, the last order preceding the failure in question (s 11P(1)(a) (s 11P prospectively added by the Children and Adoption Act 2006 s 5));

192 (2) in any other case, a notice under the Children Act 1989 s 11I (as prospectively added) relating to the contact order (s 11P(1)(b) (as so prospectively added)).

A court may not make an order requiring an individual to pay compensation in respect of a failure by him to comply with a contact order where the failure occurred before the individual attained the age of 18: s 11P(2) (as so prospectively added). Nor may it make an order where the contact order is an excepted order (within the meaning of s 11B(4) (as prospectively added: see para 252 note 12 ante): s 11P(3) (as so prospectively added).

- 4 Ibid s 110(6)(a) (as prospectively added: see note 2 supra).
- 5 Ibid s 110(6)(b) (as prospectively added: see note 2 supra).
- 6 Ie a condition under ibid s 11(7)(b): see para 250 ante.
- 7 Ibid s 110(6)(c) (as prospectively added: see note 2 supra). As to contact activity conditions see para 253 ante.
- 8 Ibid s 110(6)(d) (as prospectively added: see note 2 supra). Where the person proposing to apply for an order is the child concerned, the child must obtain the leave of the court before making such an application: s 110(7) (as so prospectively added). The court may grant leave to the child concerned only if it is satisfied that he has sufficient understanding to make the proposed application: s 110(8) (as so prospectively added).
- 9 Ibid s 110(3) (as prospectively added: see note 2 supra). The burden of proof as to this matter lies on the individual claiming to have had a reasonable excuse: s 110(4) (as so prospectively added).
- 10 Ibid s 110(5) (as prospectively added: see note 2 supra).
- 11 Ibid s 110(9) (as prospectively added: see note 2 supra). The amount ordered to be paid as compensation may be recovered by the applicant as a civil debt due to him: s 110(11) (as so prospectively added).
- 12 Ibid s 110(10) (as prospectively added: see note 2 supra).
- 13 Ibid s 110(14) (as prospectively added: see note 2 supra). As to the welfare principle see para 300 post.

## **UPDATE**

### **252-260 Contact activity directions ... Compensation for financial loss**

These provisions have effect from 8 December 2008: SI 2008/2870.

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### (iii) Prohibited Steps Orders

#### 261. Prohibited steps orders.

A prohibited steps order is an order that no step which could be taken by a parent in meeting his parental responsibility<sup>1</sup> for a child<sup>2</sup>, and which is of a kind specified in the order, may be taken by any person without the consent of the court<sup>3</sup>. A prohibited steps order could thus be used, for example, to direct that the child should not be brought into contact with a named person or taken to a particular place, or should not undergo specified medical procedures. A prohibited steps order could also be used to prohibit a child's removal from the country when no residence order has been made and therefore no automatic restriction on removal<sup>4</sup> applies, or to prevent the child's removal from his home before the court has had the opportunity to decide what order, if any, should be made.

A prohibited steps order can be made to prevent the removal of a child from the jurisdiction, even if it is made *ex parte* and the person against whom it is made is not, and has no assets, within the jurisdiction<sup>5</sup>.

A prohibited steps order may not be made in respect of a child who is in the care of a local authority<sup>6</sup>. No court may exercise its powers to make a prohibited steps order: (1) with a view to achieving a result which could be achieved by making a residence order or a contact order<sup>7</sup>; or (2) in any way which is denied to the High Court<sup>8</sup> in the exercise of its inherent jurisdiction with respect to children<sup>9</sup>.

Where an application has been made by a local authority for an interim care order, the court should not alternatively make a prohibited steps order without giving the parties notice of its intention to do so and an opportunity to make representations<sup>10</sup>.

The making of a care order with respect to a child who is the subject of a prohibited steps order automatically discharges that order<sup>11</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante. It follows from the reference to 'parent' and 'parental responsibility' in this definition that a prohibited steps order could not be granted against a newspaper to restrain it from publishing information about a child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.31. As to the guidance and regulations generally see para 163 ante. See also the text and note 2 infra.

2 Thus a prohibited steps order could not be made to prevent the parents having contact with each other, since such an order 'did not impinge upon the parental responsibility of the parent concerned': *Croydon London Borough Council v A* [1992] Fam 169, [1992] 3 All ER 788. For the meaning of 'child' see para 3 ante.

3 Children Act 1989 ss 8(1), 105(1). A prohibited steps order is one of the 'section 8 orders' referred to in the Children Act 1989, as is an order varying or discharging a prohibited steps order: s 8(2).

The prohibited steps order is modelled on the orders traditionally made in the wardship jurisdiction of the High Court (see para 218 et seq ante), but it has been said that the purpose of the prohibited steps order is to impose a specific restriction on the exercise of parental responsibility instead of the vague requirement in wardship that no 'important step' be taken in respect of the child without the court's consent: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.31. See eg *Re J (child's religious upbringing and circumcision)* [1999] 2 FCR 345, sub nom *Re J (specific issue orders: Muslim upbringing and circumcision)* [1999] 2 FLR 678 (father prohibited, without the court's permission, from making arrangements for the circumcision of his five-year-old son for religious purposes). A prohibited steps order can be made against any person and this includes someone who is not a

party to the proceedings: see *Re H (prohibited steps order)* [1995] 1 WLR 667, [1995] 1 FLR 638, CA (prohibited steps order made against mother's former cohabitee preventing him from having or seeking contact with the children)

4 See para 262 post.

5 *Re D (a minor) (child: removal from jurisdiction)* [1992] 1 All ER 892, [1992] 1 WLR 315, CA.

6 See the Children Act 1989 s 9(1). For the meaning of 'local authority' see para 248 note 10 ante.

7 Ibid s 9(5)(a). See *Nottinghamshire County Council v P (local authority: prohibited steps order)* [1994] Fam 18, [1993] 3 All ER 815. As to residence orders see para 262 post. As to contact orders see para 251 et seq ante.

8 Ie by reason of the Children Act 1989 s 100(2): see para 201 ante.

9 Ibid s 9(5)(b). As to restrictions on the court's powers to make orders see para 264 post.

10 *Croydon London Borough Council v A* [1992] Fam 169, [1992] 3 All ER 788.

11 Children Act 1989 s 91(2). As to care orders see para 270 et seq post.

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## **(iv) Residence Orders**

### **262. Residence orders.**

A residence order is an order settling the arrangements to be made as to the person<sup>1</sup> with whom a child<sup>2</sup> is to live<sup>3</sup>. Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned<sup>4</sup>. It will be a matter for the court, applying the welfare principle<sup>5</sup>, to decide whether it would be in the child's interest to do so<sup>6</sup>. Where a residence order has been made with respect to a child and as a result of the order the child lives, or is to live, with one of two parents<sup>7</sup> who each has parental responsibility<sup>8</sup> for him, the order ceases to have effect if the parents live together for a continuous period of more than six months<sup>9</sup>.

When the court makes a residence order in favour of any person who is not the parent or guardian<sup>10</sup> of the child concerned, that person has parental responsibility<sup>11</sup> for the child while the residence order remains in force<sup>12</sup>. Where the court makes the order in favour of the father, it must, if the father would not otherwise have parental responsibility for the child, make an order<sup>13</sup> giving him that responsibility<sup>14</sup>. However, the acquisition of parental responsibility by virtue of a residence order does not deprive any other person of parental responsibility<sup>15</sup>. A person with parental responsibility by virtue of a residence order does not have the right: (1) to agree or refuse to agree, to the making of an adoption order<sup>16</sup> with respect to the child<sup>17</sup>; (2) to agree or refuse to agree to the making of a parental responsibility order with respect to the adoption of a child abroad<sup>18</sup>; or (3) to appoint a guardian for the child<sup>19</sup>.

Where a residence order is in force with respect to a child, no person may cause the child to be known by a new surname or remove him from the United Kingdom<sup>20</sup>, without either the written consent of every person who has parental responsibility for the child or the leave of the court<sup>21</sup>, but this does not prevent the removal of a child for a period of less than one month by the person in whose favour the residence order was made<sup>22</sup>.

The making of a residence order with respect to a child who is the subject of a care order discharges the care order<sup>23</sup>, and the making of a care order with respect to a child who is the subject of a residence order discharges that order<sup>24</sup>. No application may be made by a local authority<sup>25</sup> for a residence order and no court may make such an order in favour of a local authority<sup>26</sup>.

Where a residence order is in force with respect to a child in favour of any person, and any other person, including one in whose favour the order is also in force is in breach of the arrangements settled by the order, then the former person may, as soon as a copy of the residence order has been served on the other person, enforce the order under the Magistrates' Courts Act 1980<sup>27</sup> as if it were an order requiring the other person to produce the child to him<sup>28</sup>.

The court has jurisdiction to make an interim residence order on an ex parte application in exceptional circumstances<sup>29</sup>.

<sup>1</sup> The word 'person' in the singular includes the plural: see the Interpretation Act 1978 s 6; and STATUTES vol 44(1) (Reissue) para 1388.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 ss 8(1), 105(1). A residence order is one of the 'section 8 orders' referred to in the Children Act 1989, as is an order varying or discharging a residence order: s 8(2). An interim residence order may be made to run concurrently with an existing residence order, the effect of the latter being suspended until a later court hearing: *Re M (minors) (interim residence order)* [1997] 2 FCR 28, CA. A residence order may be made if it may be of benefit to a child's welfare, even if the child is subject to immigration control and there is no dispute about the child's welfare. However, the order must be of limited duration so that it does not fetter the Secretary of State's eventual decision as to the child's immigration status: *Re E* [1995] Imm AR 475. The relevance and value of the UN Declaration of the Rights of the Child 1959, 20 November 1959 (UN General Assembly Resolution 1386 (XIV)) is doubtful, and Principle 6 (that a child of tender years must not, save in exceptional circumstances, be separated from its mother) is not reflected in the UN Convention on the Rights of the Child 1989, 20 November 1989 (UN General Assembly Resolution 44/25; TS 44 (1992); Cm 1976): *Re A (a minor) (residence order)* [1998] 2 FCR 633, sub nom *Re A (children: 1959 UN Declaration)* [1998] 1 FLR 354, CA.

The court must take into account new care arrangements before making a residence order: *Re Dhaliwal (a child)* [2005] EWCA Civ 743, [2005] 2 FCR 398 (procedural irregularity where judge made residence order to father without cross-examining him on his new job and the consequent care arrangements involving his extended family). A judge should provide adequate reasons before refusing to make a residence order: *Re G (care proceedings: placement for adoption)* [2005] EWCA Civ 896, [2005] Fam Law 770, sub nom *Re G (a child) (care proceedings: lack of reasons)* (2005) Times, 1 August.

The making of a new residence order in response to difficulties in contact is a last resort; the status quo is to be preferred to speculative improvements in contact: *Re B (a minor) (residence order)* [1998] 1 FCR 549, sub nom *Re B (a minor) (residence order: status quo)* [1998] 1 FLR 368, CA. See also *Re K (residence order: securing contact)* [1999] 3 FCR 365, [1999] 1 FLR 583, CA (father refused admittance by mother's family); *Re A (a child) (mental health of mother)* [2001] EWCA Civ 162, [2001] 1 FCR 577, [2001] All ER (D) 106 (Feb); *Re E (children) (residence order)* [2001] EWCA Civ 567, [2001] 2 FCR 662, [2001] All ER (D) 354 (Mar). See also *Re G (children: residence: same-sex partner)* [2006] UKHL 43, [2006] 4 All ER 241, [2006] 2 FLR 629.

References in the Children Act 1989 to a person with whom a child lives, or is to live, as the result of a residence order are to be construed as references to the person named in the order as the person with whom the child is to live: s 105(3).

4 Ibid s 11(4). A shared residence order is justified in circumstances where the circumstances and the reality of the case support that conclusion, and the conclusion is consistent with the principle that the welfare of the child is the paramount consideration: see para 300 post. It is no longer an unusual order to be made in exceptional circumstances: see *Re C (a child) (shared residence)* [2006] EWCA Civ 235, [2006] All ER (D) 94 (Jan); *Re D (shared residence orders)* [2001] 1 FCR 147, [2001] 1 FLR 495, CA (there should be a low threshold for shared residence orders; ie that the order would be in the child's interest, not necessarily of positive benefit). See *Re P (children) (shared residence order)* [2005] EWCA Civ 1639, [2006] 1 FCR 309, [2006] 2 FLR 347 (shared residence order appropriate where parents had created two homes for child to the child's advantage). Previously the approach had been as set out in *A v A (minors) (shared residence)* [1995] 1 FCR 91, [1994] 1 FLR 669, CA.

Housing expectations should be provided where a joint residence order is being proposed and the court should consider asking the local housing authority to make representations in cases of doubt: *R (on the application of Bibi) v Camden London Borough Council* [2004] EWHC 2527 (Admin), [2005] 1 FLR 413, [2005] Fam Law 108. A shared residence order can be justified on the grounds of finance: *Re R (residence order: finance)* [1995] 3 FCR 334, [1995] 2 FLR 612, CA. See also *G v G (joint residence order)* [1993] Fam Law 615; *G v F (shared residence: parental responsibility)* [1998] 3 FCR 1, sub nom *G v F (contact and shared residence: applications for leave)* [1998] 2 FLR 799 (application by a lesbian partner); *Re G (residence: same-sex partner)* [2005] EWCA Civ 462, [2006] 1 FCR 436, [2005] 2 FLR 957 (shared residence order was the only way to give the same sex partner parental responsibility).

5 As to the welfare principle see para 300 post.

6 Cf *Riley v Riley* [1986] 2 FLR 429, [1987] Fam Law 15, CA (decided in relation to custody orders). Where an application is made to include a further party to the proceedings a court may use its discretion to take into account the wishes of the child: see *A v A and Newham London Borough Council* [1993] 1 FCR 870, sub nom *Re A (a minor) (residence order: leave to apply)* [1993] 1 FLR 425. There is a strong presumption that the best interests of the child are served by his being brought up by his natural parents: *A Local Authority v D* [2006] EWHC 295 (Fam), [2006] All ER (D) 392 (Feb).

7 As to the meaning of 'parent' see para 248 note 1 ante.

8 For the meaning of 'parental responsibility' see para 134 ante.

9 Children Act 1989 s 11(5).

10 For the meaning of 'guardian of a child' see para 144 note 5 ante. As to guardians and guardianship see para 144 et seq ante.

11 It has been said that the Children Act 1989 treats residence and parental responsibility as 'quite separate concepts' and that the intention is that both parents should feel that they have a continuing role to play in relation to their children: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.23. As to the guidance and regulations generally see para 163 ante.

12 Children Act 1989 s 12(2). See eg *B v B (grandparent: residence order)* [1993] 1 FCR 211, sub nom *B v B (residence order)* [1992] 2 FLR 327. The power of a court to make a residence order in favour of any person who is not the parent or guardian of the child concerned includes power to direct, at the request of that person, that the order continue in force until the child reaches the age of 18 (unless the order is brought to an end earlier); and any power to vary a residence order is exercisable accordingly: Children Act 1989 s 12(5) (s 12(5), (6) added by the Adoption and Children Act 2002 s 114(1)). Where a residence order includes such a direction, an application to vary or discharge the order may only be made, if apart from this subsection the leave of the court is not required, with such leave: Children Act 1989 s 12(6) (as so added).

13 Ie under ibid s 4 (as amended): see para 139 ante.

14 Ibid s 12(1). A natural unmarried father without parental responsibility is entitled to apply as of right for a residence order, but ceases to be so entitled after an order is made freeing the child for adoption: *Re C (minors) (parent: residence order)* [1994] Fam 1, [1993] 3 All ER 313, CA.

15 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.23; and para 141 ante. Thus the making of a residence order in favour of the child's mother does not deprive the father with parental responsibility of his right to take decisions about education or any other matter within the term parental responsibility. The general restrictions on the exercise of parental responsibility apply, in addition to those set out in the text to notes 16-19 infra: see paras 141-142 ante.

16 Ie under the Adoption and Children Act 2002 s 47 (as amended): see para 360 post.

17 Children Act 1989 s 12(3)(b).

18 Ibid s 12(3)(b) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 57). The reference in the text is to an order under the Adoption and Children Act 2002 s 84: see para 502 post.

19 Children Act 1989 s 12(3)(c).

20 For the meaning of 'United Kingdom' see para 102 note 7 ante. A condition restricting the primary carer's right to choose his place of residence within the United Kingdom is only appropriate in exceptional circumstances: *Re B (a child) (relocation)* (2007) Times, 10 October, CA.

21 Children Act 1989 s 13(1). The court may, when making a residence order, grant such leave generally or for specified purposes: s 13(3). As to the factors relevant to the exercise of the discretion to permit removal of a child see *P (L M) (otherwise E) v P (G E)* [1970] 3 All ER 659, sub nom *Poel v Poel* [1970] 1 WLR 1469, CA; *Lonslow v Hennig* [1986] 2 FLR 378, [1986] Fam Law 303, CA; *Re F (a ward) (leave to remove ward out of jurisdiction)* [1988] 2 FLR 116, [1988] Fam Law 295, CA; *Tyler v Tyler* [1990] FCR 22, [1989] 2 FLR 158, CA; *K v K (minors) (removal from the jurisdiction)* [1992] 2 FCR 161, [1992] 2 FLR 98; *M v M* (1992) Times, 12 August, CA. See also *Re W (minors) (removal from jurisdiction)* [1994] 1 FCR 842; *H v H (removal from jurisdiction)* [1995] 2 FCR 469, [1995] 1 FLR 529n, CA; *Harris v Pinnington* [1995] 3 FCR 35, sub nom *M H v G P (child: emigration)* [1995] 2 FLR 106; *Re T (a minor) (order as to residence)* [1996] 3 FCR 97, sub nom *Re T (removal from jurisdiction)* [1996] 2 FLR 352, CA; *Re H (application to remove from jurisdiction)* [1999] 2 FCR 34, [1998] 1 FLR 848, CA; *Re K (application to remove children from jurisdiction)* [1999] 2 FCR 410, [1998] 2 FLR 1006; *Re A (a minor) (holiday in non-Convention country)* [1999] 1 FCR 284, [1999] 2 FLR 1; *Re M (leave to remove child from jurisdiction)* [1999] 3 FCR 708, [1999] 2 FLR 334. See also *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FCR 425, [2001] 1 FLR 1052 (established principles governing the court's approach to an application under the Children Act 1989 s 13(1)(b) (removal of the child from the United Kingdom) were not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969)). *Payne v Payne* supra applied in *H v F (refusal of leave to remove a child from the jurisdiction)* [2005] EWHC 2705 (Fam), [2006] 1 FLR 776; *Re B (leave to remove)* [2006] EWHC 1783 (Fam), [2007] 1 FLR 333, [2006] Fam Law 1032. Cf *Al-Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951. As to the weight to be given to the impact of refusal on the new family and stepfather: see *Re S (a child) (removal from jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FCR 673, [2003] 2 FLR 1043. The court will refuse leave in circumstances where there is a significant loss to the child in respect of emotional and educational issues: see *Re Y (leave to remove from jurisdiction)* [2004] 2 FLR 330, [2004] Fam Law 650. See also *Re A (leave to remove: cultural and religious considerations)* [2006] EWHC 421 (Fam), [2006] 2 FLR 572. In



order to obtain permission to remove a child permanently from the jurisdiction the carer needs to show that the refusal will affect her sense of well-being and that her emotional state will impact on the child: *Re G (children) (removal from jurisdiction)* (2005) Times, 28 February, CA. However, see also *R v R (children) (residence order: removal from jurisdiction)* [2004] EWHC 2572 (Fam), [2005] 1 FLR 687 (mother judged not to have necessary emotional stability to establish a new life in another country at that stage). The court may feel it appropriate for the children to be separately represented when this issue is considered: see *Re N (children) (relocation outside the jurisdiction)* [2006] EWCA Civ 872, [2006] All ER (D) 132 (Jun); *Re J (children) (residence order: removal outside jurisdiction)* [2006] EWCA Civ 1897, [2007] 2 FCR 149, [2007] 1 FLR 2033.

In cases where a parent wishes to relocate within England and Wales, the court will subject such proposals to careful scrutiny and apply the guidelines in *Payne v Payne* supra: see *E v E (residence: relocation: ancillary relief)* [2006] EWCA Civ 843, [2006] 2 FCR 631, [2006] 2 FLR 1228. Permission of the court is not required for removal from England to Northern Ireland, but in exceptional cases, and applying the welfare principle, the court may attach a condition precluding removal of children: *Re H (children) (residence order: condition)* [2001] EWCA Civ 1338, [2001] 3 FCR 182, [2001] 2 FLR 1277. The principles governing an application for permanent removal of a child will not automatically, if ever, guide a decision in respect of temporary removal: *Re A (temporary removal from jurisdiction)* [2004] EWCA Civ 1587, [2005] 1 FLR 639, [2005] Fam Law 215.

As to the changing of child's surname where no residence order is in force see *Re C (minors) (change of surname)* [1997] 3 FCR 310, sub nom *Re P C (change of surname)* [1997] 2 FLR 730. See also *Dawson v Wearmouth* [1999] 2 AC 308, [1999] 2 All ER 353, HL; *Re W, Re A, Re B (change of name)* [1999] 3 FCR 337, [1999] 2 FLR 930, CA. Although a court may allow a situation in which a child's name for everyday use is not his or her official name, such a situation is in principle undesirable: *Re C (change of surname)* [1998] 2 FCR 544, [1998] 1 FLR 549, CA.

22 Children Act 1989 s 13(2).

23 Ibid s 91(1). A residence order is the only section 8 order (see note 3 supra) which may be made with respect to a child in care: see s 9(1). As to care orders see para 270 et seq post.

24 Ibid s 91(2).

25 For the meaning of 'local authority' see para 248 note 10 ante.

26 Children Act 1989 s 9(2). This also operates to prevent an authority from obtaining an order having the same effect as a residence order: *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA.

27 Ie under the Magistrates' Courts Act 1980 s 63(3) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 6.

28 Children Act 1989 s 14(1), (2). This is without prejudice to any other remedy: s 14(3).

In the family proceedings court where a person in whose favour a residence order (or special guardianship order) is in force wishes to enforce it he must file a written statement describing the alleged breach of the arrangements settled by the order, whereupon the justices' clerk must fix a date, time and place for a hearing of the proceedings and the designated officer for the court must give notice, as soon as practicable, to the person wishing to enforce the residence order (or special guardianship order) and to any person whom it is alleged is in breach of the arrangements settled by that order, of the date fixed: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 24 (amended by SI 2001/615; SI 2005/2930). As to the procedure for enforcing a section 8 order, including a residence order, in the county court and High Court see the Family Proceedings Rules 1991, SI 1991/1247, r 4.21A (added by SI 1992/2067; substituted by SI 2005/2922). As to special guardianship orders see paras 151-154 ante.

29 *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA (order granted ex parte pending inter partes hearing following abduction of child by mother). See also *Re K (procedure: family proceedings rules)* [2004] EWCA Civ 1827, [2005] 1 FLR 764 (procedural unfairness in interim residence hearing).

## UPDATE

### 262 Residence orders

NOTE 4--See *Re K (shared residence order)* [2008] EWCA Civ 526, [2009] 1 FCR 116; *Re W (shared residence order)* [2009] EWCA Civ 370, [2009] 2 FLR 436.

NOTE 6--The court should not be swayed by a desire to punish disagreeable conduct on the part of the parents: *Re C (residence order)* [2007] EWCA Civ 866, [2008] 1 FLR 211. Where the court is considering whether to make a residence order, practitioners

representing a parent involved in some other relevant matter have an ongoing duty to remain au courant with those other issues: *Re M (children)* [2008] EWHC 2281 (Fam), [2008] 2 FLR 2030. See also *Re W (children) (leave to remove)* [2008] EWCA Civ 538, [2008] 2 FCR 420; and *Re B (a child) (residence: grandparents)* [2009] EWCA Civ 545, [2009] All ER (D) 02 (Sep).

NOTE 12--Children Act 1989 ss 12(5), (6) repealed: Children and Young Persons Act 2008 s 37(2), Sch 4.

TEXT AND NOTE 14--See further Children Act 1989 s 12(1A) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 28(2)).

NOTE 21--See also *Re L (a child) (shared residence order)* [2009] EWCA Civ 20, [2009] 1 FCR 584 (existence of shared residence order would not automatically prevent either party from relocating).

NOTE 28--SI 1991/1247 r 4.21A amended, r 21B added: SI 2008/2861.

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## **(v) Specific Issue Orders**

### **263. Specific issue orders.**

A specific issue order is an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility<sup>1</sup> for a child<sup>2</sup>. No court may exercise its powers to make a specific issue order:

- 378 (1) with a view to achieving a result which could be achieved by making a contact order<sup>3</sup> or a residence order<sup>4</sup>; or
- 379 (2) in any way which is denied to the High Court<sup>5</sup> in the exercise of its inherent jurisdiction with respect to children<sup>6</sup>.

A specific issue order can be made for the return of a child to the jurisdiction, even if it is made ex parte and the person against whom it is made is not, and has no assets, within the jurisdiction<sup>7</sup>.

The making of a care order with respect to a child who is the subject of a specific issue order automatically discharges that order<sup>8</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 Children Act 1989 ss 8(1), 105(1); and see *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA.

A specific issue order is one of the 'section 8 orders' referred to in the Children Act 1989, as is an order varying or discharging a specific issue order: s 8(2). For the meaning of 'child' see para 3 ante.

A specific issue order enables the court to resolve a dispute about a particular matter (eg regarding medical treatment, education, the changing of a child's surname), and such an order may be made in conjunction with a residence or contact order or on its own. 'The aim, however, is not to give one parent or the other a general 'right' to make decisions about a particular aspect of the child's upbringing ... but rather to enable a particular dispute over such a matter to be resolved by the court, including the giving of detailed directions where necessary': Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.32. As to the guidance and regulations generally see para 163 ante. For an example of a specific issue order relating to a matter of education see *M v M (specific issue: choice of school)* [2005] EWHC 2769 (Fam), [2007] 1 FLR 251.

The availability of specific issue orders enables the court to deal with issues which, in the past, were dealt with by wardship: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.33.

As to the procedure on applications under the Children Act 1989 s 8 (as amended) for leave to perform a sterilisation operation on a child see *Practice Note* [1996] 3 FCR 95, [1996] 2 FLR 111. However, it may be preferable to apply under the inherent jurisdiction of the court: see *Practice Note (Official Solicitor: appointment in family proceedings)* [2001] 2 FLR 155; *CAFCASS Practice Note (representation of children in family proceedings pursuant to the Family Proceedings Rules 1991, r 9.5)* [2004] 1 FLR 1190.

A local authority can make an application under the Children Act 1989 s 8 (as amended) to obtain the court's authorisation for use of blood products in the treatment of a child whose parents are withholding consent to such treatment: *Re R (minor)* [1993] 2 FCR 544, 15 BMLR 72. See also *Re C (a child) (HIV test)* [2000] Fam 48, [1999] 3 FCR 289 (grant of application by local authority for order to test baby for HIV against wishes of both parents).

It is not appropriate to make a specific issue order under the Children Act 1989 s 8 (as amended) where a right of occupation is involved: *Pearson v Franklin* [1994] 2 All ER 137, [1994] 1 WLR 370, CA (Children Act 1989 s 8 not intended to be used for purpose of making ouster orders under guise of specific issue orders).

See also *Dawson v Wearmouth* [1999] 2 AC 308, [1999] 2 All ER 353, HL (order for change of surname must be in the best interests of the child). See also *Re W, Re A, Re B (change of name)* [1999] 3 FCR 337, [1999] 2 FLR 930. A child may use both parents' surnames in certain circumstances see *Re R (surname: using both parents')* [2001] EWCA Civ 1344, [2002] 1 FCR 170, [2001] 2 FLR 1358.

As to the court's discretion to grant a specific issue order to inform children of their true parentage: see *Re F (children)* (2007) Times, 6 August, [2007] All ER (D) 389 (Jul), CA; and para 121 ante.

3 As to contact orders see para 251 et seq ante.

4 Children Act 1989 s 9(5)(a). As to residence orders see para 262 ante.

5 Is denied by *ibid* s 100(2): see para 201 ante.

6 *Ibid* s 9(5)(b); and see *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA; *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA (on appeal from [1993] 2 WLR 406). As to restrictions on the court's powers to make orders see para 264 post.

7 *Re D (a minor) (child: removal from jurisdiction)* [1992] 1 All ER 892, [1992] 1 WLR 315, CA.

8 Children Act 1989 s 91(2). As to care orders see para 270 et seq post.

## UPDATE

### 263 Specific issue orders

NOTE 2--*Re F (children)* cited, reported at [2007] EWCA Civ 873, [2008] 1 FCR 382. See also *Chief Constable of Greater Manchester v KI (by their children's guardian, CAFCASS Legal)* [2007] EWHC 1837 (Fam), [2008] 2 FCR 172 (specific issue order permitting police to interview children not necessary as could be granted under inherent jurisdiction).

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## **(vi) Supplementary Provisions relating to Section 8 Orders**

### **264. Restrictions on court's powers to make section 8 orders.**

No court may exercise its powers to make a specific issue order<sup>1</sup> or a prohibited steps order<sup>2</sup> with a view to achieving a result which could be achieved by making a residence order<sup>3</sup> or a contact order<sup>4</sup>.

In addition, no court may exercise its powers to make a prohibited steps order or a specific issue order in any way which is denied to the High Court<sup>5</sup> in the exercise of its inherent jurisdiction with respect to children<sup>6</sup>.

No application may be made by a local authority for a residence order or a contact order, and no court may make such an order in favour of a local authority<sup>7</sup>.

No court may make a contact order, a prohibited steps order or a specific issue order with respect to a child who is in the care of a local authority<sup>8</sup>. Decisions of a local authority relating to a child in care may therefore only be questioned by other methods<sup>9</sup>, and the local authority itself may not obtain the court's guidance about specific issues<sup>10</sup>. Instead, it may seek leave to invoke the court's inherent jurisdiction<sup>11</sup>. These prohibitions do not apply where the child is being voluntarily accommodated by the local authority<sup>12</sup>.

No court may make any contact order, prohibited steps order, residence order or specific issue order or an order varying or discharging such an order<sup>13</sup> which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional<sup>14</sup>. No court may make any contact order, prohibited steps order, residence order or specific issue order, other than one varying or discharging such an order with respect to a child who has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional<sup>15</sup>.

1 As to specific issue orders see para 263 ante.

2 As to prohibited steps orders see para 261 ante.

3 As to residence orders see para 262 ante.

4 Children Act 1989 s 9(5)(a). See *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA (on appeal from [1993] 2 WLR 406); *Re B (minors) (residence order)* [1992] Fam 162, [1992] 3 All ER 867, CA. As to contact orders see para 251 et seq ante.

It is intended thereby to avoid prohibited steps orders or specific issue orders being used to achieve much the same procedural results as residence orders and contact orders but without the same legal effects (eg the conferment by a residence order of parental responsibility on the person in whose favour it is made: see para 406 ante): see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.34. As to the guidance and regulations generally see para 163 ante.

5 Ie denied to the High Court by the Children Act 1989 s 100(2): see para 201 ante.

6 Ibid s 9(5)(b). As to the inherent jurisdiction of the High Court with respect to children see para 218 et seq ante. The intention appears to be, whilst permitting local authorities to seek leave to apply for orders which previously could only be obtained in wardship (eg relating to medical treatment), to prevent a local authority from seeking to achieve the substance of a care order or supervision order without satisfying the special

conditions relating to the making of such orders: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.33; and note 4 supra. As to the conditions for the making of a care order or supervision order see para 274 post. It is doubtful whether the High Court has an inherent jurisdiction to restrain a local authority or the police from exercising their statutory or common law powers: *D v D (child case: powers of court)* [1994] 3 FCR 28, sub nom *D v D (county court jurisdiction: injunctions)* [1993] 2 FLR 802, CA. See also *Re H (minors) (prohibited steps order)* [1995] 4 All ER 110, [1995] 1 WLR 667, CA (order requiring mother's former cohabitee not to have or to seek contact with her children does not contravene the Children Act 1989 s 9(5)); *Re S and D (child case: powers of court)* [1995] 1 FCR 626, [1995] 2 FLR 456, CA (although an order was in form of an injunction, it was in essence a prohibited steps order, which the judge could not properly make).

7 Children Act 1989 s 9(2). This provision was enacted in pursuance of the policy that parental responsibility for a child can only be acquired by a local authority if the criteria for the grant of a care order are satisfied: see note 6 supra. For the meaning of 'child' see para 3 ante. For the meaning of 'local authority' see para 248 note 10 ante.

8 Ibid s 9(1). The policy of the Children Act 1989 is to draw a clear distinction between children being provided with accommodation or other services by a local authority and children formally in the care of a local authority, and to prevent the courts' private law powers from being used to interfere with the local authority's exercise of its statutory parental responsibilities (see para 270 et seq post): see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.46; and note 4 supra.

9 See para 944 et seq post.

10 See para 262 ante; and the text and note 8 supra.

11 See the Children Act 1989 s 100(3); and para 218 ante.

12 See para 863 et seq post.

13 Ie a section 8 order: see para 247 note 4 ante.

14 Children Act 1989 s 9(6) (which is subject to s 12(5) (see para 262 ante): see s 9(6) (amended by the Adoption and Children Act 2002 s 114(2))). A section 8 order, if it would otherwise still be in force, ceases to have effect when the child reaches the age of 16 unless it is to have effect beyond that age by virtue of the Children Act 1989 s 9(6) (as amended) or s 12(5): s 91(10) (amended by the Adoption and Children Act 2002 s 114(3)). Cf the powers of the court under the Matrimonial Causes Act 1973 to make orders extending to age 18: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW. Where a section 8 order has effect with respect to a child who has reached the age of 16, if it would otherwise still be in force, it ceases to have effect when he reaches the age of 18: Children Act 1989 s 91(11).

There is no presumption of a right of contact between a parent and an adult child who is suffering from mental incapacity: *D-R v D-R* [1999] 2 FCR 49, sub nom *Re D-R (adult: contact)* [1999] 1 FLR 1161, CA.

15 Children Act 1989 s 9(7).

## UPDATE

### 264 Restrictions on court's powers to make section 8 orders

TEXT AND NOTE 13--For 'any contact order ... discharging such an order' read 'a specific issue order, contact order or prohibited steps order': Children Act 1989 s 9(6) (amended by Children and Young Persons Act 2008 s 37(1)).

NOTE 14--The reference is now to a section 8 order other than a residence order, and reference to Children Act 1989 s 12(5) omitted: s 91(10) (amended by Children and Young Persons Act 2008 s 37(2), Sch 4).

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## **265. Termination of section 8 orders.**

A contact order<sup>1</sup>, a prohibited steps order<sup>2</sup>, a residence order<sup>3</sup> or a specific issue order<sup>4</sup> or an order varying such an order will come to an end if the court discharges it<sup>5</sup>, or in accordance with the terms of the order<sup>6</sup>. It will cease to have effect when the child<sup>7</sup> concerned attains the relevant age<sup>8</sup>. In certain circumstances a contact order or a residence order ceases to have effect if the parents<sup>9</sup> of the child live together for a continuous period of more than six months<sup>10</sup>. The making of a care order with respect to a child who is the subject of any of the orders mentioned above discharges that order<sup>11</sup>.

1 As to contact orders see para 251 et seq ante.

2 As to prohibited steps orders see para 261 ante.

3 As to residence orders see para 262 ante.

4 As to specific issue orders see para 263 ante.

5 See the Children Act 1989 s 8(2). The discharging order is itself a 'section 8 order': see para 247 note 4 ante.

6 See *ibid* s 11(7)(c); and para 250 ante.

7 For the meaning of 'child' see para 3 ante.

8 See para 264 ante.

9 For the meaning of 'parent' see para 248 note 1 ante.

10 See the Children Act 1989 s 11(5), (6); and paras 251, 262 ante.

11 See *ibid* s 91(2); and paras 251-263 ante.

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## **266. Other powers of the court in relation to section 8 orders.**

In proceedings in which there arises any question of making a contact order<sup>1</sup>, a prohibited steps order<sup>2</sup>, a residence order<sup>3</sup> or a specific issue order<sup>4</sup>, or an order varying or discharging any of those orders, or any other question with respect to such an order, the court must<sup>5</sup> draw up a timetable with a view to determining the question without delay<sup>6</sup>, and give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to<sup>7</sup>.

Where the court has power to make a contact order, a prohibited steps order, a residence order or a specific issue order, or an order varying or discharging any of those orders, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings<sup>8</sup>.

When a court determines any question with respect to the upbringing<sup>9</sup> of a child, the child's welfare must be the paramount consideration<sup>10</sup>. If the court is considering whether to make, vary or discharge a contact order, a prohibited steps order, a residence order or a specific issue order, and the making, variation or discharge is opposed by any party to the proceedings, the court must have regard in particular to the welfare checklist laid down by the Children Act 1989<sup>11</sup>.

In appropriate circumstances the court may, when disposing of any application for an order under the Children Act 1989 (whether or not it makes any order in response to the application), order that no application for an order under the Act or of any specified kind may be made with respect to the child concerned by any person named in the order without the leave of the court<sup>12</sup>.

1 As to contact orders see para 251 et seq ante.

2 As to prohibited steps orders see para 261 ante.

3 As to residence orders see para 262 ante.

4 As to specific issue orders see para 263 ante.

5 In the light of any rules made by virtue of the Children Act 1989 s 11(2): see note 7 infra.

6 Ibid s 11(1)(a).

7 Ibid s 11(1)(b). Rules of court may specify periods within which specified steps must be taken in relation to proceedings in which such questions arise and make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay: s 11(2). Proceedings in which any question of making an enforcement order, or any other question with respect to such an order, arises are to be regarded for the purposes of s 11(1), (2) as proceedings in which a question arises with respect to a section 8 order: s 11J(11) (prospectively added by the Children and Adoption Act 2006 s 4); see para 257 ante. Similarly, proceedings in which any question of making an order for financial compensation under the Children Act 1989 s 11O(2) arises are to be regarded for the purposes of s 11(1), (2) as proceedings in which a question arises with respect to a section 8 order: s 11O(13) (prospectively added by the Children and Adoption Act 2006 s 5).

8 Children Act 1989 s 11(3). This power arises in all family proceedings: see s 10(1); and para 247 ante. See *Re C (contact: jurisdiction)* [1996] Fam 79, [1995] 1 FLR 777, CA (although a contact order made pending a



possible adoption application is an interim order, family proceedings are concluded and, therefore, the court has no jurisdiction to vary an order under the Children Act 1989 s 10). The court will make interim orders with the aim of holding the balance so as to cause least possible harm see *B v B (interim contact with grandparents)* [1993] Fam Law 393. In the family proceedings court (see para 208 ante), a justices' clerk or single justice must not make an order under the Children Act 1989 s 11(3) unless: (1) a written request for such an order has been made to which the other parties and any children's guardian consent and which they or their representatives have signed; (2) a previous such order has been made in the same proceedings; (3) the terms of the order sought are the same as those of the last such order made: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 28 (amended by SI 2001/818). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

9 'Upbringing', in relation to any child, includes the care of the child but not his maintenance: Children Act 1989 s 105(1).

10 See *ibid* s 1(1); and para 300 post. As to the welfare principle see para 300 post.

11 See *ibid* s 1(3), (4); and para 303 post. As to the welfare checklist see para 303 post.

12 *Ibid* s 91(14). Note that this applies to all applications made under the Children Act 1989 and not just in relation to section 8 orders: see further para 223 ante. *Re P (a minor) (residence order: child's welfare)* [2000] Fam 15, [1999] 2 FCR 289, sub nom *Re P (section 91(14) guidelines) (residence and religious heritage)* [1999] 2 FLR 573, CA, lays down guidelines as to how this provision is to be approached and applied bearing in mind the welfare of the child and the right of unrestricted access of the litigant to the court. Such applications should be issued in advance and supported by evidence: see *Re F (children) (restriction on applications)* [2005] EWCA Civ 499, [2005] 2 FCR 176, [2005] 2 FLR 950. See also *Re C-J (section 91(14) order)* [2006] EWHC 1491 (Fam), [2006] 2 FLR 1213, [2006] Fam Law 836; *Re S (permission to seek relief)* [2006] EWCA Civ 1190, sub nom *Re S, Re E (restriction on applications)* [2006] 3 FCR 50, [2007] 1 FLR 482 (it is not appropriate to impose conditions on a s 91(14) order). See also *S v S* [2006] EWCA Civ 1617, [2007] 1 FLR 1532. An order under the Children Act 1989 s 91(14) does not stop applications being made to the court, but it does provide the necessary filter of the court's sanction: see *Re F (children) (contact)* [2007] EWHC 2543 (Fam), [2007] All ER (D) 52 (Nov).

## UPDATE

### 266 Other powers of the court in relation to section 8 orders

NOTE 12--For procedural guidelines when the court is minded to make an order under s 91(14) see *Re C (litigant in person: s 91(14) order)* [2009] EWCA Civ 674, [2009] 2 FLR 1461, [2009] All ER (D) 52 (Sep).

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## **(vii) Family Assistance and Financial Relief Orders**

### **267. Family assistance orders.**

A family assistance order is an order requiring an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer<sup>1</sup> to be made available<sup>2</sup>, or a local authority<sup>3</sup> to make an officer of the authority available<sup>4</sup>, to advise, assist and (where appropriate) befriend any person named in the order<sup>5</sup>. A family assistance order may be made whenever in any family proceedings, the court has power to make an order under Part II of the Children Act 1989<sup>6</sup> with respect to any child<sup>7</sup>, but no court may make an order unless it has obtained the consent of every person to be named in the order other than the child<sup>8</sup>.

The persons who may be named in a family assistance order are: (1) any parent<sup>9</sup> or guardian or special guardian of the child<sup>10</sup>; (2) any person with whom the child is living or in whose favour a contact order<sup>11</sup> is in force with respect to the child; and (3) the child himself<sup>12</sup>.

A family assistance order may direct the person named in the order, or such of the persons named in the order as may be specified, to take such steps as may be specified with a view to enabling the officer concerned to be kept informed of the address of any person named in the order and to be allowed to visit any such person<sup>13</sup>. A family assistance order has effect for 12 months beginning with the day on which it is made unless it specifies a shorter period<sup>14</sup>.

If the court makes a family assistance order with respect to a child and the order is to be in force at the same time as a section 8 order<sup>15</sup> made with respect to the child, the family assistance order may direct the officer concerned to report to the court on such matters relating to the section 8 order as the court may require (including the question whether the section 8 order ought to be varied or discharged)<sup>16</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante. As to the duties of officers of the Service and Welsh family proceedings officers in relation to family assistance order reports see para 315 post.

2 Children Act 1989 s 16(1)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 87, 89(a); and the Children Act 2004 s 40, Sch 3 paras 5, 7).

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 Children Act 1989 s 16(1)(b). A family assistance order may not be made so as to require a local authority to make an officer available unless the authority agrees or the child concerned lives or will live within the authority's area: s 16(7). A family assistance order under s 16(7) cannot be made requiring an officer to take a father's children to visit him in prison unless the local authority agrees to make an officer available, or the child lives within the authority's area: *S v P (contact application: family assistance order)* [1997] 2 FCR 185, [1997] 2 FLR 277.

5 Children Act 1989 s 16(1). See also *Leeds City Council v C* [1993] 1 FCR 585, [1993] 1 FLR 269. Such an order aims to provide short term help to a family to overcome the problems connected with their separation or divorce: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 2.50. As to the guidance and regulations generally see para 163 ante.

Before making a family assistance order the court must have obtained the opinion of the appropriate officer about whether it would be in the best interests of the child in question for a family assistance order to be made and, if so, how the family assistance order could operate and for what period. The appropriate officer will be an officer of the Service, a Welsh family proceedings officer or an officer of a local authority, depending on the category of officer the court proposes to require to be made available under the family assistance order. The opinion of the appropriate officer may be given orally or in writing (eg it may form part of a welfare report under the Children Act 1989 s 7 (as amended) (see para 311 post)). Before making a family assistance order the court must give any person whom it proposes be named in the order an opportunity to comment upon any opinion given by the appropriate officer: *Practice Direction (family proceedings) (family assistance orders)* [2007] All ER (D) 59 (Sep).

6     Ie under the Children Act 1989 Pt II (ss 8-16A) (as amended): see para 247 et seq ante. See *Re E (family assistance order)* [1999] 3 FCR 700, [1999] 2 FLR 512 (it is reasonable to expect a local authority subject to a family assistance order to provide facilities for supervised contact).

7     See the Children Act 1989 s 16(1) (as amended). For the meaning of 'child' see para 3 ante.

8     Ibid s 16(3) (amended by the Children and Adoption Act 2006 ss 6(1), (2), 15(2), Sch 3). Consent for the purposes of the Children Act 1989 s 16(3) must be given either orally in court or in writing to the designated officer for the court and signed by the person giving consent: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25(1)(a) (amended by SI 1992/2068; SI 1997/1895; SI 2001/615; SI 2005/617); Family Proceedings Rules 1991, SI 1991/1247, r 4.24(1)(a) (amended by SI 1992/456; SI 1997/1893). As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

9     As to the meaning of 'parent' see para 248 note 1 ante.

10    For the meaning of 'guardian of a child' see para 144 note 5 ante. As to special guardianship see paras 151-154 ante.

11    Ie a contact order under the Children Act 1989 s 8 (as amended): see para 251 ante.

12    Ibid ss 16(2), 105(1) (s 16(2) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 58).

13    Children Act 1989 s 16(4). If the court makes a family assistance order with respect to a child and the order is to be in force at the same time as a contact order made with respect to the child, the family assistance order may direct the officer concerned to give advice and assistance as regards establishing, improving and maintaining contact to such of the persons named in the order as may be specified in the order: s 16(4A) (added by the Adoption and Children Act 2002 s 6(1), (3)).

14    Children Act 1989 s 16(5) (amended by the Children and Adoption Act 2006 s 6(1), (4)).

15    For the meaning of 'section 8 order' see para 247 note 4 ante. As to prohibited steps orders see para 261 ante. As to residence orders see para 262 ante. As to specific issue orders see para 263 ante.

16    Children Act 1989 s 16(6) (substituted by the Adoption and Children Act 2002 s 6(1), (5)). The general power of a magistrates' court under the Magistrates' Courts Act 1980 s 63(2) (see MAGISTRATES vol 29(2) (Reissue) para 827) to suspend or rescind orders does not apply in relation to orders under the Children Act 1989: s 92(5).

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## **268. Financial relief orders.**

The court is empowered under the Children Act 1989 to make orders for financial relief for children<sup>1</sup>. Applications for such orders are family proceedings and accordingly a number of other orders<sup>2</sup> are available to the court in such proceedings<sup>3</sup>.

1 See the Children Act 1989 s 15, Sch 1 (as amended) (see para 539 et seq post). As to financial provision for children under those and other statutory provisions see para 528 et seq post. The general power of a magistrates' court under the Magistrates' Courts Act 1980 s 63(2) (see MAGISTRATES vol 29(2) (Reissue) para 827) to suspend or rescind orders does not apply in relation to orders under the Children Act 1989: s 92(5). As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

2 I.e. section 8 orders (see paras 247 note 4, 251-263 ante) or family assistance orders (see para 267 ante).

3 See the Children Act 1989 ss 8(3), 10(1), 16(1).

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## **(viii) Risk Assessments**

### **269. Duty to make risk assessments.**

If, in carrying out:

- 380 (1) any function in connection with family proceedings<sup>1</sup> in which the court has power to make an order under Part II of the Children Act 1989<sup>2</sup> with respect to a child<sup>3</sup> or in which a question with respect to such an order arises<sup>4</sup>; or
- 381 (2) any function in connection with an order made by the court in such proceedings<sup>5</sup>,

an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>6</sup> or a Welsh family proceedings officer<sup>7</sup> is given cause to suspect that the child concerned is at risk of harm, he must make a risk assessment in relation to the child, and provide that risk assessment to the court<sup>8</sup>. A risk assessment, in relation to a child who is at risk of suffering harm of a particular sort, is an assessment of the risk of that harm being suffered by the child<sup>9</sup>.

The duty to provide the risk assessment to the court arises irrespective of the outcome of the assessment<sup>10</sup>. Where an officer of the Service or a Welsh family proceedings officer is given cause to suspect that the child concerned is at risk of harm and makes a risk assessment, the officer must provide the assessment to the court, even if he or she reaches the conclusion that there is no risk of harm to the child<sup>11</sup>. The fact that a risk assessment has been carried out is a material fact that should be placed before the court, whatever the outcome of the assessment, and, in reporting the outcome to the court, the officer should make clear the factor or factors that triggered the decision to carry out the assessment<sup>12</sup>.

1 See para 199 ante.

2 I.e the Children Act 1989 Pt II (ss 8-16A) (as amended): see para 247 et seq ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 16A(1)(a), (2) (s 16A added by the Children and Adoption Act 2006 s 7).

5 Children Act 1989 s 16A(1)(b), (2) (as added: see note 4 supra).

6 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante.

7 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

8 Children Act 1989 s 16A(2) (as added: see note 4 supra). As to the duties of officers of the Service and Welsh family proceedings officers in relation to risk assessments see para 315 post.

9 Ibid s 16A(3) (as added: see note 4 supra).

10 *Practice Direction (family proceedings) (risk assessments under s 16A of the Children Act 1989)* [2007] All ER (D) 58 (Sep).

11 *Practice Direction (family proceedings) (risk assessments under s 16A of the Children Act 1989)* [2007] All ER (D) 58 (Sep).

12 *Practice Direction (family proceedings) (risk assessments under s 16A of the Children Act 1989)* [2007] All ER (D) 58 (Sep).

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## **(2) APPLICATIONS UNDER**

### **(i) Applications for Care Orders and Supervision Orders**

#### **270. The legislation.**

A distinction is drawn in the Children Act 1989 between cases in which the state seeks to intervene by compulsion in a child's upbringing<sup>1</sup>, and those cases in which the issue relating to the child is brought before the court by a relative or other interested person<sup>2</sup>. The policy of the legislation is that compulsory intervention can only be justified if there is evidence that the child is being or is likely to be positively harmed because of a failure in the family, and it is not sufficient merely to show that state intervention would be in the child's interests<sup>3</sup>.

For this reason, compulsory intervention in the care and upbringing of a child is now only possible by order of the court following proceedings<sup>4</sup> in which the child, his parents and others who are connected with the child are entitled to participate<sup>5</sup>, and the legislative structure itself has been made to give effect to the principles set out above.

The scheme of the legislation is that the court may only make a care order<sup>6</sup> or supervision order<sup>7</sup> if:

- 382 (1) there is an application by a local authority<sup>8</sup> or authorised person<sup>9</sup>;
- 383 (2) the court is satisfied that the significant harm 'threshold criteria'<sup>10</sup> are met;
- 384 (3) the court is satisfied, having directed itself by reference to the matters to which the Children Act 1989 requires it to have particular regard<sup>11</sup> that the making of the order would promote the child's welfare, that being the paramount consideration<sup>12</sup>; and
- 385 (4) the court is satisfied that making an order would be better for the child than making no order at all<sup>13</sup>.

1    le public law proceedings: see paras 271-298 post. For the meaning of 'child' see para 3 ante.

2    le private law proceedings: see para 247 et seq ante.

3    The former Lord Chancellor, Lord Mackay of Clashfern, in defending the government's decision to debar local authorities from having recourse to the wardship jurisdiction, said that it may be the case that a broad discretion guided by the principle of the child's best interests would 'be appropriate and defensible where a court is deciding a dispute between warring members of a family. However, once the court becomes involved in intervention from outside the family, and especially where state intervention is proposed, I do not believe that a broad discretion can be justified ... The integrity and independence of the family is the basic building block of a free and democratic society and the need to defend it should be clearly perceivable in the law ... To provide otherwise would make it lawful for children to be removed from their families simply on the basis that a court considered that the state could do better for the child than his family. The threat to the poor and to minority groups, whose views of what is good for a child may not coincide closely with that of the majority, is all too apparent ...': Lord Mackay of Clashfern LC 'Joseph Jackson Memorial Lecture 1989' (1989) 139 NLJ 505 at 507-508.

4    Cf the power to assume parental rights by resolution under the Children Act 1948 and the Child Care Act 1980 (both repealed).

5 Department of Health publication *The Children Act 1989 Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.1. As to the weight to be attached to that Guidance see para 307 note 1 ante.

6 For the meaning of 'care order' see para 271 note 4 post. As to care orders see paras 276-280 post.

7 For the meaning of 'supervision order' see para 271 note 5 post. As to supervision orders see paras 281-287 post.

8 For the meaning of 'local authority' see para 248 note 10 ante.

9 For the meaning of 'authorised person' see para 271 post.

10 As to the significant harm 'threshold criteria' see para 274 post.

11 Ie the welfare checklist: see the Children Act 1989 s 1(3); and para 303 post.

12 As to the welfare principle see *ibid* s 1(1); and para 300 post.

13 See *ibid* s 1(5); and para 302 post.



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## **271. Application by local authority or authorised person.**

On the application of any local authority<sup>1</sup> or authorised person, the court<sup>2</sup> may make an order placing the child<sup>3</sup> with respect to whom the application is made in the care of a designated local authority (a 'care order')<sup>4</sup>, or may make an order putting him under the supervision of a designated local authority (a 'supervision order')<sup>5</sup>.

'Authorised person' means the National Society for the Prevention of Cruelty to Children and any of its officers, and any person authorised by order of the Secretary of State to bring proceedings under the Children Act 1989<sup>6</sup> and any officer of a body which is so authorised<sup>7</sup>.

The local authority designated in a care order must be the authority within whose area the child is ordinarily resident<sup>8</sup> or, where the child does not reside in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the order is being made<sup>9</sup>. Where an authorised person proposes to make an application for a care order or supervision order, he must, if it is reasonably practicable to do so and before making the application, consult the local authority appearing to him to be the authority in whose area the child concerned is ordinarily resident<sup>10</sup>.

An application made by an authorised person must not be entertained if, at the time when it is made, the child concerned is the subject of an earlier application for a care order, or supervision order which has not been disposed of or is subject to a care order or supervision order<sup>11</sup>.

Applications for a care or supervision order are subject to strict time-tabling guidelines to ensure that the applications are disposed of without unnecessary delay<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'the court' see para 145 note 2 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 31(1)(a). A 'care order' means an order made under s 31(1)(a) and, except where express provision to the contrary is made, includes an interim care order made under s 38 (see para 288 post): ss 31(11), 105(1). However, it also includes any order which by or under any enactment has the effect of, or is deemed to be, a care order for the purposes of the Children Act 1989; and any reference to a child who is in the care of an authority is a reference to a child who is in its care by virtue of a care order: s 105(1).

In an application for a care order, the burden of proof rests on the local authority applying for the order: *Re O and N (children) (non-accidental injury: burden of proof)* [2002] EWCA Civ 1271, [2002] 3 FCR 418, [2002] 2 FLR 1167. It is inappropriate to bring judicial review proceedings in order to prevent a local authority commencing care proceedings: see *Re M (care proceedings: judicial review)* [2003] EWHC 850 (Admin), [2004] 1 FCR 302, [2003] 2 FLR 171; and para 916 post.

The criteria listed in the Children Act 1989 s 10(9) (see para 249 ante) for determining whether to grant a person party status apply also to public law proceedings, and those criteria apply irrespective of whether the applicant is seeking a specific order: see *Re W (a child) (care proceedings: leave to issue application)* [2004] EWHC 3342 (Fam), [2005] 2 FLR 468, [2005] Fam Law 527. See also *Westminster City Council v B* [2005] EWHC 970 (Fam), [2005] All ER (D) 461 (May).

5 Children Act 1989 s 31(1)(b) (amended by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 Pt II paras 87, 90, Sch 8). A 'supervision order' means an order made under the Children Act 1989 s 31(1)(b)

(as amended) and, except where express provision to the contrary is made, includes an interim supervision order made under s 38 (see para 288 post): ss 31(11), 105(1).

The Secretary of State may make regulations with respect to the exercise by a local authority of its functions where a child has been placed under its supervision by a supervision order: s 35, Sch 3 para 11(1). Where a supervision order requires compliance with directions given by virtue of this provision, any expenditure incurred by the supervisor for the purposes of the directions is to be defrayed by the local authority designated in the order: Sch 3 para 11(2). At the date at which this volume states the law no such regulations had been made. As to the Secretary of State, and as to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers see para 155 ante.

The general power of a magistrates' court under the Magistrates' Courts Act 1980 s 63(2) (see *MAGISTRATES* vol 29(2) (Reissue) para 827) to suspend or rescind orders does not apply in relation to orders under the Children Act 1989: s 92(5). There is no jurisdiction to include in a care order provisions as to review by the court of the operation of the order: *Cheshire County Council v B* [1992] 2 FCR 572, sub nom *Re B (a minor) (care order: review)* [1993] 1 FLR 421. Where there is a fundamental change of circumstances between making a supervision order and an appeal against it, an application for a care order should be remitted for rehearing: *Suffolk County Council v C* [1999] 1 FCR 473n, [1999] 1 FLR 259n.

6 le under the Children Act 1989 s 31 (as amended).

7 Ibid s 31(9). At the date at which this volume states the law no order had been made authorising any person other than the National Society for the Prevention of Cruelty to Children to bring such proceedings.

8 Ibid s 31(8)(a). In determining the ordinary residence of a child for any purpose of the Children Act 1989, there is to be disregarded any period in which he lives in any place: (1) which is a school or other institution; (2) in accordance with the requirements of a supervision order under the Children Act 1989 or an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 63(1); or (3) while he is being provided with accommodation by or on behalf of a local authority (see para 863 post): Children Act 1989 s 105(6) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 129).

'School' means an educational institution which is outside the further education sector and the higher education sector and is an institution for providing: (a) primary education; (b) secondary education; or (c) both primary and secondary education, whether or not the institution also provides further education: Education Act 1996 s 4(1) (substituted by the Education Act 1997 s 51; and amended by the Education Act 2002 s 215(2), Sch 22 Pt 3); definition applied by the Children Act 1989 s 105(1) (definition amended by the Education Act 1996 s 582(1), Sch 37 para 91). See further EDUCATION.

The phrase 'any period in which he lives in any place' focuses on both the period in the child's life and the location of the place in which he lives: *Re R (a child); North Yorkshire County Council v Wiltshire County Council* [1999] Fam 323, [1999] 4 All ER 291 (the Children Act 1989 s 105(6) does not have the effect of determining a child's place of residence for the purposes of s 31(8) as the place where he was first accommodated). As to the court's jurisdiction to make a care order where a child is temporarily resident in England and Wales see *Re R (care orders: jurisdiction)* [1995] 3 FCR 305, [1995] 1 FLR 711. See also *Re M (a minor) (care orders: jurisdiction)* [1997] Fam 67, [1997] 1 All ER 263 (court has jurisdiction to make orders under the Children Act 1989 Pt IV (ss 31-42) (as amended), Pt V (ss 43-52) (as amended) in respect of children present in the jurisdiction, irrespective of whether they are habitually resident either abroad or in another part of the United Kingdom). A newly born baby cared for by its mother is incapable of establishing ordinary residence and is necessarily dependent on the residence of its mother: *C v Plymouth City Council* [2000] 2 FCR 289, CA. See also *Re H (a child) (care: local authority)* [2003] EWCA Civ 1629, [2004] 1 FCR 282, [2004] 1 FLR 534.

9 Children Act 1989 s 31(8)(b). As to the court's power to designate a local authority see *Re P (a minor) (care order: designated local authority)* [1998] 1 FCR 653, sub nom *Re P (care proceedings: designated authority)* [1998] 1 FLR 80. Where there is an issue as to which authority is to be designated, the Children Act 1989 ss 31(8), 105(6) are to be construed to achieve the result for which they were designed, namely as a simple mechanism to determine the question of administration: *Northamptonshire County Council v Islington London Borough Council* [2001] Fam 364, [1999] 3 FCR 385, CA. The words 'the child does not live within the area' are to be construed as if they read 'the child does not ordinarily live within the area': *Gateshead Metropolitan Borough Council v L* [1996] Fam 55, [1996] 3 All ER 264. A child placed with relatives 'ceases to be provided with accommodation by or on behalf of a local authority' within the meaning of the Children Act 1989 s 105(6): *Kirklees Metropolitan Borough Council v S and London Borough of Brent* [2004] 2 FLR 800, [2004] Fam Law 561; *Re H (a child) (care: local authority)* [2003] EWCA Civ 1629, [2004] Fam 89, [2004] 1 FLR 534.

10 Children Act 1989 s 31(6).

11 Ibid s 31(7). This includes an order made in criminal proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 s 63(1) (as amended) or a supervision requirement within the meaning of the Children (Scotland) Act 1995: see the Children Act 1989 s 31(7) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 127; and the Children (Scotland) Act 1995 s 105(4), Sch 4).

12 Protocol of June 2003 '*Judicial Case Management in Public Law Children Act Cases*' [2003] 2 FLR 719. This sets a guideline of 40 weeks for the final disposal of applications together with the procedure to be followed. It applies to all courts, including family proceedings courts, dealing with applications issued after 1 November 2003 for a care or supervision order.

## UPDATE

### 271 Application by local authority or authorised person

NOTE 4--See *Re M (children) (non-accidental injury)* [2008] EWCA Civ 1261, [2009] 3 FCR 674 (rejection of mother's account simply part of judge's overall analysis of case; does not derogate from the two important propositions that (1) burden of proof remains throughout on authority, and (2) judge's findings on balance of probability has remained premised on (1)).

NOTES 8, 11--Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 9 paras 127, 129 repealed: Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1.

NOTE 8--Children Act 1989 s 105(6) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 36.

1996 Act s 4(1) further amended, s 4(1A) added: Childcare Act 2006 s 95. See also *Lewisham LBC v D (criteria for territorial jurisdiction in public law proceedings)* [2008] 2 FLR 1449 (court had jurisdiction in respect of child not physically present in jurisdiction as sufficient that child habitually resident in United Kingdom at time of protection order).

TEXT AND NOTE 11--Children Act 1989 s 31(7) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 35.

NOTE 12--Protocol of June 2003 replaced: see *Practice Direction (public law proceedings) (guide to case management) (April 2010)* [2010] All ER (D) 276 (Mar) (which applies to care and supervision proceedings and, in so far as practicable, is to be applied to all other public law proceedings).

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## 272. Power of court to direct investigation of child's circumstances.

In contrast to the court's powers in family proceedings<sup>1</sup> to make contact orders, prohibited steps orders, residence orders, specific issue orders and orders varying or discharging such orders<sup>2</sup>, which it may exercise of its own motion<sup>3</sup>, an application by a qualified person is essential to confer jurisdiction on the court to make a care order or supervision order<sup>4</sup>.

Where, in any family proceedings in which a question arises with respect to the welfare of any child<sup>5</sup>, it appears to the court that it may be appropriate for a care order or supervision order to be made with respect to him, the court may direct the appropriate authority<sup>6</sup> to undertake an investigation of the child's circumstances<sup>7</sup>. Where the court gives such a direction the local authority concerned, when undertaking the investigation, must consider whether it should: (1) apply for a care order or for a supervision order with respect to the child; (2) provide services or assistance for the child or his family; or (3) take any other action with respect to the child<sup>8</sup>. Where a local authority undertakes such an investigation, and decides not to apply for a care order or supervision order with respect to the child concerned, it must inform the court of: (a) its reasons for so deciding; (b) any service or assistance which it has provided, or intends to provide, for the child and his family; and (c) any other action which it has taken, or proposes to take, with respect to the child<sup>9</sup>. This information must be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs<sup>10</sup>.

1 For the meaning of 'family proceedings' see para 199 ante.

2 The section 8 orders: see para 247 note 4 ante. As to contact orders see para 251 et seq ante. As to prohibited steps orders see para 261 ante. As to residence orders see para 262 ante. As to specific issue orders see para 263 ante.

3 See the Children Act 1989 s 10(1)(b); and para 247 ante.

4 See *ibid* s 31 (as amended); and para 271 ante. The court may, on an application for a care order, make a supervision order and, on an application for a supervision order may make a care order: s 31(5). For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante. See *Re A (a minor) (supervision order: extension)* [1995] 3 All ER 401, [1995] 1 WLR 482, CA (no jurisdiction on application to extend supervision order under the Children Act 1989 s 35 to make interim care order under s 31(5) to replace supervision order).

5 For the meaning of 'child' see para 3 ante.

6 This must be the local authority in whose area the child is ordinarily resident, or where the child is not ordinarily resident in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the direction is being given: Children Act 1989 s 37(5) (amended by the Courts and Legal Services Act 1990 s 116 Sch 16 para 16). For the meaning of 'local authority' see para 248 note 10 ante.

7 Children Act 1989 s 37(1). See *Re H (child's circumstances: direction to investigate)* [1993] 2 FCR 277, sub nom *Re H (a minor) (section 37 direction)* [1993] 2 FLR 541. As to the procedure to be followed where an order is made for an investigation under the Children Act 1989 s 37 (as amended) see the Family Proceedings Rules 1991, SI 1991/1247, r 4.26 (amended by 1994/3155); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 27 (amended by SI 1994/3156; SI 2005/617). An investigation should not be ordered unless it appears that it might be appropriate to make a public law order: *Re L (a minor) (section 37 direction)* [1999] 3 FCR 642, [1999] 1 FLR 984, CA. See also *C v C (children) (investigation of circumstances)* [2005] EWHC 2935 (Fam), sub nom *Re F (family proceedings: section 37 investigation)* [2006] 1 FLR 1122. Section 37

investigations can be used in intractable contact disputes where it appears the children may be suffering significant harm: *Re M (intractable contact dispute: interim care order)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636, [2003] Fam Law 719. As to circumstances in which a children's guardian may be appointed following an order under the Children Act 1989 s 37(1), and the circumstances in which such an appointment must cease see *Re C E (a minor) (appointment of guardian ad litem)* [1995] 1 FCR 387, sub nom *Re C E (section 37 direction)* [1995] 1 FLR 26. See also *R v Cornwall County Council, ex p L* [2000] 1 FCR 460, [2000] 1 FLR 236 (local authority's blanket ban on attendance of solicitors at case conferences held in the course of an investigation unlawful). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

8 Children Act 1989 s 37(2). For local authorities' powers and duties in respect of the provision of support for children and families see the Children Act 1989 Pt III (ss 17-30) (as amended); and para 851 et seq post.

9 Ibid s 37(3).

10 Ibid s 37(4). If, on the conclusion of any investigation or review, the authority decides not to apply for a care order or supervision order with respect to the child, the authority must consider whether it would be appropriate to review the case at a later date, and if it decides that it would be, it must determine the date on which that review is to begin: s 37(6).

## UPDATE

### 272 Power of court to direct investigation of child's circumstances

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--SI 1991/1247 r 4.26 further amended: SI 2008/2836.

NOTE 9--See *Lambeth LBC v TK* [2008] EWCA Civ 103, [2008] 1 FCR 285, [2008] All ER (D) 308 (Feb) (court entitled to direct fact-finding hearing in response to local authority's finding that person not a child).

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### **273. Relationship between care proceedings and other family proceedings.**

The distinction between proceedings under Part IV of the Children Act 1989<sup>1</sup> (which governs applications for care orders and supervision orders<sup>2</sup>) and proceedings under Part I and Part II of the Act<sup>3</sup> (which govern orders with respect to children in private law matters) is not rigid<sup>4</sup>. First, it is provided that an application for a care order or supervision order may be made on its own or in any other family proceedings<sup>5</sup>. Secondly, applications by local authorities<sup>6</sup> or authorised persons<sup>7</sup> for care orders or supervision orders fall within the definition of family proceedings<sup>8</sup> and consequently the court may in such proceedings make any other specified order<sup>9</sup> rather than making the care order or supervision order for which application has been made<sup>10</sup>. Additionally, where a court has power to make such other order, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings<sup>11</sup>.

1    Ie the Children Act 1989 Pt IV (ss 31-42) (as amended).

2    For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante.

3    Ie the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante) and Pt II (ss 8-16A) (as amended) (see para 247 et seq ante).

4    See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) paras 3.6-3.8. As to the guidance and regulations generally see para 163 ante.

5    Children Act 1989 s 31(4). Thus a local authority or authorised person may effectively intervene in for example divorce or guardianship proceedings and seek a care order or supervision order.

6    For the meaning of 'local authority' see para 248 note 10 ante.

7    For the meaning of 'authorised person' see para 271 ante.

8    See the Children Act 1989 s 8(4) (as amended); and para 199 ante.

9    Ie any 'section 8' order: see para 247 note 4 ante.

10   See the Children Act 1989 s 10(1); and para 247 ante.

11   See *ibid* s 11(3); and para 266 ante.

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**274. When a care order or supervision order may be made; the threshold criteria.**

The court may only make a care order or supervision order<sup>1</sup> if it is satisfied:

- 386 (1) that the child<sup>2</sup> concerned is suffering, or is likely to suffer<sup>3</sup>, significant harm<sup>4</sup>; and
- 387 (2) that the harm, or likelihood of harm, is attributable to:  
15
- 40. (a) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him<sup>5</sup>; or
- 41. (b) the child's being beyond parental control<sup>6</sup>.  
16

These conditions are known as the 'threshold criteria'<sup>7</sup>. In this context 'harm' means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another<sup>8</sup>; 'development' means physical, intellectual, emotional, social or behavioural development; 'health' means physical or mental health; and 'ill-treatment' includes sexual abuse and forms of treatment which are not physical<sup>9</sup>. Where the question whether harm suffered by a child is significant turns on the child's health or development, his health or development must be compared with that which could reasonably be expected of a similar child<sup>10</sup>.

If the court is satisfied that the 'threshold criteria' are met, it has jurisdiction to make a care order or supervision order, but it is not obliged to do so<sup>11</sup>. In deciding whether or not it should make an order, it must apply the principle requiring it to treat the child's welfare as the paramount consideration<sup>12</sup>. The court is required to have regard in particular to a checklist of relevant matters<sup>13</sup>, including the range of powers available to the court in the proceedings in question<sup>14</sup>.

The court cannot make a care order unless it has considered the care plan<sup>15</sup>. Before making a care order with respect to any child the court must consider the arrangements which the authority has made, or proposes to make, for affording any person contact with the child<sup>16</sup> and must invite the parties to the proceedings to comment on those arrangements<sup>17</sup>. Where a court is considering whether or not to make one or more orders with respect to a child, it must have regard to the presumption against making an order<sup>18</sup>.

No court may exercise the High Court's inherent jurisdiction with respect to children so as to require a child to be placed in the care, or put under the supervision, of a local authority, or so as to make a child who is the subject of a care order a ward of court<sup>19</sup>.

It is an abuse of process to use the court's family proceedings jurisdiction in other situations (for example to attempt to frustrate a decision to remove failed asylum seekers from the United Kingdom)<sup>20</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the meaning of 'likely to suffer' see *Newham London Borough Council v A-G* [1992] 2 FCR 119, [1993] 1 FLR 281, CA ('likely' should not be equated with the 'balance of probabilities'). 'Likely' means a real possibility, one which cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: *Re H (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1, HL; applied in *Re G (a child) (care order: threshold criteria)* [2001] 1 FCR 165, CA, and *Re U (a child) (Department for Education and Skills intervening)* [2004] EWCA Civ 567, [2004] 2 FCR 257, [2004] 2 FLR 263 (judge is entitled to rely on both medical and non-medical evidence to reach conclusions); *Re T (children) (sexual abuse: standard of proof)* [2004] EWCA Civ 558, [2004] 2 FLR 838, [2004] All ER (D) 277 (May). *Re H (minors) (sexual abuse: standard of proof)* supra was also considered in *A Local Authority v H* [2005] EWHC 2885 (Fam), [2005] All ER (D) 185 (Dec). See also *A Local Authority v S, W and T (by his guardian)* [2004] EWHC 1270 (Fam), [2004] 2 FLR 129; *Haringey London Borough Council v C (E intervening)* [2004] EWHC 2580 (Fam), [2005] 2 FLR 47, [2005] Fam Law 351; *Re W (a child) (care proceedings)* [2007] EWCA Civ 102, [2007] 2 FCR 160, sub nom *Re W (care: threshold criteria)* [2007] 2 FLR 98.

The Children Act 1989 s 31 (as amended) is designed to protect families from invasive care orders, and a care order will not be made if there is merely a theoretical risk of significant harm to a child: *Birmingham City Council v D; Birmingham City Council v M* [1994] 2 FCR 245, [1994] 2 FLR 502. See also *Northamptonshire County Council v S* [1993] Fam 136, [1993] 1 FLR 554 (likelihood to be determined when local authority involvement begins); but note *Humberside County Council v B* [1993] 1 FCR 613, [1993] 1 FLR 257 (welfare of child irrelevant in determining whether child has suffered harm). In any case in which the threshold criteria are alleged to be satisfied on the basis of future risk rather than of past harm to a child, there must be a clear written analysis and description by the local authority of the facts alleged to give rise to that future risk in relation to each child, to which all other parties have the opportunity to make written response: *Re P (children) (care proceedings: split hearing)* [2007] EWCA Civ 1265, [2007] All ER (D) 475 (Nov).

4 Children Act 1989 s 31(2)(a). See *Re O (a minor) (care proceedings: education)* [1992] 4 All ER 905, [1992] 1 WLR 912; *Birmingham City Council v H* [1993] 1 FCR 247, [1992] 2 FLR 323. In considering whether a child is suffering significant harm, the relevant time to be taken into account is the date at which the care order application is made or, if protective arrangements have been continuously in force from an earlier date, the date when those arrangements were made: *Re M M (care order: abandoned baby)* [1996] 2 FCR 521, sub nom *Re M (care order: parental responsibility)* [1996] 2 FLR 84 (abandoned baby held to be suffering significant harm immediately before being rescued, and likely to suffer significant harm in future because of emotional and physical problems). See *H v Trafford Borough Council* [1997] 3 FCR 113, 161 JPN 556 (lengthy absences of mother, combined with risk that she might reclaim child, placed child at risk of significant harm through lack of stable home). The extent to which harm needs to be 'significant' was considered in *Re L (children) (care proceedings: significant harm)* [2006] EWCA Civ 1282, [2006] 3 FCR 301; and in *Re L (care: threshold criteria)* [2007] 1 FLR 2050. See also *Re O (a child) (supervision order: future harm)* [2001] EWCA Civ 16, [2001] 1 FCR 289. Evidence can continue to be gathered after proceedings are initiated as to the state of affairs that existed at the time proceedings were initiated: see *Re G (children) (care order: evidence)* [2001] EWCA Civ 968, [2001] 2 FCR 757, sub nom *Re G (care proceedings: threshold conditions)* [2001] 2 FLR 1111.

5 Children Act 1989 s 31(2)(b)(i). In a case where the care of the child is shared and it has been proved that the child has suffered significant harm in consequence of deficient care on the part of one of the carers, the threshold conditions required for a care order or supervision order to be made are satisfied even when the court has been unable to identify which of the carers was deficient in the care given to the child: *Lancashire County Council v B* [2000] 2 AC 147, sub nom *Lancashire County Council v A* [2000] 2 All ER 97, HL.

As to the correct approach of the court in non-accidental injury cases where the perpetrator is uncertain, see *Re O and N (children) (non accidental injury)* [2003] UKHL 18, [2004] 1 AC 523, [2003] 2 All ER 305; applied in *North Yorkshire County Council v S A* [2003] EWCA Civ 839, [2003] 3 FCR 118, [2003] 2 FLR 849 (correct test was whether there was a likelihood or real possibility that potential perpetrators had inflicted the injuries). Where it has been proved that the injuries were non-accidental, it is often sufficient merely to demonstrate that the child was injured in the care of identifiable people and that one or more of those was responsible; the latter will not suffice where it cannot be proved that the injuries were non-accidental: *Re L (a child) (care proceedings: responsibility for child's injury)* [2006] EWCA Civ 49, [2006] 1 FCR 285, [2006] All ER (D) 72 (Feb). See also *Re A and D (non-accidental injury: subdural haematomas)* [2002] 1 FLR 337, [2002] Fam Law 266 (threshold criteria met on basis that rough play was not credible cause of subdural haematoma in baby).

6 Children Act 1989 s 31(2)(b)(ii). See *Re O (a minor) (care proceedings: education)* [1992] 4 All ER 905, [1992] 1 WLR 912. A care order ought to be made if the harm is attributable to an absence of proper care, notwithstanding that the specific person responsible for the harm cannot be identified: *Lancashire County Council v B (a child)*; *Lancashire County Council v W (a child)* [2000] 2 WLR 346, [1999] 3 FCR 241, CA. When, at a hearing for an application under the Children Act 1989 s 31(2), interim arrangements for the protection of the child by the local authority have been continuously in place for some time, the relevant date at which the threshold conditions have to be satisfied is the date at which the local authority initiated the protection procedure: *Re M (minor) (care order: threshold conditions)* [1994] 2 AC 424, [1994] 3 All ER 298, HL; applied in *Southwark London Borough Council v B* [1999] 1 FCR 550, [1998] 2 FLR 1095 (the date is the same for both



limbs of the Children Act 1989 s 31(2)(a) (see the text and note 4 supra). As to the making of care orders see further *Re C and B (care order: future harm)* [2000] 2 FCR 614, [2001] 1 FLR 611, CA. See also *Re M (children) (interim care order)* [2005] EWCA Civ 1594, [2006] 1 FCR 303, sub nom *Re M (interim care order: removal)* [2006] 1 FLR 1043 (judge failed to consider risk of emotional harm caused by removing child from her home).

Guidance has been given to local authorities by the Secretary of State under the Local Authority Social Services Act 1970 s 7 (as amended) stating that the power to apply for a care order or supervision order should be exercised only when there appears to be no better way of safeguarding and promoting the welfare of the child suffering, or likely to suffer, significant harm. As to the Secretary of State, and as to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers see para 155 ante. The local authority has a general duty to promote the upbringing of children in need by their families so far as this is consistent with its duty to promote children's welfare, and to avoid the need for proceedings where possible; it should have regard to the presumption against making an order contained in the Children Act 1989 s 1(5) (see para 302 post) while at the same time giving paramount consideration to the child's welfare (see para 300 post). This means that voluntary arrangements through the provision of services to the child and his family should always be fully explored. Where a care order or supervision order is the appropriate remedy because control of the child's circumstances is necessary to promote his welfare, applications in such proceedings should be part of a carefully planned process. The new scheme imposes strict conditions which have to be met but does not place unnecessary obstacles in the way of action that is necessary to protect the child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.2. Extensive guidance is given in paras 3.9-3.14 on the matters to be considered when deciding whether to apply for an order. As to the guidance and regulations generally see para 163 ante. As to the local authority's performance of these duties see *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA. The official view of the Department of Health is accordingly that where the prognosis for change is reasonable and parents show a willingness to co-operate with voluntary organisations, an application for a care order or supervision order is unlikely to succeed: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.16.

7 This term is not used in the Children Act 1989 but is used in Guidance relating thereto: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.17. A judge may, in appropriate circumstances, allow a local authority to re-open the issue of threshold criteria, even though the issue has been determined by an earlier agreement and there is no fresh evidence to consider: *Re D (a child) (threshold criteria: issue estoppel)* [2001] 1 FCR 124. When a split hearing is ordered in care proceedings, express consideration should be given by all parties and the court as to whether satisfaction of the threshold criteria under the Children Act 1989 s 31(2) will be considered and determined as part of the first, the final or an intermediate hearing: *Re P (children) (care proceedings: split hearing)* [2007] EWCA Civ 1265, [2007] All ER (D) 475 (Nov).

8 Children Act 1989 ss 31(9), 105(1) (s 31(9) definition amended by the Adoption and Children Act 2002 s 120). See note 9 infra.

9 Children Act 1989 ss 31(9), 105(1). For the official view of the Department of Health about the construction of these provisions see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) paras 3.17-3.25. See *Re O (a minor) (care proceedings: education)* [1992] 4 All ER 905, [1992] 1 WLR 912 (it is open to the court to conclude that the intellectual and social development of a child playing truant was being hindered, and that she was thereby suffering significant harm).

10 Children Act 1989 s 31(10).

11 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.16. In particular, if it considers that the child's welfare would thereby be promoted, the court may instead make an order under the Children Act 1989 s 8 (as amended) (para 247 et seq ante): see eg *Humberside County Council v B* [1993] 1 FCR 613, [1993] 1 FLR 257. The court must ensure all the necessary information is obtained before making a care order: *Re C H (care or interim care order)* [1998] 2 FCR 347, [1998] 1 FLR 402, CA. See *Re K (care order or residence order)* [1996] 1 FCR 365, [1995] 1 FLR 675 (care order may be made despite local authority opposition if 'threshold criteria' are satisfied and the welfare of the child demands it). See also *Re R (care proceedings: adjournment)* [1998] 3 FCR 654, [1998] 2 FLR 390, CA (judge wrong to adjourn care proceedings when 'threshold criteria' had been met and the interests of the child required a permanent care order); *R v East Sussex County Council, ex p W* [1999] 1 FCR 536, [1998] 2 FLR 1082 (challenge to authority's decision not to apply for an order). See also *Re F (children) (interim care order)* [2007] EWCA Civ 516, [2007] 2 FCR 639.

See *Re W (a child: care order)* [2005] EWCA Civ 649, [2005] 2 FCR 277 (failure of judge to explain why expert evidence which showed parent was incapable of caring for child was not followed; refusal of care order could not stand). Where the court decides that it is necessary to hold a preliminary fact-finding inquiry, it should set out the preliminary issues for determination: *Re D (children: contact order)* [2005] EWCA Civ 825, [2005] All ER (D) 79 (Jul). It is no obstacle to the holding of a preliminary fact-finding inquiry that no order is at the time being sought: *A County Council v DP* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031, [2005] Fam Law 769. Split hearings may be useful to determine factual matters that may impact on the assessment of child protection

issues relevant to the final disposal of the application and, if so, judicial continuity is advised if possible: see *Re G (a child) (care order: threshold criteria)* [2001] 1 FCR 165, [2001] 1 FLR 872, sub nom *Re G (care proceedings: split trials)* [2000] All ER (D) 2043, CA. A finding of no case to answer is inappropriate in care proceedings: see *Re F (a child) (care proceedings)* [2007] EWCA Civ 810, [2007] All ER (D) 503 (Jul) (split hearing; allegation of sexual abuse).

Whether a care order or supervision order is made is a matter for the discretion of the court: *Re C (care or supervision order)* [1999] 2 FLR 621, [1999] Fam Law 750. The court ought to be cautious about making a care order in circumstances where a less draconian supervision order would suffice: *Re O (care or supervision order)* [1997] 2 FCR 17, [1996] 2 FLR 755. The court cannot make a supervision order as a means of achieving the same ends as a care order, as the effect of the two orders is different: *Re V (a minor) (care or supervision order)* [1996] 2 FCR 555, [1996] 1 FLR 776, CA. On an application for a care order, where a county court judge is satisfied that a child is likely to suffer significant harm, he has no jurisdiction to make a supervision order instead of a care order on the basis of accepting undertakings from the parent: *Re B (a minor) (supervision order: parental undertaking)* [1996] 1 WLR 716, [1996] 3 FCR 446, CA. In each case where the choice between a care order or supervision order must be made, the right to respect for private and family life pursuant to Art 8 of the European Convention on Human Rights (ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969)) must be considered: *Re O (a child) (supervision order: future harm)* [2001] EWCA Civ 16, [2001] 1 FCR 289, [2001] 1 FLR 923, CA.

Evidence will be required to enable the court to discharge its duties under these provisions; and in this context the children's guardian (see paras 319-321 post) can be expected to play an important role. Where the parties agree that a care order should be made, the court is still obliged to investigate the relevant evidence upon which the order is to be based. The court may even re-investigate confession evidence which has been held to be inadmissible in criminal proceedings, as such a confession may nevertheless be true and relevant in care proceedings: *Re G (a minor) (care order: threshold conditions)* [1995] Fam 16, sub nom *Hackney London Borough Council v G* [1994] 2 FCR 216.

The local authority has a duty in care proceedings to conduct itself with integrity, transparency and inclusiveness necessary to satisfy the parents' rights to a fair hearing (pursuant to Art 6 of the European Convention on Human Rights: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134 et seq) and to respect for their private and family life (pursuant to Art 8 of the European Convention on Human Rights: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 149 et seq): see *Re M (care: challenging decisions by local authority)* [2001] 2 FLR 1300; *Re C (care proceedings: disclosure of local authority's decision making process)* [2002] EWHC 1379 (Fam), [2002] 2 FCR 673, sub nom *Re L (care: assessment: fair trial)* [2002] 2 FLR 730; but cf *Re J (a child) (care proceedings: fair trial)* [2006] EWCA Civ 545, [2007] 1 FLR 77, [2006] 2 FCR 107 (local authority fell short of the standards of transparency and fairness set by the decision in *Re C (care proceedings: disclosure of local authority's decision making process)* supra, but these were not substantial enough to affect the fairness of the proceedings). See also *Re B (a child)* [2007] EWCA Civ 556, [2007] Fam Law 798 (emphasising the need for fairness of care proceedings).

Where there is consensus amongst the parties, the profundity of the investigation which it is the court's duty to carry out must reflect the reality that there is such a consensus, particularly where those parties include the local authority with statutory duties in respect of the child and the children's guardian (as to which see paras 319-321 post): *Devon County Council v S* [1992] Fam 176, [1992] 3 All ER 793. See also *Re D (a minor) (basis of uncontested care order)* [1995] 2 FCR 681, sub nom *Stockport Metropolitan Borough Council v D* [1995] 1 FLR 873 (in care proceedings, the court has no definable statutory duty in relation to unborn children). The court does not have jurisdiction to attach a direction to a care order: *Re C (a minor) (care order)* (1992) Times, 18 August.

12 As to the welfare principle see the Children Act 1989 s 1(1); and para 300 post.

13 Ie the welfare checklist: see *ibid* s 1(3), (4) (as amended); and para 303 post.

14 See *ibid* s 1(3)(g); and para 303 post. Accordingly, the court will need to consider whether the making of any other order might be appropriate (eg a residence order rather than a care order): see para 273 ante.

15 *Ibid* s 31(3A) (added by the Adoption and Children Act 2002 s 121(1)). As to care plans see para 275 post. Care plans are not applicable to interim care orders: see the Children Act 1989 s 31A(5) (as added); and para 275 post. See *Re S and W (children) (care proceedings: care plan)* [2007] EWCA Civ 232, [2007] 1 FCR 721.

16 Children Act 1989 s 34(11)(a). The reference in the text to any child is to one to whom the provisions of the Children Act 1989 s 34 (as amended) apply: see para 278 et seq post. See *L v Bexley London Borough Council* [1997] 1 FCR 277, [1996] 2 FLR 595 (where a local authority has applied for a care order and the child then moves to live in the area of a second local authority, the arrangements which the court must consider are those of the second authority). Where the local authority and the parents have come to a sensible agreement which protects the child, the children's guardian should try to avoid upsetting that agreement or putting forward contentious proposals: *Re K (supervision orders)* [1999] 1 FCR 337, [1999] 2 FLR 303.

17 Children Act 1989 s 34(11)(b); and see paras 278-279 post.

18 See *ibid* s 1(5); and para 302 post.

19 See *ibid* s 100(2); and para 201 ante.

20 *Re A (children) (care proceedings: asylum seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921, (2003) Times 26 May.

## UPDATE

### **274 When a care order or supervision order may be made; the threshold criteria**

NOTES 3, 5--The standard of proof in considering who caused injury to child out of number of possible perpetrators is civil standard on balance of probabilities: *Re S-B (children) (non-accidental injury)* [2009] UKSC 17, [2010] 1 All ER 705.

NOTE 3--*Re P (children)*, cited, reported at [2008] 1 FCR 74. See also *Re M (children) (sexual abuse)* [2008] EWCA Civ 3, [2008] 1 FCR 97. *Re H (minors) (sexual abuse: standard of proof)*, cited, applied: *Re R (care order: threshold criteria)* [2009] EWCA Civ 942, [2010] 1 FLR 673, [2009] All ER (D) 51 (Sep).

NOTE 4--As to the extent to which harm needs to be 'significant', see also *Re A (children) (care proceedings: threshold criteria)* [2009] EWCA Civ 853, [2009] Fam Law 1026, [2009] All ER (D) 354 (Jul).

NOTE 5--See also *NH v A CC; Re D (children) (non-accidental injury: standard of proof)* [2009] EWCA Civ 472, [2009] 2 FCR 555 (judge should identify perpetrator of non-accidental injuries where such identification possible on balance of probabilities); and *Re T (a child) (non-accidental injury)* [2009] EWCA Civ 1208, [2009] 3 FCR 631.

NOTE 11--*Re B (a child)*, cited, reported at [2007] 2 FLR 979. As to when a hearing should be adjourned to enable further medical testing to be carried out on a child see *Re K (children)* [2008] EWHC 191 (Fam), [2008] 2 FCR 599. See also *Re P (children) (care proceedings)* [2009] EWCA Civ 610, [2009] Fam Law 799, [2009] All ER (D) 291 (Jun); *President's Guidance (split hearings)* [2010] All ER (D) 20 (Jun).

NOTE 14--The fact that all parties agree that a supervision order is appropriate does not restrict the court's power to make a care order, particularly where the proceedings originated in an application for a care order: *Re T (a child) (care order)* [2009] EWCA Civ 121, [2009] 3 All ER 1078. Where a judge explains his reasoning, he cannot be criticised for rejecting expert evidence which is in conflict with other expert evidence which he accepted: *AM v A Local Authority; Re B-M (children) (care orders: risk)* [2009] EWCA Civ 205, [2009] 2 FCR 505.

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## 275. Care plans.

Where an application is made on which a care order<sup>1</sup> might be made with respect to a child<sup>2</sup>, the appropriate local authority<sup>3</sup> must, within such time as the court may direct, prepare a care plan<sup>4</sup> for the future care of the child<sup>5</sup>. While the application is pending, the authority must keep any such care plan under review and, if it is of the opinion some change is required, the authority must revise the plan, or make a new plan, accordingly<sup>6</sup>. A care plan must give any prescribed information and do so in the prescribed manner<sup>7</sup>. If a children's guardian wishes to challenge a local authority's care plan the appropriate method is not by way of judicial review, but within the existing care proceedings<sup>8</sup>.

The court is under a duty to scrutinise the care plan advanced by the local authority, and if the court does not think that it meets the needs of the child concerned, the court can refuse to make a care order<sup>9</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante. For these purposes, references to a care order do not include an interim care order: Children Act 1989 s 31A(5) (s 31A added by the Adoption and Children Act 2002 s 120(2)).

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante. For these purposes, the appropriate local authority, in relation to a child in respect of whom a care order might be made, is the local authority proposed to be designated in the order: Children Act 1989 s 31A(4) (as added: see note 1 supra).

4 A plan prepared, or treated as prepared, under *ibid* s 31A (as added) is referred to in the Children Act 1989 as a 'section 31A plan': s 31A(6) (as added: see note 1 supra).

5 *Ibid* s 31A(1) (as added: see note 1 supra). The content of the care plan required was set out in *Manchester City Council v F* [1993] 1 FCR 1000, [1993] 1 FLR 419n. Prior to the enactment of s 31(3A), the court's duty to scrutinise the care plan was set out in *Re R (minors) (care proceedings: care plan)* [1994] 2 FCR 136, sub nom *Re J (minors) (care: care plan)* [1994] 1 FLR 253; applied in *Re C H (care or interim care order)* [1998] 2 FCR 347, [1998] 1 FLR 402, CA. The court has no power to supervise the execution of a care plan once a full care order has been made, and it must therefore ensure before making the order that the plan has been comprehensively compiled in accordance with the relevant criteria and considerations, including those set out in the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.62: *Re R (minors) (care proceedings: care plan)* supra. As to the guidance and regulations generally see para 163 ante. See also *Re H (care: change in care plan)* [1998] 2 FCR 657, [1998] 1 FLR 193, CA (care plan fatally flawed after being altered on the information of a witness who refused to sign a written statement or give evidence in the care proceedings). When a local authority, in preparing a care plan, recognises adoption as an option, it ought to adopt a twin track rather than a sequential approach, or consider concurrent planning: *Re D and K (minors) (care plan: twin track planning)* [1999] 4 All ER 893, [1999] 3 FCR 109. See also *B Metropolitan Borough Council v H (Goodman Project: Concurrent Planning)* [2000] Fam Law 237.

6 Children Act 1989 s 31A(2) (as added: see note 1 supra).

7 *Ibid* s 31A(3) (as added: see note 1 supra).

8 See *Re C (care proceedings: care plan)* [2002] Fam Law 497, sub nom *Re C (adoption: religious observance)* [2002] 1 FLR 1119. As to children's guardians see paras 319-321 post.

9 *Re S (children) (care proceedings: care plan)* [2007] EWCA Civ 232, [2007] 1 FCR 721. The court also has the right to invite the local authority to reconsider the care plan if the court comes to the conclusion that the plan, or any change in the plan, involves a course of action which the court believes is contrary to the interests

of the child, and which would be likely to lead the court to refuse to make a care order if the local authority were to adhere to the care plan it had proposed: *Re S (children) (care proceedings: care plan)* supra.

## **UPDATE**

### **275 Care plans**

NOTE 6--See *Re A (care plan)* [2008] EWCA Civ 650, [2008] Fam Law 722, [2008] All ER (D) 192 (May).

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## (ii) Care Orders

### 276. Effect and duration of care order.

Where a care order<sup>1</sup> is made with respect to a child<sup>2</sup> it is the duty of the local authority<sup>3</sup> designated by the order to receive the child into its care and to keep him in its care while the order remains in force<sup>4</sup>. While a care order is in force with respect to a child, the local authority designated by the order has parental responsibility<sup>5</sup> for the child<sup>6</sup>, and has the power to determine the extent to which the child's parent, guardian, special guardian<sup>7</sup> or step-parent who has acquired parental responsibility for the child<sup>8</sup> may meet his parental responsibility for him<sup>9</sup>. However, the authority must not exercise this power<sup>10</sup> unless it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare<sup>11</sup>. This does not prevent a person as mentioned above<sup>12</sup> who has care of the child from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare<sup>13</sup>. The local authority must carry out periodic reviews of the child's case to consider whether the care order can be discharged or the care plan revised<sup>14</sup>.

While a care order is in force with respect to a child, no person may cause the child to be known by a new surname, or remove him from the United Kingdom<sup>15</sup>, without either the written consent of every person who has parental responsibility for the child or the leave of the court<sup>16</sup>. However, this does not prevent the removal of such a child, for a period of less than one month, by the authority in whose care he is<sup>17</sup>. Nor does the prohibition apply to arrangements for such a child to live outside England and Wales<sup>18</sup>.

Any care order, other than an interim order, continues in force until the child reaches 18 unless it is brought to an end earlier<sup>19</sup>. The making of a care order discharges any contact, prohibited steps, residence or specific issue order or any order varying such an order<sup>20</sup>, or any supervision or school attendance order<sup>21</sup>, and brings wardship to an end<sup>22</sup>. A care order is discharged by the making of a residence order<sup>23</sup> or the making of a special guardianship order<sup>24</sup>, and takes effect subject to any emergency protection order<sup>25</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante.

2 For the meaning of 'child' see para 3 ante. No care order may be made with respect to a child who has reached the age of 17 (or 16 in the case of a child who is married): Children Act 1989 s 31(3).

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 Children Act 1989 s 33(1). For the methods whereby this duty may be discharged see para 867 et seq post. Where a care order has been made with respect to a child on the application of an authorised person (see para 271 ante), but the local authority designated by the order was not informed that that person proposed to make the application, the child may be kept in the care of that person until received into the care of the authority: s 33(2). It would be an inappropriate fetter on a local authority's discretion for a court to require a children's guardian to be allowed continued involvement with the child: *Kent County Council v C* [1993] Fam 57, [1993] 1 All ER 719. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post. A local authority is not under a general duty to inform other bodies of the identities and findings against people found guilty of sexual abuse in care or family proceedings: *Re V (minors) (sexual abuse: disclosure)*, *Re L (sexual abuse: disclosure)* [1999] 1 WLR 299, [1999] 1 FCR 308, CA. However, see *Re C (sexual abuse: disclosure to landlords)* [2002] EWHC 234 (Fam), [2002] 2 FCR 385, [2002] 2 FLR 375 (court allowed disclosure to housing association of finding that child's father had history of sexually abusing children).

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 s 33(3)(a).

7 For the meaning of 'guardian of a child' see para 144 note 5 ante. As to special guardianship see paras 151-154 ante.

8 Ie a person who has acquired parental responsibility by virtue of the Children Act 1989 s 4A (as added): see para 140 ante.

9 Ibid s 33(3)(b) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 63). The power in the Children Act 1989 s 33(3)(b) (as amended) is subject (in addition to being subject to the provisions of s 33) to any right, duty, power, responsibility or authority which a person mentioned in s 33(3)(b) (as amended) has in relation to the child and his property by virtue of any other enactment: s 33(9) (amended by the Adoption and Children Act 2002 Sch 3 paras 54, 63). The Supreme Court Act 1981 s 37 (prospectively renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 as from a day to be appointed) supports the rights conferred under the Children Act 1989 s 33, and in particular s 33(3) after a care order has been made: *Re P (care orders: injunctive relief)* [2000] 3 FCR 426.

10 Ie under the Children Act 1989 s 33(3)(b) (as amended): see the text to note 9 supra. The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.68 states that where an authority intends to exercise the power the matter should be discussed with the parent and incorporated in the plan of arrangements for the child whilst in care and periodically reviewed. As to the guidance and regulations generally see para 163 ante.

11 Children Act 1989 s 33(4). Without such power it would be impossible for the authority, without application to the court, to prevent action (such as removal of the child) which the authority considered to be inconsistent with the child's welfare.

12 Ie a person mentioned in ibid s 33(3)(b) (as amended): see the text and notes 8-9 supra.

13 Ibid s 33(5) (amended by the Adoption and Children Act 2002 Sch 3 paras 54, 63).

14 See the Children Act 1989 s 26(2)(e) (as amended); and para 939 post. As to care plans see para 275 ante. The local authority is under a duty to appoint an independent reviewing officer, who may refer the case back to CAFCASS if he considers it appropriate to do so: see *Independent Reviewing Officer's Guidance*: (Department for Education and Skills, 2004); *Independent Reviewing Officers: Starred Milestones by Any Other Name* [2005] Fam Law 488; and para 936 et seq post.

15 For the meaning of 'United Kingdom' see para 102 note 7 ante.

16 Children Act 1989 s 33(7). In determining an application by a 'Gillick competent' child (see para 4 ante) to determine his or her surname, the welfare principle (as to which see para 300 post) is paramount, but very careful consideration should also be given to the child's wishes, feelings, needs and objectives: *Re S (a minor) (change of name)* [1999] 1 FCR 304, [1999] 1 FLR 672, CA. See also *Re M, T, P, K and B (children) (care: change of name)* [2000] 2 FLR 645, [2000] Fam Law 601, where it was established that the approach should be similar in public law cases as in private law. If a foster carer wished to change the child's name, then consultation should occur with the local authority and the parents and an application made to the court if necessary: *Re D, L and L A (care: change of forename)* [2003] 1 FLR 339.

17 Children Act 1989 s 33(8)(a).

18 Ibid s 33(8)(b). The reference in the text to the arrangements for a child in care to live outside England and Wales are to those governed by s 23, Sch 2 para 19 (as amended): see para 875 post.

19 Ibid s 91(12). As to the discharge of care orders see para 293 post.

20 Ie any section 8 order: see para 247 note 4 ante. This includes a pending application for any such order: see *Hounslow London Borough Council v A* [1993] 1 WLR 291, sub nom *Re A (a minor) (care proceedings)* [1993] 1 FCR 164. As to contact orders see para 251 et seq ante. As to prohibited steps orders see para 261 ante. As to residence orders see para 262 ante. As to specific issue orders see para 263 ante.

21 Ie a school attendance order within the meaning of the Education Act 1996 s 437 (as amended): see EDUCATION vol 15(1) (2006 Reissue) para 514.

22 Children Act 1989 s 91(2)-(5) (s 91(5) amended by the Education Act 1996 s 582(1), Sch 37 para 90). As to wardship generally see para 218 et seq ante. As from a day to be appointed, it is provided that a care order also discharges any contact activity direction that has been made: Children Act 1989 s 91(2A) (prospectively

added by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 7, 9). At the date at which this volume states the law no such day had been appointed.

23 Children Act 1989 s 91(1); and see para 262 ante. This affords various persons the opportunity to bring a care order to an end: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.56. When considering an application for leave, the court must have regard, inter alia, to the local authority's plan for the child's future and the wishes and feelings of the child's parents. A person in whose favour a residence order is made, and who thereby acquires parental responsibility if he does not already have it, is able to apply for the discharge or variation of a supervision order under the Children Act 1989 s 39(2)(a) (see para 293 post): see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.56.

24 Children Act 1989 s 91(5A) (added by the Adoption and Children Act 2002 s 139, Sch 3 paras 54, 68).

25 See the Children Act 1989 s 91(6). As to emergency protection orders see para 583 et seq post.

## UPDATE

### 276 Effect and duration of care order

NOTE 4--*Re C*, cited, applied: *A Local Authority v K* [2007] EWHC 1250 (Fam), [2008] LGR 37.

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 16--A care order does not prevent the Secretary of State from ordering a child's removal from the United Kingdom: *Re L (care order: immigration powers to remove)* [2007] EWHC 158 (Fam), [2007] 2 FLR 789.

NOTE 22--Children Act 1989 s 91(2A) in force on 8 December 2008: SI 2008/2870.



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## **277. Limits on parental responsibility exercisable by local authority.**

While a care order<sup>1</sup> is in force with respect to a child<sup>2</sup>, the local authority<sup>3</sup> designated by the order<sup>4</sup> must not cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made<sup>5</sup>. Nor does the authority have the right: (1) to agree or refuse to agree to the making of an adoption order with respect to the child<sup>6</sup> or an order giving parental responsibility for the child to an applicant abroad<sup>7</sup>; or (2) to appoint a guardian<sup>8</sup> for the child<sup>9</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 See para 271 note 5 ante.

5 Children Act 1989 s 33(6)(a).

6 As to adoption orders generally see para 359 et seq post.

7 Children Act 1989 s 33(6)(b)(ii) (amended by the Adoption and Children Act 2002 s 139, Sch 3 paras 54, 63). The reference in the text to an order giving parental responsibility to an applicant abroad is to one under the Adoption and Children Act 2002 s 84: see para 502 post.

8 For the meaning of 'guardian of a child' see para 144 note 5 ante.

9 Children Act 1989 s 33(6)(b)(iii). As to the appointment of guardians see para 145 ante.

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## 278. Contact with child in care.

The Children Act 1989 establishes the principle that in respect of a child<sup>1</sup> in care, the local authority<sup>2</sup> must allow the child reasonable contact with his parents<sup>3</sup> and certain other people, unless directed otherwise by a court order<sup>4</sup>. The underlying principle is that the authority, the child and other persons concerned should as far as possible agree reasonable arrangements before the care order<sup>5</sup> is made, but should be able to seek the court's assistance if agreement cannot be reached or the authority wants to deny contact to a person who would otherwise be entitled to it<sup>6</sup>. The Act accordingly provides that where a child is in the care of a local authority, the authority must allow the child reasonable contact with: (1) his parents; (2) any guardian or special guardian of his; (3) any step-parent who has acquired parental responsibility for the child under the Children Act 1989; (4) where there was a residence order in force with respect to the child immediately before the care order was made, the person in whose favour the order was made; and (5) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person<sup>7</sup>.

An authority may refuse to allow the contact that would otherwise be required under the above provisions if it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare, and the refusal is decided upon as a matter of urgency and does not last for more than seven days<sup>8</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 For the meaning of 'parent' see para 248 note 1 ante.

4 See the Children Act 1989 s 34 (as amended); and the text and notes 7-8 infra. Prior to the Children Act 1989, the question of who should have power to determine the extent to which parents and others should be entitled to contact with a child in care was a controversial one: see, in particular, the decision of the House of Lords in *A v Liverpool City Council* [1982] AC 363, [1981] 2 All ER 385, HL. In *R v United Kingdom (Application 11468/85)* [1988] 2 FLR 445, ECtHR, the question arose whether English law was compatible with the right to respect for family life embodied in Art 8 of the European Convention on Human Rights (ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (TS 71 (1953); Cmd 8969).

A care order which provides for contact to take place at the authority's discretion does not erode the authority's duty under the Children Act 1989 s 34: *Re L (minors) (care proceedings: contact)* [1998] 3 FCR 339, (1997) 161 JP 960, sub nom *L v Bromley London Borough Council* [1998] 1 FLR 709. The jurisdiction under the Children Act 1989 s 34 is not to be employed so as to prevent contact which the local authority considers advantageous to the child's welfare: *Re W (a child) (parental contact: prohibition)* [2000] Fam 130, [2000] 2 WLR 1276, CA.

5 For the meaning of 'care order' see para 271 note 4 ante.

6 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.76. As to the guidance and regulations generally see para 163 ante. But cf *Re B (minors) (children in care: contact)* [1993] Fam 301, [1993] 1 FCR 363, CA (presumption of contact must be balanced against child's long-term interests, and the court is entitled to assume that local authority's plans to terminate contact are for child's welfare). However, it is for the local authority to justify refusal of contact, and for the court to decide on contact, and the court can require the authority to justify its plans where they involve excluding contact: *Re B (minors) (children in care: contact)* [1993] Fam 301, [1993] 1 FCR 363, CA; applied in *Re N (minors) (care orders: termination of parental contact)* [1994] 2 FCR 1101, sub nom *Re N (contested care application)* [1994] 2 FLR 992 (order for termination of contact made where contact would

hamper efforts to find permanent secure homes for disturbed children). Where both the child and the mother are children in care, the court still has a duty to assess the relative benefits and detriment of contact to the two children: *Re H (minors) (parental contact)* [1993] 1 FCR 904, 157 LG Rev 621, CA. Although it is open to the court to make an order inconsistent with the local authority care plan, this will usually be inadvisable: *Re D and H (care: termination of contact)* [1997] 1 FLR 841, CA. As to the use of psychological evidence by a mother at risk of being permanently separated from her child see *H v West Sussex County Council* [1998] 3 FCR 126, [1998] 1 FLR 862. The provisions of the Children Act 1989 s 34 do not contravene a person's right to family and private life under Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969): *Re F (care: termination of contact)* [2000] 2 FCR 481.

7 Children Act 1989 s 34(1) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 64). As to special guardianship orders see paras 151-154 ante. As to step-parents acquiring parental responsibility see the Children Act 1989 s 4A (as added); and para 140 ante.

See *Re G (children: contact)* [2002] EWCA Civ 761, [2002] 3 FCR 377, [2003] 1 FLR 270 (where a care order was made in relation to children who had suffered serious injuries by one of the parents and the court was unable to determine which, and the mother was to continue having contact, there was no reason to terminate the father's contact).

8 Children Act 1989 s 34(6). The Secretary of State may by regulations make provision as to: (1) the steps to be taken by a local authority which has exercised its powers under s 34(6); (2) the circumstances in which, and conditions subject to which, the terms of any order under s 34 may be departed from by agreement between the local authority and the person in relation to whom the order is made; (3) notification by a local authority of any variation or suspension of arrangements made (otherwise than under an order under s 34) with a view to affording any person contact with a child to whom s 34 applies: s 34(8). As to the regulations made under this provision see the Contact with Children Regulations 1991, SI 1991/891; and para 279 post. If the authority exercises the power to refuse to allow contact it must give notice to: (a) the child, if he is of sufficient understanding; (b) the persons mentioned in heads (1)-(5) in the text; and (c) any other person whose wishes and feelings the authority considers to be relevant: reg 2. Such notice must be given in writing and may be sent by post: reg 1(2).

## UPDATE

### 278 Contact with child in care

NOTE 4--A county court judge has jurisdiction to enforce a contact order under the Children Act 1989 s 38 by way of committal proceedings: *Re B (a child) (contact order: enforcement)* [2009] EWCA Civ 143, [2010] 1 WLR 419, [2009] All ER (D) 286 (Feb).

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## **279. Contact orders in respect of children in care.**

On an application made by a local authority<sup>1</sup> or a child<sup>2</sup> in its care<sup>3</sup>, the court may make such order (a 'care contact order') as it considers appropriate with respect to the contact which is to be allowed between the child and any named person<sup>4</sup>. On an application made by<sup>5</sup>:

- 388 (1) the child's parents<sup>6</sup>;
- 389 (2) any guardian or special guardian<sup>7</sup> of his;
- 390 (3) any step-parent who has acquired parental responsibility under the Children Act 1989<sup>8</sup>;
- 391 (4) where there was a residence order in force with respect to the child immediately before the care order<sup>9</sup> was made, the person in whose favour the order was made; and
- 392 (5) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person,

or on an application by any person who has obtained the leave of the court to make the application, the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and that person<sup>10</sup>.

Any order made under these provisions may impose such conditions as the court considers appropriate<sup>11</sup> and may be made either at the same time as the care order itself or later<sup>12</sup>. Moreover, when making a care order with respect to a child, or in any family proceedings in connection with a child who is in the care of a local authority, the court may make an order under these provisions even though no application for such an order has been made with respect to the child, if it considers that the order should be made<sup>13</sup>.

On an application<sup>14</sup> made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in heads (1) to (5) above and named in the order<sup>15</sup>. Where a person has made an application for a care contact order, the application has been refused and a period of not less than six months has elapsed since the refusal, that person may not make a further application for such an order with respect to the same child, unless he has obtained the leave of the court<sup>16</sup>.

A local authority may depart from the terms of a care contact order by agreement with the person in relation to whom the order is made, and where the child is of sufficient understanding, subject also to agreement with him<sup>17</sup>, and on condition that a written notification is sent to: (a) the child, if he is of sufficient understanding<sup>18</sup>; (b) the child's parents<sup>19</sup>; (c) any guardian of his<sup>20</sup>; (d) where there was a residence order in force with respect to the child immediately before the care order was made, the person in whose favour the order was made<sup>21</sup>; and (e) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person<sup>22</sup>; and (f) any other person whose wishes and feelings the authority considers to be relevant<sup>23</sup>, within seven days of the agreement to depart from the terms of the order and containing those parts of the following information<sup>24</sup> which the authority considers those persons need to know<sup>25</sup>: (i) the local authority's decision<sup>26</sup>; (ii) the date of the

decision<sup>27</sup>; (iii) the reasons for the decision<sup>28</sup>; (iv) the duration of the order, if applicable<sup>29</sup>; (v) the remedies available in case of dissatisfaction<sup>30</sup>.

A care contact order ceases to have effect when the child reaches 18, if it would otherwise still be in force<sup>31</sup>. The court may vary or discharge a care contact order on the application of the authority, the child concerned or the person named in the order<sup>32</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 Ie where no agreement as to contact is reached: see para 278 ante.

4 Children Act 1989 s 34(2). The power extends to an order that there be no contact between the child and a named person, but it will rarely be appropriate to make such an order: *Kent County Council v C* [1993] Fam 57, [1993] 1 All ER 719, [1993] 1 FLR 308; *West Glamorgan County Council v P (No 2)* [1992] 2 FCR 406, [1993] 1 FLR 407; *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, CA. In a situation where both the mother and child are children, the principle that the child's welfare should be the court's paramount consideration applies only to the mother's child since it is that child which is the subject of the contact applications: *Birmingham City Council v H (a minor)* [1994] 2 AC 212, [1994] 1 All ER 12, HL; *F v Leeds City Council* [1994] 2 FCR 428, [1994] 2 FLR 60, CA. An order under the Children Act 1989 s 34(4) should not be made merely because circumstances might change in the future so as to make termination of contact appropriate: see *Re S (children) (termination of contact)* [2004] EWCA Civ 1397, [2005] 1 FCR 489, sub nom *Re S (care: parental contact)* [2005] 1 FLR 469. Proceedings under the Children Act 1989 for a care contact order are not purely adversarial so that every party has a duty to give a full account of his case and position as soon as possible: *Re R (care: disclosure: nature of proceedings)* [2002] 1 FLR 755.

5 Ie an application made by any of the persons mentioned in the Children Act 1989 s 34(1) (as amended): see para 278 ante.

6 For the meaning of 'parent' see para 248 note 1 ante.

7 For the meaning of 'guardian of a child' see para 144 note 5 ante. As to special guardianship see para 151 ante.

8 Ie a person who acquires parental responsibility under the Children Act 1989 s 4A (as added): see para 140 ante.

9 For the meaning of 'care order' see para 271 note 4 ante.

10 Children Act 1989 s 34(3). Resources are not wholly irrelevant: *A Local Authority v S (a child) (care proceedings: contact)* [2005] EWHC 3894 (Fam), [2005] All ER (D) 24 (Aug) (order for daily contact in foster care with supervision by, or on behalf of, local authority, was exceptionally unusual but, being intended to run for few weeks only before review, was not outside court's discretion).

11 Children Act 1989 s 34(7).

12 Ibid s 34(10).

13 Ibid s 34(5).

14 An application may be made pending the final hearing of care proceedings, and the court has complete discretion to authorise refusal of contact for such period as the court considers appropriate to serve the child's welfare: *West Glamorgan County Council v P* [1992] 2 FCR 378, [1992] 2 FLR 369.

15 Children Act 1989 s 34(4). See *Re H (children) (termination of contact)* [2005] EWCA Civ 318, [2005] 2 FLR 408, [2005] 1 FCR 658.

16 Children Act 1989 s 91(17).

17 Contact with Children Regulations 1991, SI 1991/891, reg 3(a).

18 Ibid regs 2(a), 3(b).

19 Ibid regs 2(b), 3(b).

20 Ibid regs 2(c), 3(b).

21 Ibid regs 2(d), 3(b).

22 Ibid regs 2(e), 3(b).

23 Ibid regs 2(f), 3(b).

24 Ie the information specified in ibid reg 3, Schedule: see the text and notes 25-30 infra.

25 Ibid reg 3(b).

26 Ibid reg 3(b), Schedule para 1.

27 Ibid reg 3(b), Schedule para 2.

28 Ibid reg 3(b), Schedule para 3.

29 Ibid reg 3(b), Schedule para 4.

30 Ibid reg 3(b), Schedule para 5. Where a local authority varies or suspends any arrangements made (otherwise than under an order made under the Children Act 1989 s 34 (as amended)) with a view to affording any person contact with a child in the care of that local authority, written notification must be sent to those persons specified in the Contact with Children Regulations 1991, SI 1991/891, reg 2 (see the text and notes 18-23 supra) containing those parts of the information specified in the Schedule (see the text and notes 26-30 supra) as the authority considers those persons need to know, as soon as the decision is made to vary or suspend the arrangements: reg 4.

31 See the Children Act 1989 s 91(13).

32 Ibid s 34(9).

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## **280. Avoidance of delay in care proceedings.**

In any proceedings in which any question with respect to the upbringing<sup>1</sup> of a child<sup>2</sup> arises, the court must have regard to the general principle that any delay in determining the question is likely to prejudice his welfare<sup>3</sup>.

A court hearing an application for a care order or supervision order<sup>4</sup> must draw up a timetable with a view to disposing of the application without delay<sup>5</sup>, and must give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to<sup>6</sup>. Rules of court may specify periods within which specified steps must be taken in relation to such proceedings, and may make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that they are disposed of without delay<sup>7</sup>.

1 For the meaning of 'upbringing' see para 266 note 9 ante.

2 For the meaning of 'child' see para 3 ante.

3 See the Children Act 1989 s 1(2); and para 301 post. It must be expected that the court hearing an application for a care order or supervision order will normally need to adjourn the proceedings to a further hearing or hearings because it is not in a position to decide the application, even when it is not contested. The children's guardian (formerly known as the guardian ad litem: see paras 230 ante, 319-321 post) will usually need time to make inquiries, establish the child's and others' views, investigate the applicant's plans and prepare a report and recommendations for the court. Other parties will need to prepare their case, instruct a solicitor where appropriate, obtain witness statements etc: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.31. As to the guidance and regulations generally see para 163 ante. See also *Re B (a minor) (interim order for contact)* [1994] 1 FCR 905, [1994] 2 FLR 269. For consideration of time estimates, discovery and presentation of evidence in care proceedings see *Re J C (care proceedings: practice and procedure)* [1996] 1 FCR 434, [1995] 2 FLR 77. The court should not adjourn care proceedings in order to allow related criminal proceedings against the child's parents to be heard first, as the child's welfare takes precedence over any possible prejudice to the parents, and delay is generally detrimental to a child's welfare: *Re T B (care proceedings: criminal trial)* [1996] 1 FCR 101, [1995] 2 FLR 810, CA. As to measures that should be taken to avoid delay see *Re B (minors) (care proceedings: practice)* [1999] 1 WLR 238 (proceedings protracted because directions not followed); *Re C D and M D (care proceedings: practice)* [1998] 1 FLR 825, [1998] Fam Law 317; *Re D and K (children) (care plan: twin track planning)* [1999] 4 All ER 893, [2000] 1 WLR 642. Parents should issue proceedings under the Human Rights Act 1998 at the earliest available opportunity, prior to the removal of the child and not as a reaction to that removal: *Re W (removal into care)* [2005] EWCA Civ 642, [2005] 2 FLR 1022, [2005] Fam Law 767.

4 For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante.

5 Children Act 1989 s 32(1)(a). See also the Protocol of June 2003 *Judicial Case Management in Public Law Children Act Cases* [2003] 2 FLR 719; and para 271 note 12 ante. However, some delay may be planned and purposeful: see *Re C (a minor) (care proceedings)* [1992] 2 FCR 341, sub nom *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290; *Hounslow London Borough Council v A* [1993] 1 WLR 291, [1993] 1 FCR 164, [1993] 1 FLR 702.

6 Children Act 1989 s 32(1)(b).

7 Ibid s 32(2). As to the rules made under this provision see the Family Proceedings Rules 1991, SI 1991/1247, r 4.14 (amended by SI 1994/3155; SI 2001/821; SI 2005/2922; SI 2007/2187), Family Proceedings Rules 1991, SI 1991/1247, r 4.15 (amended by SI 2001/821; SI 2005/2922; SI 2007/2187); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 14 (amended by SI 1994/3156; SI

2001/818; SI 2005/617; SI 2005/2930; SI 2007/2188), Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 15 (amended by SI 2001/615; SI 2001/818; SI 2005/617; SI 2005/2930; SI 2007/2188).

## **UPDATE**

### **280 Avoidance of delay in care proceedings**

NOTE 3--See also *G v N CC* [2009] FLR 103.

NOTE 5--Protocol of June 2003 replaced: see *Practice Direction (public law proceedings) (guide to case management) (April 2010)* [2010] All ER (D) 276 (Mar) (which applies to care and supervision proceedings and, in so far as practicable, is to be applied to all other public law proceedings).

NOTE 7--SI 1991/1247 rr 4.14, 4.15 further amended: SI 2008/2861. SI 1991/1395 rr 14, 15 further amended: SI 2008/2858. SI 1991/1395 rr 14, 15 modified: SI 2008/2859.



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### (iii) Supervision Orders

#### 281. Supervision orders and their effects.

While a supervision order<sup>1</sup>, putting the child<sup>2</sup> under the supervision of a designated local authority<sup>3</sup>, is in force it is the supervisor's duty:

- 393 (1) to advise, assist and befriend the supervised child<sup>4</sup>;
- 394 (2) to take such steps as are reasonably necessary to give effect to the order<sup>5</sup>;  
and
- 395 (3) where the order is not wholly complied with, or the supervisor considers that it may no longer be necessary, to consider whether or not to apply to the court for its variation or discharge<sup>6</sup>.

The court may make a supervision order only if it is satisfied that the 'threshold criteria' are satisfied<sup>7</sup>. In appropriate circumstances an interim supervision order may be made<sup>8</sup>, and where in any proceedings on an application for a care order<sup>9</sup> or supervision order, a court makes a residence order with respect to the child concerned, it must also make an interim supervision order with respect to him unless it is satisfied that his welfare will be satisfactorily safeguarded without an interim order being made<sup>10</sup>.

A supervision order may require the supervised child to comply with any directions given from time to time by the supervisor which require him to do all or any of the following things: (a) to live at a place or places specified in the directions for a period or periods so specified; (b) to present himself to a person or persons specified in the directions at a place or places and on a day or days so specified; and (c) to participate in activities specified in the directions on a day or days so specified<sup>11</sup>. It is for the supervisor to decide whether, and to what extent, he exercises his power to give directions and to decide the form of any directions which he gives<sup>12</sup>.

The making of a supervision order with respect to any child brings to an end any earlier care order or supervision order which was made with respect to that child and would otherwise continue in force<sup>13</sup>.

1 For the meaning of 'supervision order' see para 271 note 5 ante.

2 For the meaning of 'child' see para 3 ante. No supervision order may be made with respect to a child who has reached the age of 17 (or 16 in the case of a child who is married): Children Act 1989 s 31(3).

3 See under *ibid* s 31(1)(b) (as amended): see para 271 ante.

4 *Ibid* s 35(1)(a).

5 *Ibid* s 35(1)(b).

6 *Ibid* s 35(1)(c). In the case of 'private law' proceedings (see para 247 et seq ante), a family assistance order may be appropriate: see s 16 (as amended); and para 267 ante. 'Supervised child' and 'supervisor', in relation to a supervision order mean, respectively, the child who is, or is to be, under supervision, and the person under whose supervision he is, or is to be, by virtue of the order: s 105(1). This definition also applies in relation to education supervision orders: see paras 296-298 post.

7 See *ibid* s 31(2); and para 274 ante. See also *Leeds City Council v C* [1993] 1 FCR 585, [1993] 1 FLR 269. In the exercise of its discretion, the court is guided by the welfare principle set out in the Children Act 1989 s 1(1) (see para 300 post) and it must consider in particular the matters specified in the welfare checklist contained in s 1(3) (see para 303 post), as well as the presumption against making an order set out in s 1(5) (see para 302 post). A county court judge has no inherent jurisdiction to accept undertakings as part of a supervision order from a parent even though the parent is willing to give them: *Re B (a minor) (supervision order: parental undertaking)* [1996] 1 WLR 716, [1996] 3 FCR 446, CA.

8 See the Children Act 1989 s 38; and para 288 post.

9 For the meaning of 'care order' see para 271 note 4 ante.

10 Children Act 1989 s 38(3). For general provisions regarding interim orders see paras 288-292 post.

11 *Ibid* s 35(2), Sch 3 para 2(1). The supervisor's powers under this provision do not extend to the giving of directions in respect of any medical or psychiatric examination or treatment, which are dealt with by specific provisions: see Sch 3 para 2(3); and para 283 post. Schedule 3 (as amended) does not confer jurisdiction on the court to make a supervision order subject to conditions: *Re V (a minor) (care or supervision order)* [1996] 2 FCR 555, [1996] 1 FLR 776, CA; followed in *Re S (care or supervision order)* [1996] 2 FCR 719, [1996] 1 FLR 753.

In certain circumstances, a child may be placed under a supervision requirement by a children's hearing in Scotland. Such a requirement may require a child to reside at a specified place, which may include a place in England and Wales: see the Children (Scotland) Act 1995 s 70(3), (4).

12 Children Act 1989 Sch 3 para 2(2).

13 *Ibid* Sch 3 para 10.

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**282. Selection of supervisor.**

A supervision order<sup>1</sup> must not designate a local authority<sup>2</sup> as the supervisor<sup>3</sup> unless the authority agrees or the supervised child<sup>4</sup> lives or will live within its area<sup>5</sup>.

- 1 For the meaning of 'supervision order' see para 271 note 5 ante.
- 2 For the meaning of 'local authority' see para 248 note 10 ante.
- 3 For the meaning of 'supervisor' see para 281 note 6 ante.
- 4 For the meaning of 'supervised child' see para 281 note 6 ante.
- 5 Children Act 1989 s 35(2), Sch 3 para 9(1).

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### **283. Psychiatric and medical examinations and treatment.**

A supervision order<sup>1</sup> may require the supervised child<sup>2</sup> to submit to a medical or psychiatric examination or to submit to any such examination from time to time as directed by the supervisor<sup>3</sup>. However, no court may include such a requirement in a supervision order unless it is satisfied that: (1) where the child has sufficient understanding to make an informed decision, that he consents to its inclusion; and (2) satisfactory arrangements have been, or can be, made for the examination<sup>4</sup>.

Where a court which proposes to make or vary a supervision order is satisfied, on the evidence of a registered medical practitioner, that the mental or physical condition of the supervised child is such as requires, and may be susceptible to, treatment but, in the case of a mental condition, is not such as to warrant his detention in pursuance of a hospital order<sup>5</sup>, the court may include in the order a requirement that the supervised child must, for a period specified in the order, submit to such treatment as is so specified<sup>6</sup>. No court may include such a requirement in a supervision order unless it is satisfied, where the child has sufficient understanding to make an informed decision, that he consents to its inclusion, and that satisfactory arrangements have been, or can be made for the treatment<sup>7</sup>. The treatment specified must be: (a) by, or under the direction of, such registered medical practitioner as may be specified in the order<sup>8</sup>; (b) as a non-resident patient at such a place as may be so specified<sup>9</sup>; or (c) in the case of treatment of a mental condition, as a resident patient in a hospital, independent hospital or care home, or in the case of treatment of a physical condition, in a health service hospital<sup>10</sup>.

1 For the meaning of 'supervision order' see para 271 note 5 ante.

2 For the meaning of 'supervised child' see para 281 note 6 ante.

3 Children Act 1989 s 35(2), Sch 3 para 4(1). For the meaning of 'supervisor' see para 281 note 6 ante.

Any such examination is required to be conducted: (1) by, or under the direction of, such registered medical practitioner as may be specified in the order; (2) at a place specified in the order and at which the supervised child is to attend as a non-resident patient; or (3) at a health service hospital or (in the case of a psychiatric examination) a hospital, independent hospital or care home, at which the supervised child is, or is to attend as, a resident patient: Sch 3 para 4(2) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (24)). However, a requirement under head (3) supra may not be included unless the court is satisfied, on the evidence of a registered medical practitioner, that the child may be suffering from a physical or mental condition that requires and may be susceptible to treatment, and that a period as a resident patient is necessary if the examination is to be carried out properly: Children Act 1989 Sch 3 para 4(3).

As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 1 et seq. For these purposes, 'health service hospital' means a health service hospital within the meaning given by the National Health Service Act 2006 or the National Health Service (Wales) Act 2006: Children Act 1989 s 105(1) (definition amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 124, 125). For these purposes 'hospital' has the same meaning as in the Mental Health Act 1983 s 145(1) (see MENTAL HEALTH vol 30(2) (Reissue) para 417), except that it does not include a hospital at which high security psychiatric services within the meaning of the Mental Health Act 1983 are provided (see MENTAL HEALTH vol 30(2) (Reissue) para 418): Children Act 1989 s 105(1) (definition amended by the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(2), Sch 2 para 5). 'Care home' has the same meaning as in the Care Standards Act 2000 (see MENTAL HEALTH vol 30(2) (Reissue) para 430): Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)). See also *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA, cited in note 7 infra.

4 Children Act 1989 Sch 3 para 4(4).

5 le under the Mental Health Act 1983 Pt III (ss 35-55) (as amended): see MENTAL HEALTH vol 30(2) (Reissue) para 486 et seq.

6 Children Act 1989 Sch 3 para 5(1), (3). Where the evidence relates to the supervised child's mental condition the registered medical practitioner providing the evidence must be approved for the purposes of the Mental Health Act 1983 s 12 (as amended): see MENTAL HEALTH vol 30(2) (Reissue) para 482.

7 Children Act 1989 Sch 3 para 5(5). See also *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA, where the court decided that the Family Law Reform Act 1969 s 8 did not empower a minor who had attained the age of 16 to override a consent to medical treatment given by someone with parental authority (see para 4 ante); Lord Donaldson of Lymington MR rejected the submission that that decision was inconsistent with the approach of the Children Act 1989 Sch 3 para 5.

8 Ibid Sch 3 para 5(2)(a), (4)(a).

9 Ibid Sch 3 para 5(2)(b), (4)(b).

10 Ibid Sch 3 para 5(2)(c), (4)(c) (Sch 3 para 5(2)(c) amended by the Care Standards Act 2000 Sch 4 para 14(24)).

If a medical practitioner by whom or under whose direction a supervised person is being treated in pursuance of a requirement included in a supervision order by virtue of the Children Act 1989 Sch 3 para 5 (as amended) is unwilling to continue to treat or direct the treatment of the supervised child or is of the opinion that: (1) the treatment should be continued beyond the period specified in the order; (2) the supervised child needs different treatment; (3) he is not susceptible to treatment; or (4) he does not require further treatment, the practitioner must make a report in writing to that effect to the supervisor: Sch 3 para 5(6). On receiving such a report, the supervisor must refer it to the court, and on such a reference the court may make an order cancelling or varying the requirement: Sch 3 para 5(7).

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#### **284. Power of supervisor to give directions to responsible persons.**

A supervision order<sup>1</sup> may, with the consent of any responsible person<sup>2</sup>, include a requirement<sup>3</sup> that: (1) he take all reasonable steps to ensure that the supervised child<sup>4</sup> complies with any direction given by the supervisor<sup>5</sup>; (2) he take all reasonable steps to ensure that the supervised child complies with any requirement for medical or psychiatric examination or treatment included in the order<sup>6</sup>; and (3) he comply with any directions given by the supervisor<sup>7</sup> requiring him to attend at a place specified in the directions for the purpose of taking part in activities so specified<sup>8</sup>. A supervision order may also require any person who is a responsible person in relation to the supervised child to keep the supervisor informed of his address, if it differs from the child's<sup>9</sup>.

1 For the meaning of 'supervision order' see para 271 note 5 ante.

2 'Responsible person', in relation to a supervised child, means any person who has parental responsibility for the child, and any other person with whom the child is living: Children Act 1989 ss 35(2), 105(1), Sch 3 para 1. For the meaning of 'parental responsibility' see para 134 ante. The co-operation of the responsible person is a vital contribution to the effectiveness of the order: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.91. As to the guidance and regulations generally see para 163 ante.

3 For the meaning of 'supervised child' see para 281 note 6 ante.

4 Children Act 1989 Sch 3 para 3(1). The inability of the court to require adults to contribute towards making the supervision order effective, or even to allow access to the child, was often an important factor in the perceived ineffectiveness of supervision orders: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 3.89.

5 Children Act 1989 Sch 3 para 3(1)(a). The reference in the text to directions is those given by the supervisor under Sch 3 para 2: see para 281 ante.

6 For the meaning of 'supervisor' see para 281 note 6 ante.

7 Children Act 1989 Sch 3 para 3(1)(b). The reference in the text to any requirement for medical or psychiatric examination is to any such requirement under Sch 3 para 4 or para 5 (as amended): see para 283 ante.

8 Ibid Sch 3 para 3(1)(c). A direction under head (3) in the text may specify the time at which the responsible person is to attend and whether or not the supervised child is required to attend with him: Sch 3 para 3(2). Only a supervisor has the power to direct a responsible person to attend at a specified place to undergo a course of treatment, although the court can order a responsible person to comply with such a direction: *Re H (minors) (terms of supervision order)* [1994] 2 FCR 1, [1994] 2 FLR 979.

9 Children Act 1989 Sch 3 para 3(3). As to the address of the supervised child see para 285 post.

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## **285. Address of supervised child.**

A supervision order<sup>1</sup> may require the supervised child<sup>2</sup> to: (1) keep the supervisor<sup>3</sup> informed of any change in his address<sup>4</sup>; and (2) allow the supervisor to visit him at the place where he is living<sup>5</sup>. The responsible person<sup>6</sup> in relation to any child with respect to whom a supervision order is made must<sup>7</sup>: (a) if asked by the supervisor, inform him of the child's address if it is known to him<sup>8</sup>; and (b) if he is living with the child, allow the supervisor reasonable contact with the child<sup>9</sup>.

1 For the meaning of 'supervision order' see para 271 note 5 ante.

2 Children Act 1989 s 35(2), Sch 3 para 8(1). For the meaning of 'supervised child' see para 281 note 6 ante.

3 For the meaning of 'supervisor' see para 281 note 6 ante.

4 Children Act 1989 Sch 3 para 8(1)(a).

5 Ibid Sch 3 para 8(1)(b). If a person attempting to exercise powers under Sch 3 para 8(1)(b) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: s 102(1), (6)(b). As to the application for, and grant of, such a warrant see s 102(2)-(5) (s 102(3) amended by the Nursing and Midwifery Order 2002, SI 2002/253, art 54(3), Sch 5 para 10; and the Children Act 1989 s 102(3A) added by the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1771, art 3, Schedule Pt 1 para 4).

6 For the meaning of 'responsible person' see para 284 note 2 ante.

7 Children Act 1989 Sch 3 para 8(2).

8 Ibid Sch 3 para 8(2)(a).

9 Ibid Sch 3 para 8(2)(b). If a person attempting to exercise powers under Sch 3 para 8(2)(b) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: see s 102(1), (6)(b); and note 5 supra.

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## **286. Breach of a requirement or direction.**

There is no prescribed remedy for breach of a requirement or direction. However, where the supervision order is not wholly complied with, the supervisor<sup>1</sup> must consider whether to apply to the court for its variation or discharge<sup>2</sup>. If the supervisor is prevented from visiting the child<sup>3</sup> or having reasonable contact with him<sup>4</sup> he may apply to the court for a warrant authorising a constable to assist him to exercise his powers<sup>5</sup>. If the supervisor considers that the refusal of reasonable contact requires that urgent action be taken, he may apply for an emergency protection order<sup>6</sup> or ask the constable to take the child into police protection<sup>7</sup>.

Failure to comply with requirements may lead to the local authority reconsidering its plans for the child, and this possibility should be explained to the child, the responsible person and his parents, and to any other person caring for the child, so that they know where they stand and can see the value to the child of their co-operation<sup>8</sup>.

1 For the meaning of 'supervisor' see para 281 note 6 ante.

2 See the Children Act 1989 s 35(1)(c): and para 281 ante.

3 For the meaning of 'child' see para 3 ante.

4 Ie contrary to the Children Act 1989 s 35(2), Sch 3 para 8(1)(b) or para (2)(b): see para 285 ante.

5 See *ibid* s 102(1), (6). The constable may use reasonable force if necessary: s 102(1).

6 As to emergency protection orders see para 583 et seq post.

7 See the Department of Health publication *The Children Act 1989 Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.95. As to the guidance and regulations generally see para 163 ante.

8 See the Department of Health publication *The Children Act 1989 Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.95. The local authority should at all times respond to non-co-operation in a positive and constructive way designed to regain that co-operation. Failure to work closely with those concerned with the child's welfare, in particular with the parents, may lead to a breakdown in the local authority's relationship with the parents, and consequent deleterious effects on the welfare of the child. The aim must be at all times to strive to gain the parent's support for the plans for the child's future. The court and children's guardian are also likely to want to ensure that the child and other persons understand the significance of the order when it is made: see the Department of Health publication *The Children Act 1989 Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.95. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.



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## **287. Duration of supervision order.**

A supervision order<sup>1</sup> is discharged by the making of a care order<sup>2</sup> with respect to the child<sup>3</sup>, or by the termination of an existing custody order under the Child Abduction and Custody Act 1985<sup>4</sup>, and in any event comes to an end when the child attains 18 unless it is brought to an end earlier<sup>5</sup>. Otherwise it will last for one year from the date on which it was made<sup>6</sup>. Where the supervisor<sup>7</sup> applies to the court to extend, or further extend, a supervision order the court may extend the order for such period as it may specify<sup>8</sup>. A supervision order may not be extended so as to run beyond the end of the period of three years beginning with the date on which it was made<sup>9</sup>.

1 For the meaning of 'supervision order' see para 271 note 5 ante.

2 For the meaning of 'care order' see para 271 note 4 ante.

3 See the Children Act 1989 s 91(3). For the meaning of 'child' see para 3 ante.

4 See *ibid* s 35(2), Sch 3 para 6(2). The reference in the text to the termination of an existing custody order is to its termination by an event mentioned in the Child Abduction and Custody Act 1985 s 25(1)(a) or s 25(1)(b): see para 804 post.

5 See the Children Act 1989 s 91(13); and para 293 post.

6 *Ibid* Sch 3 para 6(1). Schedule 3 para 6(1) is to be construed as giving the court jurisdiction to make a supervision order for an initial duration of less than one year: *M v Warwickshire County Council* [1994] 2 FCR 121, [1994] 2 FLR 593.

7 For the meaning of 'supervisor' see para 281 note 6 ante.

8 Children Act 1989 Sch 3 para 6(3). For the powers of the court on applications to vary or discharge supervision orders see para 295 post. See *Re A (a minor) (supervision order: extension)* [1995] 3 All ER 401, [1995] 1 WLR 482, CA (no power for court to make interim care order in place of supervision order on application to extend supervision order).

9 Children Act 1989 Sch 3 para 6(4).

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#### (iv) Interim Orders

##### 288. Interim orders.

Where (1) in any proceedings on an application for a care order<sup>1</sup> or supervision order<sup>2</sup>, the proceedings are adjourned<sup>3</sup>; or (2) it appears to the court in family proceedings that it might be appropriate for a care order or supervision order to be made and the court gives a direction<sup>4</sup> for an authority to undertake an investigation of the child's circumstances, the court may make an interim care order or an interim supervision order with respect to the child concerned<sup>5</sup>.

However, the court must not make an interim care order or interim supervision order unless it is satisfied that there are reasonable grounds for believing that the 'threshold criteria'<sup>6</sup> are satisfied<sup>7</sup>. In deciding whether to exercise its discretion to make an interim order the court must have regard to the paramountcy of the child's welfare<sup>8</sup> and direct itself by reference to the welfare checklist<sup>9</sup> and to the 'no order principle'<sup>10</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante.

2 For the meaning of 'supervision order' see para 271 note 5 ante.

3 Children Act 1989 s 38(1)(a).

4 I.e a direction under ibid s 37 (as amended): see para 272 ante.

5 Ibid s 38(1)(b). In the family proceedings court (see para 208 note 10 ante), a justices' clerk or single justice may not make an order under s 38(1) unless: (1) a written request for such an order has been made to which the other parties and any children's guardian consent and which they or their representatives have signed; (2) a previous such order has been made in the same proceedings; (3) the terms of the order sought are the same as those of the last such order made: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 28 (amended by SI 2001/818). However, the court must be conscious of delay arising if uncritical use of this rule is made: see *Re R (minors)* [1994] 2 FCR 136, sub nom *Re J (minors)* [1994] 1 FLR 253, [1994] Fam Law 248. Once an order is made, the court may not exercise a supervisory role over the local authority in whose care a child has been placed: *Re S (children: care plan)* [2002] UKHL 10, [2002] 2 AC 291, [2002] 2 All ER 192. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

6 As to the 'threshold criteria' see para 274 ante.

7 Children Act 1989 s 38(2). See *Gateshead Metropolitan Borough Council v N* [1993] 1 FCR 400, [1993] 1 FLR 811; *Re B (a minor) (interim care order: criteria)* [1993] Fam Law 335. At the hearing of an application for an interim order where there are disputed facts, the court must consider whether the evidence before it is potentially credible and gives the court the reasonable grounds required by the Children Act 1989 s 38(2): *F v Kent County Council* [1993] 1 FCR 217 (order of magistrates' court 'fatally flawed' by refusal to hear submissions by mother as to facts and law). For guidance as to the manner in which interim hearings should be conducted see eg *Hampshire County Council v S* [1993] Fam 158, [1993] 1 All ER 944; *Re W (a minor) (interim care order)* [1994] 3 FCR 102, [1994] 2 FLR 892, CA. It is not necessary for the court to be satisfied of the existence of the threshold criteria, but merely to be satisfied that there are reasonable grounds for believing that the threshold criteria will be satisfied: *Re S (children: interim care order)* [1993] 2 FCR 475. See also *Re G (minors) (interim care order)* [1993] 2 FCR 557, [1993] 2 FLR 839, CA; and *Re W (children) (care plan)* [2001] EWCA Civ 757, [2001] 2 FCR 450, [2001] 2 FLR 582. In *Re K and H (children) (interim care order)* [2006] EWCA Civ 1898, [2007] 1 FLR 2043, the test for removal of children at an interim stage was that it was necessary for their interim protection (applying *Re H (a child) (interim care order)* [2002] EWCA Civ 1932, [2003] 1 FCR 350; and *Re M (children) (interim care order)* [2005] EWCA Civ 1594, [2006] 1 FLR 143).

See *Re C (a minor) (care proceedings)* [1992] 2 FCR 341, sub nom *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290 (possibility of making interim section 8 orders to be considered); and *Hounslow London Borough Council v A* [1993] 1 WLR 291, sub nom *Re A (a minor) (care proceedings)* [1993] 1 FCR 164. The test which has to be satisfied before the court may make an interim order is not the same as for a full order, which requires proof that the child is suffering or likely to suffer significant harm. It would not be realistic to require proof of the condition at the interim stage when the children's guardian final report will probably not have been received nor all the evidence heard. The child's version of events may form an integral part of 'reasonable grounds for believing' as could, for example, medical evidence that certain symptoms were consistent with abuse. After further assessment this may be rejected at the full hearing. Court findings of fact leading to the making of interim orders should therefore not be binding on the court at the final hearing, and should not be regarded as prejudicial to any of the parties to the proceedings: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.37. As to the guidance and regulations generally see para 163 ante. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

8 As to the welfare principle see the Children Act 1989 s 1(1); and para 300 post.

9 As to the welfare checklist see *ibid* s 1(3), (4) (as amended); and para 303 post.

10 As to the 'no order' principle see *ibid* s 1(5); and para 302 post. Once the court has concluded that the threshold criteria have been satisfied, it must have regard to all the evidence in deciding whether to make no order, a supervision order or a care order, and it must give reasons for rejecting or accepting that evidence in reaching its decision: *Leicestershire County Council v G* [1995] 1 FCR 205, [1994] 2 FLR 329. See *Re B (a minor) (interim care order: criteria)* [1993] Fam Law 335; *Hampshire County Council v S* [1993] Fam 158, [1993] 1 All ER 944 (although such an order is a holding order until the substantive hearing all relevant risks must be considered; consideration should be given to transfer to adjacent court if insufficient time is available for a speedy hearing; findings on disputed facts are usually best left to the final hearing; caution should be exercised in changing a child's residence; it is usually appropriate to leave the child where he is with directions for safeguards, and to fix an early hearing date). See also *Re B (children) (residence; interim care order)* [2002] EWCA Civ 1225, [2002] 3 FCR 562, [2002] All ER (D) 301 (Jul) (judge wrong to reject expert evidence on mother's psychological disturbance which precluded refusal of interim care order).

## UPDATE

### 288 Interim orders

NOTE 7--See *Re B (a child) (care proceedings: interim care order)* [2009] EWCA Civ 1254, [2010] 1 FCR 114 (interim order awarded where evidence of severe mistreatment of child's sibling).

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## **289. Duration of interim orders.**

An interim order has effect for such period as may be specified in the order, but in any event ceases to have effect on whichever of the following events first occurs<sup>1</sup>:

- 396 (1) the expiry of the period of eight weeks beginning with the date on which the order is made<sup>2</sup>;
- 397 (2) if the order is the second or subsequent such order made with respect to the same child in the same proceedings, the expiry of the relevant period<sup>3</sup>;
- 398 (3) in proceedings on an application for a care order or supervision order<sup>4</sup>, the disposal of the application<sup>5</sup>;
- 399 (4) where a direction for an investigation of the child's circumstances has been made, on the disposal of any consequent application for a care order or supervision order<sup>6</sup>; and
- 400 (5) where, pursuant to such a direction, the court has given a subsequent direction as to the time at which information must be furnished to it<sup>7</sup> but no application for a care order or supervision order has been made, the expiry of the period fixed by the latter direction<sup>8</sup>.

Where a court makes an interim order<sup>9</sup> it must, in determining the period for which the order is to be in force, consider whether any party who was, or might have been, opposed to the making of the order was in a position to argue his case against the order in full<sup>10</sup>.

1 Children Act 1989 s 38(4). See *Gateshead Metropolitan Borough Council v N* [1993] 1 FCR 400, [1993] 1 FLR 811.

2 Children Act 1989 s 38(4)(a).

3 Ibid s 38(4)(b). For these purposes, 'relevant period' means: (1) the period of four weeks beginning with the date on which the order was made; or (2) the period of eight weeks beginning with the date on which the first order was made if that period ends later than the period in head (1) supra: s 38(5). Thus if the first order was made for three weeks, the second order could be made for five weeks; if there had been two previous orders each made for one week, the third order could be made for up to six weeks: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 3.45. As to the guidance and regulations generally see para 163 ante.

4 For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante.

5 See the Children Act 1989 s 38(4)(c).

6 See ibid s 38(4)(d). As to a direction for the investigation of a child's circumstances see para 272 ante.

7 I.e. under ibid s 37(4): see para 272 ante.

8 See ibid s 38(4)(e). When deciding the timetable in the case (see para 280 ante) the court will need to be satisfied on the need for a long interim order and it would not be expected that four week applications for subsequent orders will be made. The balance will have to be struck between allowing sufficient time for inquiries, reports and statements, and risking allowing the child to continue in interim care or supervision for so long that the balance of advantage is distorted in favour of continued intervention. Subject to that, the emphasis should be very firmly on pressing on to a final hearing as quickly as possible (unless, of course, the matter can be resolved by negotiation without further compulsory intervention out of court). The children's

guardian will have a key role in advising the court on interim orders: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.46. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

9     le under or by virtue of the Children Act 1989 s 38: see para 288 ante.

10    Ibid s 38(10).

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## 290. Exclusion requirements in interim care orders.

Where:

- 401 (1) on being satisfied that there are reasonable grounds for believing that the child<sup>1</sup> concerned is suffering, or is likely to suffer, significant harm<sup>2</sup> and that harm or likelihood of harm is attributable to the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him<sup>3</sup>, the court makes an interim care order<sup>4</sup> with respect to that child<sup>5</sup>; and
- 402 (2) the court is satisfied: (a) that there is reasonable cause to believe that, if a person ('the relevant person') is excluded from a dwelling house in which the child lives, the child will cease to suffer, or cease to be likely to suffer, significant harm<sup>6</sup>; and (b) that another person living in the dwelling house (whether a parent of the child or some other person) is able and willing to give to the child the care which it would be reasonable to expect a parent to give him<sup>7</sup>, and consents to the inclusion of the exclusion requirement<sup>8</sup>,

the court may include an exclusion requirement in the interim care order<sup>9</sup>. An exclusion requirement is any one or more of the following: (i) a provision requiring the relevant person to leave a dwelling house in which he is living with the child; (ii) a provision prohibiting the relevant person from entering a dwelling house in which the child lives; and (iii) a provision excluding the relevant person from a defined area in which a dwelling house in which the child lives is situated<sup>10</sup>.

The court may provide that the exclusion requirement is to have effect for a shorter period than the other provisions of the interim care order<sup>11</sup>. Where the court makes an interim care order containing an exclusion requirement, the court may attach a power of arrest to the exclusion requirement<sup>12</sup>. Where the court attaches a power of arrest to an exclusion requirement of an interim care order, it may provide that the power of arrest is to have effect for a shorter period than the exclusion requirement<sup>13</sup>.

If, while an interim care order containing an exclusion requirement is in force, the local authority has removed the child from the dwelling house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours, the interim care order ceases to have effect in so far as it imposes the exclusion requirement<sup>14</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'harm' see para 274 ante.

3 Ie the circumstances with respect to a child as are mentioned in the Children Act 1989 s 31(2)(a), (b)(i): see para 274 ante.

4 For the meaning of 'care order' see para 271 note 4 ante.

5 Children Act 1989 s 38A(1)(a) (s 38A added by Family Law Act 1996 s 52, Sch 6 para 1).

6 Children Act 1989 s 38A(1)(b), (2)(a) (as added: see note 5 supra).

7 Ibid s 38A(1)(b), (2)(b)(i) (as added: see note 5 supra).

8 See ibid s 38A(1)(b), (2)(b)(ii) (as added: see note 5 supra). Consent for the purposes of the Children Act 1989 s 38A(2)(b)(ii) (as added) must be given either orally in court or in writing to the designated officer for the court or the court and signed by the person giving his consent: Family Proceedings Rules 1991, SI 1991/1247, r 4.24(1)(b) (amended by SI 1992/456; SI 1997/1893); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25(1)(b) (amended by SI 1992/2068; SI 1997/1895; SI 2001/615; SI 2005/617). Any such written consent must include a statement that the person giving consent is able and willing to give to the child the care which it would be reasonable to expect a parent to give him, and understands that the giving of consent could lead to the exclusion of the relevant person from the dwelling house in which the child lives: Family Proceedings Rules 1991, SI 1991/1247, r 4.24(2) (added by SI 1997/1893); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25(2) (added by SI 1997/1895). 'Dwelling house' includes: (1) any building or part of a building which is occupied as a dwelling; (2) any caravan, house-boat or structure which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to it and occupied with it: Children Act 1989 s 105(1) (definition added by the Family Law Act 1996 Sch 6 para 5).

9 Children Act 1989 s 38A(1) (as added: see note 5 supra). As to the procedure to be followed where the court includes an exclusion requirement see the Family Proceedings Rules 1991, SI 1991/1247, r 4.24A (added by SI 1997/1893); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25A (added by SI 1997/1895).

10 Children Act 1989 s 38A(3) (as added: see note 5 supra).

11 Ibid s 38A(4) (as added: see note 5 supra). Any period specified for the purposes of s 38A(4) (as added) or s 38A(6) (as added) may be extended by the court (on one or more occasions) on an application to vary or discharge the interim care order: s 38A(7) (as so added).

12 Ibid s 38A(5) (as added: see note 5 supra). Where a power of arrest is attached to an exclusion requirement of an interim care order by virtue of s 38A(5) (as added), a constable may arrest without warrant any person whom he has reasonable cause to believe to be in breach of the requirement: s 38A(8) (as so added). The Family Law Act 1996 ss 47(7), (11), (12), 48, Sch 5 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 990-995) have effect in relation to a person arrested under the Children Act 1989 s 38A(8) (as added) as they have effect in relation to a person arrested under the Family Law Act 1996 s 47(6): Children Act 1989 s 38A(9) (as so added). As to the procedure applicable to both the hearing at which a power of arrest is attached to an interim care order and following an arrest, see *Practice Direction (interim care order: exclusion requirement: arrest)* [1998] 2 All ER 928, sub nom *Practice Direction (exclusion requirement: procedure on arrest)* [1998] 1 WLR 475.

13 Children Act 1989 s 38A(6) (as added: see note 5 supra).

14 Ibid s 38A(10) (as added: see note 5 supra).

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## **291. Undertakings relating to interim care orders.**

In any case where the court has power to include an exclusion requirement<sup>1</sup> in an interim care order<sup>2</sup>, the court may accept an undertaking from the relevant person<sup>3</sup>. However, no power of arrest may be attached to any undertaking so given<sup>4</sup>.

An undertaking given to a court under these provisions is enforceable as if it were an order of the court, and ceases to have effect if, while it is in force, the local authority<sup>5</sup> has removed the child<sup>6</sup> from the dwelling house<sup>7</sup> from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours<sup>8</sup>.

1 As to the meaning of 'exclusion requirement' see para 290 ante; definition applied by the Children Act 1989 s 38B(5) (s 38B added by Family Law Act 1996 s 52, Sch 6 para 1).

2 For the meaning of 'care order' see para 271 note 4 ante.

3 Children Act 1989 s 38B(1) (as added: see note 1 supra). As to the meaning of 'the relevant person' see para 290 ante; definition applied by s 38B(5) (as so added).

4 Ibid s 38B(2) (as added: see note 1 supra).

5 For the meaning of 'local authority' see para 248 note 10 ante.

6 For the meaning of 'child' see para 3 ante.

7 For the meaning of 'dwelling house' see para 290 note 8 ante.

8 Children Act 1989 s 38B(3) (as added: see note 1 supra). Section 38B (as added) has effect without prejudice to the powers of the High Court and county court apart from s 38B (as added): s 38B(4) (as so added).



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## 292. Supplementary powers on making interim orders.

Where the court makes an interim care order<sup>1</sup> or interim supervision order<sup>2</sup>, it may give such directions, if any, as it considers appropriate<sup>3</sup> with regard to the medical or psychiatric examination or other assessment of the child<sup>4</sup>, but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment<sup>5</sup>. Such a direction may be to the effect that there is to be no such examination or assessment, or no such examination or assessment unless the court directs otherwise<sup>6</sup>. Such a direction may be given when the interim order is made or at any time while it is in force, and may be varied at any time on the application of any person falling within any class of person prescribed by rules of court for the purpose<sup>7</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante. As to the making of interim orders see para 288 ante.

2 For the meaning of 'supervision order' see para 271 note 5 ante.

3 See *Re C (minors) (care procedure)* [1993] Fam Law 288 (relevance of resource implications). While applications naming the prospective assessor are permissible, they should not be encouraged: *Re W (assessment of child)* [1998] 1 FCR 287, [1998] 2 FLR 130, CA.

4 For the meaning of 'child' see para 3 ante.

5 Children Act 1989 s 38(6). This power is to give a mandatory direction, but the court should take into account any information with which it is provided as to effects of a financial or resource nature: *Berkshire County Council v C* [1993] Fam 205, [1993] 1 FLR 569. See also *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA, where the court decided that the Family Law Reform Act 1969 s 8 did not empower a minor who had attained the age of 16 to override a consent to medical treatment given by someone with parental authority (see para 4 ante); Lord Donaldson of Lymington MR rejected the submission that that decision was inconsistent with the approach of the Children Act 1989 s 38(6); *Essex County Council v L* [1993] Fam Law 458, (1992) Times, 18 December; *Hampshire County Council v S* [1993] Fam 158, [1993] 1 All ER 944. The provisions of the Children Act 1989 s 38(6), (7) (see note 6 infra) confer jurisdiction on the court to order or prohibit any assessment involving the child's participation, and are directed to providing the court with the material that, in its view, is required for a proper decision at the final hearing of the application for a full care order: *Re C (a minor) (interim care order: residential assessment)* [1997] AC 489, [1996] 4 All ER 871, HL, doubting *Re M (minors) (interim care order: directions)* [1996] 3 FCR 137, sub nom *Re M (interim care order: assessment)* [1996] 2 FLR 464, CA. *Re C (a minor) (interim care order: residential assessment)* supra was applied in *Re M (residential assessment directions)* [1998] 2 FLR 371, [1998] Fam Law 518 (local authority's participation in, and funding of, residential assessment of child and his parents); and *Re L (children) (care order: residential assessment)* [2007] EWCA Civ 213, [2007] 1 FLR 1370. See also *Re J (care: rehabilitation plan)* [1999] 1 FCR 749, [1998] 2 FLR 498, CA (premature use of rehabilitation plan); *Re B (psychiatric therapy for parents)* [1999] 3 FCR 20, [1999] 1 FLR 701, CA (therapeutic programme for parents which might result in rehabilitation of child to parents outside the scope of the Children Act 1989 s 38(6)); *Re D (jurisdiction: programme of assessment or therapy)* [2000] 1 FCR 436, [1999] 2 FLR 632, CA; *Re G (a child) (interim care order: residential assessment)* [2005] UKHL 68, [2006] 1 AC 576, [2006] 1 All ER 706 (intended effect of the Children Act 1989 s 38(6), (7) is not for the court to be in charge both of a child's examination and assessment and of the medical or psychiatric treatment to be provided for that child; s 38(6) is concerned with the control of information gathering that is required to be put before the court in order that the court can decide whether or not to make a care order); and *Re C (children) (residential assessment)* [2001] EWCA Civ 1305, [2001] 3 FCR 164 (local authority's funding of residential assessment of child and parents) (applied in *Re B (a child: interim care order)* [2002] EWCA Civ 25, [2002] 2 FCR 367, [2002] 1 FLR 545). See also *Sheffield City Council v V (Legal Services Commission intervening)* [2006] EWHC 1861 (Fam), [2006] Fam Law 833 (costs of assessment to be apportioned between the parties by agreement where possible. If the assessment included work outside of the Children Act 1989 s 38(6) (eg treatment or therapy) this should be made clear so that

adjustments in funding provision can be made), following *Lambeth London Borough Council v S* [2005] EWHC 776 (Fam), [2005] 2 FLR 1171, [2005] All ER (D) 341 (May).

As to the costs of a report which had not been commissioned under the Children Act 1989 s 38(6), see *Calderdale Metropolitan Borough Council v S* [2004] EWHC 2529 (Fam), [2005] 1 FLR 751, [2005] Fam Law 353 applied in *Lambeth London Borough Council v S* supra.

6 Children Act 1989 s 38(7). See also the cases cited in note 5 supra. The provisions of s 35(2), Sch 3 paras 4, 5 (both as amended) which govern psychiatric and medical examinations and treatment in the case of supervision orders (see para 283 ante) do not apply in relation to interim supervision orders: s 38(9).

7 Ibid s 38(8). For the relevant rules of court see the Family Proceedings Rules 1991, SI 1991/1247, r 4.2(1); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(1).

## UPDATE

### 292 Supplementary powers on making interim orders

NOTE 3--See *Re K (care order)* [2007] EWCA Civ 697, [2007] 2 FLR 1066 (relevance of residential assessment to issues before court).

NOTE 5--See *Re A (a child) (residential assessment)*; *Cardiff City Council v K* [2009] EWHC 865 (Fam), [2010] 1 FCR 593 (court's jurisdiction in relation to placement unregulated by statutory scheme and guidance as to suitability of family proceedings court for applications under s 38(6)).

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## **(v) Discharge, Variation and Substitution of Orders**

### **293. Discharge of care orders; discharge and variation of supervision orders.**

A care order<sup>1</sup> may be discharged by the court on the application<sup>2</sup> of: (1) any person who has parental responsibility<sup>3</sup> for the child<sup>4</sup>; (2) the child himself<sup>5</sup>; or (3) the local authority<sup>6</sup> designated by the order<sup>7</sup>. On the application of a person who is not entitled to apply for the order to be discharged, but who is a person to whom an exclusion requirement<sup>8</sup> contained in the order applies, an interim care order may be varied or discharged by the court in so far as it imposes the exclusion requirement<sup>9</sup>.

A supervision order<sup>10</sup> may be varied or discharged by the court on the application of: (a) any person who has parental responsibility for the child<sup>11</sup>; (b) the child himself<sup>12</sup>; or (c) the supervisor<sup>13</sup>. On the application of a person who is not entitled to apply for the order to be discharged but who is a person with whom the child is living, a supervision order may be varied by the court in so far as it imposes a requirement which affects that person<sup>14</sup>.

In reaching decisions on applications for the variation or discharge of care orders and supervision orders the court must have regard to the welfare principle<sup>15</sup>, and must have particular regard to the matters specified in the welfare checklist<sup>16</sup>.

A local authority must consider whether to apply for discharge of the care order at every review of the case of a child in its care<sup>17</sup>. The supervisor must consider applying for the discharge of a supervision order where it is not being wholly complied with or he considers that the order may no longer be necessary<sup>18</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante.

2 Where an application has been made for: (1) the discharge of a care order, supervision order or education supervision order (see para 296 post); (2) the substitution of a supervision order for a care order (see para 294 post); or (3) a child assessment order (see para 581 post), no further application of a kind mentioned in heads (1)-(3) supra may be made with respect to the child concerned, without the leave of the court, unless the period between the disposal of the previous application and the making of the further application exceeds six months: Children Act 1989 s 91(15). However, this does not apply on applications relating to interim orders: s 91(16). A judge hearing an application to discharge a care order under s 39 (as amended) does not have the jurisdiction, if he decides to discharge it, to substitute an interim care order: *Re C (a child) (care order: application to discharge)* [2005] EWCA Civ 1329, [2005] All ER (D) 148 (Nov).

3 For the meaning of 'parental responsibility' see para 134 ante.

4 Children Act 1989 s 39(1)(a). For the meaning of 'child' see para 3 ante.

5 Ibid s 39(1)(b). The child does not require leave of the court to make the application: see *Re A* [1995] 2 FCR 686, [1995] 1 FLR 599.

6 For the meaning of 'local authority' see para 248 note 10 ante.

7 Children Act 1989 s 39(1)(c).

8 For the meaning of 'exclusion requirement' see para 290 ante.

9 Children Act 1989 s 39(3A) (added by the Family Law Act 1996 s 52, Sch 6 para 2). As to exclusion requirements see paras 290-291 ante. Where a power of arrest has been attached to an exclusion requirement of an interim care order, the court may, on the application of any person entitled to apply for the discharge of the order so far as it imposes the exclusion requirement, vary or discharge the order in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order): Children Act 1989 s 39(3B) (added by the Family Law Act 1996 Sch 6 para 2).

10 For the meaning of 'supervision order' see para 271 note 5 ante.

11 Children Act 1989 s 39(2)(a).

12 Ibid s 39(2)(b).

13 Ibid s 39(2)(c). For the meaning of 'supervisor' see para 281 note 6 ante. The Children Act 1989 draws a distinction between supervision orders and care orders: the former may be varied or discharged, but (in line with the principle that management of compulsory care is the local authority's responsibility) the Act does not provide for the variation of a care order: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.54. As to the guidance and regulations generally see para 163 ante.

14 Children Act 1989 s 39(3).

15 As to the welfare principle see *ibid* s 1(1); and para 300 post. The burden of establishing that the child's welfare requires the revocation of the order falls on the person who makes the application for discharge: see *Re S (minors) (care orders: appeal out of time)* [1996] 2 FCR 838, sub nom *Re S (minors) (discharge of care order)* [1995] 2 FLR 639, CA.

16 As to the welfare checklist see *ibid* s 1(3), (4) (as amended); and para 303 post.

17 As to review of cases see paras 936-943 post.

18 See the Children Act 1989 s 35(1)(c); and para 281 ante. See also the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.58.

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#### **294. Substitution of supervision orders for care orders.**

Where a care order<sup>1</sup> is in force with respect to a child<sup>2</sup> the court may, on the application of any person entitled to apply for the order to be discharged<sup>3</sup>, substitute a supervision order<sup>4</sup> for the care order<sup>5</sup>. When a court is considering such a substitution, any provision of the Children Act 1989 which would otherwise require the threshold criteria<sup>6</sup> to be satisfied at the time when the proposed order is substituted or made is to be disregarded<sup>7</sup>. The court is not empowered, however, to make a care order following an application to vary or discharge a supervision order unless, after a full hearing, the threshold criteria are re-established<sup>8</sup>.

In reaching decisions regarding the substitution of a supervision order for a care order the court must have regard to the welfare principle<sup>9</sup>, and must have particular regard to the matters specified in the welfare checklist<sup>10</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the persons who are entitled to apply for a care order to be discharged see para 293 ante.

4 For the meaning of 'supervision order' see para 271 note 5 ante.

5 Children Act 1989 s 39(4). See *Oxfordshire County Council v L (care or supervision order)* [1998] 1 FLR 70, [1998] Fam Law 22.

6 As to the threshold criteria see para 274 ante.

7 Children Act 1989 s 39(5).

8 This is so even though such an application will most likely arise from non-compliance with the terms of the original order: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.55. As to the guidance and regulations generally see para 163 ante. As to the variation or discharge of supervision orders see para 293 ante.

9 As to the welfare principle see the Children Act 1989 s 1(1); and para 300 post.

10 As to the welfare checklist see *ibid* s 1(3), (4) (as amended); and para 303 post.

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## **295. Court's powers on care order and supervision order appeals.**

An appeal lies against the making of a care order or supervision order<sup>1</sup> (including an interim order<sup>2</sup>) or an order varying or discharging such an order or against the court's refusal to make a care order<sup>3</sup>.

The Children Act 1989 contains powers<sup>4</sup> to make orders having effect during the 'appeal period'<sup>5</sup>. Where a court dismisses an application for a care order and at the time of that dismissal the child concerned is the subject of an interim care order<sup>6</sup>, the court may make a care order with respect to the child to have effect subject to such directions, if any, as the court may see fit to include in the order<sup>7</sup>. Where a court dismisses an application for a care order or an application for a supervision order and at the time of that dismissal the child concerned is the subject of an interim supervision order, the court may make a supervision order with respect to the child to have effect subject to such directions, if any, as the court may see fit to include in the order<sup>8</sup>. Where a court grants an application to discharge a care order or supervision order, it may order that its decision is not to have effect, or that the care order or supervision order is to continue to have effect but subject to such directions as the court sees fit to include in the order<sup>9</sup>.

An order under the above provisions only has effect for such period, not exceeding the appeal period, as may be specified in the order<sup>10</sup>.

Where (1) an appeal is made against any decision of a court under these provisions; or (2) any application is made to the appellate court in connection with a proposed appeal against that decision, the appellate court may extend the period for which the order in question is to have effect, but not so as to extend it beyond the end of the appeal period<sup>11</sup>.

1 For the meaning of 'care order' see para 271 note 4 ante. For the meaning of 'supervision order' see para 271 note 5 ante.

2 See *Re M (minors: interim care order)* [1993] 2 FCR 182, [1993] 2 FLR 406. See also *Re G (minors: costs)* [1993] Fam Law 621.

3 See the Children Act 1989 s 94(1) (as amended) (appeals from magistrates' courts to the High Court); and para 304 post. As to interim orders see paras 288-292 ante.

4 The underlying policy is to allow these powers to be exercised where there is already some background of compulsory intervention in the child's upbringing; the basic approach is to allow the immediate status quo to be maintained in order to provide continual protection for the child or to prevent interruption in the continuity of his care until the appeal is heard: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.61. As to the guidance and regulations generally see para 163 ante.

5 See the Children Act 1989 s 40; and the text and notes 6-11 infra. The 'appeal period' is: (1) where an appeal is made against the decision in question, the period between the making of that decision and the determination of the appeal; and otherwise (2) the period during which an appeal may be made against the decision: s 40(6).

6 See paras 288-292 ante.

7 Children Act 1989 s 40(1).

8 Ibid s 40(2).

9 Ibid s 40(3).

10 Ibid s 40(4).

11 Ibid s 40(5). See note 5 supra.

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## **(vi) Education Supervision Orders**

### **296. Duration and effect of education supervision orders.**

On the application of any local education authority<sup>1</sup> the court may make an education supervision order, that is to say an order putting the child<sup>2</sup> with respect to whom the application is made under the supervision of a designated<sup>3</sup> local education authority<sup>4</sup>. A court may only make an education supervision order if it is satisfied that the child concerned is of compulsory school age<sup>5</sup> and is not being properly educated<sup>6</sup>. For these purposes, a child is being properly educated only if he is receiving efficient full-time education suitable to his age, ability and aptitude and any special educational needs he may have<sup>7</sup>.

Where a local education authority proposes to make an application for an education supervision order, it must, before making the application, consult the appropriate local authority<sup>8</sup>.

An education supervision order may not be made with respect to a child who is in the care of a local authority<sup>9</sup>.

An education supervision order has effect for a period of one year beginning with the date on which it is made<sup>10</sup>. It may be discharged on the application of the child concerned, his parent<sup>11</sup> or the local education authority concerned<sup>12</sup>. An education supervision order will not expire if, before it would otherwise have expired, the court, on the application of the authority in whose favour the order was made, has extended the period during which it is in force<sup>13</sup>. In any event, an order ceases to have effect on the child's ceasing to be of compulsory school age, or on the making of a care order with respect to the child<sup>14</sup>.

Where an education supervision order is in force with respect to a child, it supersedes or precludes the operation of certain statutory provisions regarding that child<sup>15</sup>.

1 'Local education authority' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 20): Children Act 1989 s 105(1) (definition amended by the Education Act 1996 s 582(1), Sch 37 para 91).

2 For the meaning of 'child' see para 3 ante.

3 The local education authority designated in an education supervision order must be: (1) the authority within whose area the child concerned is living or will live; or (2) where the child is a registered pupil at a school, and the authority mentioned in head (1) supra and the authority within whose area the school is situated agree, the latter authority: Children Act 1989 s 36(7). 'Registered pupil', in relation to a school, means a person registered as a pupil at the school in the register kept under the Education Act 1996 s 434 (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 512): Education Act 1996 s 434(5); definition applied by the Children Act 1989 s 105(1) (amended by the Education Act 1996 Sch 37 para 91). For the meaning of 'school' see para 271 note 8 ante.

4 Children Act 1989 ss 36(1), (2), 105(1). In the ordinary case an education supervision order is the appropriate procedure to secure a child's attendance at school, but in a proper case application for a care order may be founded on playing truant: *Re O (a minor) (care proceedings: education)* [1992] 4 All ER 905, [1992] 1 WLR 912. Such an application is not within the definition of 'specified proceedings' in the Children Act 1989 s 41(6) (see para 311 post), and there is no power for a children's guardian to be appointed in a family proceedings court on such an application: *Essex County Council v B* [1993] 1 FCR 145, [1993] 1 FLR 866. The



general power of a magistrates' court under the Magistrates' Courts Act 1980 s 63(2) (see MAGISTRATES vol 29(2) (Reissue) para 827) to suspend or rescind orders does not apply in relation to orders under the Children Act 1989: s 92(5). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

The provisions of s 36 (as amended) replace the Children and Young Persons Act 1969 s 1(2)(e) (repealed), under which the court had power to make a care order if satisfied that a child of compulsory school age was not receiving efficient full time education; the Children Act 1989 contains no provision empowering the court to make a care order on educational grounds as such.

The Secretary of State may by regulations make provision modifying, or displacing, the provisions of any enactment about education in relation to any child with respect to whom an education supervision order is in force to such extent as appears to the Secretary of State to be necessary or expedient in consequence of the provision made by the Children Act 1989 with respect to such orders: s 36(10), Sch 3 para 20. At the date at which this volume states the law no such regulations had been made. As to the Secretary of State, and as to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the Welsh Ministers see para 155 ante.

5 For the meaning of 'compulsory school age' see the Education Act 1996 s 8 (as amended); and EDUCATION vol 15(1) (2006 Reissue) para 15.

6 Children Act 1989 s 36(3).

7 Ibid s 36(4). A child has 'special educational needs' if he has a learning difficulty which calls for special educational provision to be made for him: Education Act 1996 s 312(1); definition applied by the Children Act 1989 s 105(1) (definition amended by the Education Act 1996 s 582(1), Sch 37 para 91). See further EDUCATION vol 15(2) (2006 Reissue) para 984.

Where a child is the subject of a school attendance order which is in force under the Education Act 1996 s 437 and which has not been complied with, or where a child is not attending regularly (within the meaning of s 444 (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 521):

193 (1) a school at which he is a registered pupil; or

194 (2) any place at which education is provided for him in the circumstances mentioned in s 444ZA(1) (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 522); or

195 (3) any place which he is required to attend in the circumstances mentioned in s 444ZA(2) (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 522),

then, unless it is proved that he is being properly educated, it is assumed that he is not: Children Act 1989 s 36(5) (substituted by the Education Act 2005 s 117, Sch 18 para 1).

8 Children Act 1989 s 36(8) (amended by the Education Act 1996 s 307(1), (3), Sch 19 para 149, Sch 21 Pt II). As to the procedure for such consultation see the Family Proceedings Rules 1991, SI 1991/1247, r 4.27 (amended by SI 1997/1893); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 31 (amended by SI 1997/1895). The appropriate local authority, in the case of a child who is being provided with accommodation by, or on behalf of, a local authority, is that authority, and in any other case is the local authority within whose area the child concerned lives, or will live: Children Act 1989 s 36(9).

9 Ibid s 36(6).

10 Ibid Sch 3 para 15(1).

11 For the purposes of ibid Sch 3 paras 12-21 (as amended) (see paras 297-298 post), 'parent', in relation to a child or young person, includes any person who is not a parent of his but who has parental responsibility for him, or who has care of him: Education Act 1996 s 576(1); definition applied by the Children Act 1989 Sch 3 para 21 (amended by the Education Act 1996 s 582(1), Sch 37 para 93(1), (3)). For the meaning of 'parental responsibility' see para 134 ante.

12 Children Act 1989 Sch 3 para 17(1). On discharging an education supervision order the court may direct the local authority within whose area the child lives, or will live, to investigate the child's circumstances: Sch 3 para 17(2).

13 Ibid Sch 3 para 15(2). The period may be extended on more than one occasion, but no one extension may be for more than three years: Sch 3 para 15(4), (5). An application for extension may not be made earlier than three months before the date on which the order would otherwise expire: Sch 3 para 15(3).

14 See ibid Sch 3 para 15(6).

15 See *ibid* Sch 3 para 13 (as amended). Where an education supervision order is in force with respect to a child, the duties of the child's parents under the Education Act 1996 ss 7, 444 (as amended) (duties to secure education of children and to secure regular attendance of registered pupils) are superseded by their duty to comply with any directions in force under the education supervision order: Children Act 1989 Sch 3 para 13(1). See further EDUCATION vol 15(1) (2006 Reissue) para 526 et seq. Where an education supervision order is made with respect to a child:

- 196 (1) any school attendance order made under the Education Act 1996 s 437 (as amended) with respect to the child and in force immediately before the making of the education supervision order, ceases to have effect (Children Act 1989 Sch 3 para 13(2)(a) (amended by the Education Act 1996 s 582(1), Sch 37 para 93(1), (2)(b))); and
- 197 (2) while the education supervision order remains in force, the following provisions do not apply with respect to the child: (a) the Education Act 1996 s 437 (as amended) (school attendance orders); (b) s 9 (as amended) (pupils to be educated in accordance with wishes of their parents); (c) ss 411, 423 (both repealed) (parental preference and appeals against admission decisions) (Children Act 1989 Sch 3 para 13(2)(b) (amended by the Education Act 1996 s 582(1), Sch 37 para 93(1), (2)(b)));
- 198 (3) a supervision order made with respect to the child in criminal proceedings, while the education supervision order is in force, may not include an education requirement of the kind which could otherwise be included under the Powers of Criminal Courts (Sentencing) Act 2000 s 63 (as amended), Sch 6 para 7 (see para 1351 post) (Children Act 1989 Sch 3 para 13(2)(c) (amended by Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 131(1), (2)));
- 199 (4) any education requirement of a kind mentioned in head (3) *supra*, which was in force with respect to the child immediately before the making of the education supervision order, ceases to have effect (Children Act 1989 Sch 3 para 13(2)(d)).

## UPDATE

### 296 Duration and effect of education supervision orders

NOTE 7--Children Act 1989 s 36(5) amended: Education and Skills Act 2008 Sch 1 para 43 (not yet in force).

NOTE 15--Head (3). Children Act 1989 Sch 3 para 13(2)(c) substituted: Criminal Justice and Immigration Act 2008 Sch 4 para 37(2).

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## **297. Duties of the supervisor.**

Where an education supervision order<sup>1</sup> is in force, it is the duty of a supervisor<sup>2</sup> to advise, assist and befriend, and give directions to, the supervised child<sup>3</sup> and his parents<sup>4</sup> in such a way as will, in the opinion of the supervisor, secure that he is properly educated<sup>5</sup>. It is also the supervisor's duty, where any such directions given to the supervised child or a parent have not been complied with, to consider what further steps to take in the exercise of the supervisor's powers under the Children Act 1989<sup>6</sup>. Before giving any directions the supervisor, so far as is reasonably practicable, must ascertain the wishes and feelings of the child and his parents, including in particular their wishes as to the place at which the child should be educated<sup>7</sup>. When settling the terms of any such directions, the supervisor must give due consideration, having regard to the child's age and understanding, to such wishes and feelings of his as the supervisor has been able to ascertain, and to such wishes and feelings of the child's parents as he has been able to ascertain<sup>8</sup>.

1 For the meaning of 'education supervision order' see para 296 ante.

2 For the meaning of 'supervisor' see para 281 note 6 ante.

3 For the meaning of 'supervised child' see para 281 note 6 ante. For the meaning of 'child' see para 3 ante.

4 For the meaning of 'parent' in this context see para 296 note 11 ante.

5 Children Act 1989 s 36(10), Sch 3 para 12(1)(a). Directions may be given under Sch 3 para 12 at any time while the education supervision order is in force: Sch 3 para 12(4).

6 Ibid Sch 3 para 12(1)(b). An education supervision order may require the child to keep the supervisor informed of any change in his address, and to allow the supervisor to visit him at the place where he is living: Sch 3 para 16(1). Moreover, a person who is the parent of a child with respect to whom an education supervision order has been made must, if asked by the supervisor, inform him of the child's address (if it is known to him); and if he is living with the child, allow the supervisor reasonable contact with the child: Sch 3 para 16(2).

7 Ibid Sch 3 para 12(2).

8 Ibid Sch 3 para 12(3).

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## **298. Failure to comply with direction under education supervision order.**

If a parent<sup>1</sup> of a child<sup>2</sup> with respect to whom an education supervision order<sup>3</sup> is in force persistently fails to comply with a direction given under the order, he is guilty of an offence<sup>4</sup>. It is a defence for any person charged with such an offence to prove: (1) that he took all reasonable steps to ensure that the direction was complied with; (2) the direction was unreasonable; or (3) that he had complied with a requirement included in a supervision order<sup>5</sup> made with respect to the child, or with directions given under such a requirement, and it was not reasonably practicable to comply both with the direction under the education supervision order and with the requirement or directions under the supervision order<sup>6</sup>.

Where a child with respect to whom an education supervision order is in force persistently fails to comply with any direction given under the order, the local education authority<sup>7</sup> concerned must notify the appropriate local authority<sup>8</sup>, which must investigate the circumstances of the child<sup>9</sup>.

1 For the meaning of 'parent' in this context see para 296 note 11 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'education supervision order' see para 296 ante.

4 Children Act 1989 s 36(10), Sch 3 para 18(1). The offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: Sch 3 para 18(3). As to the standard scale see para 132 note 2 ante.

5 For the meaning of 'supervision order' see para 271 note 5 ante.

6 See the Children Act 1989 Sch 3 para 18(2). Where an education supervision order and a supervision order or an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 63(1) (see para 1340 post) are in force at the same time with respect to the same child, any failure to comply with a direction given by the supervisor under the education supervision order is disregarded if it would not have been reasonably practicable to comply with it without failing to comply with a direction given under the other order: Children Act 1989 Sch 3 para 14 (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 131(1), (3)).

7 For the meaning of 'local education authority' see para 296 note 1 ante.

8 Children Act 1989 Sch 3 para 19(1).

9 Ibid Sch 3 para 19(2). For the meaning of 'appropriate local authority' see para 296 note 8 ante; definition applied by Sch 3 para 19(3).

## **UPDATE**

## **298 Failure to comply with direction under education supervision order**

NOTE 6--Children Act 1989 Sch 3 para 14 further amended and Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 131 repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 37(3), Sch 28 Pt 1.



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### **(3) CRITERIA APPLIED BY THE COURT IN DETERMINING FAMILY PROCEEDINGS**

#### **299. Introduction.**

The Children Act 1989 contains three principles relating to the exercise of the court's discretion in proceedings relating to children. The first is known as the welfare principle<sup>1</sup>, the second is the principle that any delay in determining any question with respect to the upbringing of a child is likely to prejudice the welfare of the child<sup>2</sup>, and the third is the general presumption against making orders<sup>3</sup>.

1 See the Children Act 1989 s 1(1); and para 300 post.

2 See *ibid* s 1(2), (3), (4); and para 301 post.

3 See *ibid* s 1(5); and para 302 post.

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### 300. The welfare principle.

When a court determines any question with respect to the upbringing<sup>1</sup> of a child<sup>2</sup> or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration<sup>3</sup>. This provision is general in scope<sup>4</sup>, and restates principles first embodied in statute in the Guardianship of Infants Act 1925<sup>5</sup>. In interpreting the provisions of the earlier legislation, however, it has been held that the paramountcy principle (as this principle is sometimes called) would apply only when the matters specified (such as the child's upbringing) were directly in issue, and that accordingly, it did not apply to an application for the grant of an injunction excluding one spouse from the matrimonial home<sup>6</sup>. However, it has been said that the circumstances of each individual case are so infinitely varied that no formula can be applied to cases concerning the upbringing of children<sup>7</sup>, and that the value of decided cases as precedents is accordingly limited<sup>8</sup>.

1 For the meaning of 'upbringing' see para 266 note 9 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 1(1). This provision is referred to in this work as the 'welfare principle'.

4 The question is not what the essential justice of the case requires, but what the best interests of the child would require: *S (B D) v S (D J) (children: care and control)* [1977] Fam 109 at 114, [1977] 1 All ER 656 at 660, CA, per Ormrod LJ; *Re K (minors) (children: care and control)* [1977] Fam 179 at 183, [1977] 1 All ER 647 at 649, CA. Because of the paramountcy of the child's welfare, the doctrine of estoppel per res judicata does not apply in child care cases: *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248. See also *Re A (children) (conjoined twins: surgical separation)* [2001] Fam 147, [2000] 4 All ER 961. The welfare principle has been held to be compatible with Art 8(2) of the European Convention on Human Rights (see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 149): *Re L (a child) (contact: domestic violence)* [2001] Fam 260, [2000] 2 FCR 404, sub nom *Re L, V, M and H (contact: domestic violence)* [2000] 2 FLR 334, CA. This view was upheld in *Yousef v Netherlands (Application 33711/96)* [2002] 3 FCR 577, [2003] 1 FLR 210, ECtHR.

5 See the Guardianship of Infants Act 1925 (repealed) and the Guardianship of Minors Act 1971 (repealed). The court had to regard the child's welfare as its 'first and paramount' consideration in the leading case of *J v C* [1970] AC 668 at 710-711, [1969] 1 All ER 788 at 820-821, HL, where Lord MacDermott stated that the principle laid down by the Guardianship of Infants Act 1925 connoted 'a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed'. It would seem that the omission of the words 'first and' from the formulation of the welfare principle now embodied in the Children Act 1989 is of little practical significance, because decisions of the courts had made those words largely redundant; the child's welfare rules upon and determines the course to be followed. See also *Re K D (a minor) (ward: termination of access)* [1988] AC 806, [1988] 1 All ER 577, HL; followed in *Re M (child's upbringing)* [1996] 2 FCR 473, [1996] 2 FLR 441, CA; *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, CA. On the weight to be given to parental wishes see *Re K (a minor) (custody)* [1990] 3 All ER 795, [1990] 1 WLR 431, CA; *Re K (private placement for adoption)* [1991] FCR 142, sub nom *Re K (a minor) (wardship: adoption)* [1991] 1 FLR 57, CA; *Re C (a minor) (access)* [1992] 1 FCR 969, [1992] 1 FLR 309, CA.

6 *Richards v Richards* [1984] AC 174, [1983] 2 All ER 807, HL; and see *K v K (minors: property transfer)* [1992] 2 All ER 727, [1992] 1 WLR 530, CA; *Re A (minors) (residence orders: leave to apply)* [1992] Fam 182, [1992] 3 All ER 872, CA. The principle did not apply when the court had to decide whether to prevent publication of a book which might be harmful to a child: *Re X (a minor)* [1975] Fam 47, [1975] 1 All ER 697, CA.

The principle might also yield to considerations of public policy: *Re Mohamed Arif* [1968] Ch 643, sub nom *Re A (an infant)*, *Hanif v Secretary of State for Home Affairs* [1968] 2 All ER 145, CA; *Re J S (a minor) (boy soldier)* [1990] Fam 182, [1990] 2 All ER 861. See also *Re Z (a minor) (identification: restrictions on publication)* [1997] Fam 1, sub nom *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, CA (paramountcy principle applies where parent wishes her handicapped child to participate in television programme about the education she receives at specialised institution). The principle applies only to actions of which child is the object, not to those of which he is the subject: see also *Re X (a child) (injunctions restraining publication)* [2001] 1 FCR 541, [2000] All ER (D) 1403.

7 *Re F (an infant)*, *F v F* [1969] 2 Ch 238 at 241, [1969] 2 All ER 766 at 768; *Pountney v Morris* [1984] FLR 381, [1984] Fam Law 176, CA, per Dunn LJ.

8 *Re K (minors) (children: care and control)* [1977] Fam 179 at 183, [1977] 1 All ER 647 at 649, CA, per Stamp LJ.

## UPDATE

### 300 The welfare principle

NOTES--As to the resolution of cases by consent at the first hearing dispute resolution appointment see *Practice Direction (revised private law programme)* [2010] All ER (D) 276 (Mar).

NOTE 4--The Court of Appeal has given guidance on the exercise of the discretionary power to decline to conduct pre-arranged fact-finding hearing: *Re F-H (children) (fact-finding hearing)* [2008] EWCA Civ 1249, [2009] 1 FCR 749. See also *Re R (fact-finding hearing)* [2009] EWCA Civ 1619, [2009] Fam Law 481, [2008] All ER (D) 243 (Jul) (trial judges in preliminary fact-finding hearings involving serious allegations of domestic violence should never terminate the case without hearing all the available evidence and accept a submission of no case to answer); and *Re L (a child) (fact-finding hearing)* [2009] EWCA Civ 1008, [2009] 3 FCR 527 (judge at fact-finding hearing should not prejudice outcome of care proceedings and thereby potentially deprive parent of opportunity to instruct independent expert).



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### 301. Delay prejudicial.

The second general principle laid down by the Children Act 1989 is that in any proceedings in which any question with respect to the upbringing<sup>1</sup> of a child<sup>2</sup> arises, the court must have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>3</sup>. The court must draw up a timetable with a view to determining the question without delay, and must give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to<sup>4</sup>. There may, however, be cases where, on the facts, delay is in the child's interests<sup>5</sup>.

1 For the meaning of 'upbringing' see para 266 note 9 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 1(2). Delay in court proceedings was considered to be generally harmful to children not only because of the uncertainty it creates for them but also because of the harm it does to the relationship between the parents in their capacity to co-operate with one another in the future; and it was considered that progress of a case should be controlled by the court (rather than the parties): see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 1.8. As to the guidance and regulations generally see para 163 ante.

See *Re M (child's upbringing)* [1996] 2 FCR 473, [1996] 2 FLR 441, CA (order made for review in two years' time of arrangements to be made for return of Zulu child to his native country overruled, as delay in making final decision might hamper re-introduction of child to his parents and culture, and was therefore contrary to child's interests).

4 See the Children Act 1989 ss 11(1), 32; and paras 266, 280 ante. In this context, it is intended that preliminary hearings should be used to minimise delay and produce less adversarial conduct of cases in court: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 1.17. The court should not adjourn care proceedings in order to allow related criminal proceedings against the child's parents to be heard first, as the child's welfare takes precedence over any possible prejudice to the parents, and delay is generally detrimental to a child's welfare: *Re T B (care proceedings: criminal trial)* [1996] 1 FCR 101, [1995] 2 FLR 801, CA. See also *Re R (a child) (care proceedings: teenage pregnancy)* [2000] 2 FCR 556. As to where a father's late application to be joined as a party to care proceedings was refused see *Re P (care proceedings: father's application to be joined as a party)* [2001] 3 FCR 279, [2001] 1 FLR 781.

5 See eg *Re S (minors) (interim custody)* [1992] 1 FCR 158, CA; *Re C (a minor) (care proceedings)* [1992] 2 FCR 341, sub nom *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290 (delay for purposes of assessment is proper delay); *Leeds City Council v C* [1993] 1 FCR 585, [1993] 1 FLR 269 (planned and purposeful delay may well be beneficial).

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### 302. The presumption against making an order.

The third general principle laid down by the Children Act 1989 provides that where a court is considering whether or not to make one or more orders under the Act with respect to a child<sup>1</sup> it must not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all<sup>2</sup>. This provision is intended to discourage unnecessary court orders being made, for example as part of a standard package of orders. It is thought that to restrict the making of orders to those cases where they are necessary to resolve a specific problem should reduce conflict and promote parental agreement and co-operation<sup>3</sup>. It is also intended to ensure that the order is granted only where it will positively improve the child's welfare and not simply because the grounds for making the order are made out, as, for example, in care proceedings where the court may decide that it would be better for a particular child not to be in local authority care<sup>4</sup>.

1 For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 1(5). The principle has been referred to as the 'no order' principle, although this term does not appear in the Children Act 1989. Where the court applies this principle it should nonetheless draw an order determining the application: *S v R (parental responsibility)* [1993] 1 FCR 331, [1993] Fam Law 339. See *Re D (a minor)* [1992] 1 All ER 892, [1992] 1 WLR 315, CA (nothing in the Children Act 1989 precludes the court from making prohibited steps and specific issue orders where child removed abroad); *B v B (grandparent: residence order)* [1993] 1 FCR 211, sub nom *B v B (a minor: residence order)* [1992] 2 FLR 327 (case for order made out); and see also *Re S (minors: access)* [1990] FCR 379, [1990] 2 FLR 166, CA.

Where no order for contact is made, the practical effect of the decision and possible future applications must be considered: *D v D (application for contact)* [1994] 1 FCR 694. See also *Re W (a minor) (contact)* [1994] 2 FCR 1216, [1994] 2 FLR 441, CA (the Children Act 1989 s 1(5) is irrelevant where a parent seeking a contact order has wilfully been denied contact by the parent with day-to-day care of the child who states that she will disobey any contact order); *Re S (contact: grandparents)* [1996] 3 FCR 30, [1996] 1 FLR 158, CA (successful appeal against decision to make no order for contact in respect of grandparents because of mother's unwillingness to obey contact order, despite merits of grandparents' application). See also *Re E (a minor) (parental responsibility)* [1994] 2 FCR 709, [1995] 1 FLR 392, CA (no order made for inclusion of child's name on parent's passport).

The principle does not create a presumption either way; the court must simply consider whether it is in the best interests of the child to make the order: *Re G (children) (residence order: no order principle)* [2005] EWCA Civ 1283, [2006] 1 FLR 771, [2005] All ER (D) 399 (Jul). When applying the principle, the child's medium to long-term interests are to be considered: *Re X and Y (application to remove children from jurisdiction)* [2001] 2 FCR 398, [2001] 2 FLR 118.

3 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 1.12. As to the guidance and regulations generally see para 163 ante. See also *B v B (grandparent: residence order)* [1993] 1 FCR 211, sub nom *B v B (a minor: residence order)* [1992] 2 FLR 327. In general, the court should not depart from the views of parents who have expressed a consensual desire that a certain order be made: *Re G (children) (residence order: no order principle)* [2005] EWCA Civ 1283, [2006] 1 FLR 771, [2005] All ER (D) 399 (Jul).

4 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 1.12. As to care proceedings under the Children Act 1989 Pt IV (ss 31-42) (as amended) see para 270 et seq ante.

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### 303. Matters for the court's particular attention: the welfare checklist.

Where: (1) the court is considering whether to make, vary or discharge a contact order, a prohibited steps order, a residence order or a specific issue order<sup>1</sup>, and the making, variation or discharge of the order is opposed by any party to the proceedings; or (2) the court is considering whether to make, vary or discharge an order under Part IV of the Children Act 1989<sup>2</sup>, the court must have regard in particular to<sup>3</sup>:

- 403 (a) the ascertainable wishes and feelings of the child<sup>4</sup> concerned (considered in the light of his age and understanding)<sup>5</sup>;
- 404 (b) his physical, emotional and educational needs<sup>6</sup>;
- 405 (c) the likely effect on him of any change in his circumstances<sup>7</sup>;
- 406 (d) his age, sex, background and any characteristics of his which the court considers relevant<sup>8</sup>;
- 407 (e) any harm which he has suffered or is at risk of suffering<sup>9</sup>;
- 408 (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs<sup>10</sup>;
- 409 (g) the range of powers available to the court under the Act in the proceedings in question<sup>11</sup>.

This provision would seem to direct the court's consideration to what could be achieved by an exercise of all the powers, ranging from the power to order a welfare report, to the power to make various substantive orders under the Children Act 1989<sup>12</sup>.

1   le a section 8 order: see para 247 note 4 ante. As to contact orders see para 251 et seq ante. As to prohibited steps orders see para 261 ante. As to residence orders see para 262 ante. As to specific issue orders see para 263 ante. See *Re W (residence order)* [1998] 1 FCR 75, [1999] 1 FLR 869, CA (when making a residence order the court must consider the criteria laid down in the Children Act 1989 s 1(3) and not be swayed by an instinctive reaction to the unconventional behaviour of the parents).

2   Children Act 1989 s 1(4). As to Pt IV (ss 31-42) (as amended) see para 270 et seq ante.

3   Ibid s 1(3).

4   For the meaning of 'child' see para 3 ante.

5   Children Act 1989 s 1(3)(a). See *Re W (a minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA. The right of a child to be heard is a cornerstone of the legislation: *Re H (a minor) (care proceedings: children's wishes)* [1993] 1 FLR 440 at 450 per Thorpe J. See also *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 All ER 783 at para 57 per Baroness Hale. However, it is not the law that the child's wishes (as distinct from his welfare) are paramount: *R (a minor) (religious sect)* [1993] 2 FCR 525, sub nom *Re R (a minor) (residence: religion)* [1993] 2 FLR 163, CA; *Re S (a minor) (independent representation)* [1993] Fam 263, [1993] 3 All ER 36, CA; *Re H (children) (contact order) (No 2)* [2001] 3 FCR 385, [2002] 1 FLR 22 (wishes of child were outweighed by need to protect mental and physical health of child's primary carer). Note that there is no duty on a judge personally to interview a child: *R (a minor) (religious sect)* supra. The courts have, under previous legislation, emphasised that the decision is for the court, and not for the child: see *Adams v Adams* [1984] FLR 768, [1984] Fam Law 249, CA (pressures on children quite sufficient when marriage has broken down and one of the parents has left home without putting on the additional burden of being made to feel that they have to decide their own future). See also *Re P (minors) (wardship)* [1992] Fam Law 229n, (1992) Times, 11 May, CA (duty of court to listen to children, ascertain their wishes and then make decision having regard to, but not constrained by, those wishes). For cases in which the

child's expressed wishes have been relevant see eg *Clarke-Hunt v Newcombe* (1982) 4 FLR 482, CA; *Re D W (a minor) (custody)* [1984] Fam Law 17, CA. The age of the child may be of particular significance in deciding on the weight to be given to the views expressed: see eg *Re P (a minor) (education: child's wishes)* [1992] 1 FCR 145, [1992] 1 FLR 316, CA; *M v M (custody: appeal)* [1987] 1 WLR 404, [1987] 2 FLR 146, CA. See *Re G (a minor) (appeal)* [1993] 1 FCR 810, sub nom *Re C (a minor) (care: child's wishes)* [1993] 1 FLR 832 (child too young to carry burden of decisions about her own future); *B v B (minors: residence and care disputes)* [1994] 2 FCR 667, sub nom *B v B (minors) (interviews and listing arrangements)* [1994] 2 FLR 489, CA (child should be assured that responsibility for final decision rests with the court). See also *Re M (a minor) (child: wishes and feelings)* [1995] 2 FCR 90, sub nom *Re M (family proceedings: affidavits)* [1995] 2 FLR 100, CA (practice of requesting 12-year-old child to swear affidavit in family proceedings was inappropriate and to make him choose between parents was unfair). The recommendations of an experienced court welfare officer or children and family reporter with regard to a residence order ought not to be departed from without at least reasoning that departure: *Re W (residence)* [1999] 3 FCR 274, [1999] 2 FLR 390, CA. Children and family reporters were formerly known as welfare officers: see para 230 ante.

6 Children Act 1989 s 1(3)(b). In relation to physical needs it has been said that affluence and happiness are not synonymous (see *Re P (adoption: parental agreement)* [1985] FLR 635, [1985] Fam Law 254, CA; *Re K (a minor) (ward: care and control)* [1990] 3 All ER 795, [1990] 1 WLR 431, CA) and that disadvantages of a material sort must be of little weight: *Stephenson v Stephenson* [1985] FLR 1140 at 1148, CA. In relation to educational matters see *Re P (a minor) (education: child's wishes)* [1992] 1 FCR 145, [1992] 1 FLR 316, CA; *May v May* [1986] 1 FLR 325, [1986] Fam Law 105, CA. As to the importance of emotional needs see *J v C* [1970] AC 668, [1969] 1 All ER 788, HL; *Re W (a minor) (custody)* (1982) 4 FLR 492 at 504, CA, per Cumming-Bruce LJ (capacity of parents to form relationships is of 'immense importance'); *Adams v Adams* [1984] FLR 768, [1984] Fam Law 249, CA; *C v C (custody of children)* [1988] FCR 411, [1988] 2 FLR 291, CA; *Stephenson v Stephenson* supra (lack of the bonding between mother and child). For the significance of the parental tie see *Re K (a minor) (ward: care and control)* supra; *Re H (a minor) (custody: interim care and control)* [1991] FCR 985, [1991] 2 FLR 109, CA; *Re W (a minor) (residence order)* [1993] 2 FCR 589, [1993] 2 FLR 625, CA; and para 869 post. If there is no bond between a child and a parent the court may be reluctant to destabilise the family by reintroducing the parent: *Re S M (a minor) (access)* [1991] FCR 492, [1991] 2 FLR 333. For cases on the value of paternal access see *Starling v Starling* (1979) 4 FLR 135, CA; *Re C (minor: access)* [1991] FCR 969, [1992] 1 FLR 309, CA; cf *Re B (minor) (access)* [1991] FCR 976, [1992] 1 FLR 140, CA.

If it is alleged that exposure to parental behaviour (eg a homosexual relationship) might be detrimental to the child, evidence is desirable: cf *C v C (custody of child)* [1991] FCR 254, [1991] 1 FLR 223, CA; *B v B (custody of children)* [1991] FCR 1, [1991] 1 FLR 402. Presumptions that children of a certain age should generally be with one parent or the other carry much less weight than was once the case: *Re S (a minor)* [1991] FCR 155, [1991] 2 FLR 388, CA; *Re A (a minor) (custody)* [1991] FCR 569, [1991] 2 FLR 394, CA. As to the importance of links between siblings see *Cossey v Cossey* (1980) 11 Fam Law 56, CA; *Re S (minors: access)* [1990] FCR 379, [1990] 2 FLR 166, CA; *C v C (minors: custody)* [1988] 2 FLR 291 at 302, CA ('beyond argument' that young brothers and sisters should wherever possible be brought up together to provide mutual emotional support). See also *Re D (a minor) (contact: mother's hostility)* [1993] 1 FCR 964, [1993] 2 FLR 1, CA; *Re K (contact: mother's anxiety)* [1999] 2 FLR 703, [1999] Fam Law 527; *Re H (a minor) (contact)* [1994] 2 FCR 419, [1994] 2 FLR 776, CA (contact with step-father); *Re D (a minor) (natural parent: presumption of care)* [1999] 2 FCR 118, [1999] 1 FLR 134, CA (the presumption in favour of a natural parent (if acceptable as a carer) may not be overridden by the benefits of a child staying with his or her siblings where the relationship with those siblings can be continued through contact); *Re K (specific issue order)* [1999] 2 FLR 280, [1999] Fam Law 455 (where informing a child of his father would, because of the mother's obsessional hatred of the father, cause the child an emotional disruption, it was in child's best interests not to be told the truth); *V v V (children) (intractable contact dispute)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851 (mother repeatedly frustrated father's attempts to gain contact; residence transferred to father because it was the only way of ensuring children's need of having relationship with father satisfied); *Re D (a child) (intractable contact dispute: publicity)* [2004] EWHC 727 (Fam), [2004] 3 FCR 234, [2004] 1 FLR 1226. See also *Re A (a child) (residence order)* [2007] EWCA Civ 889, [2007] All ER (D) 156 (Jun).

7 Children Act 1989 s 1(3)(c). See *Re W (a minor) (residence order)* [1993] 2 FCR 589, [1993] 2 FLR 625, CA (other things being equal, it is desirable that a child remain with his natural parents, but this gives way to particular needs in particular circumstances); *Re D (a child) (residence: natural parent)* [2000] 1 FCR 97, [1999] 2 FLR 1023 (the strong supposition that, other things being equal, it is in the child's best interests to remain with his or her natural parent means that it is wrong to carry out a balancing exercise between two households). See also *Re C (a minor) (wardship and adoption)* (1979) 2 FLR 177 at 194, CA; *D v M (minor: custody appeal)* [1983] Fam 33 at 41, [1982] 3 All ER 897 at 902, CA, per Ormrod LJ. For the relevance of the quality of the existing arrangements see *S v W* (1980) 11 Fam Law 81, CA. The status quo may take some time to be recognised: *Allington v Allington* [1985] FLR 586, [1985] Fam Law 157, CA; *Re W (a minor)* (1992) Times, 22 May, CA ('status quo' not appropriate to describe situation in which new-born baby was with father for three weeks). The fundamental rule of child care has been said to be that stability is all important, and the maintenance of some kind of routine crucial: *Re B (a minor)* (1983) 4 FLR 683, CA. An ex parte order changing residential arrangements is only to be made in exceptional circumstances: *Re H (a minor) (custody)* [1991] FCR 616, [1991] 2 FLR 411, CA. For other cases emphasising the need for continuity of care see *Re K (minors) (children: care and control)* [1977] Fam 179 at 186-187, [1977] 1 All ER 647 at 651, CA, per Stamp LJ; *S (B D) v*

*S (D J) (children: care and control)* [1977] Fam 109 at 118, [1977] 1 All ER 656 at 662-663, CA, per Ormrod LJ; *D v M (minor: custody appeal)* supra (undesirable that child be looked after by three or four adults); *Plant v Plant* (1982) 4 FLR 305, CA; *H v H* [1984] Fam Law 112, CA.

8 Children Act 1989 s 1(3)(d). In the past, the court often applied a working rule that when dealing with young children, the right place for them to be is with their mother unless there is some substantial reason why they should not be: see eg *M v M (custody of children)* (1982) 4 FLR 603 at 609. However, see now *Re S (a minor) (custody)* [1991] FCR 155 at 158, [1991] 2 FLR 388 at 390, CA, per Butler-Sloss LJ; and *Re A (a minor) (custody)* [1991] FCR 569, [1991] 2 FLR 394, CA (unbroken relationship of mother and baby or toddler difficult to displace, but other considerations apply where mother and child have been separated. No starting point that mother is to be preferred).

The child's background may include religious factors: see *Re R (religious sect)* [1993] 2 FCR 525, sub nom *Re R (a minor) (residence: religion)* [1993] 2 FLR 163, CA; *Re T (minors) (custody: religious upbringing)* (1975) 2 FLR 239, CA; *Wright v Wright* (1980) 2 FLR 276, CA; *Re H (a minor) (custody: religious upbringing)* (1980) 2 FLR 253, DC (Jehovah's Witness); *Re B and G (minors) (custody)* [1985] FLR 134 (Scientology) (affd [1985] FLR 493, CA). Racial origin and cultural and linguistic factors may also be relevant: see *Re N (a minor) (transracial placement)* [1990] FCR 241, sub nom *Re N (a minor) (adoption)* [1990] 1 FLR 58; *Re P (a minor)* [1990] FCR 260, [1990] 1 FLR 96, CA; *Re A (a minor) (cultural background)* [1987] 2 FLR 429, [1988] Fam Law 65. See also *H v Trafford Borough Council* [1997] 3 FCR 113, (1996) 161 JPN 556 (child's racial and cultural background). See *Re G (children) (residence: same-sex partner)* [2006] UKHL 43, [2006] 4 All ER 241, [2006] 2 FLR 629 (the fact of biological parentage needed to be assessed as part of the welfare checklist).

9 Children Act 1989 s 1(3)(e). See *Re G (minors)* [1992] 2 FCR 720, [1993] 1 FLR 910, CA (drug taking); followed in *Re P (a minor) (ex parte residence order)* [1993] 2 FCR 417, [1993] 1 FLR 915, CA. For the approach taken in cases where there have been allegations that one parent has been guilty of sexual abuse see *Re P (a minor) (child abuse: custody)* [1991] FCR 757, [1990] 2 FLR 317 ('overwhelmingly likely' that four-year-old boy had seen sexual behaviour between his parents, and strong likelihood that child had been subjected to sexual abuse, but risk of harm did not outweigh the advantage of preserving links with father who had a good relationship with his son). For guidance on the procedure appropriate in cases of suspected child abuse see *Re A (minors) (child abuse)* [1992] 1 All ER 153, [1992] 1 FLR 439. See also *Scott v Scott* [1986] 2 FLR 320, [1986] Fam Law 301, CA; *C v C (a minor) (child abuse: evidence)* [1988] FCR 458, [1988] 1 FLR 462; *L v L (child abuse: access)* [1989] FCR 697, [1989] 2 FLR 16, CA; *H v H (child abuse: Access)* [1989] FCR 257, [1989] 1 FLR 212, CA; and cf *Re R (a minor) (access)* [1988] FCR 497, [1988] 1 FLR 206, CA. On the significance of a parent's homosexual orientation and relationship cf *C v C (custody of child)* [1991] FCR 254, [1991] 1 FLR 223, CA; and *B v B (custody of children)* [1991] FCR 1, [1991] 1 FLR 402. On the use of excessive corporal punishment see *Re H (minors)* [1987] 2 FLR 12; *L v L* (1980) 2 FLR 48, CA. See also *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248 (doctrine of estoppel per res judicata held not to apply to allegation of sexual abuse, as paramountcy of child's welfare outweighed public policy reasons for application of doctrine); *Re M and R (minors) (sexual abuse: expert evidence)* [1996] 4 All ER 239, sub nom *M and R (minors) (expert opinion: evidence)* [1996] 2 FCR 617, CA (when assessing whether a child is at risk of suffering harm the court can only have regard to any harm that the child has suffered or is at risk of suffering if it is satisfied on the balance of probabilities that such harm or risk of harm in fact exists); *Re P (sexual abuse: standard of proof)* [1996] 3 FCR 714, [1996] 2 FLR 333, CA (the court cannot infer a substantial risk of future abuse from evidence that abuse has occurred in the past which does not satisfy it on the balance of probabilities). As to the standard of proof to be applied when attempting to decide which parent had been responsible for a child's injuries see *Re G (a child) (non-accidental injury: standard of proof)* [2001] 1 FCR 97, CA. As to the correct approach of the court in non-accidental injury cases where the perpetrator is uncertain, see *Re O and N (children) (non accidental injury)* [2003] UKHL 18, [2004] 1 AC 523, [2003] 2 All ER 305 (applied in *North Yorkshire County Council v S A* [2003] EWCA Civ 839, [2003] 3 FCR 118, [2003] 2 FLR 849 (correct test was whether there was a likelihood or real possibility that potential perpetrators had inflicted the injuries)). As to the assessment of psychological harm see *Re A (a child) (residence order)* [2007] EWCA Civ 889, [2007] All ER (D) 156 (Jun) (mother's personality disorder rendered her so hostile to contact that the child was likely to suffer psychological problems); followed in *Re C (a child) (residence)* [2007] EWCA Civ 866, [2007] All ER (D) 187 (Oct).

10 Children Act 1989 s 1(3)(f). See eg *B v B* [1985] FLR 166, [1985] Fam Law 29, CA; *B v B (custody of child)* [1985] FLR 462, [1985] Fam Law 119, CA; *D v M (minor: custody appeal)* [1983] Fam 33, [1982] 3 All ER 897, CA (mother's poor parenting skills did not justify removal of one-year-old from her care to father's).

11 Children Act 1989 s 1(3)(g).

12 Eg the court may want to consider imposing conditions on the making of a residence order, or it may want to consider the desirability of making contact orders with other relatives: see para 247 et seq ante.

## UPDATE

### 303 Matters for the court's particular attention: the welfare checklist

NOTE 7--See also *Re B (a child) (residence)* [2009] UKSC 5, [2010] 1 All ER 223.

NOTE 9--Neither the seriousness of any allegations nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts: *Re B (children) (care proceedings: standard of proof)* [2008] UKHL 35, [2008] 4 All ER 1 (allegation of sexual abuse).

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## (4) APPEALS

### 304. Appeals from the family proceedings court.

An appeal lies to the High Court against the making by a magistrates' court of any order under the Children Act 1989 or the Adoption and Children Act 2002 or any refusal to make such an order<sup>1</sup> except in relation to an interim order for periodical payments<sup>2</sup>. However, where a magistrates' court has power, in relation to any proceedings under the Children Act 1989 or the Adoption and Children Act 2002 to decline jurisdiction because it considers that the case can more conveniently be dealt with by another court, no appeal lies against the exercise of that power<sup>3</sup>.

On any such appeal, the High Court may make such orders as may be necessary to give effect to its determination of the appeal<sup>4</sup>, and where such an order is made the High Court may make such incidental or consequential orders as appear to it to be just<sup>5</sup>. Where an appeal from the magistrates' court relates to an order for the making of periodical payments, the High Court may order that its determination of the appeal is to have effect from such date as it thinks fit to specify in the order<sup>6</sup>, but that date may not be earlier than the earliest date allowed in accordance with rules of court made for these purposes<sup>7</sup>. Any order of the High Court made on an appeal, other than an order requiring the case to be re-heard by the magistrates' court, is treated, for the purposes of the enforcement of the order and any power to vary, revive or discharge orders, as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court<sup>8</sup>.

The Lord Chancellor<sup>9</sup> may, after consulting the Lord Chief Justice, by order make provision as to the circumstances in which appeals may be made against decisions taken by courts on questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of certain orders<sup>10</sup>.

1 Children Act 1989 s 94(1) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 23; and the Adoption and Children Act 2002 s 100). This provision is expressed to be subject to any express provision made by or under the Children Act 1989: s 94(1) (as so amended). As to the rules which apply where an appeal lies to the High Court under s 94 (as amended) see the Family Proceedings Rules 1991, SI 1991/1247, r 4.22 (amended by SI 1992/2067; SI 2001/821; SI 2005/617; SI 2005/2922). Appeals under the Adoption and Children Act 2002 must comply with the Family Procedure (Adoption) Rules 2005, SI 2005/2795, Pt 19 (rr 171-183): see para 511 post. As to the procedure governing applications for leave to appeal in family cases and the management of family appeals see *Re O (family appeals: management)* [1998] 1 FLR 431n, CA. An appeal under the Children Act 1989 s 94 (as amended) should be held in open court: *Re R (a minor) (child case: procedure)* [1997] 3 FCR 704, sub nom *Croydon London Borough Council v R* [1997] 2 FLR 675. As to the test to be applied by the appellate court in children cases see *G v G (minors: custody appeal)* [1985] 1 WLR 647, [1985] FLR 894. The same test applies whether the appeal is heard in the High Court, the county court or the Court of Appeal: see *Re W, Re A, Re B (change of name)* [1999] 3 FCR 337, [1999] 2 FLR 930, CA.

2 Children Act 1989 s 94(3). The reference in the text to an interim order for periodical payments is to one made under s 15, Sch 1 (as amended): see para 548 post. As to the duty of the court to record findings and reasons see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21 (amended by SI 1992/2068; SI 1994/3156; SI 2001/615; SI 2001/818; SI 2005/2930); and note *R v Oxfordshire County Council* [1992] Fam 150, [1992] 3 All ER 660; *Re O (a minor) (care proceedings: education)* [1992] 4 All ER 905, [1992] 1 WLR 912; *Devon County Council v S* [1992] Fam 176, [1992] 2 FLR 244; *Hillingdon London Borough Council v H* [1993] Fam 43, [1993] 1 All ER 198, followed in *S v S (children: financial provision)* [1993] Fam 200, [1993] 1 FCR 805; *Hertfordshire County Council v W* [1992] 2 FCR 885, sub nom *W v Hertfordshire County Council* [1993] 1 FLR 118; *Re B (procedure: family proceedings court)* [1992] 2 FCR 631, [1993] Fam Law 209, CA; *Hampshire County Council v S* [1993] Fam 158, [1993] 1 All ER 944; *Essex County Council v F* [1993] 2 FCR 289, [1993] 1

FLR 847. On an appeal to the High Court from the magistrates' court it is essential that all the documentation, including the notes of evidence, be provided in typescript: *S v S* (1992) Times, 8 September. See also *S v Oxfordshire County Council* [1993] 2 FCR 676, [1993] 1 FLR 452; *T v W (contact: reasons for refusing leave)* [1997] 1 FCR 118, [1996] 2 FLR 473; *Re P (minors) (contact: discretion)* [1999] 1 FCR 566, [1998] 2 FLR 696.

3 Children Act 1989 s 94(2) (amended by the Adoption and Children Act 2002 s 100).

4 Children Act 1989 s 94(4).

5 Ibid s 94(5).

6 Ibid s 94(6).

7 Ibid s 94(7). At the date at which this volume states the law, no rules of court had been made for this purpose.

Where, on an appeal in respect of an order for periodical payments, the High Court reduces the amount of those payments or discharges the order, it may order the person entitled to those payments to pay to the person making them such sums in respect of payments already made as it thinks fit, and if any arrears are due under the order for periodical payments it may remit payment of the whole, or part, of those arrears: s 94(8). The court has power to deal with questions relating to the level of periodical payments and to the remission of arrears on a single notice of appeal: *S v S (children: periodical payments)* [1993] Fam 200, [1993] 1 FLR 606.

8 See the Children Act 1989 s 94(9).

9 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

10 Children Act 1989 s 94(10) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 206). The text refers to any order under the Children Act 1989 Sch 11 para 2 (as amended): see para 208 ante. Except to the extent provided for in any order made under s 94(10), no appeal may be made against any decision of a kind mentioned in s 94(10): s 94(11). The Lord Chief Justice may nominate a judicial office holder to exercise his functions under s 94(10) (as amended): s 94(12) (added by the Constitutional Reform Act 2005 Sch 4 paras 203, 206).

In exercise of the power under the Children Act 1989 s 94(10), the Children (Allocation of Proceedings) (Appeals) Order 1991, SI 1991/1801, has been made, which provides that where a district judge orders the transfer of proceedings to a magistrates' court in accordance with the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 11 (as amended), an appeal may be made against that decision: (1) to a judge of the Family Division of the High Court; or (2) except where the order was made by a district judge or deputy district judge of the principal registry of the Family Division, to a circuit judge: arts 1, 2.

## UPDATE

### 304 Appeals from the family proceedings court

TEXT AND NOTES--1989 Act s 94 amended: SI 2009/871.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--SI 1991/1247 r 4.22 revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 900.

NOTE 2--SI 1991/1395 r 21 modified: SI 2008/2859. SI 1991/1395 r 21 further amended: SI 2009/637.

NOTE 10--SI 1991/1677 art 11 now Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, art 16; and SI 1991/1801 arts 1, 2 now SI 2008/2836 art 26 (see also PARA 211A)



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### 305. County court appeals.

In a county court any party may appeal from an order or decision made or given by the district judge in family proceedings to a judge on notice<sup>1</sup>. Where a district judge is sitting in the Principal Registry of the High Court, the appeal lies to a judge of the High Court<sup>2</sup>. Such an appeal is limited to a review of the decision or order of the district judge unless the judge considers that in the circumstances of the case it would be in the interests of justice to hold a rehearing<sup>3</sup>. Unless the court otherwise orders, any such notice must be issued within 14 days of the order or decision appealed against and served not less than 14 days before the day fixed for the hearing of the appeal<sup>4</sup>. Such appeals are heard in chambers unless the judge otherwise directs<sup>5</sup>. Unless the court otherwise orders, the appeal does not operate as a stay of proceedings on the order or decision appealed against<sup>6</sup>.

1 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(1). This provision does not apply where any order or decision granting or varying an order (or refusing to do so): (1) on an application for ancillary relief; or (2) in proceedings to which r 3.1 (as amended) (application in case of failure to provide reasonable maintenance), r 3.2 (application for alteration of maintenance agreement during lifetime of parties), r 3.3 (application for alteration of maintenance agreement after death of one party), or r 3.6 (Married Women's Property Act 1882) apply, is treated as a final order for the purposes of CPR Sch 2 CCR Ord 37 r 6 (which gives a right of appeal to the judge from a judgment or final decision of the district judge): see the Family Proceedings Rules 1991, SI 1991/1247, r 8.1(1), (2) (amended by SI 1997/1893); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 737. Note that the Family Proceedings Rules 1991, SI 1991/1247, r 8.1 (as amended) does not apply to any appeal by a party to proceedings for the assessment of costs against a decision in those proceedings: r 8.1(7) (added by SI 2003/184). For the rules which apply in proceedings under the Children Act 1989 (see para 204 ante) where an appeal lies from any decision of a district judge to the judge of the court in which the decision was made see the Family Proceedings Rules 1991, SI 1991/1247, r 4.22 (amended by SI 1992/2067; SI 2001/821; SI 2005/617; SI 2005/2922). As to the test to be applied by the appellate court in children cases see para 304 note 1 ante.

2 *Re S (a minor) (appeals from the Principal Registry)* [1997] 1 FCR 119, sub nom *Re S (a minor) (appeal from the Principal Registry: procedure)* [1997] 2 FLR 856. There is no reason to differentiate between appeals from a district judge of the Principal Registry and district judges elsewhere: *Re W, Re A, Re B (change of name)* [1999] 3 FCR 337, [1999] 2 FLR 930, CA.

3 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(3)(a) (r 8.1(3) substituted by SI 2003/184). Oral evidence or evidence which was not before the district judge may be admitted if in all circumstances of the case it would be in the interests of justice to do so, irrespective of whether the appeal be by way of review or rehearing: Family Proceedings Rules 1991, SI 1991/1247, r 8.1(3)(b) (as so substituted).

4 *Ibid* r 8.1(4).

5 *Ibid* r 8.1(5). See *Blunkett v Quinn* [2004] EWHC 2816 (Fam), [2005] 1 FCR 103, [2005] 1 FLR 648.

6 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(6).

## UPDATE

### 305 County court appeals

NOTE 1--SI 1991/1247 r 4.22 revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 900. SI 1991/1247 r 8.1 now also does not apply to proceedings referred to in r 8.2: r 8.1(7) (substituted by SI 2009/636).



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### **306. Appeals to the Court of Appeal.**

An appeal lies to the Court of Appeal<sup>1</sup> from:

- 410 (1) the determination of the judge of a county court in such manner and subject to such conditions as may be provided by the Civil Procedure Rules<sup>2</sup>; and
- 411 (2) any judgment or order of the High Court<sup>3</sup>.

<sup>1</sup> When determining an application for permission to appeal against orders for residence and contact, the Court of Appeal is restricted to a review of the judge's decision to see whether the appellant has an arguable case, which is fit to present before a full court on appeal, that the judge's order is plainly wrong: *Re W (children) (permission to appeal)* (2007) Times, 2 August, CA (considering *G v G* [1985] 2 All ER 225, HL).

<sup>2</sup> See the County Courts Act 1984 s 77(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(7); and the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 8); and CIVIL PROCEDURE. For the procedure governing appeals to the Court of Appeal commenced before 2 May 2000 see CPR Sch 1 RSC Ord 59. For the procedure governing appeals to the Court of Appeal commenced on or after 2 May 2000 see CPR Pt 52; *Practice Direction-Appeals* (1999) PD 52 (as amended). As to the test to be applied by the appellate court in children cases see para 304 note 1 ante.

<sup>3</sup> See the Supreme Court Act 1981 s 16(1) (as amended) (prospectively renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 as from a day to be appointed); and CIVIL PROCEDURE.

In the Family Division of the High Court an application for permission to appeal should be made to the judge at the conclusion of the judgment, but if it is not so made, it may be made to the same judge at a later stage. The position in the county court is somewhat different in that if the application is not made to the judge at the conclusion of the trial, it cannot be advanced to the circuit judge at a later stage but must go to the Court of Appeal: see *Klentzeris v Klentzeris* [2007] EWCA Civ 533, [2007] Fam Law 790.

### **UPDATE**

### **306 Appeals to the Court of Appeal**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

*Klentzeris*, cited, reported at [2007] 2 FLR 996.

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## **(5) PARTICULAR DUTIES OF THE COURT IN MATRIMONIAL AND CIVIL PARTNERSHIP PROCEEDINGS**

### **307. Divorce, nullity of marriage, judicial separation and civil partnership proceedings.**

In any proceedings for a decree of divorce or nullity of marriage, or a decree of judicial separation or in any proceedings for dissolution, nullity or separation order in respect of a civil partnership<sup>1</sup>, the court<sup>2</sup> must consider: (1) whether there are any children of the family to whom the relevant provisions of the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 apply<sup>3</sup>; and (2) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1989 with respect to any of them<sup>4</sup>.

A child of the family, in relation to the parties to a marriage or a civil partnership, means: (a) a child<sup>5</sup> of both those parties; and (b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family<sup>6</sup>. An unborn child cannot be treated as a child of the family<sup>7</sup>.

Where a petition for divorce, nullity of marriage or judicial separation, or for dissolution, nullity of civil partnership or separation, discloses that there is a minor child of the family who is under 16 or who is over that age and is receiving instruction at an educational establishment or undergoing training for a trade or profession, the petition must be accompanied by a statement, signed by the petitioner personally, and if practicable agreed with the respondent, containing the information required by the prescribed form<sup>8</sup> to which must be attached a copy of any medical report mentioned in the statement<sup>9</sup>.

A respondent on whom a statement of arrangements is served<sup>10</sup> may sign the form indicating his agreement with the arrangements. However, whether or not he does agree, the respondent may file in the court office a statement of his views of the present and proposed arrangements for the children and on receipt of such a statement from the respondent, the proper officer must send a copy to the petitioner<sup>11</sup>. If no application<sup>12</sup> for an order under Part I or Part II of the Children Act 1989<sup>13</sup> in the cause is pending, the district judge<sup>14</sup> must, after certifying that the petitioner is entitled to a decree nisi or a conditional order in civil partnership proceedings<sup>15</sup> or after giving directions as to the provision of evidence in a defended cause<sup>16</sup>, as the case may be, proceed to consider the matters specified in heads (1) and (2) above<sup>17</sup>.

1 As to such proceedings see the Matrimonial Causes Act 1973 ss 1-18 (as amended; prospectively further amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 319 et seq).

2 'The court' means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (as amended), the county court: Matrimonial Causes Act 1973 s 52(1) (amended by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 16). In respect of civil partnerships, the court having jurisdiction is the High Court or a county court which has been designated a 'civil partnership proceedings county court' by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (as amended) : Civil Partnership Act 2004 s 220.

3 Matrimonial Causes Act 1973 s 41(1)(a) (s 41 substituted by the Children Act 1989 s 108(4), Sch 12 para 31); Civil Partnership Act 2004 s 63(1)(a). As from a day to be appointed the Matrimonial Causes Act 1973 s 41(1) is amended by the Family Law Act 1996 s 66(3), Sch 10. At the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 ante.

4 Matrimonial Causes Act 1973 s 41(1)(b) (as substituted: see note 3 supra); Civil Partnership Act 2004 s 63(1)(b).

The provisions of the Matrimonial Causes Act 1973 s 41 (as substituted) and the Civil Partnership Act 2004 s 63 apply to any child of the family who has not reached the age of 16 at the date when the court considers the case in accordance with the requirements of the section, and to any child of the family who has reached that age at that date and in relation to whom the court directs that the section should apply: s 41(3) (as so substituted); Civil Partnership Act 2004 s 63(3). For the meaning of 'child of the family' see the text and notes 5-7 infra.

5 'Child' is not confined to a minor child (*Whytte v Ticehurst* [1986] Fam 64, [1986] 2 All ER 158 (but see para 309 post)); and includes an illegitimate child (Matrimonial Causes Act 1973 s 52(1) (amended by the Children Act 1975 s 108(1)(b), Sch 4 Pt I)). For the meaning of 'child of the family' in the Children Act 1989 see para 248 note 10 ante.

6 Matrimonial Causes Act 1973 s 52(1) (amended by the Children Act 1989 s 108(7), Sch 12 para 33, Sch 15). There must be a 'family' (*M v M (child of the family)* (1980) 2 FLR 39, CA) and the child must have been 'treated' as a part of that family for however short a period: *W v W (child of the family)* [1984] FLR 796, CA; *W (R J) v W (S J)* [1972] Fam 152, [1971] 3 All ER 303. See *Re A (a minor) (child of family)* [1998] 1 FCR 458, [1998] 1 FLR 347, CA (granddaughter, for whom grandparents had assumed primary responsibility, was a 'child of the family').

7 *A v A (family: unborn child)* [1974] Fam 6, [1974] 1 All ER 755.

8 le Form M4: see the Family Proceedings Rules 1991, SI 1991/1247, r 1.2(4), Appendix 1 (amended by SI 1993/295; SI 2005/2922). Form M4 requires the petitioner to give details of the children (children of both parties, other children of the family, and other children who are not children of the family), and requires that the arrangements which are proposed for the children of the family should be set out in some detail (eg including the addresses at which the children now live, the number of living rooms, bedrooms, etc at that address, details of the tenure of the house, the names of all other persons living with the children, and a statement by the petitioner as to whether there are any changes proposed in those arrangements). Full details of education and training are required. The petitioner must give details of child care arrangements, stating for example which parent looks after the children from day to day, and whether that parent goes out to work (and if so what his or her hours of work are, who looks after the children during school holidays, etc). Details of maintenance arrangements must be given, as must details of arrangements for contact with the children, details of the children's health, and details of all court proceedings. The petitioner is finally asked whether he would agree to discuss the matter with a conciliator and the other spouse or civil partner if there is disagreement about the arrangements for the children. For arrangements for conciliation see *District Judge's Direction (children: conciliation)* [2004] 1 FCR 781, [2004] 1 FLR 974; and para 308 note 9 post.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.2(2) (amended by SI 1992/2067; SI 2005/2922).

10 le in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.2(2) (as amended): see the text and note 9 supra.

11 See *ibid* r 2.38 (amended by SI 2005/2922).

12 le as is referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 2.40(1).

13 le the Children Act 1989 Pt I (ss 1-7) (as amended) (see para 134 et seq ante), Pt II (ss 8-16A) (as amended) (see para 247 et seq ante).

14 'District judge' in relation to proceedings in the principal registry, a district registry or a county court or civil partnership proceedings county court means the district judge or one of the district judges for that registry or county court: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

15 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.36(1)(a) (amended by SI 2005/2922).

16 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4).

17 See *ibid* r 2.39(1) (amended by SI 2005/2922).

## UPDATE

**307 Divorce, nullity of marriage, judicial separation and civil partnership proceedings**

TEXT AND NOTES 12-14--Words 'If no application ... pending' omitted: SI 1991/1247 r 2.39(1) (amended by SI 2008/2836).

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### **308. Powers of district judge.**

If the district judge<sup>1</sup> is satisfied that there are no children of the family<sup>2</sup> to whom the relevant statutory provision applies<sup>3</sup>, or that there are such children but the court need not exercise its powers under the Children Act 1989 with respect to any of them, or give any direction<sup>4</sup> that the making of the decree be postponed, he must certify accordingly<sup>5</sup>. If he is not so satisfied, he may, without prejudice to his other powers<sup>6</sup>, direct that the parties or any of them file further evidence relating to the arrangements for the children (and the direction must specify the matters to be dealt with in further evidence), that a welfare report on the children, or any of them be prepared<sup>7</sup> or that the parties, or any of them, attend before him as specified, and the parties must be notified accordingly<sup>8</sup>.

Where it appears to the court that the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Children Act 1989 with respect to a child but it is not in a position to exercise that power or, as the case may be, those powers, without giving further consideration to the case, and there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction, it may direct that the decree of divorce or nullity is not made absolute or that the decree of judicial separation is not granted or the civil partnership order is not made final or a separation order not made, until the court orders otherwise<sup>9</sup>.

1 For the meaning of 'district judge' see para 307 note 14 ante.

2 For the meaning of 'child of the family' see para 307 ante.

3 I.e. the provisions of the Matrimonial Causes Act 1973 s 41 (as substituted) or the Civil Partnership Act 2004 s 63: see para 307 ante.

4 I.e. under the Matrimonial Causes Act 1973 s 41(2) (as substituted) or the Civil Partnership Act 2004 s 63(2): see the text and note 9 infra.

5 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.39(2) (amended by SI 2005/2922). Where there are children of the family but the district judge is satisfied the court need not exercise its powers with respect to them, the petitioner and the respondent must each be sent a copy of the district judge's certificate: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.39(2).

6 I.e. his power under the Children Act 1989 (see para 310 post) or the Matrimonial Causes Act 1973 s 41(2) (as substituted) or the Civil Partnership Act 2004 s 63(2): see the text and note 9 infra.

7 As to the power to order a welfare report see para 317 post.

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(3) (amended by SI 2005/2922).

9 Matrimonial Causes Act 1973 s 41(2) (substituted by the Children Act 1989 s 108(4), Sch 12 para 31); Civil Partnership Act 2004 s 63(2). As from a day to be appointed the Matrimonial Causes Act 1973 s 41(2) is amended by the Family Law Act 1996 s 66(3), Sch 10. At the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 ante. In the principal registry of the Family Division, the district judge may, at any time whilst considering arrangements for children under this provision, direct a conciliation appointment: see *Practice Direction (child: custody: conciliation)* [2004] 2 All ER 463, [2004] 1 WLR 1287.

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### **309. Matrimonial proceedings in magistrates' courts.**

Where an application is made by a party to a marriage for an order that the respondent should make financial provision for the other party or for a child of the family<sup>1</sup>, or for payments which have been agreed by the parties<sup>2</sup>, or under the provision applicable where the parties have been living apart by agreement<sup>3</sup>, then if there is a child of the family who is under 18 the court must not dismiss or make a final order on the application until it has decided whether to exercise any of its powers under the Children Act 1989 with respect to the child<sup>4</sup>.

1    Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553. 'Child of the family' has the same meaning as in the Matrimonial Causes Act 1973: see the Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (as amended); and para 307 ante.

2    Ie under ibid s 6 (as substituted): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 554-555.

3    Ie ibid s 7 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 556.

4    Ibid s 8 (substituted by the Children Act 1989 s 108(5), Sch 13 para 36). As to the court's powers under the Children Act 1989 see para 310 post.



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### **310. Matrimonial proceedings and civil partnership proceedings as family proceedings.**

All proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 and the Matrimonial Causes Act 1973 and certain proceedings under the Civil Partnership Act 2004 are within the meaning of 'family proceedings'<sup>1</sup>. Accordingly the court has jurisdiction in any such proceedings to make contact orders, prohibited steps orders, residence orders or specific issue orders<sup>2</sup> in exactly the same way as in any other family proceedings<sup>3</sup>. In particular, if the court considers that it might be appropriate for a care order or supervision order to be made with respect to a child, the court has power to direct the appropriate authority to undertake an investigation of a child's circumstances<sup>4</sup>. There is power to make orders if the court considers that the order should be made even though no application has been made for such an order<sup>5</sup>, and the court may make an order at any time during the proceedings even though it is not in a position to dispose finally of those proceedings<sup>6</sup>.

1 See the Children Act 1989 s 8(3) (as amended); and para 199 et seq ante.

2 The section 8 orders: see para 247 note 4 ante. As to contact orders see para 251 et seq ante. As to prohibited steps orders see para 261 ante. As to residence orders see para 262 ante. As to specific issue orders see para 263 ante.

3 See para 208 et seq ante.

4 See para 272 ante.

5 See para 247 ante.

6 See para 266 ante.

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## **(6) WELFARE REPORTS AND CHILDREN'S GUARDIANS**

### **(i) Introduction**

#### **311. Independent reports.**

The Children Act 1989 contains two provisions which enable the court to have independent reports available to it. First, a court considering any question with respect to a child under the Act may ask an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer<sup>1</sup> or ask a local authority to arrange for an officer of the authority or such other person (other than an officer of the Service or a Welsh family proceedings officer) as the authority considers appropriate, to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report<sup>2</sup>. Secondly, for the purpose of any specified proceedings<sup>3</sup>, the court must appoint an officer of the Service or a Welsh family proceedings officer for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests<sup>4</sup>. The officer must be appointed in accordance with rules of court<sup>5</sup>, and is under a duty to safeguard the interests of the child in the manner prescribed by such rules<sup>6</sup>.

1 Children Act 1989 s 7(1)(a) (s 7(1) amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 88; and the Children Act 2004 s 40, Sch 3 paras 5, 6). As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante; and for the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

2 Children Act 1989 s 7(1)(b) (as amended: see note 1 supra). Where, before 1 April 2001 (ie the date on which the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818, came into force) a person had been requested to prepare a welfare report in accordance with the Children Act 1989 s 7(1) and the proceedings in which the report was requested are still continuing, that person is treated, for the purposes of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, as the children and family reporter in those proceedings: Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2001, SI 2001/818, r 18; see para 230 ante. For the meaning of 'children and family reporter' see para 230 note 13 ante.

As to the respective functions of a court welfare officer or children and family reporter and a children's guardian see *Re S (a minor) (care proceedings: reports)* [1992] 2 FCR 554, sub nom *Re S (a minor) (guardian ad litem/welfare officer)* [1993] 1 FLR 110, CA. See also para 317 text and note 7 post. Children and family reporters were formerly known as welfare officers: see para 230 ante. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

In separate proceedings relating to siblings, information compiled for the purpose of public law proceedings can be made available in private law proceedings by way of an application under the Children Act 1989 s 7 (as amended): *W v Wakefield County Council* [1994] 2 FCR 564, [1995] 1 FLR 170. As to private law proceedings see para 247 et seq ante. As to public law proceedings see para 270 et seq ante.

3 For the purposes of the Children Act 1989 s 41 (as amended), 'specified proceedings' means any proceedings:

200 (1) on an application for a care order or supervision order (see para 270 et seq ante) (s 41(6)(a));

201 (2) in which the court has given a direction under s 37(1) (see paras 201, 272 ante) and has made, or is considering whether to make, an interim care order (see paras 288-292 ante) (s 41(6)(b));

- 202 (3) on an application for the discharge of a care order or the variation or discharge of a supervision order (see paras 293-295 ante) (s 41(6)(c));
- 203 (4) on an application under s 39(4) (see para 294 ante) (s 41(6)(d));
- 204 (5) in which the court is considering whether to make a residence order (see para 262 ante) (s 41(6)(e));
- 205 (6) with respect to contact between a child who is the subject of a care order and any other person (see paras 278-279 ante) (s 41(6)(f));
- 206 (7) under Pt V (ss 43-52) (as amended) (see paras 578-609 post) with respect to a child who is the subject of a care order (s 41(6)(g));
- 207 (8) on an appeal against: (a) the making of, or refusal to make, a care order, supervision order or any order under s 34 (see paras 278-279 ante); (b) the making of, or refusal to make, a residence order with respect to a child who is the subject of a care order; or (c) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in heads (a) or (b) supra; (d) the refusal of an application under s 39(4) (see para 294 ante); (e) the making of, or refusal to make, an order under Pt V (as amended) (s 41(6)(h));
- 208 (9) on an application for the making or revocation of a placement order (within the meaning of the Adoption and Children Act 2002 s 21) (Children Act 1989 s 41(6)(hh) (added by Adoption and Children Act 2002 s 122(1)(a)));;
- 209 (10) which are specified for the time being, for the purposes of the Children Act 1989 s 41 (as amended), by rules of court (s 41(6)(i)).

In respect of proceedings in the High Court and county court, the following proceedings are specified for the purposes of s 41 (as amended) in accordance with s 41(6)(i):

- 210 (i) proceedings under the Children Act 1989 s 25 (as amended) (see para 1037 et seq post) (Family Proceedings Rules 1991, SI 1991/1247, r 4.2(2)(a));
- 211 (ii) applications under the Children Act 1989 s 33(7) (see para 276 ante) (Family Proceedings Rules 1991, SI 1991/1247, r 4.2(2)(b));
- 212 (iii) proceedings under the Children Act 1989 s 23, Sch 2 para 19(1) (see para 875 post) (Family Proceedings Rules 1991, SI 1991/1247, r 4.2(2)(c));
- 213 (iv) applications under the Children Act 1989 s 36, Sch 3 para 6(3) (see para 287 ante) (Family Proceedings Rules 1991, SI 1991/1247, r 4.2(2)(d));
- 214 (v) appeals against the determination of proceedings of a kind set out in heads (i)-(iv) supra (r 4.2(2)(e) (amended by SI 1991/2113)).

In respect of proceedings in the family proceedings court, the following proceedings are specified for the purposes of the Children Act 1989 s 41 (as amended) in accordance with s 41(6)(i):

- 215 (A) proceedings under s 25 (as amended) (see para 1037 et seq post) (Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(2)(a) (r 2(2) amended by SI 1991/1991));
- 216 (B) applications under the Children Act 1989 s 33(7) (see para 276 ante) (Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(2)(b) (as so amended));
- 217 (C) proceedings under the Children Act 1989 Sch 2 para 19(1) (see para 875 post) (Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(2)(c) (as so amended));
- 218 (D) applications under the Children Act 1989 Sch 3 para 6(3) (see para 287 ante) (Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(2)(d) (as so amended)).

Where an investigation is carried out following an order under the Children Act 1989 s 37(1) and the local authority decides not to apply for a care order or supervision order, the proceedings cease to be 'specified proceedings', and the children's guardian's appointment under s 41(6)(b) must cease: *Re C E (a minor) (appointment of guardian ad litem)* [1995] 1 FCR 387, sub nom *Re C E (section 37 direction)* [1995] 1 FLR 26 (the case also gives guidance as to the circumstances in which it is appropriate to appoint a children's guardian

under the Children Act 1989 s 41(6)(b)). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

4 Ibid s 41(1) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 91(a); and the Children Act 2004 s 40, Sch 3 paras 5, 9(1), (2)). See eg *Re J (a minor) (change of name)* [1993] 1 FCR 74, [1993] 1 FLR 699. See also para 317 post.

5 Children Act 1989 s 41(2)(a) (s 41(2) amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 91(b); and the Children Act 2004 Sch 3 paras 5, 9(1), (3)). As to the appointment of the children's guardian who is for this purpose the relevant officer of the Service see the Family Proceedings Rules 1991, SI 1991/1247, r 4.10 (as amended) (see para 319 post); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10 (as amended) (see para 319 post). See also *Essex County Council v B* [1993] 1 FCR 145, [1993] 1 FLR 866.

6 Children Act 1989 s 41(2)(b) (as amended: see note 5 supra). As to rules of court relating to the powers and duties of officers of the Service and Welsh family proceedings officers see the Family Proceedings Rules 1991, SI 1991/1247, r 4.11 (as substituted) (see para 314 post); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11 (as substituted) (see para 314 post).

Rules of court may make provision as to: (1) the assistance which any officer of the Service or Welsh family proceedings officer may be required by the court to give to it; (2) the consideration to be given by any officer of the Service or Welsh family proceedings officer, where an order of a specified kind has been made in the proceedings in question, as to whether to apply for the variation or discharge of the order; and (3) the participation of officers of the Service or Welsh family proceedings officers in reviews, of a kind specified in the rules, which are conducted by the court: Children Act 1989 s 41(10) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 87, 91; and the Children Act 2004 Sch 3 paras 5, 9(1), (4)).

Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of: (a) any statement contained in a report made by an officer of the Service or a Welsh family proceedings officer who is appointed under the Children Act 1989 s 41 (as amended) for the purpose of the proceedings in question; and (b) any evidence given in respect of the matters referred to in the report, in so far as the statement or evidence is, in the opinion of the court, relevant to the question which the court is considering: s 41(11) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 87, 91; and the Children Act 2004 Sch 3 paras 5, 9(1), (5)).

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### **312. Confidentiality of reports.**

The following wording must be indorsed on all welfare reports filed in Family Division proceedings and on all copies which are supplied to the parties or their solicitors: 'This report has been prepared for the court and should be treated as confidential. It must not be shown nor its contents revealed to any person other than a party or a legal adviser to such a party. Such legal adviser may make use of the report in connection with an application for assistance from the Community Legal Service Fund'<sup>1</sup>.

Subject to certain provisions<sup>2</sup>, nothing in the Family Proceedings Courts (Children Act 1989) Rules 1991<sup>3</sup> prevents the disclosure of a document prepared by an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer<sup>4</sup> for the purpose of enabling a person to perform functions required under the Justices of the Peace Act 1997<sup>5</sup> or the Children Act 2004 and assisting an officer of the Service and a Welsh family proceedings officer who is appointed by the court under any enactment to perform his functions<sup>6</sup>.

It is a contempt of court to show the contents of the report to any person who is not a party to the proceedings for which the report was obtained, the legal representative of a party, the children's guardian<sup>7</sup>, the Legal Services Commission or a children and family reporter<sup>8</sup>, and leave of the court can, as a general rule, only be given by the court which ordered the report or in which the proceedings were conducted<sup>9</sup>. The court to which an application is made will have to balance, on the one hand the public interest in maintaining the confidentiality of information tendered in confidence to assist the court in promoting the welfare of children, and on the other hand the public interest, in the administration of justice, that all relevant and admissible evidence should, as a general rule, be before the court when it decides an action between two parties<sup>10</sup>.

A party must file and serve on: (1) the parties; (2) any local authority that is preparing or has prepared a special guardianship report<sup>11</sup>; (3) any welfare officer or children and family reporter; (4) any officer of CAFCASS or any Welsh family proceedings officer who is preparing or has prepared a family assistance order report or a risk assessment; and (5) any children's guardian of whose appointment he has been given notice<sup>12</sup>, written statements of the substance of the oral evidence which the party intends to adduce at a hearing of, or a directions appointment in, those proceedings and copies of any documents, including experts' reports, upon which the party intends to rely at a hearing of, or a directions appointment in, those proceedings at or by such time as the court directs or, in the absence of a direction, before the hearing or appointment<sup>13</sup>.

The judge should not discuss the case with the welfare officer in the absence of the parties, save perhaps in the most exceptional circumstances<sup>14</sup>.

1 *Practice Direction* [1984] 1 All ER 827, [1984] 1 WLR 446. For the exceptional jurisdiction to debar a party from access to reports see *Official Solicitor to the Supreme Court v K* [1965] AC 201, [1963] 3 All ER 191, HL.

2 *Ie* subject to the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A (as added): see para 313 post.

3 *Ie* *ibid* r 23 (as amended): see note 6 *infra*.

4 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante. As an officer of CAFCASS, a children and family reporter who, in the course of compiling a report instigated by the court, has obtained information which gives rise to concern about a child's welfare may report such information to the social services without the court's permission: see *Re M (a child) (disclosure: children and family reporter)* [2002] EWCA Civ 1199, [2002] 4 All ER 401, [2003] Fam 26.

5 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23(3)(a) (r 23(3) substituted by SI 2005/585). The reference in the text to the Justices of the Peace Act 1997 is to s 62(3A) (as added): see MAGISTRATES vol 29(2) (Reissue) para 650. As to the law relating to the confidentiality of documents generally see further CONFIDENCE AND DATA PROTECTION.

6 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23(3)(b) (as substituted: see note 5 supra). Nothing in r 23 (as amended) prevents the disclosure of any document relating to proceedings by an officer of the service or a Welsh family proceedings officer to any other officer of the service or Welsh family proceedings officer unless that other officer is involved in the same proceedings but on behalf of a different party: r 23(4) (added by SI 2001/818; amended by SI 2005/585). Nothing in the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23 (as amended), prevents the notification by the court or the designated officer of the court of a direction under the Children Act 1989 s 37(1) (see paras 201, 272 ante) to the authority concerned: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23(2) (amended by SI 2005/617).

As to communication of information relating to proceedings see para 313 post.

7 As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post. As to preserving the confidentiality of a children's guardian's report see *Re C (minors) (guardian ad litem: disclosure of report)* [1995] 2 FCR 837.

8 Children and family reporters were formerly known as welfare officers: see para 230 ante.

9 *Brown v Matthews* [1990] Ch 662 at 679-680, [1990] 2 All ER 155 at 168 per Nicholls LJ, CA (where it was sought to adduce a welfare officer's report in proceedings between a husband and his father-in-law in relation to the proceeds of sale of the former matrimonial home); and see *R v Sunderland Juvenile Court, ex p G* [1988] 2 All ER 34, [1988] 1 WLR 398, CA (regarding disclosure of guardian ad litem's report by leave of juvenile court). There is a general power in any case concerning the welfare of a child to direct that material damaging to the child is not disclosed to a party: see *Re B (a minor) (disclosure of evidence)* [1993] Fam 142, [1993] 1 FLR 191, CA. A children and family reporter or welfare officer should not give an undertaking that an informant's confidentiality will be respected: *Re G (minors) (welfare report: disclosure)* [1994] 1 FCR 37, [1993] 2 FLR 293, CA. See also *Re F (child case: disclosure of documents)* [1995] 1 FCR 589, sub nom *Re F (a minor) (disclosure: immigration)* [1994] 2 FLR 958, applying *Brown v Matthews* supra (all the documents used in proceedings under the Children Act 1989 may be disclosed in other proceedings if the child would not be harmed by such disclosure and if it would lead to justice being done in the other proceedings). For the extent to which privilege can be relied on in proceedings under the Children Act 1989 see *Essex County Council v R* [1994] Fam 167n, sub nom *Re R (a minor) (disclosure of privileged material)* [1993] 4 All ER 702, [1994] 1 FCR 225; *Oxfordshire County Council v M* [1994] Fam 151, [1994] 1 FCR 753, [1994] 2 All ER 269, CA (the court can override professional privilege in proceedings under the Children Act 1989 and order disclosure of reports adverse to a client's interests that are relevant to the determination of the case); *Re D and M (minors)* (1993) 18 BMLR 71, CA (disclosure of medical reports); *S County Council v B* [2000] Fam 76, [2000] 1 FCR 536 (refusal to disclose reports of experts instructed solely for the purposes of criminal proceedings upheld). As to the privilege against self-incrimination see *L v United Kingdom (disclosure of expert evidence)* [2000] 2 FCR 145, [2000] 2 FLR 322, ECtHR. As to disclosure to the police of evidence given in care proceedings to aid them in their child protection functions and to formulate their investigations see *Oxfordshire County Council v L and F* [1997] 3 FCR 124, [1997] 1 FLR 235. As to disclosure to the police of welfare reports and associated preparatory documents see *Re W (minors) (social worker: disclosure)* [1998] 2 All ER 801, sub nom *Re W (disclosure to police)* [1998] 2 FCR 405, CA. As to applications for non-disclosure of sensitive information see *Re M (disclosure)* [1999] 1 FCR 492, [1998] 2 FLR 1028, CA. See also *Re L (care proceedings: disclosure to third party)* [2000] 1 FLR 913.

10 *Brown v Matthews* [1990] Ch 662 at 679-680, [1990] 2 All ER 155 at 168, CA, per Nicholls LJ. See also *Re W (children) (care proceedings: disclosure)* [2003] EWHC 1624 (Fam), [2004] 1 All ER 787, [2003] 2 FLR 1023 (disclosure of relevant confidential information could compromise police operation; local authority should seek court's guidance). Any order which restricts disclosure must be clearly worded, particularly if it is one to which a penal notice is attached: *Re G (a child) (litigants in person)* [2003] EWCA Civ 1055, [2003] 2 FLR 963, [2003] Fam Law 808.

11 I.e. a report under the Children Act 1989 s 14A(8) (as added) or s 14A(9) (as added): see para 151 ante.

12 I.e. notice under the Family Proceedings Rules 1991, SI 1991/1247, r 4.10(5) (as amended) (see para 319 post) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(5) (see para 319 post).

13 Family Proceedings Rules 1991, SI 1991/1247, r 4.17(1) (amended by SI 2001/821; SI 2005/2992; SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17(1) (amended by SI 2001/818; SI 2005/2930; SI 2007/2188). As to documentary evidence generally see the Family Proceedings Rules 1991, SI 1991/1247, r 4.17 (amended by SI 1992/2067; SI 2001/821; SI 2005/2922; SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17 (amended by SI 1992/2068; SI 2001/818; SI 2005/2930; SI 2007/2188).

14 See *H v H (irregularity: effect on order)* (1982) 4 FLR 119, CA; *Re B (a minor) (irregularity of practice)* [1990] FCR 463, [1990] 1 FLR 300, CA (decided per incuriam); but cf *Re C (a minor)* [1991] FCR 308, [1991] 2 FLR 438, CA; and see *Re B (a minor) (disclosure of evidence)* [1993] Fam 142, [1993] 1 FLR 191, CA.

## **UPDATE**

### **312 Confidentiality of reports**

NOTE 6--SI 1991/1395 r 23 further amended: SI 2009/858.

NOTE 13--SI 1991/1247 r 4.17 further amended: SI 2008/2861. SI 1991/1395 r 17(1) further amended: SI 2008/2858. SI 1991/1395 r 17(1) modified: SI 2008/2859.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/4. PROCEEDINGS RELATING TO THE UPBRINGING OF CHILDREN/(6) WELFARE REPORTS AND CHILDREN'S GUARDIANS/(i) Introduction/313. Communication of information relating to proceedings.

### **313. Communication of information relating to proceedings.**

For the purposes of the law relating to the contempt of court<sup>1</sup>, information relating to relevant proceedings<sup>2</sup> (whether or not contained in a document filed with the court) may be communicated: (1) where the court<sup>3</sup> gives permission<sup>4</sup>; (2) subject to any direction of the court<sup>5</sup>; or (3) where the communication is to a party, the legal representative<sup>6</sup> of a party, a professional legal adviser<sup>7</sup>, an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>8</sup> or a Welsh family proceedings officer<sup>9</sup>, the welfare officer<sup>10</sup>, the Legal Services Commission<sup>11</sup>, an expert whose instruction by a party has been authorised by the court, or a professional acting in furtherance of the protection of children<sup>12</sup>.

Information may be communicated in the following circumstances:

- 412 (a) a party may communicate any information relating to the proceedings to a lay adviser<sup>13</sup> or a McKenzie Friend<sup>14</sup> to enable the party to obtain advice or assistance in relation to the proceedings<sup>15</sup>;
- 413 (b) a party may communicate any information relating to the proceedings to the party's spouse, civil partner, cohabitant<sup>16</sup> or close family member for the purpose of confidential discussions enabling the party to receive support from his spouse, civil partner, cohabitant or close family member<sup>17</sup>;
- 414 (c) a party may communicate any information relating to the proceedings to a health care professional<sup>18</sup> or a person or body providing counselling services for children or families to enable the party or any child of the party to obtain health care or counselling<sup>19</sup>;
- 415 (d) a party may communicate any information relating to the proceedings to the Secretary of State<sup>20</sup>, a McKenzie Friend, a lay adviser or an appeal tribunal dealing with an appeal under the Child Support Act 1991<sup>21</sup> for the purposes of making or responding to such an appeal or the determination of such an appeal<sup>22</sup>;
- 416 (e) a party may communicate any information relating to the proceedings to an adoption panel to enable it to discharge its functions as appropriate<sup>23</sup>;
- 417 (f) a party or any person lawfully in receipt of information may communicate any information relating to the proceedings to the Children's Commissioner or the Children's Commissioner for Wales so as to refer an issue affecting the interests of children to the Children's Commissioner or the Children's Commissioner for Wales<sup>24</sup>;
- 418 (g) a party or a legal representative may communicate any information relating to the proceedings to a mediator<sup>25</sup> for the purpose of mediation in relation to the proceedings<sup>26</sup>;
- 419 (h) a party, any person lawfully in receipt of information or a proper officer<sup>27</sup> may communicate any information relating to the proceedings to a person or body conducting an approved research project<sup>28</sup> for the purpose of the approved research project<sup>29</sup>;
- 420 (i) a party, a legal representative or a professional legal adviser may communicate any information relating to the proceedings to a body or person responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers<sup>30</sup> for the purposes of making a complaint or the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser<sup>31</sup>;



- 421 (j) a legal representative or a professional legal adviser may communicate any information relating to the proceedings to a person or body assessing quality assurance systems<sup>32</sup> to enable the legal representative or professional legal adviser to obtain a quality assurance assessment<sup>33</sup>;
- 422 (k) a legal representative or a professional legal adviser may communicate any information relating to the proceedings (providing that it does not, or is not likely to, identify any person involved in the proceedings) to an accreditation body<sup>34</sup> to enable the legal representative or professional legal adviser to obtain accreditation<sup>35</sup>;
- 423 (l) a party may communicate the text or summary of the whole or part of a judgment given in proceedings to an elected representative<sup>36</sup> or peer<sup>37</sup> to enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure<sup>38</sup>;
- 424 (m) a party may communicate the text or summary of the whole or part of a judgment given in proceedings to the General Medical Council for the purpose of making a complaint to the General Medical Council<sup>39</sup>;
- 425 (n) a party may communicate the text or summary of the whole or part of a judgment given in proceedings to a police officer for the purpose of a criminal investigation<sup>40</sup>;
- 426 (o) a party or any person lawfully in receipt of information may communicate the text or summary of the whole or part of a judgment given in proceedings to a member of the Crown Prosecution Service to enable the Crown Prosecution Service to discharge its functions under any enactment<sup>41</sup>.

A person who receives information under the above provisions may only communicate the information for the purpose or purposes for which he received that information, or of professional development or training, providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent<sup>42</sup>.

1 As to the law relating to contempt of court see CONTEMPT OF COURT.

2 'Relevant proceedings' means: (1) in relation to the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A (as added and amended), proceedings held in private to which the Family Proceedings Rules 1991, SI 1991/1247 (as amended) apply where the proceedings: (a) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (b) are brought under the Children Act 1989; or (c) otherwise relate wholly or mainly to the maintenance or upbringing of a minor (Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(1) (r 10.20A added by SI 2005/1976)); (2) in relation to the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A (as added and amended), proceedings held in private and brought under the Children Act 1989, any statutory instrument made under it, or any other enactment amended by it (Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, rr 1(2), 23A(1) (r 23A added by SI 2005/1977); and see the Children Act 1989 s 93(3)).

3 In the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (as amended), a reference in heads (1) and (2) in the text to the court includes a reference to the justice's clerk: see r 23A(1)(a), (b) (as added: see note 2 supra).

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(2)(a) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(1)(a) (as added: see note 2 supra).

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(2)(b) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(1)(b) (as added: see note 2 supra). The text refers to a direction in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added) or r 10.20A(4) (as added) or, as the case may be, the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added) or r 23A(3) (as added).

6 'Legal representative' means a barrister or solicitor, solicitor's employee or other authorised litigator, as defined in the Courts and Legal Services Act 1990 (see LEGAL PROFESSIONS VOL 65 (2008) PARA 498), who has been instructed to act for a party in relation to the proceedings: Family Proceedings Rules 1991, SI 1991/1247, r

10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

7 'Professional legal adviser' means a barrister or solicitor, solicitor's employee or other authorised litigator, as defined in the Courts and Legal Services Act 1990 (see LEGAL PROFESSIONS vol 65 (2008) PARA 498), who is providing advice to a party but is not instructed to represent that party in the proceedings: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

8 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante.

9 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

10 'Welfare officer' means a person who has been asked to prepare a report under the Children Act 1989 s 7(1)(b) (as amended) (see para 311 ante): Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2) (definition amended by SI 2001/818).

11 As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq.

12 Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(2)(c) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(1)(c) (as added: see note 2 supra). 'Professional acting in furtherance of the protection of children' means: (1) an officer of a local authority exercising child protection functions; (2) a police officer who is exercising powers under the Children Act 1989 s 46 (see para 594 et seq) or serving in a child protection unit or a paedophile unit of a police force; (3) any professional person attending a child protection conference or review in relation to a child who is the subject of the proceedings to which the information relates; or (4) an officer of the National Society for the Prevention of Cruelty to Children: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

13 'Lay adviser' means a non-professional person who gives lay advice on behalf of an organisation in the lay advice sector: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

14 'McKenzie Friend' means any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving him advice: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

15 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added (see note 2 supra); and amended by SI 2005/2922); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added (see note 2 supra); and amended by SI 2005/2930).

16 'Cohabitant' means one of two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added (see note 2 supra); definition substituted by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added (see note 2 supra); definition substituted by SI 2005/2930).

17 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

18 'Health care professional' means a registered medical practitioner, a registered nurse or midwife, a clinical psychologist or a child psychotherapist: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

19 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

20 As to the Secretary of State see para 155 ante.

21 In an appeal under the Child Support Act 1991 s 20 (as substituted and amended; prospectively further substituted): see para 557 post.

22 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended (see notes 2, 15 supra); further amended by SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended (see notes 2, 15 supra); further amended by SI 2007/2188).

23 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended (see notes 2, 15 supra); further amended by SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended (see notes 2, 15 supra); further amended by SI 2007/2188). 'Adoption panel' means a panel established in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 3 (as amended) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3 (see para 428 post): Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added (see note 2 supra); definition added by SI 2007/2187).

24 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra). As to the Children's Commissioner and the Children's Commissioner for Wales see para 164 et seq ante.

25 'Mediator' means a family mediator who is undertaking, or has successfully completed, a family mediation training course approved by the United Kingdom College of Family Mediators, or who is a member of the Law Society's Family Mediation Panel: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

26 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

27 In *ibid* r 23A(2) (as added and amended), for 'proper officer' read 'designated officer': r 23A(2) (as added and amended: see notes 2, 15 supra).

28 'Approved research project' means a project of research which is: (1) approved in writing by a Secretary of State after consultation with the President of the Family Division; (2) approved in writing by the President of the Family Division; or (3) conducted under the Children Act 1989 s 83 (as amended) (see para 159 ante) or the Criminal Justice and Court Services Act 2000 s 13 (see para 241 ante): Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

29 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

30 'Body or person responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers' means the Law Society, the General Council of the Bar, the Institute of Legal Executives or the Legal Services Ombudsman: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

31 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

32 'Body assessing quality assurance systems' includes the Law Society, the Legal Services Commission and the General Council of the Bar: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

33 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

34 'Accreditation body' means the Law Society, Resolution or the Legal Services Commission: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

35 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

36 'Elected representative' means a member of the House of Commons, a member of the National Assembly for Wales or a member of the European Parliament elected in England and Wales: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

37 'Peer' means a member of the House of Lords as defined by the House of Lords Act 1999 (see PARLIAMENT vol 78 (2010) PARAS 835, 836 et seq): Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

38 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra).

39 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra). As to the General Medical Council see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 13 et seq.

40 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra). 'Criminal investigation' means an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it: Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(4) (as added: see note 2 supra).

41 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(3) (as added and amended: see notes 2, 15 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(2) (as added and amended: see notes 2, 15 supra). As to the Crown Prosecution Service see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1079 et seq.

42 Family Proceedings Rules 1991, SI 1991/1247, r 10.20A(4) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 23A(3) (as added: see note 2 supra).

## UPDATE

### 313 Communication of information relating to proceedings

TEXT AND NOTES--SI 1991/1247 r 10.20A replaced: see SI 1991/1247 Pt XI (rr 11.1-11.9) (added by SI 2009/857; and amended by SI 2009/3348), which makes revised provision as to the communication of information regarding proceedings relating to children. General provision as to when it is permissible for the purposes of the law relating to contempt of court to communicate information concerning proceedings held in private is made (SI 1991/1247 r 11.2), together with provision for the communication of information in specific circumstances (rr 11.4-11.8). Pt XI does not permit the communication of information relating to the proceedings to the public at large, or any section of the public (r 11.2(2)), and nothing in rr 11.4-11.8 permits the disclosure of an unapproved draft judgment handed down by the court (r 11.2(3)). No party may instruct an expert for any purpose relating to proceedings without leave of the court (r 11.3(1)), and where leave has not been given no evidence arising out of an unauthorised instruction may be introduced without leave of the court (r 11.3(2)). SI 1991/1395 r 23A replaced: see SI 1991/1395 Pt IIC (rr 21Q-21Y) (added by SI 2009/858; and amended by SI 2009/3348), which also makes revised provision as to the communication of information regarding proceedings relating to children.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/4. PROCEEDINGS RELATING TO THE UPBRINGING OF CHILDREN/(6) WELFARE REPORTS AND CHILDREN'S GUARDIANS/(ii) Officers of the Children and Family Court Advisory and Support Service and Welsh Family Proceedings Officers/314. General powers and duties.

## **(ii) Officers of the Children and Family Court Advisory and Support Service and Welsh Family Proceedings Officers**

### **314. General powers and duties.**

In carrying out his duty<sup>1</sup>, the officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or the Welsh family proceedings officer<sup>2</sup> must, in any proceedings in which any question with respect to the upbringing<sup>3</sup> of a child<sup>4</sup> arises:

- 427 (1) have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child<sup>5</sup>; and
- 428 (2) have regard in particular to: (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background and any characteristics of his which the officer of the Service considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the officer of the Service considers the question to be relevant, is of meeting his needs<sup>6</sup>.

The officer must make such investigations as may be necessary for him to carry out his duties and must, in particular: (i) contact or seek to interview such persons as he thinks appropriate or as the court directs<sup>7</sup>; (ii) obtain such professional assistance as is available to him which he thinks appropriate or which the justices' clerk or the court directs him to obtain<sup>8</sup>.

The officer must also provide to the designated officer for the court, the justices' clerk and the court such other assistance as he or it may require<sup>9</sup>. A party may question the officer of the Service or the Welsh family proceedings officer about oral or written advice tendered by him to the designated officer for the court, the justices' clerk or the court<sup>10</sup>.

<sup>1</sup> ie the duty to prepare welfare reports under the Children Act 1989 s 7(1)(a) (as amended) (see para 311 ante) and the duty to safeguard the interests of the child under s 41(2) (as amended) (see para 311 ante).

<sup>2</sup> As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

<sup>3</sup> For the meaning of 'upbringing' see para 266 note 9 ante.

<sup>4</sup> For the meaning of 'child' see para 3 ante.

<sup>5</sup> See the Children Act 1989 s 1(2); the Family Proceedings Rules 1991, SI 1991/1247, r 4.11(1) (r 4.11 substituted by SI 2001/821; amended by SI 2005/559; SI 2007/2187); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11(1) (r 11 substituted by SI 2001/818; amended by SI 2005/585; SI 2007/2188). As to the principle of prejudicial delay see para 301 ante.

<sup>6</sup> See the Children Act 1989 s 1(3)(a)-(f); the Family Proceedings Rules 1991, SI 1991/1247, r 4.11(1) (as substituted and amended: see note 5 supra); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI

1991/1395, r 11(1) (as substituted and amended: see note 5 supra). As to the welfare checklist contained in the Children Act 1989 s 1(3) see para 303 ante.

7 Family Proceedings Rules 1991, SI 1991/1247, r 4.11(2)(a) (as substituted and amended: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11(2)(a) (as substituted and amended: see note 5 supra). An order restraining confidential information imparted to a guardian, from being disclosed to a child's mother, can be made where there is a high probability that such disclosure will harm the child: *Re C (disclosure of information)* [1996] 3 FCR 765, [1996] 1 FLR 797, distinguished in *Re K (adoption: disclosure of information)* [1998] 2 FCR 388, [1997] 2 FLR 74.

8 Family Proceedings Rules 1991, SI 1991/1247, r 4.11(2)(b) (as substituted and amended: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11(2)(b) (as substituted and amended: see note 5 supra). If there is a dispute on the exercise of the power, the guardian should apply to the court for directions: *R v Waltham Forest London Borough Council, ex p Gray* [1989] FCR 509, [1989] 2 FLR 138.

9 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.11(3) (as substituted and amended: see note 5 supra); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11(3) (as substituted and amended (see note 5 supra); further amended by SI 2005/617).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.11(4) (as substituted and amended: see note 5 supra); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11(4) (as substituted and amended (see note 5 supra); further amended by SI 2005/617).

As to cross-examination of an officer of the Service or a Welsh family proceedings officer see para 243 ante.

## **UPDATE**

### **314 General powers and duties**

NOTES 5, 6--SI 1991/1247 r 4.11(1) further amended: SI 2008/2861. SI 1991/1395 r 11(1) further amended: SI 2008/2858.

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### **315. Duties in relation to family assistance order reports and risk assessments.**

When an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> or a Welsh family proceedings officer<sup>2</sup> is preparing a family assistance order report<sup>3</sup> or a risk assessment<sup>4</sup> he must consider whether:

- 429 (1) to notify the child of such of the contents of the report or assessment as he considers appropriate to the age and understanding of the child<sup>5</sup>;
- 430 (2) to recommend in the report or assessment that the court lists a hearing for the purposes of considering the report or assessment<sup>6</sup>;
- 431 (3) it is in the best interests of the child for the child to be made a party to the proceedings<sup>7</sup>.

If the officer decides to notify the child of any of the contents of the report or assessment, he must explain those contents to the child in a manner appropriate to the child's age and understanding<sup>8</sup>. If the officer considers that the child should be made a party to the proceedings he must notify the court of his opinion together with the reasons for that opinion<sup>9</sup>. If the officer considers that the court should exercise its discretion<sup>10</sup> in relation to service of a risk assessment, he must state in the risk assessment both the way in which he considers the court should exercise its discretion (including his view on the length of any suggested delay in service) and his reasons for reaching his view<sup>11</sup>. The officer must file the report or assessment with the court: (a) at or by the time directed by the court; (b) in the absence of any such direction, at least 14 days before a relevant hearing<sup>12</sup>; or (c) where there has been no direction from the court and no relevant hearing is listed, as soon as possible following completion of the report or assessment<sup>13</sup>. When an officer prepares a family assistance order report, he must, as soon as practicable, serve copies of that report on each party and on any local authority that is preparing or has prepared a special guardianship report<sup>14</sup>.

At any hearing where a family assistance order report or a risk assessment is considered, any party may question the officer about the report or assessment<sup>15</sup>.

1 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante.

2 For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

3 As to family assistance order reports see para 267 ante. Where a family assistance order directs a local authority officer to prepare a family assistance order report, the Family Proceedings Rules 1991, SI 1991/1247, rr 4.5, 4.13, 4.14(1)(a)(i), (2), 4.15(2), 4.17(1) and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, rr 5(4)(a), (b), 13, 14(1)(a)(i), (2), 15(5), 17(1) apply to, or in respect of, the local authority officer preparing a family assistance order report as they would apply to, or in respect of, a welfare officer preparing a report in accordance with the Children Act 1989 s 7(1)(b) (see para 317 post): Family Proceedings Rules 1991, SI 1991/1247, r 4.13A (added by SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13A (added by SI 2007/2188).

4 As to risk assessments see para 269 ante.

5 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(1), (2)(a) (r 4.11AA added by SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(1), (2)(a) (r 11AA added by SI 2007/2188). For the meaning of 'child' see para 3 ante.

6 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(2)(b) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(2)(b) (as added: see note 5 supra).

7 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(2)(c) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(2)(c) (as added: see note 5 supra).

8 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(3) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(3) (as added: see note 5 supra).

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(4) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(4) (as added: see note 5 supra).

10 It is the court's discretion to delete portions of the assessment if necessary or to delay its service under the Family Proceedings Rules 1991, SI 1991/1247, r 4.17AA(2) (as added) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17AA (as added): see note 14 infra.

11 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(5) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(5) (as added: see note 5 supra).

12 A hearing is a relevant hearing if the proper officer or justices' clerk has given the officer of the service or the Welsh family proceedings officer notice that the report or assessment is to be considered at it: Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(7) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(7) (as added: see note 5 supra).

13 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(6) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(6) (as added: see note 5 supra).

14 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(8) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(8) (as added: see note 5 supra). Special guardianship reports are made under the Children Act 1989 s 14A(8), (9) (as added): see para 151 ante. Where an officer of the Service or a Welsh family proceedings officer has filed a risk assessment with the court, the proper officer or the justices' clerk must as soon as practicable serve copies of the risk assessment on each party and any local authority that is preparing or has prepared a special guardianship report, but before serving the risk assessment, the court must consider whether, in order to prevent a risk of harm to the child, it is necessary for: (1) information to be deleted from a copy of the risk assessment before that copy is served on a party; or (2) service of a copy of the risk assessment (whether with information deleted from it or not) on a party to be delayed for a specified period, and the court may direct accordingly: Family Proceedings Rules 1991, SI 1991/1247, r 4.17AA (added by SI 2007/2187); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 17AA (added by SI 2007/2188).

15 Family Proceedings Rules 1991, SI 1991/1247, r 4.11AA(9) (as added: see note 5 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11AA(9) (as added: see note 5 supra).

## UPDATE

### 315 Duties in relation to family assistance order reports and risk assessments

NOTES--SI 1991/1395 r 11AA(1) substituted, r 11AA(2)-(6), (8), (9) amended: SI 2008/2858. SI 1991/1395 r 11AA(1), (2), (8), (9) modified: SI 2008/2859.



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### **316. Right to have access to local authority records.**

Where an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or Welsh family proceedings officer has been appointed<sup>1</sup> he has the right at all reasonable times to examine and take copies of:

- 432 (1) any records of, or held by, a local authority or an authorised person<sup>2</sup> which were compiled in connection with the making, or proposed making, by any person of any application under the Children Act 1989 with respect to the child concerned<sup>3</sup>;
- 433 (2) any records of, or held by, a local authority which were compiled in connection with any functions which stand referred to its social services committee<sup>4</sup> so far as those records relate to that child<sup>5</sup>; or
- 434 (3) any records of, or held by, an authorised person which were compiled in connection with the activities of that person, so far as those records relate to that child<sup>6</sup>.

Where an officer of the Service or a Welsh family proceedings officer takes a copy of any record which he is entitled to examine<sup>7</sup> under these provision, that copy or any part of it is admissible as evidence of any matter referred to in any report which he makes to the court in the proceedings in question, or evidence which he gives in those proceedings<sup>8</sup>. Disclosure under the provisions described above<sup>9</sup> cannot be resisted on the ground of public interest immunity<sup>10</sup>.

Apart from the statutory requirements, it appears that a local authority is under a duty to disclose to the applicants before the hearing evidence which is to be used (or which is available)<sup>11</sup>.

1    le under the Children Act 1989 s 41 (as amended): see para 311 ante. As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

2    For the meaning of 'authorised person' see para 271 ante; definition applied by *ibid* s 42(4) (added by the Courts and Legal Services Act 1990 s 116, Sch 16 para 18(1), (4)).

3    Children Act 1989 s 42(1)(a) (s 42(1) amended by the Courts and Legal Services Act 1990 Sch 16 para 18, Sch 20; the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 92; and the Children Act 2004 s 40, Sch 3 paras 5, 10). For the meaning of 'child' see para 3 ante.

4    As to social services committees see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006.

5    Children Act 1989 s 42(1)(b) (as amended: see note 3 supra). A children's guardian is entitled to inspect a case record prepared by a local authority in relation to prospective adoptive parents: *Manchester City Council v T* [1994] Fam 181, [1994] 2 All ER 526, CA. See also *Re R (care proceedings: disclosure)* [2000] 3 FCR 721. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

6    Children Act 1989 s 42(1)(c) (as amended: see note 3 supra).

7    le under *ibid* s 42 (as amended).

8 Ibid s 42(2) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 92; and the Children Act 2004 Sch 3 paras 5, 10). This provision has effect regardless of any enactment or rule of law which would otherwise prevent the record in question being admissible in evidence: Children Act 1989 s 42(3).

9 le under ibid s 42 (as amended): see the text and notes 1-8 supra.

10 *Re J (a child) (care proceedings: disclosure)* [2003] EWHC 976 (Fam), [2003] 2 FLR 522, [2003] All ER (D) 299 (May).

11 *R v Hampshire County Council, ex p K* [1990] 2 QB 71, [1990] 2 All ER 129, DC. It has been held that a local authority which had a child in its care under a care order made under the Children and Young Persons Act 1969 was under a duty to disclose to the guardian any major proposed change in the circumstances of the child, and to listen to the guardian's views about any such proposal: *R v North Yorkshire County Council, ex p M* [1989] QB 411, [1989] 1 All ER 143 (local authority, whilst application for discharge of care order pending, decided to place child for adoption); *R v Hereford and Worcester County Council, ex p D* [1992] 1 FCR 497, [1992] 1 FLR 448 (local authority had duty to consult guardian before removing child from foster parents).

## UPDATE

### 316 Right to have access to local authority records

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **(iii) Welfare Reports, Welfare Officers and Children and Family Reporters**

#### **317. Welfare reports, welfare officer and children and family reporter.**

The power to request a welfare report is available to the court in considering any question with respect to a child under the Children Act 1989<sup>1</sup>. It is the duty of the local authority or an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or Welsh family proceedings officer<sup>2</sup> to comply with any request for such a report<sup>3</sup>.

The court has power to ask for a report on any matter relating to the welfare of the child<sup>4</sup>. It is not obliged, however, to require a welfare report in any case, and if a report is unduly delayed the court may proceed so far as it thinks it right and proper to do so without the benefit of a full report<sup>5</sup>. The report may be made in writing or orally as the court requires<sup>6</sup> and after the filing of a written report by a welfare officer<sup>7</sup>, the court or the justices' clerk may direct that the welfare officer attend any hearing at which the report is to be considered<sup>8</sup>. In the absence of special circumstances the court should not require a welfare report in addition to a report of a children's guardian<sup>9</sup>.

The primary function of the welfare report is to assist the court by providing it with the factual information on which to make a decision<sup>10</sup>, and a full welfare report will contain: (1) a statement of the conditions, material and otherwise, in which the children are living or in which it is proposed that they should live; (2) a reference to, or summary of, any relevant reports on the family and the children by independent persons such as doctors, school teachers, social workers, probation officers, and including police records; and (3) a statement of the relations of the children with each of their parents, including, when the children are old enough, a summary of their own views about their respective parents and their homes, and their own wishes as to the future<sup>11</sup>. It is not a function of an officer preparing a welfare report to undertake conciliation<sup>12</sup>.

The Lord Chancellor may, after consulting the Lord Chief Justice, make regulations specifying matters which, unless the court orders otherwise, must be dealt with in any report<sup>13</sup>.

Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of any statement contained in the report and any evidence given in respect of the matters referred to in the report, in so far as the statement or evidence is, in the court's opinion, relevant to the question which it is considering<sup>14</sup>. Welfare reports may, and almost inevitably do, contain hearsay evidence<sup>15</sup>, but where a judge has to arrive at crucial findings of fact he should found them upon sworn evidence rather than an unsworn report<sup>16</sup>. The parties may well wish to cross-examine the officer of the Service or the Welsh family proceedings officer or children and family reporter<sup>17</sup>, and the rules provide that any party may question them about the report at such a hearing<sup>18</sup>.

A welfare report will often contain a recommendation, but although the court should give any recommendation careful consideration, and state its reasons clearly if it decides not to follow that recommendation<sup>19</sup>, it is entirely within the court's discretion whether or not to accept the recommendation in a report<sup>20</sup>.

1 See the Children Act 1989 s 7(1) (as amended); and para 311 ante. The power would therefore be available for example when the court is considering making a parental responsibility order, on the application of an unmarried father (see para 139 ante), or where an application is made for the appointment of a guardian of a child (see para 144 et seq ante), or in any other family proceedings in which the court is considering the making of an order under the Children Act 1989. The court might thus seek a welfare report in proceedings which have been started under the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see para 199 et seq ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq. For the meaning of 'child' see para 3 ante.

2 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

3 Children Act 1989 s 7(5) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 88(b); and the Children Act 2004 s 40, Sch 3 paras 5, 6).

4 See the Children Act 1989 s 7(1) (as amended); and para 311 ante.

5 See *Re K (infants)* [1963] Ch 381, [1962] 3 All ER 1000, CA (revsd on other grounds sub nom *Official Solicitor to the Supreme Court v K* [1965] AC 201, [1963] 3 All ER 191, HL); *Re H (minors) (welfare reports)* [1990] FCR 866, [1990] 2 FLR 172, CA. See also *Re C (a minor) (custody of child)* (1980) 2 FLR 163, CA; and *Plant v Plant* (1982) 4 FLR 305, CA. 'The time of the busy Divorce Court Welfare Service will be better spent and the time of busy judges saved if the court specifies those matters on which the report is to be made'; but this 'should never prevent the officer from bringing to the notice of the court any other matters which he considers that the court should have in mind': *Practice Direction* [1981] 2 All ER 1056, [1981] 1 WLR 1162.

Appropriate directions may be given at any time under the provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 4.14 (as amended); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 14 (as amended): see para 280 ante. As to the court's powers to give directions as to the preparation of welfare reports under the Children Act 1989 s 7 (as amended) see the Family Proceedings Rules 1991, SI 1991/1247, r 4.14(2)(g); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 14(2)(g). A district judge exercising his functions under the Matrimonial Causes Act 1973 s 41 (as substituted) or Civil Partnership Act 2004 s 63 (see para 307 ante) may direct that a welfare report on a child be prepared: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.39 (amended by SI 2005/2992); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 884. Where there is an appeal it may be preferable that a welfare report is ordered by the Court of Appeal rather than by the county court judge, and it is wrong to order an up-to-date welfare report for use in the Court of Appeal automatically: *M v M* [1990] FCR 80, [1989] 2 FLR 354, 357, CA, per Croom-Johnson LJ. See also *Re W (welfare reports)* [1995] 3 FCR 793, [1995] 2 FLR 142, CA (where the court welfare officer was ordered to prepare a welfare report even though one had already been prepared by a local authority social worker, and even though additional report might lead to delay in proceedings).

6 Children Act 1989 s 7(3). Where the court or justices' clerk has directed that a written report be made by children and family reporter or an officer of the local authority in accordance with s 7(1)(b) (see para 311 ante), the report must be filed at or by such time as the court or justices' clerk directs, or (in the absence of such a direction) at least 14 days before a relevant hearing, and the proper officer or the designated officer for the court must, as soon as practicable, serve a copy of the report on the parties and any local authority that is preparing, or has prepared, a report under s 14A(8) or s 14A(9) (as added) (see para 151 ante) and any children's guardian: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.13(1) (r 4.13 substituted by SI 1992/2067; and amended by SI 2001/821; 2005/2922); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(1) (r 13 substituted by SI 1992/2068; amended by SI 2001/818; SI 2005/617; SI 2005/2930). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post. A hearing is relevant if the proper officer or designated officer for the court has given the welfare officer notice that his report is to be considered at it: Family Proceedings Rules 1991, SI 1991/1247, r 4.13(2) (substituted by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(2) (substituted by SI 2001/818; amended by SI 2005/617).

7 In accordance with the Children Act 1989 s 7(1)(b) (as amended): see para 311 ante. 'Welfare officer' is the name given to an officer of the authority under the Family Proceedings Rules 1991, SI 1991/1247, r 4.13 (as substituted and amended).

8 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.13(3) (substituted by SI 1992/3027); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(3) (substituted by SI 1992/2068; and amended by SI 2001/615). Except where such a direction is given at a hearing attended by the welfare officer, the proper officer or designated officer of the court must inform the children and family reporter or the officer of the local authority of such a direction, and at the hearing at which the report is considered any party may question the children and family reporter or the officer of the local authority on the report: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.13(3)(a) (as so substituted); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(3)(a) (as so substituted; and amended by SI 2005/617). If any party

considers it desirable that the children and family reporter or officer of the local authority should attend the hearing, the proper course is to ask the district judge so to direct, or if time does not permit, to inform the officer of the local authority or children and family reporter that it is proposed at the hearing to ask for a direction that he attend: *Practice Direction* [1981] 2 All ER 1056, [1981] 1 WLR 1162. Children and family reporters were formerly known as welfare officers: see para 230 ante.

9 *Re S (a minor) (care proceedings: reports)* [1992] 2 FCR 554, sub nom *Re S (a minor) (guardian ad litem/welfare officer)* [1993] 1 FLR 110, CA. The welfare officer must consider whether it is in the best interests of the child for the child to be made party to the proceedings: Family Proceedings Rules 1991, SI 1991/1247, r 4.13(3A) (added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(3A) (added by SI 2001/818). If the welfare officer considers the child should be made a party to the proceedings he must notify the court of his opinion together with the reasons for that decision: Family Proceedings Rules 1991, SI 1991/1247, r 4.13(3B) (added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(3B) (added by SI 2001/818).

10 *Scott v Scott* (1986) 150 JP 333, [1986] 2 FLR 320, CA.

11 *T v T* (30 March 1982) Lexis, CA.

12 *Re H (conciliation: welfare reports)* [1986] 1 FLR 476, [1986] Fam Law 193.

13 Children Act 1989 s 7(2) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 204(1), (2)). At the date at which this volume states the law, no such regulations had been made. The Lord Chief Justice may nominate a judicial office holder to exercise this function: see the Children Act 1989 s 7(6) (added by the Constitutional Reform Act 2005 Sch 4 para 204(3)).

14 Children Act 1989 s 7(4).

15 See the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, which, in effect, disappplies the hearsay rule to civil proceedings when evidence relating to the upbringing, maintenance or welfare of a child is being heard. As to the weight to be attached to such evidence see *R v B County Council, ex p P* [1991] 2 All ER 65 at 72, [1991] 1 WLR 221 at 230, CA, per Butler-Sloss LJ. See also *Re C (minors) (hearsay evidence: contempt proceedings)* [1993] 4 All ER 690, sub nom *Re C (minors) (contempt proceedings)* [1993] 1 FCR 820, CA. As to hearsay evidence see CIVIL PROCEDURE vol 11 (2009) PARA 806 et seq.

16 See *Thompson v Thompson* (1975) [1986] 1 FLR 212n, CA.

17 For the meaning of 'children and family reporter' see para 230 note 13 ante.

18 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.13(3)(b) (as substituted: see note 6 supra); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 13(3)(b) (as substituted: see note 6 supra). As to the attendance of the officer of the local authority or children and family reporter see note 6 supra. If the officer of the local authority or children and family reporter goes into the witness-box the parties are entitled to ask him questions, but as an officer of the court, the officer of the local authority or children and family reporter does not give evidence on oath: *I v H (contact hearing: procedure)* [1998] 2 FCR 433, sub nom *Re I and H (contact: right to give evidence)* [1998] 1 FLR 876, CA.

The court may limit the issues on which an officer of the Service or Welsh family proceedings officer may be cross-examined: Family Proceedings Rules 1991, SI 1991/1247, r 10.14A (added by SI 2001/821; amended by SI 2005/559); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 22A (added by SI 2001/818; amended by SI 2005/585).

Recommendations in a report should normally be explored in cross-examination: *W v W (custody of child)* [1988] FCR 640, [1988] 2 FLR 505, CA. A whole day of cross-examination of the welfare officer would usually be considered excessive and unhelpful: *Re B (a minor) (residence order)* [1998] 1 FCR 549, sub nom *Re B (residence order: status quo)* [1998] 1 FLR 368, CA.

19 *S v Oxfordshire County Council* [1993] 2 FCR 676, [1993] 1 FLR 452. This principle applies equally to court welfare reports as to recommendations of children's guardians: *S v Oxfordshire County Council* supra. The court is entitled to weigh up the relevant considerations without the officer's attendance and can depart from his recommendations even if he does not attend to give oral evidence: *Re C (a minor) (application for residence order)* [1995] 2 FCR 276, sub nom *Re C (section 8 order: court welfare officer)* [1995] 1 FLR 617, CA. A judge should give reasons for rejecting the recommendations of the officer of the local authority or children and family reporter: *Re A (a minor) (residence order)* [1998] 2 FCR 633, sub nom *Re A (children: 1959 UN Declaration)* [1998] 1 FLR 354, CA.

20 *Clark v Clark* (1970) 114 Sol Jo 318; *Hutchinson v Hutchinson* (1980) 2 FLR 167, DC; *Dickinson v Dickinson* (1982) 13 Fam Law 174, CA; *Plant v Plant* (1982) 4 FLR 305, CA; *Leete v Leete and Stevens* [1984] Fam Law 21, CA; *Stephenson v Stephenson* [1985] FLR 1140, CA; *W v W (custody of child)* [1988] FCR 640,

[1988] 2 FLR 505, CA; *Re P (a minor)* [1989] FCR 689, [1989] 2 FLR 43, CA; *P v P (custody of children: split custody order)* [1991] FCR 97, [1991] 1 FLR 337, CA; *M v C (children's orders: reasons)* [1993] 1 FCR 264. See also *Devon County Council v Clancy* (1985) 149 JP 521, [1985] FLR 1159, CA; *Re V (residence order)* [1996] 3 FCR 101, sub nom *Re V (residence: review)* [1995] 2 FLR 1010, CA; *Re E (children) (residence order)* [2001] EWCA Civ 567, [2001] 2 FCR 662.

## **UPDATE**

### **317 Welfare reports, welfare officer and children and family reporter**

NOTE 5--SI 1991/1247 r 2.39 further amended: SI 2008/2836. SI 1991/1247 r 4.14 further amended: SI 2008/2861.

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### **318. Specific powers and duties of the children and family reporter.**

The children and family reporter<sup>1</sup> is under a duty<sup>2</sup> to: (1) notify the child of such contents of his report (if any) as he considers appropriate to the age and understanding of the child, including any reference to the child's own views on the application and the recommendation of the children and family reporter<sup>3</sup>; and (2) if he does notify the child of any contents of his report, explain them to the child in a manner appropriate to his age and understanding<sup>4</sup>.

Where the court has directed that a written report be made by a children and family reporter and notified the children and family reporter that his report is to be considered at the hearing, the children and family reporter must file his report and serve a copy on the other parties, and on any local authority that is preparing, or has prepared, a special guardianship report<sup>5</sup> and on the children's guardian<sup>6</sup> (if any) by such time as the court may direct and if no direction is given, not less than 14 days before that hearing<sup>7</sup>.

The court may direct that the children and family reporter attend any hearing at which his report is to be considered<sup>8</sup>. The children and family reporter must advise the court if he considers that the joinder of a person as a party to the proceedings would be likely to safeguard the interests of the child<sup>9</sup>. The children and family reporter must consider whether it is in the best interests of the child for the child to be made a party to the proceedings<sup>10</sup>, and if he considers the child should be made a party to the proceedings he must notify the court of his opinion together with the reasons for that opinion<sup>11</sup>.

1 For the meaning of 'children and family reporter' see para 230 note 13 ante.

2 This is in addition to the duties he or she has as an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or as a Welsh family proceedings officer under the Family Proceedings Rules 1991, SI 1991/1247, r 4.11 (as substituted and amended) (see para 314 ante) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11 (as substituted and amended) (see para 314 ante). As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

3 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(1)(a) (r 4.11B added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(1)(a) (r 11B added by SI 2001/818).

4 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(1)(b) (as added: see note 3 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(1)(b) (as added: see note 3 supra).

5 I.e. a report under the Children Act 1989 s 14A(8) (as added) or s 14A(9) (as added): see para 151 ante.

6 As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 post.

7 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(2) (as added (see note 3 supra); amended by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(2) (as added (see note 3 supra); amended by SI 2005/2930).

8 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(3) (as added: see note 3 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(3) (as added: see note 3 supra).

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(4) (as added: see note 3 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(4) (as added: see note 3 supra).

10 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(5) (as added: see note 3 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(5) (as added: see note 3 supra).

11 Family Proceedings Rules 1991, SI 1991/1247, r 4.11B(6) (as added: see note 3 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11B(6) (as added: see note 3 supra).



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#### **(iv) Children's Guardians**

##### **319. Appointment of children's guardians.**

As soon as practicable after the commencement of specified proceedings<sup>1</sup>, or the transfer of such proceedings to the court, the justices' clerk or the court must appoint a children's guardian<sup>2</sup>, unless such an appointment has already been made by the court which made the transfer and is subsisting, or the court considers that such an appointment is not necessary to safeguard the interests of the child<sup>3</sup>. At any stage in the proceedings a party may apply, without notice to the other parties unless the justices' clerk or the court directs otherwise, for the appointment of a children's guardian<sup>4</sup>. The justices' clerk or the court must grant such an application unless he or it considers such an appointment not to be necessary to safeguard the interests of the child, in which case reasons must be given, and a note of such reasons must be taken by the justices' clerk or proper officer<sup>5</sup>.

At any stage in the proceedings the court may, of its own motion, appoint a children's guardian<sup>6</sup>. The court or the designated officer for the court may, in specified proceedings, appoint more than one children's guardian in respect of the same child<sup>7</sup>. The proper officer or the designated officer for the court must, as soon as practicable, notify the parties and any welfare officer or children and family reporter of an appointment<sup>8</sup> or, as the case may be, of a decision not to make such an appointment<sup>9</sup>. Upon the appointment of a children's guardian the proper officer or the designated officer for the court must, as soon as practicable, notify him of the appointment and serve on him copies of the application and of documents filed<sup>10</sup>.

A children's guardian appointed by the court or the designated officer for the court must not: (1) be a member, officer or servant of the local authority which, or an authorised person<sup>11</sup> who, is a party to the proceedings<sup>12</sup>; (2) be, or have been, a member, officer or servant of a local authority or voluntary organisation<sup>13</sup> who has been directly concerned in that capacity in arrangements relating to the care, accommodation or welfare of the child during the five years prior to the commencement of proceedings<sup>14</sup>; or (3) be a serving probation officer who has, in that capacity, been previously concerned with the child or his family<sup>15</sup>. When appointing a children's guardian the court must consider the appointment of anyone who has previously acted as children's guardian of the same child<sup>16</sup>.

The appointment of a children's guardian must continue for such time as is specified in the appointment or until terminated by the court<sup>17</sup>. When terminating an appointment, the court must give its reasons in writing for so doing<sup>18</sup>. Where the justices' clerk or the court appoints a children's guardian or refuses to make such an appointment, the court or the proper officer must record the appointment or refusal in the appropriate form<sup>19</sup>.

<sup>1</sup> ie the specified proceedings set out in para 311 note 3 ante.

<sup>2</sup> For the meaning of 'children's guardian' see para 230 note 9 ante. Children's guardians were formerly known as guardians ad litem: see para 230 ante. Transitional provisions provide that where a person (being either the Official Solicitor or some other person), had been appointed as guardian ad litem before 1 April 2001 and the proceedings in which he was appointed are still continuing, that person is to be treated as if he had been appointed as a children's guardian: see the Family Proceedings (Amendment) Rules 2001, SI 2001/821, r 3(1), (2); and para 230 ante.

3 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(1) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(1) (amended by SI 2001/818).

4 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(2) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(2) (amended by SI 2001/818).

5 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(3); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(3).

6 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(4) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(4) (amended by SI 2001/818).

7 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(4A) (added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(4A) (added by SI 2001/818; amended by SI 2005/617).

8 le under the Family Proceedings Rules 1991, SI 1991/1247, r 4.10 (as amended) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10 (as amended). For the meaning of 'children and family reporter' see para 230 note 13 ante.

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(5) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(5) (amended by SI 2001/818; SI 2005/617).

10 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(6) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(6) (amended by SI 2001/818; SI 2005/617).

11 le within the meaning of the Children Act 1989 s 31(9): see para 274 ante.

12 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

13 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(7)(a) (substituted by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(7)(a) (substituted by SI 2001/818; amended by SI 2005/617). The fact that a person has been previously involved in the case will not necessarily preclude the court from appointing that person as children's guardian: *Re J (a minor) (adoption: appointment of guardian ad litem)* [1999] 3 FCR 456, [1999] 2 FLR 86, CA. The appointment of a court welfare officer or children and family reporter may also be considered irregular and ineffective: *Devon County Council v S and L* [1993] 2 FCR 36, [1993] 1 FLR 842. Children and family reporters were formerly known as welfare officers: see para 230 ante.

14 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(7)(b) (substituted by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(7)(b) (substituted by SI 2001/818).

15 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(7)(c) (substituted by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(7)(c) (substituted by SI 2001/818).

16 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(8) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(8) (amended by SI 2001/818).

17 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(9) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(9) (amended by SI 2001/818).

18 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(10) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(10) (amended by SI 2001/818).

19 Family Proceedings Rules 1991, SI 1991/1247, r 4.10(11) (amended by SI 1994/3155; SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 10(11) (amended by SI 2001/818). For the appropriate form see the Family Proceedings Rules 1991, SI 1991/1247, r 1.2(4), Appendix 1 (as amended); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3, Sch 1 (as amended).

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### **320. Specific powers and duties of children's guardians.**

The children's guardian<sup>1</sup> must (1) appoint a solicitor to represent the child unless such a solicitor has already been appointed<sup>2</sup>; and (2) give such advice to the child as is appropriate having regard to his understanding and, subject to the child instructing the solicitor direct, instruct the solicitors representing the child on all matters relevant to the interests of the child including possibilities for appeal, arising in the course of proceedings<sup>3</sup>. Where it appears to the children's guardian that the child is instructing his solicitor direct or intends to conduct and is capable of conducting the proceedings on his own behalf, he must inform the court<sup>4</sup>. From then on the children's guardian: (a) must perform all of his duties<sup>5</sup>, other than those duties under head (1) above, and such other duties as the justices' clerk or the court may direct<sup>6</sup>; (b) must take such part in the proceedings as the justices clerk or the court may direct<sup>7</sup>; and (c) may, with the leave of the justices' clerk or the court, have legal representation in the conduct of those duties<sup>8</sup>.

Unless excused by the justices' clerk or the court, the children's guardian must attend all directions appointments in and hearings of the proceedings and must advise the court<sup>9</sup> on the following matters: (i) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order<sup>10</sup>; (ii) the wishes of the child in respect of any matter relevant to the proceedings including his attendance at court<sup>11</sup>; (iii) the appropriate forum for the proceedings<sup>12</sup>; (iv) the appropriate timing of the proceedings or any part of them<sup>13</sup>; (v) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application<sup>14</sup>; and (vi) any other matter concerning which the designated officer for the court, the justices clerk or the court seeks his advice or concerning which he considers that the designated officer for the court, the justices' clerk or the court should be informed<sup>15</sup>.

The advice given under heads (i) to (vi) above may, subject to any order of the court, be given orally or in writing, and if the advice be given orally, a note of it must be taken by the justices' clerk or the proper officer or the court<sup>16</sup>. The children's guardian must, where practicable, notify any person whose joinder as a party to those proceedings would be likely<sup>17</sup> to safeguard the interests of the child of that person's right to apply to be joined<sup>18</sup> and must inform the designated officer for the court or the court of any such notification given, of anyone whom he attempted to so notify but was unable to contact, and of anyone whom he believes may wish to be joined to the proceedings<sup>19</sup>.

The children's guardian must, unless the justices' clerk or the court otherwise directs, not less than 14 days before the date fixed for the final hearing of the proceedings, file a written report advising on the interests of the child and serve a copy of the filed report on the other parties and any local authority that is preparing or has prepared a special guardianship report<sup>20</sup>. The children's guardian must serve and accept service of documents on behalf of the child<sup>21</sup> and, where the child has not himself been served, and has sufficient understanding, advise the child of the contents of any document so served<sup>22</sup>.

If the children's guardian inspects records<sup>23</sup> he must bring to the attention of the court, and unless the court or the justices' clerk otherwise directs, the other parties to the proceedings, all records and documents which may, in his opinion, assist in the proper determination of the proceedings<sup>24</sup>.

The children's guardian must ensure that, in relation to a decision made by the justices' clerk or the court in the proceedings, if he considers it appropriate to the age and understanding of the child, the child is notified of that decision, and if the child is notified of the decision, it is explained in a manner appropriate to his age and understanding<sup>25</sup>.

If a care order<sup>26</sup> is made, however, the children's guardian has no role to play in the performance by the local authority of its duties, and the court has no power to direct his continued involvement<sup>27</sup>. If a children's guardian wishes to challenge a local authority's care plan the appropriate method is not by way of judicial review, but within the existing care proceedings<sup>28</sup>.

1 For the meaning of 'children's guardian' see para 230 note 9 ante.

2 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(1)(a) (r 4.11A added by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(1)(a) (r 11A added by SI 2001/818). In respect of proceedings in the High Court and county court, where the children's guardian is an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') authorised by CAFCASS in the terms mentioned by and in accordance with the Criminal Justice and Court Services Act 2000 s 15(1) (see para 243 ante), or where the children's guardian is a Welsh family proceedings officer authorised by the Welsh Ministers in the terms mentioned by and in accordance with the Children Act 2004 s 37(1), the Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(1)(a) (as added) does not require him to appoint a solicitor for the child if he intends to have conduct of the proceedings on behalf of the child unless the child wishes to instruct a solicitor direct, and the children's guardian or the court considers that he is of sufficient understanding to do so: r 4.11A(2A) (added by SI 2005/559). As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante. For the meaning of 'officer of the Service' see para 230 ante.

3 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(1)(b) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(1)(b) (as added: see note 2 supra). As to the appointment of a solicitor under the Family Proceedings Rules 1991, SI 1991/1247, r 4.12(1)(a) (as amended) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(1)(a) (as amended) see para 321 post.

4 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(3) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2) (as added: see note 2 supra). In the family proceedings court the court is to be informed through the designated officer for the court: see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2) (as so added; amended by SI 2005/617).

5 le as set out in the Family Proceedings Rules 1991, SI 1991/1247, r 4.11 (as substituted) (see para 314 ante), r 4.11A (as added and amended); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11 (as substituted and amended) (see para 314 ante), r 11A (as added and amended).

6 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(3)(i) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2)(i) (as added: see note 2 supra).

7 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(3)(ii) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2)(ii) (as added: see note 2 supra).

8 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(3)(iii) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2)(iii) (as added: see note 2 supra).

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3) (as added: see note 2 supra).

10 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(a) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(a) (as added: see note 2 supra).

11 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(b) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(b) (as added: see note 2 supra).

12 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(c) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(c) (as added: see note 2 supra).

13 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(d) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(d) (as added: see note 2 supra).

14 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(e) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(e) (as added: see note 2 supra).

15 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(4)(f) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(3)(f) (as added: see note 2 supra).

16 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(5) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(4) (as added: see note 2 supra).

17 Ie likely in the opinion of the children's guardian (see the Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(6) (as added)) or in the opinion of the officer of the Service or the Welsh family proceedings officer (see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(5) (as added (see note 2 supra); amended by SI 2005/585).

18 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 4.7(2); or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 7(2).

19 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(6) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(5) (as added (see note 2 supra); amended by SI 2005/617).

20 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(7) (as added (see note 2 supra); amended by SI 2005/2922); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(6) (as added (see note 2 supra); amended by SI 2005/2930). As to special guardianship reports see the Children Act 1989 s 14A(8), (9) (as added); and para 151 ante. As to preserving the confidentiality of a report by a children's guardian see *Re C (minors) (guardian ad litem: disclosure of report)* [1995] 2 FCR 837, [1996] 1 FLR 61. Children's guardians were formerly known as guardians ad litem: see para 230 ante.

21 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.8(3)(b), (4)(b); or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 8(3)(b), (4)(b).

22 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(8) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(7) (as added: see note 2 supra).

23 Ie of the kinds referred to in the Children Act 1989 s 42 (as amended): see para 316 ante.

24 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(9) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(8) (as added: see note 2 supra). In the family proceedings court the children's guardian must bring such matters to the attention of the court through the designated officer for the court: see r 11A(8) (as so added; amended by SI 2005/617).

25 Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(10) (as added: see note 2 supra); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(9) (as added: see note 2 supra).

26 For the meaning of 'care order' see para 271 note 4 ante.

27 *Kent County Council v C* [1993] Fam 57, [1993] 1 All ER 719; and see *Re M (prohibited steps order: application for leave)* [1993] 1 FCR 78, [1993] 1 FLR 275 (guardian appointed in emergency protection proceedings had no locus standi to apply as such for prohibited steps order). However, the children's guardian may have a role under the Children Act 1989 s 26(2A) (as added and amended) in circumstances where the independent reviewing officer makes a referral to CAFCASS: see para 936 post.

28 See *Re C (care proceedings: care plan)* [2002] Fam Law 497, sub nom *Re C (adoption: religious observance)* [2002] 1 FLR 1119. As to care plans see para 275 ante.

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### **321. Solicitor for the child.**

In any specified proceedings<sup>1</sup>, where the child concerned is not represented by a solicitor and any of the following conditions is satisfied, the court may appoint a solicitor to represent him<sup>2</sup>. The conditions are that: (1) no officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or Welsh family proceedings officer<sup>3</sup> has been appointed for the child<sup>4</sup>; (2) the child has sufficient understanding to instruct a solicitor and wishes to do so<sup>5</sup>; (3) it appears to the court that it would be in the child's best interests for him to be represented by a solicitor<sup>6</sup>.

An appointed solicitor<sup>7</sup> must represent the child: (a) in accordance with instructions received from the children's guardian (unless the solicitor considers, having taken into account the views of the children's guardian and any direction of the court<sup>8</sup>, that the child wishes to give instructions which conflict with those of the children's guardian and that he is able, having regard to his understanding, to give such instructions on his own behalf in which case he must conduct the proceedings in accordance with instructions received from the child<sup>9</sup>); or (b) where no children's guardian has been appointed for the child and the child has sufficient understanding to instruct a solicitor and wishes to do so<sup>10</sup>, in accordance with instructions received from the child<sup>11</sup>; or (c) in default of instructions under heads (a) or (b) above, in furtherance of the best interests of the child<sup>12</sup>.

An appointed solicitor<sup>13</sup> must serve and accept service of documents on behalf of the child<sup>14</sup> and, where the child has not himself been served and has sufficient understanding, advise the child of the contents of any document so served<sup>15</sup>. Where the child wishes an appointment of a solicitor<sup>16</sup> to be terminated, he may apply to the court for an order terminating the appointment, and the solicitor and the children's guardian must be given an opportunity to make representations<sup>17</sup>.

Where the children's guardian wishes an appointment of a solicitor<sup>18</sup> to be terminated, he may apply to the court for an order terminating the appointment; and the solicitor and, if he is of sufficient understanding, the child, must be given an opportunity to make representations<sup>19</sup>. When terminating an appointment the court must give reasons for so doing, a note of which must be taken by the proper officer or the justices' clerk<sup>20</sup>. In the High Court or county court, where the court appoints a solicitor<sup>21</sup> or refuses to make such an appointment, the court or the proper officer must record the appointment or refusal in the appropriate form<sup>22</sup>. In the family proceedings court, where the justices' clerk or the court appoints a solicitor<sup>23</sup> or refuses to make such an appointment, the justices' clerk must record the appointment or refusal in the appropriate form<sup>24</sup> and the designated officer for the court must serve a copy on the parties and, where he is appointed, on the solicitor<sup>25</sup>.

1 As to the specified proceedings see para 311 note 3 ante.

2 Children Act 1989 s 41(3). Any solicitor appointed under or by virtue of s 41 (as amended) (see the text and notes 2-6 infra; and para 311 ante) must be appointed, and represent the child, in accordance with rules of court: s 41(5). As to rules of court in family proceedings see paras 206-207 ante.

3 As to CAFCASS see para 230 et seq ante. As to the exercise of CAFCASS functions in Wales see para 230 ante. For the meaning of 'officer of the Service' see para 230 ante. For the meaning of 'Welsh family proceedings officer' see para 230 note 9 ante.

4 Children Act 1989 s 41(4)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 91(b); and the Children Act 2004 s 40, Sch 3 paras 5, 9(3)).

5 Children Act 1989 s 41(4)(b).

6 Ibid s 41(4)(c).

7 Ie a solicitor appointed under ibid s 41(3) (see the text and notes 1-2 supra) or in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(1) (as added) or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(1)(a) (as added) (see para 320 ante). See generally *Re H (a minor) (care proceedings: child's wishes)* [1992] 2 FCR 330, [1993] 1 FLR 440. As to the degree of understanding required see *Re T (a minor) (wardship: representation)* (1993) Times, 10 May, CA; *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, [2005] 2 FCR 354 (consideration of 'sufficient understanding').

8 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 4.11A(3) (as added); or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 11A(2) (as added): see para 320 ante.

9 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(1)(a) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(1)(a) (amended by SI 2001/818). As to the factors to be considered where there is a conflict between the views of the child and the children's guardian see *Re M (minors) (care proceedings: conflict of children's wishes: instruction of expert witnesses)* [1994] 1 FCR 866, sub nom *Re M (minors) (care proceedings: child's wishes)* [1994] 1 FLR 749. Children's guardians were formerly known as guardians ad litem: see para 230 ante.

10 Ie the condition in the Children Act 1989 s 41(4)(b) is satisfied: see the text and note 5 supra.

11 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(1)(b) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(1)(b) (amended by SI 2001/818).

12 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(1)(c); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(1)(c).

13 See note 7 supra.

14 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 4.8(3)(a), (4)(a); or the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 8(3), (4)(a).

15 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(2) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(2) (amended by SI 2001/818).

16 See note 7 supra.

17 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(3) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(3) (amended by SI 2001/818).

18 Ie under the Children Act 1989 s 41(3): see the text and notes 1-2 supra.

19 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(4) (amended by SI 2001/821); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(4) (amended by SI 2001/818).

20 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(5); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(5).

21 Ie under the Children Act 1989 s 41(3): see the text and notes 1-2 supra.

22 Family Proceedings Rules 1991, SI 1991/1247, r 4.12(6) (amended by SI 1994/3155). For the appropriate form see the Family Proceedings Rules 1991, SI 1991/1247, Sch 1 Appendix (as amended).

23 Ie under the Children Act 1989 s 41(3): see the text and notes 1-2 supra.

24 For the appropriate form see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 3, Sch 1 (as amended).

25 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 12(6) (amended by SI 2005/617).

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## **(v) The Official Solicitor**

### **322. The continuing role of the Official Solicitor in proceedings relating to the upbringing of children.**

The Children and Family Court Advisory and Support Service ('CAFCASS')<sup>1</sup> established CAFCASS Legal Services and Special Casework (CAFCASS Legal) principally to take over the Official Solicitor's responsibilities of representing children who are the subject of family proceedings<sup>2</sup>. Since 1 April 2001 the Official Solicitor has ceased to represent children who are the subject of family proceedings (other than in very exceptional circumstances and after liaison with CAFCASS)<sup>3</sup>. However, in cases of doubt or difficulty, staff of the Official Solicitor's office liaise with staff of CAFCASS Legal to avoid duplication and ensure the most suitable arrangements are made<sup>4</sup>.

1 As to CAFCASS see para 230 et seq ante.

2 See *CAFCASS Practice Note (2 April 2001)* [2001] 2 FLR 155 para 2; and para 232 ante. See also *CAFCASS and the National Assembly for Wales Practice Note (Appointment of Guardians in Private Law Proceedings) (June 2006)* [2006] 2 FLR 143. As to CAFCASS Legal see para 231 note 16 ante.

3 See *The Official Solicitor: Appointment in Family Proceedings Practice Note (2 April 2001)* [2001] 2 FLR 155 para 2; and para 232 ante.

4 See *The Official Solicitor: Appointment in Family Proceedings Practice Note (2 April 2001)* [2001] 2 FLR 155 para 9; and para 232 ante. As to the Official Solicitor's continuing responsibility for the Lord Chancellor's International Child Abduction and Contact Unit (ICACU) see para 803 post.

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## **5. ADOPTION**

### **(1) INTRODUCTION**

#### **323. Effect of adoption.**

An adoption order<sup>1</sup> achieves a complete and permanent legal transference of parental responsibility from one parent or set of parents to another; no other family law order has such profound consequences<sup>2</sup>. Under an adoption order, a child<sup>3</sup> becomes in law a full member of another family<sup>4</sup>, and an adopted person is treated in law as if born as the child of the adopters or adopter<sup>5</sup>. An adopted person is the legitimate child of the adopters or adopter and, if adopted by a couple or one of a couple<sup>6</sup>, is treated as the child of the relationship of the couple in question<sup>7</sup>. An adoption order may be set aside only on the grounds of procedural irregularity<sup>8</sup>.



1 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

2 See *Re B (adoption order: jurisdiction to set aside)* [1995] 3 All ER 333 at 337, [1995] 3 FCR 671 at 674-675, CA, per Swinton Thomas LJ, and at 343 and 681 per Sir Thomas Bingham MR.

3 As to the meaning of 'child' for the purposes of the legislation relating to adoption see para 327 note 2 post.

4 See *Re B (adoption order: jurisdiction to set aside)* [1995] 3 All ER 333 at 337, [1995] 3 FCR 671 at 674-675, CA, per Swinton Thomas LJ.

5 See the Adoption and Children Act 2002 s 67(1); and para 377 post. As to the meaning of 'adopted person' see para 377 note 1 post.

6 See under *ibid* s 51(2) (see para 363 post). As to the meaning of 'couple' for the purposes of the legislation relating to adoption see para 355 note 2 post.

7 *Ibid* s 67(2). See further para 377 post; and as to the nature of an adoption order see also *Re J (adoption: revocation of freezing order)* [2000] 2 FCR 133, [2000] 2 FLR 58. For a description of the psychological benefits of adoption see *Re H (a minor) (adoption: non-patril)* [1996] 2 FCR 597, [1996] 1 FLR 717; *Re I (adoption order: nationality)* [1999] 1 FCR 759, [1998] 2 FLR 997; *Re J (a minor) (adoption: non patril)* [1998] 1 FCR 125, [1998] 1 FLR 225, CA.

8 See *Re B (adoption order: jurisdiction to set aside)* [1995] 3 All ER 333, [1995] 3 FCR 671, CA.

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### 324. Common law and equity.

Adoption law remains a creature of statute; there is no procedure for adoption under the common law<sup>1</sup>. However, the common law does give recognition to some foreign adoptions<sup>2</sup>, which do not qualify for automatic recognition as overseas adoptions by statute<sup>3</sup>.

At common law the rights, liabilities and duties of parents are inalienable<sup>4</sup>, and adoption, in the sense of the transfer of parental rights and duties in respect of a child to another person and their assumption by him, is unknown<sup>5</sup>. The Children Act 1989 provides that a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf<sup>6</sup>. The making of any such arrangement does not affect the fact that the person who has parental responsibility may remain liable for any failure in meeting the obligations of the parental responsibility towards the child<sup>7</sup>.

In English law the making of an adoption order effects the transfer of a child into a different family group and by that order extinguishes the parental responsibility previously held by the child's former parent or parents who are not members of the child's new family group<sup>8</sup>.

The regard which is had in English courts to foreign adoptions is discussed elsewhere in this work<sup>9</sup>.

1 *R v Secretary of State for the Home Department, ex p Brassey* [1989] 2 FLR 486, [1989] Imm AR 258.

2 *Re Valentine's Settlement* [1965] Ch 831, [1965] 2 All ER 226, CA; *Re G (adoption: parental agreement)* [1996] 1 FCR 495, sub nom *Re G (foreign adoption: consent)* [1995] 2 FLR 534, [1995] Fam Law 664.

3 See *Re Valentine's Settlement* [1965] Ch 831, [1965] 2 All ER 226, CA; *Re G (adoption: parental agreement)* [1996] 1 FCR 495, sub nom *Re G (foreign adoption: consent)* [1995] 2 FLR 534, [1995] Fam Law 664.

4 *Poole v Stokes* (1914) 110 LT 1020; *Fleming v Roburite Co Ltd, Re Fleming's Application* (1917) 10 BWCC 176, CA; *Boylan v Hunter* 1922 SC 80, Ct of Sess; *Brooks v Blount* [1923] 1 KB 257, DC.

5 *Humphreys v Polak* [1901] 2 KB 385 at 390, CA. In equity, however, it was possible for a relative or stranger to put himself in loco parentis towards a child by undertaking the office and duty of a father to make provision for the child, so as to assume a fiduciary position in respect of his relation with the child: see *Powys v Mansfield* (1837) 3 My & Cr 359 at 366.

6 See the Children Act 1989 s 2(9); and para 143 ante. As to the meaning of 'parental responsibility' see s 3; and para 134 ante. The person with whom any such arrangement is made may also be a person who already has parental responsibility for the child concerned: s 2(10).

7 As to parental responsibility generally see para 133 et seq ante.

8 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

9 See CONFLICT OF LAWS vol 8(3) (Reissue) paras 343-348. As to succession to property see *Re Marshall, Barclay's Bank Ltd v Marshall* [1957] Ch 263, [1957] 1 All ER 549 (on appeal [1957] Ch 507, [1957] 3 All ER 172, CA); *Re Jones's Will Trusts, Jones v Hawtin-Squire* [1965] Ch 1124, [1965] 2 All ER 828; *Re Jebb, Ward-Smith v Jebb* [1966] Ch 666, [1965] 3 All ER 358, CA.

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### **325. Adoption legislation.**

The Adoption of Children Act 1926 introduced adoption as a legal institution into English law. Over the years, many changes in the law were made, and the legislation was consolidated in the Adoption Act 1976, which until the enactment and commencement of the Adoption and Children Act 2002 remained the principal statute<sup>1</sup>. During the currency of the Adoption Act 1976, the Children Act 1989 was enacted, introducing a number of changes in concepts and terminology, which necessitated many detailed consequential changes to the law relating to adoption, and amendments were also made with a view to harmonising adoption law across the jurisdictions of England and Wales, Scotland and Northern Ireland. A small number of substantive changes were introduced into the law designed to remedy particular defects in adoption law or to introduce improvements<sup>2</sup>.

The Adoption and Children Act 2002 received Royal Assent on 7 November 2002 and was brought fully into force on 30 December 2005<sup>3</sup>. It embodies the principal statute law currently in force, and in replacing the Adoption Act 1976<sup>4</sup> it reforms and re-codifies the law relating to adoption. Children adopted prior to 30 December 2005 remain subject to the provisions of the Adoption Act 1976 concerned with the status of adopted children which (to that limited extent) remains in force<sup>5</sup>.

<sup>1</sup> The Adoption Act 1976, which came into force on 1 January 1988 (see the Children Act 1975 and the Adoption Act 1976 (Commencement No 2) Order 1987, SI 1987/1242), was largely repealed by the Adoption and Children Act 2002 s 139(3), Sch 5, as from 30 December 2005, at which date the Adoption and Children Act 2002 was brought fully into effect (having been commenced piecemeal over several dates since its enactment) (see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897). See further note 4 infra.

<sup>2</sup> For an official explanation see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 9 Adoption Issues* (HMSO, 1991). As to the guidance and regulations generally see para 163 ante.

<sup>3</sup> See note 1 supra. Regulations made by the Secretary of State after consultation with the Welsh Ministers may provide for any reference in any provision of the Adoption and Children Act 2002 to an enactment (including an enactment contained in the Act) to include a provision of the law of the Isle of Man or any of the Channel Islands which appears to the Secretary of State to correspond in its effect to that enactment (s 108(1)(c), (3)), and may modify any provision of the Act, as such provision applies to any order made, or other thing done, under the law of the Isle of Man or any of the Channel Islands (s 108(2)). As to the Secretary of State and the Welsh Ministers see para 155 ante. At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 334 note 12 post.

<sup>4</sup> The other than the Adoption Act 1976 Pt IV (ss 38-49) (as amended) (status of adopted children: see para 375 et seq post) and Sch 2 para 6 (rights relating to property) (see SETTLEMENTS vol 42 (Reissue) para 733).

<sup>5</sup> See *ibid* ss 38-49 (as amended); and para 375 et seq post.

## **UPDATE**

### **325 Adoption legislation**

NOTE 1--SI 2005/2897 amended: SI 2010/986.

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### **326. Adoption proceedings as family proceedings.**

Proceedings under the Adoption and Children Act 2002 are 'family proceedings' for the purpose of the Children Act 1989<sup>1</sup> and accordingly<sup>2</sup> the court may make (if appropriate) a contact order, a prohibited steps order, a residence order or a specific issue order<sup>3</sup> on application, or, if the court considers that the order should be made, even though no such application has been made<sup>4</sup>.

1 See the Children Act 1989 s 8(3), (4)(d) (as amended); and para 199 ante.

2 Ie where a question arises with respect to the welfare of any child: see para 247 ante.

3 Ie 'section 8 orders'. As to contact orders see para 251 ante; as to prohibited steps orders see para 261 ante; as to residence orders see para 262 ante; and as to specific issue orders see para 263 ante.

4 See the Children Act 1989 s 10(1); and para 247 et seq ante. As to the effect of adoption on the right to institute proceedings see *Re C (minors) (adoption: residence order)* [1994] Fam 1, [1993] 3 All ER 313, sub nom *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FCR 431, [1993] 1 FLR 505, CA; *Re S (a minor) (adoption: contact)* (1993) Times, 8 March (mother of adopted child requires leave to make application for section 8 order and any such application must be transferred to the High Court; the local authority concerned in the adoption arrangements must be informed, and the Official Solicitor joined as a party). See also *G v G (children: concurrent applications)* [1993] Fam 253, [1993] 2 FLR 306. Under previous legislation it was held that the court must consider the applications of the natural parents for orders under the Children Act 1989 s 8 first, and then go on to consider any application for an order under the Adoption Act 1976: *Re C (a minor) (adoption: parental agreement: contact)* [1994] 2 FCR 485, [1993] 2 FLR 260. See further *Re M (a minor) (adoption or residence order)* [1998] 1 FCR 165, [1998] 1 FLR 570, CA (residence order made instead of adoption order contrary to applicants' express wishes). As to an application for leave to apply for a contact order made by an adopted sibling, in respect of a sibling adopted by a different family see *Re S (a minor) (adopted child: contact)* [1999] Fam 283, [1999] 1 All ER 648; and para 249 note 5 ante.

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### 327. Welfare test.

Under previous legislation<sup>1</sup> the welfare of the child<sup>2</sup> was not the court's paramount consideration: rather, 'first consideration' had to be given to the child's welfare<sup>3</sup>. This position has changed significantly with the enactment of the new adoption legislation<sup>4</sup>, under which the 'paramount consideration' of a court<sup>5</sup> or adoption agency<sup>6</sup> coming to a decision relating to the adoption of a child<sup>7</sup> must be the child's welfare, throughout his life<sup>8</sup>.

1    Ie the Adoption Act 1976, which is largely repealed (see para 325 ante).

2    For the purposes of both the Adoption Act 1976 and the Adoption and Children Act 2002, 'child', except where used to express a relationship, means a person who has not attained the age of 18 years: Adoption Act 1976 s 72(1) (repealed); Adoption and Children Act 2002 s 144(1). References in the Adoption and Children Act 2002, in connection with any adoption proceedings (whether or not concluded), to a 'child', such as 'child to be adopted' or 'adopted child', include a person who has attained the age of 18 years before the proceedings are concluded: ss 49(5), 147, Sch 6.

3    See the Adoption Act 1976 s 6 (repealed).

4    Ie the Adoption and Children Act 2002.

5    As to the court see para 511 post.

6    Ie a local authority or a registered adoption society: see paras 394-395 post.

7    For these purposes 'coming to a decision relating to the adoption of a child', in relation to a court, includes coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order under the Adoption and Children Act 2002 s 26 (or the revocation or variation of such an order) (see para 339 post), and coming to a decision about granting leave in respect of any action (other than the initiation of proceedings in any court) which may be taken by an adoption agency or individual under the Adoption and Children Act 2002, but does not include coming to a decision about granting leave in any other circumstances: s 1(7). Thus 'coming to a decision relating to the adoption of a child' within s 1(1), (7) applies only to decisions under the Adoption and Children Act 2002 and does not include coming to a decision about granting leave in any other circumstances (including decisions about granting leave in proceedings under the Children Act 1989): see *Re P (a child) (adoption order: leave to oppose making of adoption order)* [2007] EWCA Civ 616, [2007] 2 FCR 407, [2007] All ER (D) 334 (Jun).

For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. For the meaning of 'placement order', and as to placement orders generally, see para 335 et seq post.

Section 1(7) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

For the purposes of the Adoption and Children Act 2002 'local authority' means any unitary authority, or any county council so far as it is not a unitary authority: ss 144(1), 147, Sch 6. For these purposes 'unitary authority' means the council of any county so far as it is the council for an area for which there are no district councils, the council of any district comprised in an area for which there is no county council, the council of a county borough, the council of a London borough or the Common Council of the City of London: s 144(1), Sch 6. As to the local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55.

If the Secretary of State is satisfied or the Welsh Ministers are satisfied that any local authority has failed, without reasonable excuse, to comply with any of the duties imposed on it by the Adoption and Children Act 2002 or the Adoption (Intercountry Aspects) Act 1999 s 1 (see para 483 post) or s 2(4) (see para 486 post), he

or they may make an order declaring that authority to be in default in respect of that duty: Adoption and Children Act 2002 s 14(1). The order may contain such directions as appear to be necessary for the purpose of ensuring that, within the period specified in the order, the duty is complied with (s 14(3)), and must give the reasons why it was made (s 14(2)). Any such directions are enforceable, on the application of the Secretary of State or the Welsh Ministers, by a mandatory order: s 14(4). As to the Secretary of State and the Welsh Ministers see para 155 ante.

8 See *ibid* s 1(1), (2). This corresponds to the provision made with regard to child welfare generally by the Children Act 1989, which requires a court determining any question with respect to a child's upbringing or the administration of his property or income to give paramount consideration to the child's welfare (see s 1(1); and para 300 ante). See also *Re S (a child) (adoption order or special guardianship order)* [2007] EWCA Civ 54, [2007] 1 FCR 271, [2007] 1 FLR 819. As to which inquiries are in the interests of the child see *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206, [2007] All ER (D) 368 (Nov) (when a decision was required to be made about the long term care of a child, whom a mother wished to be adopted, there was no duty to make inquiries which it was not in the interests of the child to make; and inquiries were not in the interests of the child simply because they would provide more information about the child's background: they had genuinely to further the prospect of finding a long term carer for the child without delay).

## **UPDATE**

### **327 Welfare test**

NOTE 8--*Re C (a child)*, reported at [2008] 3 WLR 445.

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### 328. Delay.

The current legislation governing adoption<sup>1</sup> specifically incorporates the principle that delay is inimical to the welfare of children, requiring a court<sup>2</sup> or adoption agency<sup>3</sup> at all times to bear in mind that, in general, any delay in coming to a decision relating to the adoption of a child<sup>4</sup> is likely to prejudice the child's welfare<sup>5</sup>. Accordingly, for the avoidance of delay the legislation provides that in proceedings in which a question may arise as to whether an adoption order<sup>6</sup> or placement order<sup>7</sup> should be made, or any other question with respect to such an order, the court must<sup>8</sup> draw up a timetable with a view to determining such a question without delay<sup>9</sup> and give such directions as it considers appropriate for the purpose of ensuring that the timetable is adhered to<sup>10</sup>.

1    Ie the Adoption and Children Act 2002.

2    As to the court see para 511 post.

3    Ie a local authority or a registered adoption society: see paras 394-395 post.

4    For the meaning of 'child' see para 327 note 2 ante. As to the meaning of 'coming to a decision relating to the adoption of a child' see para 327 note 7 ante.

5    Adoption and Children Act 2002 s 1(3). As to the paramountcy of the child's welfare see para 327 ante. This corresponds to the provision made with regard to child welfare generally by the Children Act 1989, which requires the court in any proceedings in which any question with respect to the upbringing of a child arises to have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child (see s 1(2); and para 301 ante), and is also embodied in the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (amended by SI 2007/2189), which provide that dealing with a case justly includes, inter alia, ensuring so far as is practicable that it is dealt with expeditiously (see r 1(2)(a); and para 511 post). As to the court see para 511 post.

6    For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

7    For the meaning of 'placement order', and as to placement orders generally, see para 335 et seq post.

8    The court is required to exercise these powers in the light of any rules made by virtue of the Adoption and Children Act 2002 s 109(2), which may prescribe periods within which prescribed steps must be taken in relation to such proceedings (s 109(2)(a)) and make other provision with respect to such proceedings for the purpose of ensuring that such questions are determined without delay (s 109(2)(b)). See generally in this regard the Family Procedure (Adoption) Rules 2005, SI 2005/2795; and para 511 post.

9    Adoption and Children Act 2002 s 109(1)(a).

10   Ibid s 109(1)(b).

## UPDATE

### 328 Delay

NOTE 5--SI 2005/2795 further amended: SI 2008/2447, SI 2009/3348.

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### **329. Welfare checklist.**

Whenever a court<sup>1</sup> or adoption agency<sup>2</sup> is coming to a decision relating to the adoption of a child<sup>3</sup> it must have regard to:

- 435 (1) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding)<sup>4</sup>;
- 436 (2) the child's particular needs<sup>5</sup>;
- 437 (3) the likely effect on the child (throughout his life) of having ceased to be a member of the original family<sup>6</sup> and become an adopted person<sup>7</sup>;
- 438 (4) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant<sup>8</sup>;
- 439 (5) any harm<sup>9</sup> which the child has suffered or is at risk of suffering<sup>10</sup>; and
- 440 (6) the relationship which the child has with relatives<sup>11</sup>, and with any other person in relation to whom the court or agency considers the relationship to be relevant<sup>12</sup>.

The matters to which a court or agency is required to have regard in coming to a decision relating to the adoption of a child correspond to those to which a court is required to have regard in making a decision with regard to child welfare generally<sup>13</sup>, and it follows that a court or agency coming to a decision relating to the adoption of a child must always consider the whole range of powers<sup>14</sup> available to it in the child's case<sup>15</sup>. The 'no-order' principle also applies<sup>16</sup>.

1 As to the court see para 511 post.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post.

3 For the meaning of 'child' see para 327 note 2 ante. As to the meaning of 'coming to a decision relating to the adoption of a child' see para 327 note 7 ante.

4 Adoption and Children Act 2002 s 1(4)(a).

5 Ibid s 1(4)(b).

6 For these purposes references to relationships are not confined to legal relationships: ibid s 1(8)(a).

7 Ibid s 1(4)(c).

8 Ibid s 1(4)(d). In placing a child for adoption an adoption agency is also required to give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background: s 1(5). References in the Adoption and Children Act 2002 (apart from s 18 (see para 331 post)) to an adoption agency placing a child for adoption are to its placing a child for adoption with prospective adopters (ss 18(5)(a), 147, Sch 6) and include, where it has placed a child with any persons (whether under the Adoption and Children Act 2002 or not), leaving the child with them as prospective adopters (s 18(5)(b)); and references (apart from in s 18) to a child who is placed for adoption by an adoption agency are to be interpreted accordingly.

9 For the meaning of 'harm' see the Children Act 1989 ss 31(9) (as amended), 105(1); and para 274 ante (definition applied by the Adoption and Children Act 2002 s 1(4)(e)).

10 Ibid s 1(4)(e).



11 For the purposes of the Adoption and Children Act 2002 'relative', in relation to a child, means a grandparent, brother, sister, uncle or aunt, whether of the full blood or half blood or by marriage or civil partnership (ss 144(1), 147, Sch 6 (s 144(1) amended by the Civil Partnership Act 2004 s 79(1), (11))), and for the particular purposes of the Adoption and Children Act 2002 s 1 references to a 'relative', in relation to a child, include the child's mother and father (s 1(8)(b)).

12 Ibid s 1(4)(f). The matters to which the court or agency is required to have regard in this context include:

- 219 (1) the likelihood of any such relationship continuing and the value to the child of its doing so (s 1(4)(f)(i));
- 220 (2) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs (s 1(4)(f)(ii)); and
- 221 (3) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child (s 1(4)(f)(iii)).

13 See the Children Act 1989 s 1(3), (4). These provisions require a court which is either considering whether to make, vary or discharge a section 8 order (see para 303 ante) in circumstances where the making, variation or discharge of the order is opposed by any party to the proceedings, or is considering whether to make, vary or discharge a special guardianship order (see para 151 et seq ante) or an order under Pt IV (ss 31-42) (as amended) (care and supervision orders: see para 270 et seq ante), to have regard in particular to:

- 222 (1) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) (see s 1(3)(a), (4) (as amended); and para 303 ante);
- 223 (2) the child's physical, emotional and educational needs (see s 1(3)(b); and para 303 ante);
- 224 (3) the likely effect on the child of any change in his circumstances (see s 1(3)(c); and para 303 ante);
- 225 (4) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant (see s 1(3)(d); and para 303 ante); and
- 226 (5) any harm which the child has suffered or is at risk of suffering (see s 1(3)(e); and para 303 ante).

14 Ie whether under the Adoption and Children Act 2002 or the Children Act 1989.

15 Adoption and Children Act 2002 s 1(6). In connection with the operation of the welfare checklist provisions contained in the Children Act 1989 and the Adoption and Children Act 2002, with reference to the circumstances in which a special guardianship order (see para 152 ante), rather than an adoption order, may be appropriate, see *Re S (a child) (adoption order or special guardianship order)* [2007] EWCA Civ 54, [2007] 1 FCR 271, [2007] 1 FLR 819.

16 See para 330 post.

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### **330. 'No order' principle.**

The 'no order' principle under the Children Act 1989 (which provides that where a court is considering whether or not to make one or more orders under that Act with respect to a child, it must not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all<sup>1</sup>) is also embodied in the Adoption and Children Act 2002, which provides that a court<sup>2</sup> or adoption agency<sup>3</sup> coming to a decision relating to the adoption of a child<sup>4</sup> must, in addition to always considering the whole range of powers available to it<sup>5</sup> in the child's case, not make any order under the Act unless it considers that making the order would be better for the child than not doing so<sup>6</sup>.

1 See the Children Act 1989 s 1(5); and para 302 ante.

2 As to the court see para 511 post.

3 Ie a local authority or a registered adoption society: see paras 394-395 post.

4 For the meaning of 'child' see para 327 note 2 ante. As to the meaning of 'coming to a decision relating to the adoption of a child' see para 327 note 7 ante.

5 Ie whether under the Adoption and Children Act 2002 or the Children Act 1989.

6 Adoption and Children Act 2002 s 1(6).

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## **(2) PLACEMENT FOR ADOPTION**

### **(i) Placement and Placement Orders**

#### **331. Placement for adoption by agencies.**

An adoption agency<sup>1</sup> may place a child<sup>2</sup> for adoption with prospective adopters<sup>3</sup> or, where it has placed a child with any persons<sup>4</sup>, leave the child with them as prospective adopters<sup>5</sup>; however, unless the child in question is less than six weeks old, the agency may do this only with parental consent<sup>6</sup> or under a placement order<sup>7</sup>. An agency may place a child for adoption with prospective adopters only if it is satisfied that the child ought to be placed for adoption<sup>8</sup>.

If an application for an adoption order<sup>9</sup> has been made by any persons in respect of a child and has not been disposed of, an adoption agency which placed the child with those persons may leave the child with them until the application is disposed of<sup>10</sup> but, apart from that, the child may not be placed for adoption with any prospective adopters<sup>11</sup>.

1    le a local authority or a registered adoption society: see paras 394-395 post.

2    For the meaning of 'child' see para 327 note 2 ante.

3    Adoption and Children Act 2002 s 18(1)(a).

4    le whether under *ibid* Pt I (ss 1-110) (as amended) or not: s 18(1).

5    *Ibid* s 18(1)(b).

6    le under *ibid* s 19 (see para 332 post).

7    *Ibid* s 18(1). See also the Adoption Agencies Regulations 2005, SI 2005/389, reg 35(3), (4) (which provide that where a prospective adopter notifies an adoption agency that he wishes to proceed with the placement and the agency is authorised to place the child for adoption or the child is less than six weeks old (subject to the proviso that unless there is a placement order in respect of the child, the agency may not place for adoption a child who is less than six weeks old unless the parent or guardian of the child has agreed in writing with the agency that the child may be placed for adoption), the agency may place the child for adoption with the prospective adopter). For the meaning of 'placement order', and as to placement orders generally, see para 335 et seq post. The Adoption and Children Act 2002 s 18 is subject to ss 30-35 (see para 342 et seq post): s 18(7).

Section 18 does not apply where on or after 30 December 2005 a child is free for adoption by virtue of a freeing order made under the Adoption Act 1976 s 18 (repealed as from that date by the Adoption and Children Act 2002 s 139, Sch 5) but is not placed for adoption, and the adoption agency may place the child for adoption accordingly: see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 4(a).

8    Adoption and Children Act 2002 s 18(2). Once a child has been placed (or authorised to be placed) for adoption with prospective adopters by a local authority, that child becomes 'looked after' by the authority: s 18(3). References in Pt I Ch 3 (ss 18-65) to an adoption agency being, or not being, 'authorised' to place a child for adoption are to the agency being or (as the case may be) not being authorised to do so under s 19 (see para 332 post) or a placement order (see s 21 et seq; and para 335 post): s 18(6). By virtue of s 147, Sch 6, for the duties of local authorities towards children 'looked after' by them see the Children Act 1989 s 22 (as amended); and para 867 et seq post. For the meaning of 'local authority' see para 327 note 7 ante.

In Wales, where a local authority ('the placing authority') is considering the placement of a child who is looked after with a prospective adopter who is resident in the area of another local authority ('the recovering authority') the placing authority must consult the recovering authority in writing about the placement and the result of the assessments undertaken in accordance with the Adoption and Children Act 2002 s 4(1), (2) (see

para 415 post) and in particular about the ability of the agencies in the area of the recovering authority to provide any identified adoption support services: Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(4). As to the provision of adoption support services see para 394 et seq post. A placing authority must allow a period of 20 working days following such consultation before the placement of the child can be considered by the adoption panel in accordance with the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18 (see para 471 post): Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(5). Where a recovering authority has responded in writing to the consultation, that response must be taken into account by the adoption panel when considering the placement of the child in accordance with the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18 and by the adoption agency in accordance with reg 19 (see para 470 post): Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(6).

9 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. As to applications for adoption see the Adoption and Children Act 2002 ss 49-51; and paras 361-363 post. For this purpose 'adoption order' includes a Scottish or Northern Irish adoption order (s 18(4)); and a 'Scottish adoption order' is an order made, or having effect as if made, under the Adoption (Scotland) Act 1978 s 12, and a 'Northern Irish adoption order' is an order made, or having effect as if made, under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 12 (Adoption and Children Act 2002 s 144(1), Sch 6).

10 Ibid s 18(4)(a). Section 18(4) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

11 Adoption and Children Act 2002 s 18(4)(b).

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### 332. Placement of children for adoption with consent.

Where an adoption agency<sup>1</sup> is satisfied that each parent<sup>2</sup> or guardian<sup>3</sup> of a child<sup>4</sup> has consented<sup>5</sup> to the child being placed for adoption<sup>6</sup> with prospective adopters identified in the consent<sup>7</sup>, or being placed for adoption with any prospective adopters who may be chosen by the agency<sup>8</sup>, and has not withdrawn the consent, the agency is authorised to place the child for adoption accordingly<sup>9</sup>.

If an agency has placed a child for adoption under these provisions in pursuance of consent given by a parent of the child<sup>10</sup>, and at a later time, the other parent of the child acquires parental responsibility for the child<sup>11</sup>, the other parent is to be treated as having at that time given consent in the same terms as those in which the first parent gave consent<sup>12</sup>.

1     ie a local authority or a registered adoption society: see paras 394-395 post.

2     For the purposes of the provisions relating to placements for adoption and adoption orders (ie the Adoption and Children Act 2002 Pt I Ch 3 (ss 18-65)), 'parent' (except in s 52(9), (10) (see para notes 10-12 infra)) means a parent having parental responsibility: ss 19(5), 20(6), 52(2), (6). As to the meaning of 'parental responsibility' see, by virtue of Sch 6, the Children Act 1989 s 3; and para 134 ante.

3     For the meaning of 'guardian' see *ibid* s 105(1); and para 144 note 5 ante (definition applied by the Adoption and Children Act 2002 ss 144(1), 147, Sch 6). For the purposes of the Adoption and Children Act 2002 'guardian' also includes a 'special guardian' within the meaning of the Children Act 1989 s 105(1) (as amended) (see para 151 ante): see the Adoption and Children Act 2002 s 144(1), Sch 6.

4     For the meaning of 'child' see para 327 note 2 ante.

5     For the meaning of 'consent' see para 370 post. Consent to a child being placed for adoption with prospective adopters identified in the consent may be combined with consent to the child subsequently being placed for adoption with any prospective adopters who may be chosen by the agency in circumstances where the child is removed from or returned by the identified prospective adopters: s 19(2). As to consent where the parent or guardian resides outside England and Wales see the Adoption Agencies Regulations 2005, SI 2005/389, reg 20A (added by SI 2005/3482).

6     As to references to an adoption agency placing a child for adoption see para 329 note 8 ante.

7     Adoption and Children Act 2002 s 19(1)(a).

8     *Ibid* s 19(1)(b).

9     *ibid* s 19(1). This does not apply where an application has been made on which a care order might be made and the application has not been disposed of (s 19(3)(a)) or a care order or placement order has been made after the consent was given (s 19(3)(b)). For the meaning of 'care order' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). For the meaning of 'placement order', and as to placement orders generally, see para 335 et seq post.

Where a child is placed for adoption the adoption agency must ensure that the child and the prospective adopter are visited within one week of the placement and thereafter at least once a week until the first review and thereafter at such frequency as the agency decides at each review, ensure that written reports are made of such visits and provide such advice and assistance to the prospective adopter as the agency considers necessary: Adoption Agencies Regulations 2005, SI 2005/389, reg 36(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(2), (5). As to reviews of placements see para 446 post.

10    Adoption and Children Act 2002 s 52(9)(a).

11 Ibid s 52(9)(b). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

12 Ibid s 52(10).

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### **333. Advance consent to adoption.**

A parent<sup>1</sup> or guardian<sup>2</sup> of a child<sup>3</sup> who consents<sup>4</sup> to the child being placed for adoption<sup>5</sup> by an adoption agency<sup>6</sup> may, at the same or any subsequent time, consent to the making of a future adoption order<sup>7</sup>. Consent to a future adoption order may be given specific to the prospective adopters identified in the consent at the time of the placement<sup>8</sup> or may be consent to adoption by any prospective adopters chosen by the agency<sup>9</sup>. Consent can be withdrawn<sup>10</sup>, and the person giving consent can at any time state<sup>11</sup> that he does not wish to be informed of any application for an adoption order<sup>12</sup> or withdraw such a statement<sup>13</sup>.

1 For the meaning of 'parent' see para 332 note 2 ante.

2 As to the meaning of 'guardian' see para 332 note 3 ante.

3 For the meaning of 'child' see para 327 note 2 ante.

4 For the meaning of 'consent' see para 370 post. As to consent where the parent or guardian resides outside England and Wales see the Adoption Agencies Regulations 2005, SI 2005/389, reg 20A (added by SI 2005/3482).

5 I.e. under the Adoption and Children Act 2002 s 19 (see para 332 ante). References in the Adoption and Children Act 2002 to a child placed for adoption under s 19 include a child who was placed under s 19 with prospective adopters and continues to be placed with them, whether or not consent to the placement has been withdrawn: s 19(4).

6 I.e. a local authority or a registered adoption society: see paras 394-395 post.

7 Adoption and Children Act 2002 s 20(1). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

8 Ibid s 20(2)(a).

9 Ibid s 20(2)(b).

10 Ibid s 20(3).

11 I.e. by notice given to the adoption agency: ibid s 20(4). 'Notice' means notice in writing: ss 144(1), 147, Sch 6. Any notice or information required to be given by virtue of the Adoption and Children Act 2002 may be given by post: s 110. A notice under s 20(4) has effect from the time when it is received by the adoption agency but has no effect if the person concerned has withdrawn his consent: s 20(5).

12 Ibid s 20(4)(a).

13 Ibid s 20(4)(b).

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### **334. Parental responsibility in placements.**

Where a child<sup>1</sup> is placed for adoption<sup>2</sup> or an adoption agency<sup>3</sup> is authorised to place<sup>4</sup> a child for adoption<sup>5</sup>, parental responsibility<sup>6</sup> for the child is given to the agency concerned<sup>7</sup>. While the child is placed with prospective adopters, parental responsibility is given to them<sup>8</sup>. The agency may determine that the parental responsibility of any parent<sup>9</sup> or guardian<sup>10</sup>, or of prospective adopters, is to be restricted to the extent specified in the determination<sup>11</sup>.

Where a local authority is authorised to place a child for adoption or a child who has been placed for adoption is less than six weeks old, the authority's duty to ascertain and give due weight to the wishes and feelings of the parent and to promote contact are disapplied, and the adoption agency is instead required to provide counselling and information for, and to ascertain the wishes and feelings of, inter alia, the child's parent or guardian<sup>12</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 Ie under the Adoption and Children Act 2002 s 19 (see para 332 ante).

3 Ie a local authority or a registered adoption society: see paras 394-395 post.

4 Ie under the Adoption and Children Act 2002 s 19 (see para 332 ante).

5 Ibid s 25(1)(a). As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

6 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

7 Ibid s 25(2).

8 Ibid s 25(3).

9 For the meaning of 'parent' see para 332 note 2 ante.

10 As to the meaning of 'guardian' see para 332 note 3 ante.

11 Adoption and Children Act 2002 s 25(4).

12 In these circumstances an adoption agency must, so far as is reasonably practicable: (1) provide a counselling service for the parent or guardian of the child; (2) explain to the parent or guardian (and provide the necessary written information): (a) the procedure in relation to both placement for adoption and adoption; (b) the legal implications of giving consent to placement for adoption under *ibid* s 19 (see para 332 ante), giving consent to the making of a future adoption order under s 20 (see para 333 ante) and a placement order; and (c) the legal implications of adoption; and (3) ascertain the wishes and feelings of the parent or guardian of the child and of any other person (or, in Wales, any other significant person) the agency considers relevant, regarding: (a) the placement of the child for adoption and his adoption, including any wishes and feelings about the child's religious and cultural upbringing; (b) contact with the child if the child is authorised to be placed for adoption or the child is adopted; and (c) in England, the child himself: Adoption Agencies Regulations 2005, SI 2005/389, reg 14(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 14(1). These provisions do not, however, apply in England if the agency is satisfied that the requirements set out above have been carried out in respect of the parent or guardian and any other person the agency considers relevant by another adoption agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 14(2).

Where the father of a child does not have parental responsibility for the child and the father's identity is known to the adoption agency, an adoption agency must, where it is satisfied that it is appropriate to do so: (i) provide



a counselling service for the father; (ii) explain to him (and provide the necessary written information) the procedure in relation to both placement for adoption and adoption and the legal implications of adoption; (iii) ascertain his wishes and feelings regarding: (A) the placement of the child for adoption and his adoption, including any wishes and feelings about the child's religious and cultural upbringing; (B) contact with the child if the child is authorised to be placed for adoption or the child is adopted; and (C) in England, the child himself; and (iv) ascertain so far as possible whether the father wishes to acquire parental responsibility for the child under the Children Act 1989 s 4 (see para 139 ante) or intends to apply for a residence order or contact order with respect to the child under s 8 (see paras 251, 262 ante) or, where the child is subject to a care order, an order under s 34 (see para 270 et seq ante): Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3), (4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 14(2), (3).

For modifications of the Children Act 1989 in relation to adoption see the Adoption Agencies Regulations 2005, SI 2005/389, reg 45 (amended by SI 2005/3482); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 46; and para 977 post.

Any power to make subordinate legislation (which does not include a direction: Adoption and Children Act 2002 s 140(9)) conferred by the Adoption and Children Act 2002 on the Lord Chancellor, the Secretary of State, the Scottish Ministers, the Welsh Ministers or the Registrar General is exercisable by statutory instrument (s 140(1)). Other than in the case of an Order in Council or subordinate legislation made by the Scottish Ministers (s 140(4)(a)) or the Welsh Ministers (unless made jointly by the Secretary of State and the Welsh Ministers) (s 140(4)(b)), a statutory instrument containing subordinate legislation under s 9 which includes provision made by virtue of s 45(2), or under s 92(6), s 94 or s 123(6), or which adds to, replaces or omits any part of the text of an Act (s 140(3)(a)-(c)), is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament, and a statutory instrument containing subordinate legislation made under any provision of the Adoption and Children Act 2002 (other than s 14 or s 148 or an instrument to which s 140(3) applies) is subject to annulment in pursuance of a resolution of either House of Parliament (s 140(2)). As to the Secretary of State and the Welsh Ministers see para 155 ante. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Subordinate legislation made under the Adoption and Children Act 2002 may make different provision for different purposes: s 140(7). A power to make such subordinate legislation (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to those cases subject to specified exceptions (s 140(8)(a)) or a particular case or class of case (s 140(8)(b)).

## **UPDATE**

### **334 Parental responsibility in placements**

NOTE 12--SI 2005/389 reg 14(4) amended, SI 2005/1313 reg 14(2) substituted, reg 14(3) amended: SI 2009/1892.

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### **335. Application for placement orders.**

A placement order is an order made by the court<sup>1</sup> authorising a local authority<sup>2</sup> to place a child<sup>3</sup> for adoption with any prospective adopters who may be chosen by the authority<sup>4</sup>. A local authority must apply to the court for a placement order in respect of a child<sup>5</sup> if:

- 441 (1) the child is placed for adoption by it or is being provided with accommodation by it<sup>6</sup>;
- 442 (2) no adoption agency<sup>7</sup> is authorised to place the child for adoption<sup>8</sup>;
- 443 (3) the child has no parent<sup>9</sup> or guardian<sup>10</sup> or the authority considers that the conditions for making a care order<sup>11</sup> are met<sup>12</sup>; and
- 444 (4) the authority is satisfied that the child ought to be placed for adoption<sup>13</sup>,

and it may so apply if the child is subject to a care order<sup>14</sup> and the appropriate local authority<sup>15</sup> is authorised<sup>16</sup> to place the child for adoption<sup>17</sup>.

These provisions<sup>18</sup> do not apply in respect of a child if any persons have given notice of intention to adopt<sup>19</sup> or if an application for an adoption order has been made and has not been disposed of<sup>20</sup>; however, the appropriate local authority<sup>21</sup> is required to apply to the court for a placement order if it is satisfied that the child ought to be placed for adoption and either an application has been made (and not disposed of) on which a care order might be made in respect of a child<sup>22</sup> or a child is subject to a care order and the authority is not authorised to place the child for adoption<sup>23</sup>.

If a local authority is under a duty to apply to the court for a placement order in respect of a child<sup>24</sup>, or has applied for a placement order in respect of a child and the application has not been disposed of<sup>25</sup>, the child is 'looked after' by the authority<sup>26</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'local authority' see para 327 note 7 ante.

3 For the meaning of 'child' see para 327 note 2 ante.

4 Adoption and Children Act 2002 s 21(1).

5 Ibid s 22 (see the text and notes 6-25 infra) does not apply where on or after 30 December 2005 a child is free for adoption by virtue of a freeing order made under the Adoption Act 1976 s 18 (repealed as from that date by the Adoption and Children Act 2002 s 139, Sch 5) but is not placed for adoption, and the adoption agency may place the child for adoption accordingly: see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 4(a).

6 Adoption and Children Act 2002 s 22(1)(a). For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

7 Ie a local authority or a registered adoption society: see paras 394-395 post.

8 Adoption and Children Act 2002 s 22(1)(b). As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

9 For the meaning of 'parent' see para 332 note 2 ante.

10 As to the meaning of 'guardian' see para 332 note 3 ante.

11 le the conditions set out in the Children Act 1989 s 31(2) (see para 274 ante). For the meaning of 'care order' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante) (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

12 Ibid s 22(1)(c).

13 Ibid s 22(1)(d). See *Re P-B (a child) (placement order)* [2006] EWCA Civ 1016, [2007] 3 FCR 308 (in its role as adoption agency, the local authority has to be satisfied that the child ought to be placed for adoption).

14 Adoption and Children Act 2002 s 22(3)(a).

15 In relation to a care order, the 'appropriate local authority' is the local authority in whose care the child is placed by the order (s 22(7)(a)); and in relation to an application on which a care order might be made, it is the local authority which makes the application (s 22(7)(b)). As to the meaning of 'child in the care of a local authority' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

16 le under ibid s 19 (see para 332 ante).

17 Ibid s 22(3)(b).

18 le ibid s 22(1), (3) (see the text and notes 6-17 supra).

19 Ibid s 22(5)(a). For the meaning of 'notice of intention to adopt' see s 44(2); and para 365 post. As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante. The provisions of s 22(1), (3) are not disapplied in these circumstances if the period of four months beginning with the giving of the notice of intention to adopt has expired without the persons who gave the notice applying for an adoption order (which includes a Scottish or Northern Irish adoption order) or their application for such an order has been withdrawn or refused: s 22(5)(a). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. As to Scottish and Northern Irish adoption orders see para 331 note 9 ante. Section 22(5) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

20 Adoption and Children Act 2002 s 22(5)(b).

21 See note 15 supra.

22 Adoption and Children Act 2002 s 22(2)(a).

23 Ibid s 22(2)(b).

24 Ibid s 22(4)(a).

25 Ibid s 22(4)(b).

26 For the duties of local authorities towards children 'looked after' by them see, by virtue of ibid Sch 6, the Children Act 1989 s 22 (as amended); and para 867 post.

## UPDATE

### 335 Application for placement orders

NOTE 13--Expert reports which have been filed and served in care proceedings and which address the present and future needs of the subject child should be provided to members of an adoption panel in advance of the meeting and to decision makers for pre-reading: *Re B (children) (placement order: expert reports)* [2008] EWCA Civ 835, [2008] 2 FCR 570.

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### **336. Power of court to make orders.**

The court<sup>1</sup> may make a placement order<sup>2</sup> only if, in the case of each parent<sup>3</sup> or guardian<sup>4</sup> of the child<sup>5</sup>, it is satisfied either that the parent or guardian has consented<sup>6</sup> to the child being placed for adoption with any prospective adopters who may be chosen by the local authority<sup>7</sup> and has not withdrawn the consent<sup>8</sup> or that the parent's or guardian's consent should be dispensed with<sup>9</sup>, and may not make a placement order in respect of a child unless the child is subject to a care order<sup>10</sup>, the court is satisfied that the conditions for making a care order<sup>11</sup> are met<sup>12</sup>, or the child has no parent or guardian<sup>13</sup>.

Before making a placement order the court must consider the arrangements which the adoption agency<sup>14</sup> has made, or proposes to make, for allowing any person contact with the child<sup>15</sup> and invite the parties to the proceedings to comment on those arrangements<sup>16</sup>, and when making the order the court may on its own initiative make an order for contact<sup>17</sup>.

In proceedings in which a question may arise as to whether a placement order should be made, or any other question with respect to such an order, the court must, for the avoidance of delay, draw up and make provision for adherence to a timetable for the determination of such a question<sup>18</sup>.

As part of the process of application for a placement order<sup>19</sup>, where an application in respect of a child has been made and has not been disposed of<sup>20</sup> and no interim care order<sup>21</sup> is in force<sup>22</sup>, the court may give any directions it considers appropriate for the medical or psychiatric examination or other assessment of the child, although a child who is of sufficient understanding to make an informed decision may refuse to submit to the examination or other assessment<sup>23</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'placement order' see para 335 ante.

3 For the meaning of 'parent' see para 332 note 2 ante.

4 As to the meaning of 'guardian' see para 332 note 3 ante.

5 For the meaning of 'child' see para 327 note 2 ante.

6 For the meaning of 'consent' see para 370 post.

7 For the meaning of 'local authority' see para 327 note 7 ante.

8 Adoption and Children Act 2002 s 21(3)(a).

9 Ibid s 21(3)(b). The making of a placement order without the consent of one of the parents does not necessarily violate that parent's right to family life under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 151): see Application 21949/03 *Eski v Austria* [2007] 1 FCR 453, [2007] 1 FLR 1650, ECtHR.

10 Adoption and Children Act 2002 s 21(2)(a). For the meaning of 'care order' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

11 ie the conditions set out in the Children Act 1989 s 31(2) (see para 274 ante).

- 12 Adoption and Children Act 2002 s 21(2)(b).
- 13 Ibid s 21(2)(c).
- 14 Ie a local authority or a registered adoption society: see paras 394-395 post.
- 15 Adoption and Children Act 2002 s 27(4)(a). As to contact generally see para 339 post.
- 16 Ibid s 27(4)(b).
- 17 Ibid s 26(4). An 'order for contact' is an order under s 26 (see para 339 post). The respondents to such an application are set out in the Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 23; and para 487 note 6 post.
- 18 See the Adoption and Children Act 2002 s 109; and para 328 ante.
- 19 As to applications see para 335 ante.
- 20 Adoption and Children Act 2002 s 22(6)(a).
- 21 For the meaning of 'interim care order' see the Children Act 1989 s 38; and para 288 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).
- 22 Ibid s 22(6)(b). If interim care orders were in force in these circumstances the court could use the powers vested in it by the Children Act 1989 s 38(6) (see para 292 ante).
- 23 Adoption and Children Act 2002 s 22(6).

## UPDATE

### 336 Power of court to make orders

NOTE 16--See *Re T (placement order)* [2008] EWCA Civ 248, [2008] Fam Law 608, [2008] All ER (D) 279 (Mar) (finding that adoption in best interests of children, who needed specialist therapeutic foster placement for a few months, and that a placement order should follow, premature).

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### 337. Effect of a placement order.

A placement order<sup>1</sup> continues in force until it is revoked<sup>2</sup>, an adoption order<sup>3</sup> is made in respect of the child<sup>4</sup>, or the child marries, forms a civil partnership or attains the age of 18 years<sup>5</sup>. A care order<sup>6</sup> is suspended for the duration of the placement order<sup>7</sup>; and on the making of a placement order any existing contact order<sup>8</sup>, prohibited steps order<sup>9</sup>, residence order<sup>10</sup>, specific issue order<sup>11</sup> or supervision order<sup>12</sup>, ceases to have effect<sup>13</sup>. Where a placement order is in force, no prohibited steps order, residence order or specific issue order<sup>14</sup>, and no supervision order or child assessment order<sup>15</sup>, may be made in respect of the child<sup>16</sup>; and no special guardianship order<sup>17</sup> may be made in respect of the child unless an application has been made for an adoption order<sup>18</sup> and the person applying for the special guardianship order has obtained the court's leave<sup>19</sup>.

Where a placement order is in force in respect of a child, parental responsibility<sup>20</sup> for the child is given to the adoption agency<sup>21</sup> concerned<sup>22</sup>. While the child is placed with prospective adopters, parental responsibility is given to them<sup>23</sup>. The agency may determine that the parental responsibility of any parent<sup>24</sup> or guardian<sup>25</sup>, or of prospective adopters, is to be restricted to the extent specified in the determination<sup>26</sup>.

1 For the meaning of 'placement order' see para 335 ante.

2 Adoption and Children Act 2002 s 21(4)(a). Provision for the revocation of placement orders is made by s 24 (see para 338 post).

3 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. For this purpose 'adoption order' includes a Scottish or Northern Irish adoption order (as to which see para 331 note 9 ante): *ibid* s 21(4).

4 *Ibid* s 21(4)(b). For the meaning of 'child' see para 327 note 2 ante. Section 21(4)(b) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention'): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

5 Adoption and Children Act 2002 s 21(4)(c) (amended by the Civil Partnership Act 2004 s 79(1), (2)).

6 For the meaning of 'care order' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

7 Where a placement order is made in respect of a child and either the child is subject to a care order (*ibid* s 29(1)(a)) or the court at the same time makes a care order in respect of the child (s 29(1)(b)), the care order does not have effect at any time when the placement order is in force (s 29(1)). As to the court see para 511 post.

8 As to contact orders see para 251 ante.

9 For the meaning of 'prohibited steps order' see the Children Act 1989 s 8(1); and para 261 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

10 For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

11 For the meaning of 'specific issue order' see the Children Act 1989 s 8(1); and para 263 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

12 For the meaning of 'supervision order' see the Children Act 1989 s 31(11); and para 271 note 5 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

13 Ibid s 29(2).

14 Ibid s 29(3)(a).

15 Ibid s 29(3)(b). For the meaning of 'child assessment order' see the Children Act 1989 s 43(2); and para 578 post (definition applied by the Adoption and Children Act 2002 Sch 6).

16 This exclusion does not however apply in respect of a residence order if an application for an adoption order has been made in respect of the child (ibid s 29(4)(a)) and the residence order is applied for by a parent or guardian who has obtained the court's leave under s 47(3) or (5) (see para 360 post) or by any other person who has obtained the court's leave under s 29(4) (s 29(4)(b)). The provisions of s 29(4)(a), (5)(a) are modified in their application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Hague Convention: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

17 As to special guardianship orders see para 151 ante.

18 Adoption and Children Act 2002 s 29(5)(a).

19 Ibid s 29(5)(b). The reference in the text to the applicant having obtained the court's leave is a reference to his having obtained the court's leave under s 29(4) or, if he is a guardian of the child, under s 47(5) (see para 360 post). As to the meaning of 'guardian' see para 332 note 3 ante. See further the modification of the Children Act 1989 ss 14A, 14C (as added); and paras 151-152 post.

20 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

21 Ie a local authority or a registered adoption society: see paras 394-395 post.

22 Adoption and Children Act 2002 s 25(1)(b), (2).

23 Ibid s 25(3).

24 For the meaning of 'parent' see para 332 note 2 ante.

25 As to the meaning of 'guardian' see para 332 note 3 ante.

26 Adoption and Children Act 2002 s 25(4).

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### **338. Variation or revocation of placement order.**

The court<sup>1</sup> may vary a placement order<sup>2</sup> so as to substitute another local authority<sup>3</sup> for the local authority authorised by the order to place the child<sup>4</sup> for adoption<sup>5</sup>. Such variation may be made only on the joint application of both authorities<sup>6</sup>. The court may also revoke a placement order on the application of any person<sup>7</sup>, although such an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless the court has given leave to apply<sup>8</sup> and the child is not placed for adoption by the authority<sup>9</sup>. Where an application for the revocation of a placement order has been made and has not been disposed of<sup>10</sup>, and the child is not placed for adoption by the authority<sup>11</sup>, the child may not without the court's leave be placed for adoption under the order<sup>12</sup>.

If the court determines, on an application for an adoption order<sup>13</sup>, not to make the order, it may revoke any placement order in respect of the child<sup>14</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'placement order' see para 335 ante.

3 For the meaning of 'local authority' see para 327 note 7 ante.

4 For the meaning of 'child' see para 327 note 2 ante.

5 Adoption and Children Act 2002 s 23(1).

6 Ibid s 23(2).

7 Ibid s 24(1).

8 Ibid s 24(2)(a). The court cannot give leave unless satisfied that there has been a change in circumstances since the order was made: s 24(3). This does not mean that the court is obliged to grant leave if it is satisfied that there has been a change of circumstances; the discretion is still there to be exercised: see *Re M (children) (placement order)* [2007] EWCA Civ 1084, [2007] All ER (D) 14 (Nov).

9 Adoption and Children Act 2002 s 24(2)(b). For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

10 Ibid s 24(5)(a).

11 Ibid s 24(5)(b).

12 Ibid s 24(5).

13 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

14 Adoption and Children Act 2002 s 24(4). Section 24(4) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

## **UPDATE**

### **338 Variation or revocation of placement order**



NOTE 8--*Re M*, cited, reported sub nom *M v Warwickshire CC* [2008] 1 WLR 991. In deciding whether to grant leave to an applicant to apply for revocation of a placement order, the question is not whether a local authority has acted as a reasonable parent, but whether in all the circumstances, including the applicant's prospect of success in securing revocation and the child's interests, leave should be given: *NS-H v Kingston-Upon-Hull City Council* [2008] EWCA Civ 493, [2008] 2 FLR 918, [2008] All ER (D) 176 (May); *Re S (placement order: revocation)* [2008] EWCA Civ 1333, [2009] 1 FLR 503, [2008] All ER (D) 48 (Oct).

NOTES 10-12--See *Re F (a child) (placement order)* [2008] EWCA Civ 439, [2008] 2 FCR 93 (child placed with adoptive parents after application for revocation of placement order made).

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## (ii) Effect of Placement

### 339. Adoption and contact.

On an adoption agency<sup>1</sup> being authorised to place a child<sup>2</sup> for adoption<sup>3</sup>, or placing a child for adoption<sup>4</sup> who is less than six weeks old, any provision for contact under the Children Act 1989<sup>5</sup> (and, as from a day to be appointed, any contact activity direction) ceases to have effect<sup>6</sup>. Where an adoption agency is authorised to place a child for adoption, or a child is placed for adoption, no application may be made for any provision for contact under the Children Act 1989<sup>7</sup>, and the court<sup>8</sup> may make an order<sup>9</sup> requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for the person named in the order and the child otherwise to have contact with each other<sup>10</sup>. Those entitled to apply for a contact order are:

- 445 (1) the child or the agency<sup>11</sup>;
- 446 (2) any parent<sup>12</sup>, guardian<sup>13</sup> or relative<sup>14</sup>;
- 447 (3) any person in whose favour there was provision for contact under the Children Act 1989 which ceased<sup>15</sup> to have effect<sup>16</sup>;
- 448 (4) if a residence order<sup>17</sup> was in force immediately before the adoption agency was authorised to place the child for adoption or (as the case may be) placed the child for adoption at a time when he was less than six weeks old, the person in whose favour the order was made<sup>18</sup>;
- 449 (5) if a person had care of the child immediately before that time by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person<sup>19</sup>; and
- 450 (6) any person who has obtained the court's leave to make the application<sup>20</sup>.

A contact order<sup>21</sup> will continue to be of effect for as long as the agency is authorised to place the child for adoption (or the child is placed for adoption)<sup>22</sup>, but it can be varied or revoked on application by the child, the agency or by a person named in the order<sup>23</sup>, and the agency may refuse to allow (for a limited period) the contact that would otherwise be required by virtue of an order<sup>24</sup>.

1 le a local authority or a registered adoption society: see paras 394-395 post.

2 For the meaning of 'child' see para 327 note 2 ante.

3 As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

4 As to an adoption agency placing a child for adoption see para 329 note 8 ante.

5 le a contact order under the Children Act 1989 s 8 (see para 251 ante) or an order under s 34 (as amended) (parental contact with children in care: see para 274 ante): Adoption and Children Act 2002 s 26(6).

6 Ibid s 26(1) (prospectively amended by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 13, 14). For the meaning of 'contact activity direction' see the Children Act 1989 s 11A (prospectively added); and para 252 ante (definition applied by the Adoption and Children Act 2002 s 26(5)). At the date at which this volume states the law no such day had been appointed.

7 Ibid s 26(2)(a). This does not prevent an application for a contact order under the Children Act 1989 s 8 (see para 251 ante) being made where the application is to be heard together with an application for an adoption order in respect of the child: Adoption and Children Act 2002 s 26(5). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. Where there are competing contact and adoption applications concerning a child, the applications should be heard concurrently: *G v G (children: concurrent applications)* [1993] Fam 253, [1993] 2 FLR 306.

8 As to the court see para 511 post.

9 le under the Adoption and Children Act 2002 s 26(2).

10 Ibid s 26(2)(b). A court in England and Wales does not have jurisdiction to make an order under s 26 unless the condition in the Family Law Act 1986 s 3 (as amended) (see para 833 post) is satisfied: s 2(2B) (added by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 46, 48). In England, where an adoption agency decides that a child should be placed for adoption it must consider what, if any, arrangements it should make for allowing any person contact with the child once the agency is authorised to place the child for adoption ('the contact arrangements'), subject to the requirement that in coming to a decision in relation to contact arrangements the agency must take into account the wishes and feelings of the parent or guardian of the child and (where the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3) (see para 334 ante) applies and the agency considers it is appropriate), the father of the child, take into account any advice given by the adoption panel in accordance with reg 18(3) (see para 434 post), and have regard to the considerations set out in the Adoption and Children Act 2002 s 1(2), (4) (see paras 327, 329 ante): Adoption Agencies Regulations 2005, SI 2005/389, reg 46(1)-(3). The agency must give notification of the contact arrangements to the child (if the agency considers he is of sufficient age and understanding), the parent or guardian (if their whereabouts are known to the agency), and, where reg 14(3) applies and the agency considers it is appropriate, the father of the child (if his whereabouts are known to the agency), any person in whose favour there was a provision for contact under the Children Act 1989 which ceased to have effect by virtue of s 26(1) (see para 936 post), and any other person the agency considers relevant: Adoption Agencies Regulations 2005, SI 2005/389, reg 46(4). If the agency proposes to make any change to the contact arrangements which affects any person mentioned in reg 46(4), it must seek the views of that person and take those views into account in deciding what arrangements it should make for allowing any person contact with the child while he is placed for adoption with the prospective adopter: reg 46(6).

Where an adoption agency in England decides that a child should be placed for adoption with a particular prospective adopter, the agency must review the contact arrangements in light of the views of the prospective adopter and any advice given by the adoption panel in accordance with reg 32(3) (see para 443 post): reg 46(5). The agency must set out the contact arrangements in the placement plan and keep the contact arrangements under review: reg 46(7).

Under the legislation having effect prior to the enactment of the Adoption and Children Act 2002 it was uncommon for the court to impose a condition of contact on an adoption order. The court could make a contact order as an alternative to attaching conditions to the contact order: see generally *Re C (a minor) (adoption order: condition)* [1986] 1 FLR 315, CA (condition that annual progress report be sent to natural father contrary to concept of adoption and threatened adoptive parents' feeling of security so as not to be in the child's interests); *Re V (a minor) (adoption: consent)* [1987] Fam 57, [1986] 1 All ER 752, CA (adoption order inappropriate where regular access by natural parent necessary for child's welfare); *Re W (a minor) (adoption or custodianship)* [1988] FCR 129, [1988] 1 FLR 175, CA (access by natural parents where child adopted by grandparents); *Re C (a minor) (adoption order: conditions)* [1989] AC 1, [1988] 1 All ER 705, HL (maintenance of affectionate relationship between child and natural brother in child's best interests, therefore adoption order made subject to condition as to access but only in most exceptional case would such a condition be imposed to which adopters do not agree); *Re B (adoption: father's objections)* [1999] 3 FCR 522, [1999] 2 FLR 215, CA; *Re F (a minor) (adoption order: injunction)* [1990] Fam 189, [1990] 3 All ER 580 (injunction preventing communication with parents and preventing the natural father from going within 500 yards of adopted child), overruled by *Re D (a minor) (adoption order: validity)* [1991] Fam 137, [1991] 3 All ER 461, CA; but see *Re O (contempt: committal)* [1996] 2 FCR 89, [1995] 2 FLR 767, CA (sentence of 12 months' imprisonment upheld for breach of an injunction preventing contact taking place). An adoption order is intended to be final, and it was accordingly held that contact should not be re-opened unless there has been a fundamental change of circumstances: *Re O (a minor) (wardship: adopted child)* [1978] Fam 196, [1978] 2 All ER 27, CA; *Re S (a minor) (adoption: contact)* (1993) Times, 8 March. See also *Re DX (an infant)* [1949] Ch 320, sub nom *Re AB (an infant)* [1949] 1 All ER 709; *Re G (DM) (an infant)* [1962] 2 All ER 546, [1962] 1 WLR 730; *Re B (MF) (an infant)* [1972] 1 All ER 898, [1972] 1 WLR 102, CA; *Re J* [1973] Fam 106, [1973] 2 All ER 410. The High Court could, under its inherent jurisdiction, attach to an adoption order an order that the Registrar General should not reveal the details of an adoption recorded in the Adopted Children's Register (see para 383 et seq post) without leave of the court: see *Re X (a minor) (adoption details: disclosure)* [1994] Fam 174, [1994] 2 FLR 450, CA; *Re W (adoption details: disclosure)* [1999] 2 FCR 283, [1998] 2 FLR 625. See also *Re T (a minor) (contact after adoption)* [1995] 2 FCR 537, [1995] 2 FLR 251, CA (contact order unnecessary where adopters agreed that natural mother must have contact with child, even though there was no agreement as to how often it was to take place); *Re E (adopted child) (contact: leave)* [1995] 2 FCR 655, [1995] 1 FLR 57 (where conditions to be imposed on adoptive parents were not included in the order, the natural parents would not necessarily be

granted leave to apply for a contact order); *Re T (minors) (adopted children: contact)* [1996] Fam 34, [1996] 1 All ER 215, CA (adoptive parents to give reasons for refusing to provide annual reports, as informally agreed, to children's half-sister); *Re S (a minor) (adopted child: contact)* [1999] Fam 283, [1999] 1 All ER 648, sub nom *Re S (contact: application by sibling)* [1998] 2 FLR 897; *Re B (adoption: father's objections)* supra (father with history of abductions not entitled to retain link with adopted child).

11 Adoption and Children Act 2002 s 26(3)(a).

12 For the meaning of 'parent' see para 332 note 2 ante.

13 As to the meaning of 'guardian' see para 332 note 3 ante.

14 Adoption and Children Act 2002 s 26(3)(b). For the meaning of 'relative' see para 329 note 11 ante.

15 Ie by virtue of ibid s 26(1) (see the text and notes 1-6 supra).

16 Ibid s 26(3)(c).

17 For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

18 Ibid s 26(3)(d).

19 Ibid s 26(3)(e).

20 Ibid s 26(3)(f).

21 Ie an order made under ibid s 26 (see the text and notes 1-20 supra).

22 Ibid s 27(1)(a).

23 Ibid s 27(1)(b).

24 Ibid s 27(2). The agency may exercise this power only if it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare (s 27(2)(a)) and the refusal is decided upon as a matter of urgency and does not last for more than seven days (s 27(2)(b)). Regulations may make provision as to the steps to be taken by an agency which has exercised its power under s 27(2), the circumstances in which, and conditions subject to which, the terms of any order under s 26 (see the text and notes 1-20 supra) may be departed from by agreement between the agency and any person for whose contact with the child the order provides, and notification by an agency of any variation or suspension of arrangements made (otherwise than under an order under s 26) with a view to allowing any person contact with the child: s 27(3). In England, it is accordingly provided that where an adoption agency has decided under s 27(2) to refuse to allow the contact that would otherwise be required by virtue of an order under s 26, the agency must, as soon as the decision is made, inform the child (if the agency considers he is of sufficient age and understanding), the person in whose favour the order under s 26 was made, and the prospective adopter (if the child is placed for adoption) and notify them of the decision, the date of the decision, the reasons for the decision and the duration of the period: Adoption Agencies Regulations 2005, SI 2005/389, reg 47(1), (3). The terms of an order under the Adoption and Children Act 2002 s 26 may be departed from by agreement between the agency and any person for whose contact with the child the order provides, although this is subject to where the child's agreement (where he is of sufficient age and understanding) to consultation before the agreement is reached with the prospective adopter with whom the child is placed for adoption (where the child is placed for adoption) or written confirmation by the agency to the persons required to be informed of a decision of a refusal to allow contact of the terms of that agreement: Adoption Agencies Regulations 2005, SI 2005/389, reg 47(2).

Similar provision is made in respect of Wales, where it is provided that where the adoption agency has decided under the Adoption and Children Act 2002 s 27(2) to refuse to allow the contact that would otherwise be required by virtue of an order under s 26, the agency must, as soon as the decision is made, notify specified persons in writing of such specified parts of the information as the agency considers those persons need to know: Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 47(1). The specified persons are:

227 (1) the child, if the adoption agency considers the child is of sufficient age and understanding (reg 47(4)(a));

228 (2) the child's parents (reg 47(4)(b));

229 (3) any guardian of the child (reg 47(4)(c));

230 (4) any person for whose contact with the child the order under the Adoption and Children Act 2002 s 26 provides (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 47(4)(d));

- 231 (5) any person the agency allowed contact with the child (reg 47(4)(e));
- 232 (6) if the child is placed for adoption, the prospective adopter (reg 47(4)(f)); and
- 233 (7) any other person whose wishes and feelings the agency considers to be relevant (reg 47(4)(g)).

The specified parts of the information are:

- 234 (a) the adoption agency's decision (reg 47(5)(a));
- 235 (b) the date of the decision (reg 47(5)(b));
- 236 (c) the reasons for the decision (reg 47(5)(c)); and
- 237 (d) the duration (if applicable) (reg 47(5)(d)).

In Wales, the terms of an order under the Adoption and Children Act 2002 s 26 may be departed from by agreement between the adoption agency and any person for whose contact with the child the order provides, if the child is of sufficient age and understanding (and subject to the child's agreement), if the child is placed for adoption (subject to prior consultation with the prospective adopter with whom the child is placed for adoption) and if written notification by the agency to the specified persons (cf heads (1)-(7) supra) of those specified parts of the information (cf heads (a)-(d) supra) as the agency considers those persons need to know, within seven days of the agreement to depart from the terms of the order: Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 47(2). Where the agency varies or suspends any arrangements made (otherwise than under an order under the Adoption and Children Act 2002 s 26) with a view to allowing any person contact with the child, the agency must notify the specified persons in writing of those parts of the specified information as the agency considers those persons need to know: Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 47(3).

Before making a placement order the court must consider the contact arrangements which the adoption agency has made or proposes to make and invite the parties to comment on those arrangements: see the Adoption and Children Act 2002 s 27(4); and para 336 ante.

## **UPDATE**

### **339 Adoption and contact**

NOTE 6--Amendment to Children Act 1989 s 26(1) in force on 8 December 2008: SI 2008/2870.

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### **340. Placement restricting application of other orders.**

In taking any decision relating to the adoption of a child the court<sup>1</sup> or adoption agency<sup>2</sup> will have to consider the whole range of powers available to it under the Children Act 1989 and the Adoption and Children Act 2002<sup>3</sup>. Once a child<sup>4</sup> has been placed for adoption<sup>5</sup> or an adoption agency is authorised to place a child for adoption<sup>6</sup>, a parent<sup>7</sup> or guardian<sup>8</sup> of the child may not apply for a residence order<sup>9</sup> unless an application for an adoption order<sup>10</sup> has been made and the parent or guardian has obtained the court's leave<sup>11</sup>; moreover, if an application has been made for an adoption order, a guardian of the child may not apply for a special guardianship order<sup>12</sup> unless he also has so obtained the court's leave<sup>13</sup>.

A placement order takes precedence over a care order<sup>14</sup> and any existing contact order<sup>15</sup>, prohibited steps order<sup>16</sup>, residence order<sup>17</sup>, specific issue order<sup>18</sup>, or supervision order<sup>19</sup>; prevents the making of a supervision order or child assessment order<sup>20</sup>; and restricts the circumstances under which a special guardianship order may be made<sup>21</sup>.

1 As to the court see para 511 post.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post.

3 See the Adoption and Children Act 2002 s 1(6); and para 329 ante.

4 For the meaning of 'child' see para 327 note 2 ante.

5 I.e. under the Adoption and Children Act 2002 s 19 (see para 332 ante).

6 As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

7 For the meaning of 'parent' see para 332 note 2 ante.

8 As to the meaning of 'guardian' see para 332 note 3 ante.

9 For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

10 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

11 Adoption and Children Act 2002 s 28(1)(a). The reference in the text to having obtained the court's leave is a reference to having obtained the court's leave under s 47(3) or (5) (see para 360 post). Section 28(1) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

12 As to special guardianship orders see para 151 post.

13 Adoption and Children Act 2002 s 28(1)(b). The reference in the text to having obtained the court's leave is a reference to having obtained the court's leave under s 47(3) or (5) (see para 360 post).

14 For the meaning of 'care order' see the Children Act 1989 ss 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

15 As to contact orders see para 251 ante.

16 For the meaning of 'prohibited steps order' see the Children Act 1989 s 8(1); and para 261 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

17 For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

18 For the meaning of 'specific issue order' see the Children Act 1989 s 8(1); and para 263 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

19 For the meaning of 'supervision order' see the Children Act 1989 s 31(11); and para 271 note 5 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

20 For the meaning of 'child assessment order' see the Children Act 1989 s 43(2); and para 578 post (definition applied by the Adoption and Children Act 2002 Sch 6).

21 See *ibid* 29(1)-(5); and para 337 ante.

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### **341. Placement restricting renaming and removal of child.**

Once a child<sup>1</sup> is placed for adoption<sup>2</sup> or an adoption agency<sup>3</sup> is authorised to place a child for adoption<sup>4</sup> or a placement order<sup>5</sup> is in force in respect of a child<sup>6</sup>, then (whether or not the child is in England and Wales) a person may neither cause the child to be known by a new surname<sup>7</sup>, nor remove the child from the United Kingdom<sup>8</sup>, unless the court<sup>9</sup> gives leave or each parent<sup>10</sup> or guardian<sup>11</sup> of the child gives written consent<sup>12</sup> (although this does not prevent the removal of a child from the United Kingdom for a period of less than one month by a person who provides the child's home)<sup>13</sup>. Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>14</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 Ie under the Adoption and Children Act 2002 s 19 (see para 332 ante).

3 Ie a local authority or a registered adoption society: see paras 394-395 post.

4 Adoption and Children Act 2002 s 28(2)(a). As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante. Section 28(2) is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 53; and para 490 post) and in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases (see regs 6(a), 7; and para 499 note 2 post).

5 For the meaning of 'placement order' see para 335 ante.

6 Adoption and Children Act 2002 s 28(2)(b).

7 Ibid s 28(3)(a).

8 Ibid s 28(3)(b). As to the United Kingdom see para 102 note 7 ante. Regulations made by the Secretary of State after consultation with the Welsh Ministers may provide for any reference in any provision of the Adoption and Children Act 2002 to the United Kingdom to include the Isle of Man or any of the Channel Islands (s 108(1)(d), (3)); and may modify any provision of the Act, as such provision applies to any order made, or other thing done, under the law of the Isle of Man or any of the Channel Islands (s 108(2)). As to the Secretary of State and the Welsh Ministers see para 155 ante. At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 334 note 12 ante.

9 As to the court see para 511 post.

10 For the meaning of 'parent' see para 332 note 2 ante.

11 As to the meaning of 'guardian' see para 332 note 3 ante.

12 Adoption and Children Act 2002 s 28(2). For corresponding provision with regard to child welfare generally see the Children Act 1989 s 13; and para 262 ante. See also *Re D, L and LA (care: change of forename)* [2003] 1 FLR 339.

13 Adoption and Children Act 2002 s 28(4).

14 See *ibid* s 41(1)(a); and para 357 post.



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### **(iii) Recovery and Removal of Children Placed for Adoption**

#### **342. General prohibitions on removal of children.**

Provision is made for the prevention of the removal of children placed for adoption or accommodated by adoption agencies or local authorities<sup>1</sup>. These provisions apply whether or not the child<sup>2</sup> in question is in England and Wales<sup>3</sup>, although they do not in general<sup>4</sup> apply if the child is subject to a care order<sup>5</sup>, do not prevent the removal of a child who is arrested<sup>6</sup>, and do not affect the exercise by any local authority<sup>7</sup> or other person of any power conferred by any enactment (other than that relating to the removal of children from local authority accommodation)<sup>8</sup>. Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>9</sup>.

1 See the Adoption and Children Act 2002 ss 30-33; the text and notes 2-8 infra; and para 343 et seq post. 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post.

2 For the meaning of 'child' see para 327 note 2 ante.

3 Adoption and Children Act 2002 s 30(5).

4 Ie apart from ibid s 30 (see paras 343-344 post).

5 Ibid s 30(4). For the meaning of 'care order' see the Children Act 1989 s 31(11), 105(1); and para 271 note 4 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

6 Ibid s 30(7).

7 For the meaning of 'local authority' see para 327 note 7 ante.

8 Adoption and Children Act 2002 s 30(6). The enactment relating to the removal of children from local authority accommodation referred to in the text is the Children Act 1989 s 20(8) (see para 866 post).

9 See the Adoption and Children Act 2002 s 41(1)(a); and para 357 post.

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### **343. Removal of child placed for adoption.**

Where a child<sup>1</sup> is placed for adoption<sup>2</sup> by an adoption agency<sup>3</sup>, no person (other than the agency) can remove the child from the prospective adopters<sup>4</sup>. The same protection applies in circumstances where a child is placed for adoption by an adoption agency and either the child is less than six weeks old or the agency has at no time been authorised to place the child for adoption<sup>5</sup>. A person who removes a child in contravention of these provisions is guilty of an offence<sup>6</sup>, and removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>7</sup>.

1 For the meaning of 'child' see para 327 note 2 ante (and see also para 342 ante).

2 Ie under the Adoption and Children Act 2002 s 19 (see para 332 ante).

3 Ie a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante.

4 Adoption and Children Act 2002 s 30(1)(a). Section 30 is subject to ss 31-33 (see para 345 et seq post): s 30(4). As to the application of ss 30-33 generally see para 342 ante.

5 Ibid s 30(1)(b). For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante. As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

6 Ibid s 30(8). A person who commits this offence is liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 30(8). As to the standard scale see para 132 note 2 ante.

7 See ibid s 41(1)(a); and para 357 post.

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#### **344. Removal of child not yet placed for adoption.**

Where a child<sup>1</sup> who is not for the time being placed for adoption is being provided with accommodation by a local authority<sup>2</sup> and the authority has applied to the court<sup>3</sup> for a placement order<sup>4</sup> and the application has not been disposed of<sup>5</sup>, the child may be removed from the accommodation only by the authority or by a person who has the court's leave<sup>6</sup>. Where this does not apply, but a child who is not for the time being placed for adoption is being provided with accommodation by an adoption agency<sup>7</sup> and the agency is authorised to place the child for adoption<sup>8</sup> or would be so authorised if any consent<sup>9</sup> to such placement had not been withdrawn<sup>10</sup>, the child may be removed from the accommodation only by the agency<sup>11</sup>. A person who removes a child in contravention of these provisions is guilty of an offence<sup>12</sup>, and removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>13</sup>.

1 For the meaning of 'child' see para 327 note 2 ante (and see also para 342 ante).

2 Adoption and Children Act 2002 s 30(2)(a). For the meaning of 'local authority' see para 327 note 7 ante.

3 As to the court see para 511 post.

4 For the meaning of 'placement order' see para 335 ante.

5 Adoption and Children Act 2002 s 30(2)(b).

6 Ibid s 30(2). As to the application of ss 30-33 generally see para 342 ante.

7 Ibid s 30(3)(a). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post.

8 *Ie* under *ibid* s 19 (see para 332 ante). As to an adoption agency placing a child for adoption see para 329 note 8 ante. As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

9 For the meaning of 'consent' see para 370 post.

10 Adoption and Children Act 2002 s 30(3)(b).

11 Ibid s 30(3).

12 Ibid s 30(8). A person who commits this offence is liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 30(8). As to the standard scale see para 132 note 2 ante. As to the commission of offences by incorporated bodies see para 391 note 17 post.

13 See *ibid* s 41(1)(a); and para 357 post.

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### **345. Recovery by parent or guardian where consent to placement withdrawn.**

The parent<sup>1</sup> or guardian<sup>2</sup> of any child<sup>3</sup> who has been placed for adoption<sup>4</sup> by an adoption agency<sup>5</sup> may, where consent<sup>6</sup> to such placement has been withdrawn<sup>7</sup>, inform the agency that he wishes the child to be returned to him, and unless an application is, or has been, made for a placement order<sup>8</sup> and the application has not been disposed of<sup>9</sup>, the agency must give notice<sup>10</sup> of the parent's or guardian's wish to the prospective adopters<sup>11</sup> and the prospective adopters must return the child to the agency within the period of 14 days beginning with the day on which the notice is given<sup>12</sup>. Failure to give up the child is an offence<sup>13</sup>, although if the prospective adopters have made a prior application for an order in respect of the child which is still pending<sup>14</sup> they are not required by virtue of the notice to return the child to the agency unless the court<sup>15</sup> so orders<sup>16</sup>.

The parent or guardian of any child who is not for the time being placed for adoption, but who is being provided with accommodation by an adoption agency<sup>17</sup> in circumstances where the agency would be authorised to place the child for adoption<sup>18</sup> if consent to placement had not been withdrawn<sup>19</sup>, may inform the agency that he wishes the child to be returned to him and, unless an application is, or has been, made for a placement order and the application has not been disposed of, the agency must return the child within the period of seven days beginning with the request<sup>20</sup>.

1 For the meaning of 'parent' see para 332 note 2 ante.

2 As to the meaning of 'guardian' see para 332 note 3 ante.

3 For the meaning of 'child' see para 327 note 2 ante (and see also para 342 ante).

4 I.e. under the Adoption and Children Act 2002 s 19 (see para 332 ante).

5 Ibid s 32(1)(a). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante.

6 For the meaning of 'consent' see para 370 post.

7 Adoption and Children Act 2002 s 32(1)(b).

8 For the meaning of 'placement order', and as to applications for placement orders, see para 335 ante.

9 Adoption and Children Act 2002 s 32(1).

10 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

11 Ibid s 32(2)(a).

12 Ibid s 32(2)(b). As to the application of ss 30-33 generally see para 342 ante. Failure to comply with this requirement is ground for making a recovery order: see s 41(1)(a); and para 357 post. As soon as a child is returned to an adoption agency under s 32 the agency must return the child to the parent or guardian in question: s 32(4).

13 A prospective adopter who fails to comply with ibid s 32(2)(b) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 32(3). As to the standard scale see para 132 note 2 ante.

14     le where a notice under *ibid* s 32(2) is given but: (1) before the notice was given, an application for an adoption order (including a Scottish or Northern Irish adoption order), special guardianship order (see para 151 ante) or residence order, or for leave to apply for a special guardianship order or residence order, was made in respect of the child (s 32(5)(a)); and (2) the application (and, in a case where leave is given on an application to apply for a special guardianship order or residence order, the application for the order) has not been disposed of (s 32(5)(b)). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). As to Scottish and Northern Irish adoption orders see para 331 note 9 ante. Section 32(5) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

15     As to the court see para 511 post.

16     Adoption and Children Act 2002 s 32(5).

17     *Ibid* s 31(1)(a).

18     As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

19     Adoption and Children Act 2002 s 31(1)(b).

20     *Ibid* s 31(2).

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**346. Recovery by parent or guardian where child not placed or less than six weeks old.**

Where a child<sup>1</sup> is placed for adoption by an adoption agency<sup>2</sup> and either the child is less than six weeks old or the agency has at no time been authorised to place the child for adoption<sup>3</sup>, and any parent<sup>4</sup> or guardian<sup>5</sup> of the child informs the agency that he wishes the child to be returned to him<sup>6</sup>, the agency must, unless an application is, or has been, made for a placement order<sup>7</sup> and the application has not been disposed of<sup>8</sup>, must give notice<sup>9</sup> of the parent's or guardian's wish to the prospective adopters who must return the child to the agency within the period of seven days beginning with the day on which the notice is given<sup>10</sup>. Failure to give up the child is an offence<sup>11</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 342 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

3 Adoption and Children Act 2002 s 31(3)(a). As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

4 For the meaning of 'parent' see para 332 note 2 ante.

5 As to the meaning of 'guardian' see para 332 note 3 ante.

6 Adoption and Children Act 2002 s 31(3)(b).

7 For the meaning of 'placement order', and as to applications for placement orders, see para 335 ante.

8 Adoption and Children Act 2002 s 31(1).

9 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

10 Ibid s 31(4). As to the application of ss 30-33 generally see para 342 ante. Failure to comply with this requirement is ground for making a recovery order: see s 41(1)(a); and para 357 post. As soon as a child is returned to an adoption agency under s 31(4), the agency must return the child to the parent or guardian in question: s 31(6).

11 A prospective adopter who fails to comply with *ibid* s 31(4) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 31(5). As to the standard scale see para 132 note 2 ante.

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**347. Recovery by parent or guardian where placement order refused.**

Where:

- 451 (1) a child<sup>1</sup> is placed for adoption<sup>2</sup> by a local authority<sup>3</sup>;
- 452 (2) the authority has applied for a placement order<sup>4</sup> and the application has been refused<sup>5</sup>; and
- 453 (3) any parent<sup>6</sup> or guardian<sup>7</sup> of the child informs the authority that he wishes the child to be returned to him<sup>8</sup>,

the prospective adopters must return the child to the authority on a date determined by the court<sup>9</sup>. It is an offence for a prospective adopter to fail to return a child<sup>10</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 342 ante.

2 See under the Adoption and Children Act 2002 s 19 (see para 332 ante).

3 Ibid s 33(1)(a). For the meaning of 'local authority' see para 327 note 7 ante.

4 For the meaning of 'placement order', and as to applications for placement orders, see para 335 ante.

5 Adoption and Children Act 2002 s 33(1)(b).

6 For the meaning of 'parent' see para 332 note 2 ante.

7 As to the meaning of 'guardian' see para 332 note 3 ante.

8 Adoption and Children Act 2002 s 33(1)(c).

9 Ibid s 33(2). As to the court see para 511 post. Failure to comply with this requirement is ground for making a recovery order: see s 41(1)(a); and para 357 post. As soon as a child is returned to the authority, it must return the child to the parent or guardian in question: s 33(4). As to the application of ss 30-33 generally see para 342 ante.

10 A prospective adopter who fails to comply with ibid s 33(4) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 33(3). As to the standard scale see para 132 note 2 ante.

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#### **(iv) Return of Children Placed for Adoption**

##### **348. Removal of child subject to or formerly subject to placement order.**

Where a placement order<sup>1</sup> in respect of a child<sup>2</sup> is in force<sup>3</sup>, or has been revoked<sup>4</sup> in circumstances where the child has not been returned by the prospective adopters or remains in any accommodation provided by the local authority<sup>5</sup>, only the authority may remove the child from the prospective adopters or from the accommodation provided by it<sup>6</sup>. A person who removes a child in contravention of this restriction is guilty of an offence<sup>7</sup>, and removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>8</sup>.

1 For the meaning of 'placement order' see para 335 ante.

2 For the meaning of 'child' see para 327 note 2 ante. These provisions apply whether or not the child in question is in England and Wales: Adoption and Children Act 2002 s 34(8).

3 Ibid s 34(1)(a).

4 As to the revocation of placement orders see para 338 ante.

5 Adoption and Children Act 2002 s 34(1)(b). For the meaning of 'local authority' see para 327 note 7 ante.

6 Ibid s 34(1). The provisions prohibiting the removal of children subject or formerly subject to placement orders (ie s 34: see also para 349 post) do not affect the exercise by any local authority or other person of a power conferred by any enactment (other than the Children Act 1989 s 20(8): see para 866 post) (Adoption and Children Act 2002 s 34(6)) and do not prevent the removal of a child who is arrested (s 34(7)).

7 Ibid s 34(2). The offence is punishable on summary conviction by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 34(5). As to the standard scale see para 132 note 2 ante.

8 See ibid s 41(1)(a); and para 357 post.



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### **349. Recovery of child on revocation of placement order.**

Where a court<sup>1</sup> revoking a placement order<sup>2</sup> in respect of a child<sup>3</sup> determines that the child is not to remain with any former prospective adopters with whom the child is placed, the prospective adopters must return the child to the local authority<sup>4</sup> within the period determined by the court for the purpose; and a person who fails to do so is guilty of an offence<sup>5</sup>. Where a court revoking a placement order in respect of a child determines that the child is to be returned to a parent<sup>6</sup> or guardian<sup>7</sup>, the local authority must return the child to the parent or guardian as soon as the child is returned to the authority or, where the child is in accommodation provided by the authority, at once<sup>8</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'placement order' see para 335 ante. As to the revocation of placement orders see para 338 ante.

3 For the meaning of 'child' see para 327 note 2 ante. These provisions apply whether or not the child in question is in England and Wales: Adoption and Children Act 2002 s 34(8).

4 For the meaning of 'local authority' see para 327 note 7 ante. Failure to comply with this requirement is grounds for making a recovery order: see *ibid* s 41(1)(a); and para 357 post.

5 *Ibid* s 34(3). As to the application of s 34 see para 348 note 6 ante. The offence is punishable on summary conviction by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 34(5). As to the standard scale see para 132 note 2 ante.

6 For the meaning of 'parent' see para 332 note 2 ante.

7 As to the meaning of 'guardian' see para 332 note 3 ante.

8 Adoption and Children Act 2002 s 34(4).

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### **350. Return of child by prospective adopters.**

Where a child<sup>1</sup> is placed for adoption by an adoption agency<sup>2</sup> and the prospective adopters give notice<sup>3</sup> to the agency of their wish to return the child, the agency must receive the child from the prospective adopters before the end of the period of seven days beginning with the giving of the notice<sup>4</sup> and give notice to any parent<sup>5</sup> or guardian<sup>6</sup> of the child of the prospective adopters' wish to return the child<sup>7</sup>. The child's case must then be reviewed<sup>8</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. These provisions apply whether or not the child in question is in England and Wales: Adoption and Children Act 2002 s 35(6).

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

3 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

4 Ibid s 35(1)(a). Section 35(1) is modified in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 6(a), 8; and para 499 note 2 post.

5 For the meaning of 'parent' see para 332 note 2 ante.

6 As to the meaning of 'guardian' see para 332 note 3 ante.

7 Adoption and Children Act 2002 s 35(1)(b).

8 In England, where the child is returned to the adoption agency in accordance with ibid s 35(1) or s 35(2) (see para 351 post) the agency must conduct a review of the child's case no earlier than 28 days, or later than 42 days, after the date on which the child is returned to the agency, and when carrying out that review the agency must consider the matters set out in the Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6) (a), (b), (c), (f) (see para 446 post) (reg 36(10)); where a child is so returned in Wales, the agency must conduct a review of the child's case as soon as reasonably practicable and in any event no later than 28 days after the date on which the child is returned to the agency (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(11)).

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### **351. Recovery of child from prospective adopters.**

Where a child<sup>1</sup> is placed for adoption by an adoption agency<sup>2</sup> and the agency is of the opinion that the child should not remain with the prospective adopters<sup>3</sup> and gives notice<sup>4</sup> to them of its opinion<sup>5</sup>, the prospective adopters must, not later than the end of the period of seven days beginning with the giving of the notice, return the child to the agency<sup>6</sup>. Failure to give up the child is an offence<sup>7</sup>, although if the prospective adopters have made a prior application for an order in respect of the child which is still pending<sup>8</sup> they are not required by virtue of the notice to return the child to the agency unless the court<sup>9</sup> so orders<sup>10</sup>. The child's case must be reviewed after he is returned<sup>11</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. These provisions apply whether or not the child in question is in England and Wales: Adoption and Children Act 2002 s 35(6).

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

3 Adoption and Children Act 2002 s 35(2)(a). The provisions of s 35(2), (3), (5) are modified in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 6(a), 8; and para 499 note 2 post.

4 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

5 Ibid s 35(2)(b). If the agency gives such a notice, it must also give notice to any parent or guardian of the child of the obligation to return the child to the agency: s 35(3). For the meaning of 'parent' see para 332 note 2 ante. As to the meaning of 'guardian' see para 332 note 3 ante.

6 Ibid s 35(2).

7 A prospective adopter who fails to comply with ibid s 35(2) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 35(4). As to the standard scale see para 132 note 2 ante. Failure to comply with this requirement is also grounds for making a recovery order: see s 41(1)(a); and para 357 post.

8 I.e. where an adoption agency gives notice under ibid s 35(2) (s 35(5)(a)) but: (1) before the notice was given, an application for an adoption order (including a Scottish or Northern Irish adoption order), special guardianship order (see para 151 ante) or residence order, or for leave to apply for a special guardianship order or residence order, was made in respect of the child (s 35(5)(b)); and (2) the application (and, in a case where leave is given on an application to apply for a special guardianship order or residence order, the application for the order) has not been disposed of (s 35(5)(c)). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post. For the meaning of 'residence order' see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). As to Scottish and Northern Irish adoption orders see para 331 note 9 ante. Section 35(5) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

9 As to the court see para 511 post.

10 Adoption and Children Act 2002 s 35(5).

11 See para 350 note 8 ante.

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## **(v) Removal of Children in Non-Agency Cases**

### **352. Restrictions on removal generally.**

Provision is made within the legislation restricting the removal of children<sup>1</sup> whose home is with any persons ('the people concerned') with whom the child is not placed by an adoption agency<sup>2</sup> but who:

- 454 (1) have applied for an adoption order<sup>3</sup> in respect of the child, and the application has not been disposed of<sup>4</sup>;
- 455 (2) have given notice of intention to adopt<sup>5</sup>; or
- 456 (3) have applied for leave to apply for an adoption order<sup>6</sup>, and the application has not been disposed of<sup>7</sup>.

Such a child may be removed only by specified persons depending on the circumstances in which he is living<sup>8</sup>. Removal of a child in contravention of these restrictions (which apply whether or not the child in question is in England and Wales<sup>9</sup>, although they do not prevent the removal of a child who is arrested<sup>10</sup>) is an offence<sup>11</sup>, and removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>12</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante. For these purposes the reference to a child placed by an adoption agency includes a child placed by a Scottish or Northern Irish adoption agency: s 36(1). 'Scottish adoption agency' means a local authority, or a voluntary organisation providing a registered adoption service; but in relation to the provision of any particular service, references to a Scottish adoption agency do not include a voluntary organisation unless it is registered in respect of that service or a service which, in Scotland, corresponds to that service: ss 144(3), 147, Sch 6. Expressions used in s 144(3) have the same meaning as in the Regulation of Care (Scotland) Act 2001; and 'registered' means registered under Pt 1 (ss 1-32): Adoption and Children Act 2002 s 144(3). 'Northern Irish adoption agency' means an adoption agency within the meaning of the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 3: Adoption and Children Act 2002 s 144(1), Sch 6.

3 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

4 Adoption and Children Act 2002 s 36(1)(a). Section 36 is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 54; and para 490 post.

5 Adoption and Children Act 2002 s 36(1)(b). For the meaning of 'notice of intention to adopt' see s 44(2); and para 365 post. As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante. For the purposes of ss 36-40, a notice of intention to adopt is to be disregarded if the period of four months beginning with the giving of the notice has expired without the people concerned applying for an adoption order (s 36(2)(a)) or the notice is a second or subsequent notice of intention to adopt and was given during the period of five months beginning with the giving of the preceding notice (s 36(2)(b)). Section 36(2) does not apply in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 6(b); and para 499 note 2 post.

6 I.e. under the Adoption and Children Act 2002 s 42(6) (see para 364 post).

7 Ibid s 36(1)(c). For the purposes of ss 36-40, if the people concerned apply for leave to apply for an adoption order under s 42(6) and the leave is granted, the application for leave is not to be treated as disposed of until the period of three days beginning with the granting of the leave has expired: s 36(3).

8 Ibid s 36(1). As to removal of a child subject to an adoption order application, removal of a child living with local authority foster parents, removal of a child by a partner of a parent, and removal of a child in other non-agency cases see ss 37-40; and paras 353-356 post.

9 Ibid s 36(7).

10 Ibid s 36(4).

11 Ibid s 36(6)(b). The offence is punishable on summary conviction by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 36(6). As to the standard scale see para 132 note 2 ante.

12 See ibid s 41(1)(a); and para 357 post.

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### **353. Removal of child subject to adoption order application.**

When a child's<sup>1</sup> home is with any persons with whom he is not placed by an adoption agency<sup>2</sup> but who have applied for an adoption order<sup>3</sup> in respect of him, and the application has not been disposed of, the child may be removed only by a person who has the court's<sup>4</sup> leave<sup>5</sup> or a local authority<sup>6</sup> or other person in the exercise of a power conferred by any enactment (other than that relating to the removal of children from local authority accommodation)<sup>7</sup>. Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>8</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 352 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante; and as to references to a child placed by an adoption agency see para 352 note 2 ante.

3 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

4 As to the court see para 511 post.

5 Adoption and Children Act 2002 ss 36(1)(a), 37(a). Sections 36, 37 are modified in their application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 54; and para 490 post.

6 For the meaning of 'local authority' see para 327 note 7 ante.

7 Adoption and Children Act 2002 s 37(b). The enactment relating to the removal of children from local authority accommodation referred to in the text is the Children Act 1989 s 20(8) (see para 866 ante). As to the application of these restrictions, and the punishment of their contravention, see para 352 ante.

8 See the Adoption and Children Act 2002 s 41(1)(a); and para 357 post.

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### **354. Removal of child living with local authority foster parents.**

Where a child's<sup>1</sup> home is with local authority foster parents<sup>2</sup>, the categories of person who may remove him depend on how long the child has had that home and whether those foster parents have given notice of an intention to adopt him<sup>3</sup>. If the child has had his home with the foster parents at all times during the period of five years ending with the removal and the foster parents have given notice of intention to adopt<sup>4</sup>, or an application has been made<sup>5</sup> for leave to apply for an adoption order<sup>6</sup> and has not been disposed of<sup>7</sup>, he may be removed only by a person who has the court's<sup>8</sup> leave<sup>9</sup> or by a local authority or other person in the exercise of a power conferred by any enactment (other than that relating to the removal of children from local authority accommodation)<sup>10</sup>. If, however, the above circumstances do not obtain but the child has had his home with the foster parents at all times during the period of one year ending with the removal<sup>11</sup> and the foster parents have given notice of intention to adopt<sup>12</sup>, the child may be removed by a person with parental responsibility<sup>13</sup> for the child who is exercising the power relating to the removal of children from local authority accommodation<sup>14</sup> (in addition to the persons referred to above<sup>15</sup>). Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>16</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 352 ante.

2 As to the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 900 post (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). For the meaning of 'local authority' see para 327 note 7 ante.

3 Ibid s 38(1). As to the application of these restrictions, and the punishment of their contravention, see para 352 ante. Section 38 is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 54; and para 490 post.

4 Adoption and Children Act 2002 s 38(2)(a). For the meaning of 'notice of intention to adopt' see s 44(2); and para 365 post. As to the giving of notices of intention to adopt see para 352 note 5 ante. As to the giving of notices under the Adoption and Children Act 2002 generally see para 333 note 11 ante.

5 Ie under ibid s 42(6) (see para 364 post)

6 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

7 Adoption and Children Act 2002 s 38(2)(b).

8 As to the court see para 511 post.

9 Adoption and Children Act 2002 s 38(3)(a).

10 Ibid s 38(3)(b). The enactment relating to the removal of children from local authority accommodation referred to in the text is the Children Act 1989 s 20(8) (see para 866 post).

11 Adoption and Children Act 2002 s 38(4)(a).

12 Ibid s 38(4)(b).

13 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 Sch 6).

- 14 Ibid s 38(5)(a). As to the power referred to see the Children Act 1989 s 20(8); and para 866 post.
- 15 Adoption and Children Act 2002 s 38(5)(b), (c).
- 16 See *ibid* s 41(1)(a); and para 357 post.



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### **355. Removal of child by partners of parents.**

Where a child's<sup>1</sup> home is with a partner of a parent<sup>2</sup> who has given notice of an intention to adopt<sup>3</sup>, the categories of person who may remove him depend on how long the child has had that home<sup>4</sup>. If the child's home has been with the partner for not less than three years (whether continuous or not) during the period of five years ending with the removal he may be removed only by a person who has the court's<sup>5</sup> leave<sup>6</sup> or by a local authority<sup>7</sup> or other person in the exercise of a power conferred by any enactment (other than that relating to the removal of children from local authority accommodation)<sup>8</sup>. If, however, the above circumstances do not obtain, the child may be removed by a parent or guardian<sup>9</sup> (in addition to the persons referred to above<sup>10</sup>). Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>11</sup>.

Where a parent or guardian may remove a child from persons with whom the child has not been placed by an adoption agency (that is, 'the people concerned')<sup>12</sup> in accordance with these provisions, the people concerned must at the request of the parent or guardian return the child to the parent or guardian at once<sup>13</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 352 ante.

2 For the meaning of 'parent' see para 332 note 2 ante. For the purposes of the Adoption and Children Act 2002 a person is the partner of a child's parent if the person and the parent are a couple but the person is not the child's parent (s 144(7)); and a 'couple' means a married couple (ss 144(4)(a), 147, Sch 6), two people who are civil partners of each other (s 144(4)(aa) (added by the Civil Partnership Act 2004 s 79(1), (12))) or two people (whether of different sexes or the same sex) living as partners in an enduring family relationship (Adoption and Children Act 2002 s 144(4)(b)) (not including two people one of whom is the other's parent, grandparent, sister, brother, aunt or uncle (s 144(5))). References to relationships in s 144(5) are to relationships of the full blood or half blood or, in the case of an adopted person, such of those relationships as would exist but for adoption (s 144(6)(a)) and include the relationship of a child with his adoptive, or former adoptive, parents (s 144(6)(b)), but do not include any other adoptive relationships (s 144(6)).

3 As to the giving of notices of intention to adopt see para 352 note 5 ante. As to the giving of notices under the Adoption and Children Act 2002 generally see para 333 note 11 ante.

4 Ibid s 39(1). As to the application of these restrictions, and the punishment of their contravention, see para 352 ante. Section 39 is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 54; and para 490 post.

5 As to the court see para 511 post.

6 Adoption and Children Act 2002 s 39(2)(a).

7 For the meaning of 'local authority' see para 327 note 7 ante.

8 Adoption and Children Act 2002 s 39(2)(b). The enactment relating to the removal of children from local authority accommodation referred to in the text is the Children Act 1989 s 20(8) (see para 866 post).

9 Adoption and Children Act 2002 s 39(3)(a). As to the meaning of 'guardian' see para 332 note 3 ante.

10 Ibid s 39(3)(b), (c).

11 See ibid s 41(1)(a); and para 357 post.

12 See *ibid* s 36(1); and para 352 ante. 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post.

13 *Ibid* s 36(5). Failure to comply with this requirement is an offence punishable on summary conviction by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 36(6)(a). As to the standard scale see para 132 note 2 ante. Section 36(5) does not apply in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 6(b); and para 499 note 2 post.

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### **356. Removal of child in other non-agency cases.**

If a child's<sup>1</sup> home is with persons with whom he has not been placed by an adoption agency<sup>2</sup> (that is, 'the people concerned')<sup>3</sup> and, in circumstances not covered by the provisions relating to the removal of children subject to an adoption order application<sup>4</sup>, the removal of children living with local authority foster parents<sup>5</sup> or the removal of children by partners of parents<sup>6</sup>, the people concerned have either given notice of intention to adopt<sup>7</sup> or have applied<sup>8</sup> for leave to apply for an adoption order<sup>9</sup> and the application has not been disposed of<sup>10</sup>, the child may be removed only by a person who has the court's<sup>11</sup> leave<sup>12</sup> or by a local authority<sup>13</sup> or other person in the exercise of a power conferred by any enactment (other than that relating to the removal of children from local authority accommodation)<sup>14</sup>. Removal or intended removal in contravention of these provisions is ground for making a recovery order<sup>15</sup>.

1 For the meaning of 'child' see para 327 note 2 ante. See also para 352 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante; and as to references to a child placed by an adoption agency see para 352 note 2 ante.

3 See the Adoption and Children Act 2002 s 36(1); and para 352 ante.

4 See *ibid* s 37; and para 353 ante.

5 See *ibid* s 38; and para 354 ante.

6 See *ibid* s 39; and para 355 ante.

7 *Ibid* s 40(1)(a). For the meaning of 'notice of intention to adopt' see s 44(2); and para 365 post. As to the giving of notices of intention to adopt see para 352 note 5 ante. As to the giving of notices under the Adoption and Children Act 2002 generally see para 333 note 11 ante. Section 40 is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 54; and para 490 post.

8 I.e. under the Adoption and Children Act 2002 s 42(6) (see para 364 post). In connection with applications see para 352 note 7 ante.

9 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

10 Adoption and Children Act 2002 s 40(1)(b).

11 As to the court see para 511 post.

12 Adoption and Children Act 2002 s 40(2)(a).

13 For the meaning of 'local authority' see para 327 note 7 ante.

14 Adoption and Children Act 2002 s 40(2)(b). The enactment relating to the removal of children from local authority accommodation referred to in the text is the Children Act 1989 s 20(8) (see para 866 post). As to the application of these restrictions, and the punishment of their contravention, see para 352 ante.

15 See the Adoption and Children Act 2002 s 41(1)(a); and para 357 post.

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## **(vi) Recovery Orders**

### **357. Power to make orders.**

A 'recovery order', in relation to a child, is an order:

- 457 (1) directing any person who is in a position to do so to produce the child<sup>1</sup> on request<sup>2</sup>;
- 458 (2) authorising the removal of the child<sup>3</sup>;
- 459 (3) requiring any person who has information as to the child's whereabouts to disclose that information on request<sup>4</sup>; or
- 460 (4) authorising a constable to enter any specified premises and search for the child<sup>5</sup>.

The court may make a recovery order on the application of any person<sup>6</sup> where it appears to it that a child has been removed in contravention of any of the statutory restrictions on removal<sup>7</sup> or that there are reasonable grounds for believing that a person intends to remove a child in contravention of those provisions<sup>8</sup>, or that a person has failed to comply with specified elements of those restrictions relating to the timely recovery or return of a child<sup>9</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 Adoption and Children Act 2002 s 41(2)(a). The persons to whom the child must be produced or by whom the child may be removed (see the text and note 3 infra) pursuant to such a direction are any person named by the court (s 41(4)(a)), any constable (s 41(4)(b)), or any person who, after the order is made, is authorised to exercise any power under the order by an adoption agency which is authorised to place the child for adoption (s 41(4)(c)). As to the court see para 511 post. 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post. As to references to an adoption agency being, or not being, authorised to place a child for adoption see para 331 note 8 ante.

3 Ibid s 41(2)(b). For the persons who may remove a child pursuant to a recovery order see note 2 supra.

4 Ibid s 41(2)(c). The persons who may request such disclosure pursuant to a recovery order are any constable or officer of the court: s 41(2)(c).

5 Ibid s 41(2)(d). A constable may be empowered to use reasonable force if necessary: s 41(2)(d). Premises may be specified under s 41(2)(d) only if it appears to the court that there are reasonable grounds for believing the child to be on them: s 41(3).

6 Ibid s 41(2).

7 Ie any of the provisions of ibid ss 18-40: see para 331 et seq ante.

8 Ibid s 41(1)(a).

9 Ibid s 41(1)(b). The 'specified elements' referred to in the text are s 31(4) (see para 346 ante) s 32(2) (see para 345 ante), s 33(2) (see para 347 ante), s 34(3) (see para 349 ante) and s 35(2) (see para 351 ante).

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### **358. Compliance.**

A person must comply with a request to disclose information as required by a recovery order<sup>1</sup> even if the information sought might constitute evidence that he had committed an offence<sup>2</sup>; however, in criminal proceedings in which the person is charged with an offence (other than specified perjury offences<sup>3</sup>) no evidence relating to the information provided may be adduced<sup>4</sup>, and no question relating to the information may be asked<sup>5</sup>, by or on behalf of the prosecution unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of the person<sup>6</sup>.

A person who intentionally obstructs a person exercising a power of removal conferred by a recovery order is guilty of an offence<sup>7</sup>.

1 As to the making of recovery orders see para 357 ante. A recovery order has effect in relation to Scotland as if it were an order made by the Court of Session which that court had jurisdiction to make: Adoption and Children Act 2002 s 41(9).

2 Ibid s 41(6).

3 I.e. an offence under the Perjury Act 1911 s 2 or s 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 716-717) (Adoption and Children Act 2002 s 41(8)(a)) or an offence under the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(1) or (2) (false statements made on oath or otherwise than on oath) (Adoption and Children Act 2002 s 41(8)(b)).

4 Ibid s 41(7)(a).

5 Ibid s 41(7)(b).

6 Ibid s 41(7).

7 Ibid s 41(5). The offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: s 41(5). As to the standard scale see para 132 note 2 ante.

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### **(3) ADOPTION ORDERS**

#### **359. Effect of adoption order.**

An adoption order is an order made by the court<sup>1</sup> giving parental responsibility<sup>2</sup> for a child<sup>3</sup> to the adopters or adopter<sup>4</sup>. The making of an adoption order operates to extinguish the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order<sup>5</sup>, any order under the Children Act 1989 or its Scottish or Northern Irish equivalents<sup>6</sup>, and any duty arising by virtue of an agreement or an order of a court to make payments, so far as the payments are in respect of the adopted child's maintenance or upbringing for any period after the making of the adoption order<sup>7</sup>. An adoption order does not affect parental responsibility so far as it relates to any period before the making of the order<sup>8</sup> and, in the case of an order made on an application<sup>9</sup> by the partner of a parent<sup>10</sup> of the adopted child, does not affect the parental responsibility of that parent or any duties of that parent arising by virtue of an agreement or an order of a court to make payments, so far as the payments are in respect of the adopted child's maintenance or upbringing for any period after the making of the adoption order<sup>11</sup>. An adoption order may be made even if the child to be adopted is already an adopted child<sup>12</sup>. There is a right of appeal against an adoption order made by a magistrates' court<sup>13</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

3 For the meaning of 'child' see para 327 note 2 ante.

4 Adoption and Children Act 2002 s 46(1).

5 Ibid s 46(2)(a).

6 Ibid s 46(2)(b), (c). The Scottish and Northern Irish equivalents of the Children Act 1989 are the Children (Northern Ireland) Order 1995, SI 1995/755, and the Children (Scotland) Act 1995, although orders under s 9, s 11(1)(d) or s 13, and exclusion orders within the meaning of s 76(1), are excepted from these provisions: Adoption and Children Act 2002 s 46(2).

7 Ibid s 46(2)(d). Section 46(2)(d) does not apply to a duty arising by virtue of an agreement which constitutes a trust (s 46(4)(a)) or which expressly provides that the duty is not to be extinguished by the making of an adoption order (s 46(4)(b)).

8 Ibid s 46(3)(a).

9 Ie an application under ibid s 51(2) (see para 363 post).

10 For the meaning of 'partner of a parent' see para 355 note 2 ante.

11 Adoption and Children Act 2002 s 46(3)(b).

12 Ibid s 46(5).

13 See the Children Act 1989 s 94 (as amended); and para 304 ante.

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### **360. Persons in respect of whom an adoption order cannot be made.**

An adoption order<sup>1</sup> may not be made in relation to a person:

- 461 (1) who is or has been married<sup>2</sup>;
- 462 (2) who is or has been a civil partner<sup>3</sup>; or
- 463 (3) who has attained the age of 19 years<sup>4</sup>.

There are also restrictions on the adoption of children<sup>5</sup> having parents<sup>6</sup> or guardians<sup>7</sup>. Subject to the statutory requirements as to the giving of consent<sup>8</sup>, an adoption order may not be made if the child has a parent or guardian<sup>9</sup> unless:

- 464 (a) in the case of each parent or guardian of the child, the court<sup>10</sup> is satisfied that consent is given or should be dispensed with<sup>11</sup>;
- 465 (b) the child has been placed for adoption by an adoption agency<sup>12</sup> with the prospective adopters in whose favour the order is proposed to be made<sup>13</sup> and the placement is not opposed<sup>14</sup>; or
- 466 (c) the child is free for adoption under Scottish or Northern Irish law<sup>15</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 Adoption and Children Act 2002 s 47(8).

3 Ibid s 47(8A) (added by the Civil Partnership Act 2004 s 79(1), (3)).

4 Adoption and Children Act 2002 s 47(9).

5 For the meaning of 'child' see para 327 note 2 ante.

6 For the meaning of 'parent' see para 332 note 2 ante.

7 As to the meaning of 'guardian' see para 332 note 3 ante.

8 Ie the requirements of the Adoption and Children Act 2002 s 52 (see paras 370-373 post).

9 Ibid s 47(1). Section 47 is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691); see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

10 As to the court see para 511 post.

11 Adoption and Children Act 2002 s 47(2). The court must be satisfied that the parent or guardian consents to the making of the order (s 47(2)(a)) or has consented under s 20 (see para 333 post) (and has not withdrawn the consent) and does not oppose the making of the order (s 47(2)(b)), or that the parent's or guardian's consent should be dispensed with (s 47(2)(c)). A parent or guardian may not oppose the making of an adoption order under s 47(2)(b) without the court's leave (s 47(3)), and the court cannot give such leave unless satisfied that there has been a change in circumstances since the consent was given (s 47(7)).

12 Ie a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

13 Adoption and Children Act 2002 s 47(4)(a).

14 Ibid s 47(4)(b). The placement is not opposed for these purposes if the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old (s 47(4)(b)(i)) or if the child was placed for adoption under a placement order (s 47(4)(b)(ii)), and no parent or guardian opposes the making of the adoption order (s 47(4)(c)). For the meaning of 'placement order' see para 335 ante. A parent or guardian may not oppose the making of an adoption order under this provision without the court's leave (s 47(5)), and the court cannot give such leave unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made (s 47(7)). See further *Re P (a child) (adoption order: leave to oppose making of adoption order)* [2007] EWCA Civ 616, [2007] 2 FCR 407, [2007] All ER (D) 334 (Jun).

15 Adoption and Children Act 2002 s 47(6). A child is free for adoption for these purposes if he is free for adoption by virtue of an order made under the Adoption (Scotland) Act 1978 s 18 (Adoption and Children Act 2002 s 47(6)(a)) or the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 17(1) or art 18(1) (Adoption and Children Act 2002 s 47(6)(b)).

## UPDATE

### 360 Persons in respect of whom an adoption order cannot be made

NOTES 11, 15--See *Re M (adoption: leave to oppose)* [2009] EWHC 3643 (Fam), [2010] 1 FLR 238 (to permit belatedly obtained fresh evidence, which went to the findings in the original proceedings in order to found an application for leave to oppose adoption proceedings would undermine the purpose of s 47(7)).



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### **361. Persons who can apply.**

An adoption order<sup>1</sup> may be made on an application either by a couple<sup>2</sup> or by an individual person<sup>3</sup>. An application may be made if the applicant<sup>4</sup> or at least one of the couple<sup>5</sup> is domiciled in a part of the British Islands<sup>6</sup> or if the applicant or both of the couple have been habitually resident in a part of the British Islands for a period of not less than one year ending with the date of the application<sup>7</sup>. An application for an adoption order may be made only if the person to be adopted has not attained the age of 18 years on the date of the application<sup>8</sup>.

The court may not hear an application for an adoption order in relation to a child where a previous adoption application<sup>9</sup> made in relation to the child<sup>10</sup> by the same persons was refused by any court, unless it appears to the court that, because of a change in circumstances or for any other reason, it is proper to hear the application<sup>11</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 Adoption and Children Act 2002 ss 46(1), 49(1)(a). Applications by couples must be made under s 50 (see para 362 post). For the meaning of 'couple' see para 355 note 2 ante. Sections 48, 49 are modified in their application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55, 58; and para 490 post.

3 Adoption and Children Act 2002 s 49(1)(b). Applications by individuals must be made under s 51 (see para 363 post).

4 *Ie* in the case of an application under *ibid* s 51.

5 *Ie* in the case of an application under *ibid* s 50.

6 *Ibid* s 49(2).

7 *Ibid* s 49(3). As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

8 *Ibid* s 49(4).

9 *Ie* any application for an adoption order or a Scottish or Northern Irish adoption order, or for an order for adoption made in the Isle of Man or any of the Channel Islands: *ibid* s 48(2). As to Scottish and Northern Irish adoption orders see para 331 note 9 ante. As to the court see para 511 post.

10 For the meaning of 'child' see para 327 note 2 ante.

11 Adoption and Children Act 2002 s 48(1). Section 48(1) is modified in relation to an order under s 84 giving parental responsibility prior to an overseas adoption: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 11; and para 502 post.

## **UPDATE**

### **361 Persons who can apply**

NOTE 2--See also *Re G (adoption: unmarried couple)* [2008] UKHL 38, [2008] 3 WLR 76, [2008] 2 FCR 366 (Northern Ireland legislation preventing unmarried couple being considered as potential adoptive parents contrary to right to family life under European Convention on Human Rights art 8 and prohibition on discrimination in art 14).



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### **362. Adoption by couple.**

An adoption order<sup>1</sup> may be made on the application of a couple<sup>2</sup> where:

- 467 (1) both of them have attained the age of 21 years<sup>3</sup>; or
- 468 (2) one is the mother or father of the person to be adopted and has attained the age of 18 years<sup>4</sup> and the other has attained the age of 21 years<sup>5</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 For the meaning of 'couple' see para 355 note 2 ante. Note that neither marriage nor civil partnership is a precondition for adoption.

3 Adoption and Children Act 2002 s 50(1). Section 50 is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

4 Adoption and Children Act 2002 s 50(2)(a).

5 Ibid s 50(2)(b).

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### 363. Adoption by one person.

An adoption order<sup>1</sup> may be made on the application of one person who has attained the age of 21 years and is neither married nor a civil partner<sup>2</sup>. This does not, however, mean that a person who has attained the age of 21 years cannot adopt as an individual if he is part of a couple (whether married, unmarried or in a civil partnership)<sup>3</sup>, since an adoption order may also be made on the application of such a person if the court<sup>4</sup> is satisfied that he is the partner of a parent<sup>5</sup> of the person to be adopted<sup>6</sup>, that his spouse or civil partner cannot be found<sup>7</sup>, that the spouses or civil partners have separated and are living apart and the separation is likely to be permanent<sup>8</sup>, or that the person's spouse or civil partner is by reason of ill-health, whether physical or mental, incapable of making an application for an adoption order<sup>9</sup>. An adoption order may not, however, be made on an application under these provisions by the mother or the father of the person to be adopted unless the court is satisfied that the other natural parent is dead or cannot be found<sup>10</sup>, there is no other parent (by virtue of the statutory provisions governing fatherhood in cases of artificial insemination)<sup>11</sup>, or there is some other reason justifying the child's being adopted by the applicant alone<sup>12</sup>.

<sup>1</sup> For the meaning of 'adoption order' see para 359 ante.

<sup>2</sup> Adoption and Children Act 2002 s 51(1) (s 51(1) amended, and s 51(3A) added, by the Civil Partnership Act 2004 s 79(1), (4), (5)). The Adoption and Children Act 2002 s 51 (as amended) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691); see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

<sup>3</sup> Where any child adopted by one natural parent as sole adoptive parent subsequently becomes a legitimated person on the marriage of the natural parents, the court by which the adoption order was made (which in relation to an adoption order made by a magistrates' court includes a court acting for the same local justice area) may, on the application of any of the parties concerned, revoke the order: Adoption and Children Act 2002 s 55(1), (2) (s 55(2) amended by the Courts Act 2003 s 109(1), Sch 8 para 412). Where an order is so revoked, the officer of the court (as prescribed by the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (as amended)) must communicate the revocation in the prescribed manner to the Registrar General who must then cancel or secure the cancellation of the entry in the Adopted Children Register relating to the adopted person (Adoption and Children Act 2002 Sch 1 para 6(1), (2)(a)) and the marking with the word 'Adopted' of any entry relating to the adopted person in the registers of live births or other records (Sch 1 para 6(2)(b)). As to the Adopted Children Register see para 383 post. A copy or extract of an entry in any register or other record, being an entry the marking of which is cancelled under these provisions, is not to be treated as an accurate copy unless both the marking and the cancellation are omitted from it: Sch 1 para 6(3). As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

Under the former legislation (ie the Adoption Act 1976 s 15 (repealed)) an adoption application could have been made by a single person, whether living alone, or cohabiting in a heterosexual, homosexual, or asexual relationship with another person whom it is proposed should fulfil a quasi parental role towards the child: see *Re W (a minor) (adoption: homosexual adopter)* [1998] Fam 58, [1997] 3 All ER 620. It is possible for an adoption order to be made in favour of one co-habitee with a joint residence order in favour of both of them: see *Re AB (adoption: parental consent)* [1996] 1 FCR 633, sub nom *Re AB (adoption: joint residence)* [1996] 1 FLR 27. An adoption order made in favour of a married couple who had separated could only be made if the requirements of the Adoption Act 1976 s 13(3) (repealed) had been met: see *Re WM (adoption: non-patril)* [1997] 2 FCR 494, [1997] 1 FLR 132.

<sup>4</sup> As to the court see para 511 post.

<sup>5</sup> For the meaning of 'partner of a parent' see para 355 note 2 ante.

6 Adoption and Children Act 2002 s 51(2). Under the former legislation (ie the Adoption Act 1976) considerable caution was expressed as to the court making adoption orders in favour of a step-parent (see *Re Pj (adoption: practice on appeal)* [1998] 2 FLR 252, [1998] Fam Law 452, CA), and in particular where the natural father objected to an adoption order (see *Re B (adoption: father's objections)* [1999] 3 FCR 522, [1999] 2 FLR 215, CA). See also *Re G (adoption order)* [1999] 1 FCR 482, [1999] 1 FLR 400, CA (complex cases should be transferred to the High Court at an early stage). However, see also *Söderback v Sweden* [1999] 1 FLR 250, ECtHR.

7 Adoption and Children Act 2002 s 51(3)(a), (3A)(a) (as added: see note 2 supra).

8 Ibid s 51(3)(b), (3A)(b) (as added: see note 2 supra).

9 Ibid s 51(3)(c), (3A)(c) (as added: see note 2 supra).

10 Ibid s 51(4)(a). Where the court makes an adoption order on such an application it must record that it is satisfied as to the fact mentioned in s 51(4)(a) or (as the case may be) s 51(4)(b) (see the text and note 11 infra): s 51(4).

11 Ibid s 51(4)(b). See note 10 supra. For this purpose the statutory provisions governing fatherhood in cases of artificial insemination are the Human Fertilisation and Embryology Act 1990 s 28 (disregarding s 28(5A)-(5I) (as added)) (see para 103 ante); Adoption and Children Act 2002 51(4)(b) (amended by the Human Fertilisation and Embryology Act 1990 (Deceased Fathers) Act 2003 s 2(1), Schedule para 18).

12 Adoption and Children Act 2002 s 51(4)(c). Where the court makes an adoption order on such an application it must record the reason: s 51(4). As to the construction of s 51(4)(c), with particular reference to that provision's compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (right to family life: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 149 et seq), see *Re B (a child) (sole adoption by unmarried father)* [2001] UKHL 70, [2002] 1 All ER 641, [2002] 1 FCR 150 (decided under the corresponding provision of the Adoption Act 1976 (ie s 15(3)(b) (repealed))).

## UPDATE

### 363 Adoption by one person

TEXT AND NOTES 10-12--Adoption and Children Act 2002 s 51(4) amended, s 51(5) added: Human Fertilisation and Embryology Act 2008 Sch 6 para 39.

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### **364. Child to live with adopters before application.**

As with the former legislation<sup>1</sup>, an application for an adoption order<sup>2</sup> may not be made unless particular conditions relating to the child's<sup>3</sup> residence are met<sup>4</sup>. These are:

- 469 (1) if the child was placed for adoption with the applicant or applicants by an adoption agency<sup>5</sup> or in pursuance of an order of the High Court<sup>6</sup>, or the applicant is a parent<sup>7</sup> of the child<sup>8</sup>, an application for an adoption order may be made only if the child has had his home with the applicant or, in the case of an application by a couple, with one or both of them at all times during the period of ten weeks preceding the application<sup>9</sup>;
- 470 (2) if the applicant or one of the applicants is the partner of a parent<sup>10</sup> of the child, an application for an adoption order may be made only if the child has had his home with the applicant or, as the case may be, applicants at all times during the period of six months preceding the application<sup>11</sup>;
- 471 (3) if the applicants are local authority foster parents<sup>12</sup>, an application for an adoption order may be made only if the child has had his home with the applicants at all times during the period of one year preceding the application<sup>13</sup> (although this does not prevent an application being made if the court<sup>14</sup> gives leave to make it<sup>15</sup>); and
- 472 (4) in any other case, an application for an adoption order may be made only if the child has had his home with the applicant or, in the case of an application by a couple, with one or both of them for not less than three years (whether continuous or not) during the period of five years preceding the application<sup>16</sup> (although this does not prevent an application being made if the court gives leave to make it<sup>17</sup>).

1 *Ie the Adoption Act 1976 Pt II (ss 12-25) (repealed).*

2 *For the meaning of 'adoption order' see para 359 ante.*

3 *For the meaning of 'child' see para 327 note 2 ante.*

4 *Adoption and Children Act 2002 s 42(1).*

5 *Ie a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante. For the purposes of *ibid* ss 42, 43, 44(1), an adoption agency includes a Scottish or Northern Irish adoption agency (as to which see para 352 note 2 ante) (s 42(8) (a)); and references to a child placed for adoption by an adoption agency are to be read accordingly (s 42(8) (b)).*

6 *Ibid* s 42(1)(a), (2)(a). Section 42 is modified in its application to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 56; and para 490 post) and in relation to a child brought into the United Kingdom for adoption in non-Hague Convention cases (see regs 6(a), 9; and para 499 note 2 post).

7 *For the meaning of 'parent' see para 332 note 2 ante.*

8 *Adoption and Children Act 2002 s 42(2)(b).*

9 *Ibid* s 42(2).

10 *For the meaning of 'partner of a parent' see para 355 note 2 ante.*

11 Adoption and Children Act 2002 s 42(1)(b), (3).

12 As to the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 900 post (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). For the meaning of 'local authority' see para 327 note 7 ante.

13 Adoption and Children Act 2002 s 42(4).

14 As to the court see para 511 post.

15 Adoption and Children Act 2002 s 42(6).

16 Ibid s 42(5).

17 Ibid s 42(6).

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### 365. Notice of intention to adopt.

Where persons ('proposed adopters') wish to adopt a child<sup>1</sup> who is not placed for adoption with them by an adoption agency<sup>2</sup>, an adoption order<sup>3</sup> may not be made in respect of the child unless the proposed adopters have given notice<sup>4</sup> to the appropriate local authority<sup>5</sup> of their intention to apply for the adoption order (a 'notice of intention to adopt')<sup>6</sup>.

If the child has had his home with the proposed adopters (or, in the case of an application by a couple<sup>7</sup>, with one or both of them) for less than three years (whether continuous or not) during the past five years, or where the proposed adopters are local authority foster parents<sup>8</sup> but the child has not had his home with them at all times during the preceding year, notice of intention to adopt may not be given unless the person giving the notice has the court's<sup>9</sup> leave to apply for an adoption order<sup>10</sup>.

On receipt of a notice of intention to adopt, the local authority must arrange for the investigation of the matter and submit to the court a report of the investigation<sup>11</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 post. As to an adoption agency placing a child for adoption see para 329 note 8 ante. Those who fall into this category of non-agency placements will include step-parents and relatives; foster parents who do not have the support of the local authority may apply to adopt under the Adoption and Children Act 2002 s 42(4) or (6) if the child has had his home with them for a year (see para 364 ante). Under the former legislation (ie the Adoption Act 1976 s 14 (repealed)), considerable caution was expressed as to the court making adoption orders in favour of a step-parent (see *Re PJ (adoption: practice on appeal)* [1998] 2 FLR 252, [1998] Fam Law 452, CA), and in particular where the natural father objected to an adoption order (see *Re B (adoption: father's objections)* [1999] 3 FCR 522, [1999] 2 FLR 215, CA). See also *Re G (adoption order)* [1999] 1 FCR 482, [1999] 1 FLR 400, CA (complex cases should be transferred to the High Court at an early stage). However, see also *Söderback v Sweden* [1999] 1 FLR 250, ECtHR.

3 For the meaning of 'adoption order' see para 359 ante.

4 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante. The notice must be given not more than two years, or less than three months, before the date on which the application for the adoption order is made: s 44(3). Section 44(3) does not apply in the application of these provisions to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 52, 57; and para 490 post.

5 For the meaning of 'local authority' see para 327 note 7 ante. The reference to the 'appropriate local authority' in relation to any proposed adopters is in certain cases (generally where the prospective adopters have moved abroad) a reference to the authority prescribed by regulations: see the Adoption and Children Act 2002 s 44(9)(a). In England these authorities are: (1) in the case of the proposed adoption by one person who no longer has his home in England, the local authority for the area in which that person's last home in England was situated (Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005, SI 2005/3390, reg 3(1), (2)); (2) in the case of the proposed adoption by a couple who no longer have their home in England and who shared together the last home they had in England, the local authority for the area in which that home in England was situated (reg 3(3)); (3) in the case of the proposed adoption by a couple who no longer have their home in England and who did not share together the last home each had in England, the local authority which the couple nominate, being the local authority for the area in which the last home in England of one of them was situated (reg 3(4)); and (4) in the case of the proposed adoption by a couple only one of whom ever had his home in England, the local authority for the area in which that person's last home in England was situated (reg 3(5)). In Wales the authorities are: (a) in the case of a proposed adoption by one person who no longer has a home in Wales, the local authority for the area in which that person's last home in Wales was situated (Local Authority (Non-agency Adoptions) (Wales) Regulations 2005, SI 2005/3113, reg 3(1), (2)); (b) in the case where



the proposed adopters no longer have a home in Wales and shared together the last home they had in Wales, the local authority for the area in which that home was situated (reg 3(3)); (c) in the case where the proposed adopters no longer have a home in Wales and did not share together the last home each had in Wales, the local authority which the proposed adopters nominate, being the local authority for the area in which the last home in Wales of one of the adopters was situated (reg 3(4)); and (d) where there are two proposed adopters and neither of them has a home in Wales but where one of them has had a home or homes in Wales, the local authority for the area in which the last of that person's homes in Wales was situated (reg 3(5)). In any other case the reference to the appropriate local authority in relation to any proposed adopters is a reference to the local authority for the area in which, at the time of giving the notice of intention to adopt, they have their home: Adoption and Children Act 2002 s 44(9)(b).

6 Ibid ss 44(1), (2), 147, Sch 6. Where a local authority has placed a child with any persons otherwise than as prospective adopters, and the persons give notice of intention to adopt, the authority is not to be treated as leaving the child with them as prospective adopters for the purposes of s 18(1)(b) (see para 331 ante): s 44(8). If a local authority receives a notice of intention to adopt in respect of a child whom it knows was (immediately before the notice was given) looked after by another local authority, it must, not more than seven days after the receipt of the notice, inform the other local authority in writing that it has received the notice: s 44(7). As to the meaning of 'child looked after by a local authority' see the Children Act 1989 s 22; and para 335 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

Section 44(2) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

7 For the meaning of 'couple' see para 355 note 2 ante.

8 As to the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 900 post (definition applied by the Adoption and Children Act 2002 Sch 6).

9 As to the court see para 511 post.

10 Adoption and Children Act 2002 s 44(4).

11 Ibid s 44(5). In particular, the investigation must, so far as practicable, include the suitability of the proposed adopters and any other matters relevant to the operation of s 1 (see paras 327-330 ante) in relation to the application: s 44(6). For the purposes of an investigation arranged under s 44(5), the local authority must take steps to obtain in respect of both the proposed adopters and any other member of their household aged 18 or over an enhanced criminal record certificate: Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005, SI 2005/3390, reg 4; Local Authority (Non-agency Adoptions) (Wales) Regulations 2005, SI 2005/3113, reg 4. Those provisions state that the reference to an enhanced criminal record certificate is to such a certificate within the meaning of the Police Act 1997 s 115 including the matters specified in s 115(6A) (as added); however, those provisions have been repealed and reference should now be made to s 116 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 716-717). Additional requirements have effect in connection with Hague Convention adoptions: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 30, 49.

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### **366. Assessment of suitability of applicants.**

Where an application for an adoption order<sup>1</sup> relates to a child<sup>2</sup> placed for adoption by an adoption agency<sup>3</sup>, the agency must submit to the court<sup>4</sup> a report on the suitability of the applicants and on any other relevant matters<sup>5</sup>, and must assist the court in any manner the court directs<sup>6</sup>. Regulations<sup>7</sup> may make provision as to the matters to be taken into account by an adoption agency in determining, or making any report in respect of, the suitability of any persons to adopt a child<sup>8</sup>.

An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant<sup>9</sup> in the home environment have been given either to the adoption agency (where the child was placed for adoption with the applicant or applicants by an agency)<sup>10</sup> or to the local authority<sup>11</sup> within whose area the home is (in any other case)<sup>12</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 For the meaning of 'child' see para 327 note 2 ante.

3 I.e. a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

4 As to the court see para 511 post.

5 Adoption and Children Act 2002 s 43(a). 'Relevant matters' are matters relevant to the operation of s 1 (see paras 327-330 ante): s 43(a). Additional requirements have effect (and s 43 is applied with modifications) in connection with adoptions under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention'): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 49, 52, 55. The Adoption and Children Act 2002 s 43 is also modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 11; and para 502 post.

6 Adoption and Children Act 2002 s 43(b).

7 I.e. under *ibid* s 9 (general power to regulate adoption agencies: see para 397 note 1 post).

8 *Ibid* s 45(1). In particular, the regulations may make provision for the purpose of securing that, in determining the suitability of a couple to adopt a child, proper regard is had to the need for stability and permanence in their relationship: s 45(2). As to assessing the suitability of adopters see the Adoption Agencies Regulations 2005, SI 2005/389, regs 21-30; in relation to England, the Suitability of Adopters Regulations 2005, SI 2005/1712; in relation to Wales, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 21-31; and para 438 post. For the meaning of 'couple' see para 355 note 2 ante.

9 Or, in the case of an application by a couple, both of them together: Adoption and Children Act 2002 s 42(7).

10 *Ibid* s 42(7)(a). Section 42(7) is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Hague Convention: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

11 For the meaning of 'local authority' see para 327 note 7 ante.

12 Adoption and Children Act 2002 s 42(7)(b).

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### **367. Matters to which the court must have regard.**

Before making an adoption order<sup>1</sup>, the court<sup>2</sup> must consider whether there should be arrangements for allowing any person contact with the child<sup>3</sup>; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings<sup>4</sup>. In proceedings in which a question may arise as to whether an adoption order should be made, or any other question with respect to such an order, the court must, for the avoidance of delay, draw up and make provision for adherence to a timetable for the determination of such a question<sup>5</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 As to the court see para 511 post.

3 For the meaning of 'child' see para 327 note 2 ante.

4 Adoption and Children Act 2002 s 46(6).

5 See *ibid* s 109; and para 328 ante.

### **UPDATE**

### **367 Matters to which the court must have regard**

NOTE 4--See *Re A (a child) (adoption)* [2007] EWCA Civ 1383, [2008] 1 FCR 55.

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### **368. Registration of adoption orders.**

Every adoption order<sup>1</sup> must contain a direction to the Registrar General<sup>2</sup> to make an entry in the Adopted Children Register<sup>3</sup>. In general where, on an application to a court<sup>4</sup> for an adoption order in respect of a child<sup>5</sup>, the identity of the child with a child to whom an entry in the registers of live births or other records relates is proved to the satisfaction of the court, any adoption order made in pursuance of the application must contain a direction to the Registrar General to secure that the entry in the register or, as the case may be, record in question is marked with the word 'Adopted'<sup>6</sup>; this requirement does not, however, apply where an adoption order is made in respect of a child who has previously been the subject of an adoption order made by a court<sup>7</sup> in England or Wales<sup>8</sup>, in which event the order must contain a direction to the Registrar General to mark the previous entry in the Adopted Children Register with the word 'Re-adopted'<sup>9</sup>. Where an adoption order is made, the officer of the court which made the order must communicate the order to the Registrar General, and the Registrar General must then comply with the directions contained in the order<sup>10</sup>. Provision is also made for registrations of adoptions in parts of the British Islands outside England and Wales<sup>11</sup>.

1 For the meaning of 'adoption order' see para 359 ante.

2 As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

3 Adoption and Children Act 2002 s 77(6), Sch 1 para 1(1). As to the Adopted Children Register see para 383 post. The entry must be made in the form prescribed by regulations made by the Registrar General with the approval of the Chancellor of the Exchequer: see Sch 1 para 1(1); and the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 2(1), Sch 1 (England), Sch 2 (Wales).

4 As to the court see para 511 post.

5 For the meaning of 'child' see para 327 note 2 ante.

6 Adoption and Children Act 2002 Sch 1 para 1(2).

7 *Ibid* under *ibid* Pt 1 (ss 1-110) (as amended) or any other enactment: Sch 1 para 1(3).

8 *Ibid* Sch 1 para 1(3)(a).

9 *Ibid* Sch 1 para 1(3)(b).

10 *Ibid* Sch 1 para 1(4). The court officer in question, and the manner of his communication of the order, are prescribed by the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (amended by SI 2007/2189).

11 See the Adoption and Children Act 2002 Sch 1 para 2.

## **UPDATE**

### **368 Registration of adoption orders**

NOTE 3--Reference to the Chancellor of the Exchequer is now to the Secretary of State: Adoption and Children Act 2002 Sch 1 para 1(1) (amended by SI 2008/678).

NOTE 10--SI 2005/2795 further amended: SI 2008/2447, SI 2009/3348.



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### **369. Correction and rectification of adoption orders.**

The court<sup>1</sup> by which an adoption order<sup>2</sup> has been made may<sup>3</sup>:

- 473 (1) amend the order by the correction of any error in the particulars contained in it<sup>4</sup>;
- 474 (2) amend the order by substituting or, as the case may be, adding a new name for an adopted person in the particulars required to be entered in the Adopted Children Register<sup>5</sup>; and
- 475 (3) revoke a direction for the marking of an entry in the registers of live births<sup>6</sup>, the Adopted Children Register or other records wrongly included<sup>7</sup> in the order<sup>8</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'adoption order' see para 359 ante.

3 Where an adoption order is amended or a direction revoked pursuant to these provisions the prescribed officer of the court must communicate the amendment in the prescribed manner to the Registrar General (Adoption and Children Act 2002 Sch 1 para 4(4)), and the Registrar General must then either amend the entry in the Adopted Children Register accordingly (Sch 1 para 4(5)(a)) or secure that the marking of the entry in the registers of live births, the Adopted Children Register or other records is cancelled, as the case may be (Sch 1 para 4(5)(b)). Prescription is by rules: see Sch 1 para 4(4); and the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (amended by SI 2007/2189). Without prejudice to the Adoption and Children Act 2002 Sch 1 para 4(5), where, after an entry in the registers of live births or other records has been marked in accordance with Sch 1 para 1 or 2 (see para 368 ante), the birth is re-registered under the Births and Deaths Registration Act 1953 s 14 (re-registration of births of legitimated persons: see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) paras 552-555), the entry made on the re-registration must be marked in the like manner: Adoption and Children Act 2002 Sch 1 para 5(1). Where an adoption order is quashed or an appeal against an adoption order is allowed by any court, the court must give directions to the Registrar General to secure that any entry in the Adopted Children Register and any marking of an entry in that register, the registers of live births or other records as the case may be, which was effected in pursuance of the order, is cancelled: Sch 1 para 4(6). As to the Adopted Children Register see para 383 post.

4 Ibid Sch 1 para 4(1). The court may amend an order only on the application of the adopter or the adopted person: Sch 1 para 4(1).

5 As to the particulars of registration see para 368 ante. The court may make this amendment only if satisfied on the application of the adopter or the adopted person that within the period of one year beginning with the date of the order any new name has been given to the adopted person (whether in baptism or otherwise) (ibid Sch 1 para 4(2)(a)) or has been taken by the adopted person (Sch 1 para 4(2)(b)). The new name may be added to the order either in place of or in addition to a name specified in the particulars required to be entered in the Adopted Children Register in pursuance of the order: Sch 1 para 4(2).

6 As to the registration of live births see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 541 et seq.

7 Ie included in pursuance of the Adoption and Children Act 2002 Sch 1 para 1(2) or (3) (see para 368 ante).

8 Ibid Sch 1 para 4(3). The court may revoke such a direction only if satisfied on the application of any person concerned that the direction for the marking of an entry in the registers of live births, the Adopted Children Register or other records included in the order was wrongly so included: Sch 1 para 4(3).

## **UPDATE**

### **369 Correction and rectification of adoption orders**

NOTE 10--SI 2005/2795 further amended: SI 2008/2447, SI 2009/3348.

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## **(4) CONSENT TO PLACEMENT AND ADOPTION**

### **370. Meaning of 'consent'.**

For the purposes of any references in the statutory provisions relating to placements for adoption and adoption orders<sup>1</sup> to any parent<sup>2</sup> or guardian<sup>3</sup> of a child<sup>4</sup> giving or withdrawing consent to the placement of a child for adoption<sup>5</sup> or consent to the making of an adoption order (including a future adoption order)<sup>6</sup>, 'consent' means consent given unconditionally and with full understanding of what is involved, although a person may consent to adoption without knowing the identity of the persons in whose favour the order will be made<sup>7</sup>. Any consent given by a child's mother to the making of an adoption order is ineffective if it is given less than six weeks after the child's birth<sup>8</sup>, and the withdrawal of any consent to the placement of a child for adoption<sup>9</sup>, or of any advance consent to adoption<sup>10</sup>, is ineffective if it is given after an application for an adoption order is made<sup>11</sup>.

1    Ie the Adoption and Children Act 2002 Pt I Ch 3 (ss 18-65).

2    For the meaning of 'parent' see para 332 note 2 ante.

3    As to the meaning of 'guardian' see para 332 note 3 ante.

4    For the meaning of 'child' see para 327 note 2 ante.

5    Adoption and Children Act 2002 s 52(2)(a). Section 52 is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

6    Adoption and Children Act 2002 s 52(2)(b). For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq ante.

7    Ibid ss 52(5), 147, Sch 6.

8    Ibid s 52(3).

9    For the meaning of 'placing a child for adoption' see para 329 note 8 ante.

10   Ie consent given under the Adoption and Children Act 2002 s 20 (see para 333 ante).

11   Ibid s 52(4).

## **UPDATE**

### **370 Meaning of 'consent'**

NOTE 8--Limitation on consent to an adoption order refers only to consent to making of an adoption order and not to consent to placement: *Re C (a child) (adoption: parental consent)* [2008] EWHC 2555 (Fam), [2009] Fam 83, [2009] 1 FCR 127 (child placed under authorised placement, therefore consent of each parent dispensed with).



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### **371. Form of consent.**

Parental consent to the placement of children<sup>1</sup> and advance consent to adoption<sup>2</sup> must be given in the form prescribed by rules<sup>3</sup>, and the rules may prescribe forms in which a person giving consent under any of the other statutory provisions relating to placements for adoption and adoption orders<sup>4</sup> may do so if he wishes<sup>5</sup>. Consents, including advance consents, to placements and adoptions<sup>6</sup> can be withdrawn only in the form prescribed by rules<sup>7</sup> or by notice given to the adoption agency<sup>8</sup>. Where consent is withdrawn the adoption agency must conduct a review of its decision to place the child for adoption<sup>9</sup>.

1    Ie consent for the purposes of the Adoption and Children Act 2002 s 19 (see para 332 ante).

2    Ie consent for the purposes of *ibid* s 20 (see para 333 ante). For the meaning of 'consent' see para 370 ante.

3    Ie Family Procedure Rules made by virtue of the Adoption and Children Act 2002 s 141(1): s 144(1) (definition substituted by the Courts Act 2003 s 109(1), Sch 8 para 414).

4    Ie the Adoption and Children Act 2002 Pt I Ch 3 (ss 18-65).

5    *Ibid* s 52(7). Where the parent or guardian of the child resides in England and Wales and is prepared to consent to the placement of the child for adoption under s 19 and, as the case may be, to consent to the making of a future adoption order under s 20 (advance consent to adoption), the adoption agency must request the Children and Family Court Advisory and Support Service ('CAFCASS') to appoint an officer of the Service, or the Welsh Ministers to appoint a Welsh family proceedings officer, for the purposes of the signification by that officer of the consent to placement or to adoption by that parent or guardian: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 20 (amended by SI 2005/3482); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 20. As to CAFCASS see para 230 ante. As to the Welsh Ministers see para 155 ante.

6    Ie consents and advance consents for the purposes of the Adoption and Children Act 2002 s 19 (see para 332 ante) or s 20 (see para 333 ante).

7    *Ibid* s 52(8)(a).

8    *Ibid* s 52(8)(b). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post. As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

9    Where consent given under *ibid* s 19 or s 20 in respect of a child is withdrawn in accordance with s 52(8) and the adoption agency is a local authority, on receipt of the form or notice given in accordance with s 52(8), the authority must immediately review its decision to place the child for adoption and where, in accordance with s 22(1)-(3) (in England) or s 22(1), (2) (in Wales) (see para 335 post), the authority decides to apply for a placement order in respect of the child, it must notify as soon as possible the parent or guardian of the child, the father of a child (where the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 14(2) applies (ie where the father of a child does not have parental responsibility for the child and his identity is known to the agency: see para 432 ante)) and, if the child is placed for adoption, the prospective adopter with whom the child is placed: Adoption Agencies Regulations 2005, SI 2005/389, reg 38(1), (2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 39(1), (2). Where consent is withdrawn in these circumstances and the adoption agency is a registered adoption society, the agency must immediately consider whether it is appropriate to inform the local authority in whose area the child is living: Adoption Agencies Regulations 2005, SI 2005/389, reg 38(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 39(3).

## **UPDATE**

### **371 Form of consent**

NOTE 9--SI 2005/1313 reg 39(2) amended: SI 2009/1892.

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### **372. Evidence of consent.**

If a document signifying any consent<sup>1</sup> which is required to be given is witnessed in accordance with rules<sup>2</sup> it is to be admissible in evidence without further proof of the signature of the person by whom it was executed<sup>3</sup>. A document signifying any such consent which purports to be witnessed in accordance with rules is to be presumed to be so witnessed, and to have been executed and witnessed on the date and at the place specified in the document, unless the contrary is proved<sup>4</sup>.

1 For the meaning of 'consent' see para 370 ante.

2 The Family Procedure Rules made by virtue of the Adoption and Children Act 2002 s 141(1): s 144(1) (definition substituted by the Courts Act 2003 s 109(1), Sch 8 para 414).

3 Adoption and Children Act 2002 s 104(1).

4 Ibid s 104(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/ (4) CONSENT TO PLACEMENT AND ADOPTION/373. Limited power of court to dispense with consent requirement.

### **373. Limited power of court to dispense with consent requirement.**

The court<sup>1</sup> cannot dispense with the consent<sup>2</sup> of any parent<sup>3</sup> or guardian<sup>4</sup> of a child<sup>5</sup> to the child being placed for adoption or to the making of an adoption order<sup>6</sup> in respect of the child unless the court is satisfied that the parent or guardian cannot be found<sup>7</sup> or lacks capacity (within the meaning of the Mental Capacity Act 2005)<sup>8</sup> or that the welfare of the child requires the consent to be dispensed with<sup>9</sup>. These grounds for dispensing with consent are markedly different from the test which formerly applied<sup>10</sup>, under which the court was asked to consider whether the parent or guardian:

- 476 (1) could not be found or was incapable of giving agreement<sup>11</sup>;
- 477 (2) was withholding his agreement unreasonably<sup>12</sup>;
- 478 (3) had persistently failed without reasonable cause to discharge his parental responsibility for the child<sup>13</sup>;
- 479 (4) had abandoned or neglected the child<sup>14</sup>;
- 480 (5) had persistently ill-treated the child<sup>15</sup>; or
- 481 (6) had seriously ill-treated the child<sup>16</sup>.

Where an applicant requests the court to dispense with the consent of any parent to the child being placed for adoption, or made the subject of an adoption order, he must give notice of the request in the application form (or at any later stage) by filing a written request setting out the reasons for the request<sup>17</sup>. He must also file a statement of facts setting out a summary of the history of the case and any other facts to satisfy the courts that either the parent cannot be found or is incapable of giving agreement, or the welfare of the child requires the consent to be dispensed with<sup>18</sup>.

1 As to the court see para 511 post.

2 For the meaning of 'consent' see para 370 ante.

3 For the meaning of 'parent' see para 332 note 2 ante. See *Re C (foreign adoption: natural mother's consent: service)* [2006] 1 FLR 318 (adoption order made in Papua New Guinea 12 years ago when child was a baby; order not recognised in England; natural mother's consent required). If a child's father has parental responsibility, his consent is required: see the Adoption and Children Act 2002 52; and paras 332, 370 ante. If he acquires parental responsibility after the child has been placed for adoption (ie by consent), then he is treated as having given his consent in the same terms as those in which the other parent gave consent: see s 52(10); and para 332 ante. It is open to the father without parental responsibility to claim party status as a respondent to the application (see the Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 113); and, where no proceedings have started, an adoption agency or local authority may ask the High Court for directions on the need to give a father without parental responsibility notice of the intention to place a child for adoption (see r 108).

A failure to contact the natural father may give rise to a breach of an agency's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (right to family life: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 149 et seq) and art 6 (right to be informed of proceedings: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134 et seq): see *Keegan v Ireland* (1994) 18 EHRR 342. See also *Re H (a child) (adoption: disclosure)*, *Re G (a child) (adoption: disclosure)* [2001] 1 FCR 726, sub nom *Re H, Re G (adoption: consultation of unmarried fathers)* [2001] 1 FLR 646 (the position of the natural father who did not have parental responsibility was to be considered in an adoption application, and a decision had to be taken in each case whether to give him notice of the proceedings and whether to make him a respondent). This issue was further considered in *Re M*

(*adoption: rights of natural father*) [2001] 1 FLR 745. See also *Re R (adoption: father's involvement)* [2001] 1 FLR 302, in relation to the extent of involvement in the child's life by the unmarried father as being a relevant factor in deciding whether he should be named as a respondent in adoption proceedings. See also *Re J (adoption: contacting father)* [2003] EWHC 199 (Fam), [2003] 1 FLR 933; *Re L (a child) (adoption: disclosure)* [2007] EWHC 1771 (Fam), [2007] All ER (D) 27 (Dec) (the court cannot compel the mother into providing details of who the father is).

4 As to the meaning of 'guardian' see para 332 note 3 ante.

5 For the meaning of 'child' see para 327 note 2 ante.

6 For the meaning of 'adoption order', and as to adoption orders generally, see para 359 et seq post.

7 It was held under the former legislation (ie the Adoption Act 1976 s 16(1)(b)(ii), (2)(a) (repealed), which consolidated earlier enactments making provision in this regard) that every reasonable step had to be taken to trace the parent or guardian: see *Re B (an infant)* [1958] 1 QB 12, [1957] 3 All ER 193, CA; *Re F (R) (an infant)* [1970] 1 QB 385, [1969] 3 All ER 1101, CA. Agreement was dispensed with in *Re R* [1966] 3 All ER 613, [1967] 1 WLR 34 (where the parents of a refugee child lived in a totalitarian country and to seek their agreement might expose them to serious hazard), and in *Re an adoption application* [1992] 1 WLR 596, [1992] 1 FLR 341 (where the mother had handed the child over in El Salvador and the court was satisfied on the evidence that she could not be found). The Adoption Act 1976 s 16(2)(a) (repealed) was also held to apply in a case where there was a possibility that subsequent proceedings in a foreign jurisdiction for contact between the natural parent and the child could be taken against the adoptive parents: see *Re A (adoption of a Russian child)* [2000] 1 FCR 673, [2000] 1 FLR 539.

8 Adoption and Children Act 2002 s 52(1)(a) (amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 45). As to when a person 'lacks capacity' for these purposes see MENTAL HEALTH vol 30(2) (Reissue) para 641.

The Adoption and Children Act 2002 s 52 is modified in its application to an order under s 84 giving parental responsibility prior to an overseas adoption and in relation to an adoption within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 11, 52, 55; and paras 490, 502 post.

9 Adoption and Children Act 2002 s 52(1)(b). The 'welfare' test has to be applied in the context of the welfare principles in s 1, where the welfare of the child is paramount, and having regard to the issues in the checklist (see para 329 ante). The court is likely also to ask itself whether the order is necessary and proportionate (Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8); from the case law on this matter decided under former legislation (ie the Adoption Act 1976) the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents: see *Re C (a minor) (adoption: parental agreement)* [1994] 2 FCR 485, [1993] 2 FLR 260, CA; *Re B (a child) (adoption order)* [2001] EWCA Civ 347, [2001] 2 FCR 89.

10 Ie under the Adoption Act 1976 s 16(1)(b)(ii), (2) (repealed).

11 Ibid s 16(2)(a) (repealed). The parent or guardian not being found or being incapable of giving agreement are the only tests from the former legislation to have been specifically carried through into the new provisions: for the caselaw relevant to the 'not being found' requirement see note 7 supra.

12 Ibid s 16(2)(b) (repealed). In considering whether a parent was withholding consent unreasonably under this provision, the test to be applied was not one of culpability, of callous or self-indulgent indifference, of failure or probable failure of parental duty or of potential lasting damage to the child, but of reasonableness in all the circumstances: *Re W (an infant)* [1971] AC 682, [1971] 2 All ER 49, HL. This was the leading case on the matter and it has been said that this case sets out all that any judge needs to know, and that earlier cases are unlikely to be helpful: *Re L (a minor) (adoption: statutory criteria)* [1990] 1 FLR 305 at 316, CA, per Balcombe LJ, and at 317 per Harman J. For a general discussion of cases where consent was found to have been unreasonably withheld under the Adoption Act 1976 s 16(2)(b) (repealed) see *Re W (adoption: parental agreement)* [1984] FLR 880, CA. Welfare per se was not the test (see *Re P (an infant)* [1977] Fam 25, [1977] 1 All ER 182, CA; *Re W (adoption: parental agreement)* (1981) 3 FLR 75), but was a factor which could be decisive (*Re W (an infant)* supra at 693 and 55 per Lord Hailsham of St Marylebone LC). The test of reasonableness was an objective one (*Re W (an infant)* supra at 699 and 55 per Lord Hailsham of St Marylebone LC; *Re D (an infant)* [1977] AC 602 at 625, [1977] 1 All ER 145 at 150, HL, per Lord Wilberforce; *Re R (a minor) (adoption: parental agreement)* [1987] FCR 104, [1987] 1 FLR 391, CA), and the approach to the question of determining whether a parent was unreasonably withholding consent to an adoption order was set out in *Re C (a minor) (adoption: parental agreement: contact)* supra and expressly approved in *Re F (adoption: freeing order)* [2000] 3 FCR 337, [2000] 2 FLR 505, CA. The child's wishes and likely reaction were relevant considerations: *Re B (a minor) (adoption: parental agreement)* [1990] FCR 841, [1990] 2 FLR 383, CA.

13 Adoption Act 1976 s 16(2)(c) (amended by the Children Act 1989 s 88(1), Sch 10 para 5(2)) (repealed).

- 14 Adoption Act 1976 s 16(2)(d) (repealed).
- 15 Ibid s 16(2)(e) (repealed).
- 16 Ibid s 16(2)(f) (repealed).
- 17 See the Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 27(1), (2)(a).
- 18 Ibid s 27(2)(b).

## **UPDATE**

### **373 Limited power of court to dispense with consent requirement**

NOTE 9--See also *Re P (children) (adoption: parental consent)* [2008] EWCA Civ 535, [2008] 2 FCR 185.

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**374. Consents given abroad.**

If consent to an adoption has been given abroad, and it is clear that the parent giving the consent understood that the child should be brought up in England and Wales, this is sufficient consent to an English adoption<sup>1</sup>. If a court of competent jurisdiction abroad has made orders which have deprived the parent of parental responsibility, it is not necessary to obtain the consent of that parent<sup>2</sup>.

1 *Re C (foreign adoption: natural mother's consent: service)* [2006] 1 FLR 318.

2 *Re AMR (adoption: procedure)* [1999] 3 FCR 734, [1999] 2 FLR 807.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(5) LEGAL STATUS OF ADOPTED CHILDREN/375. Relevant legislation and meaning of 'adoption'.

## **(5) LEGAL STATUS OF ADOPTED CHILDREN**

### **375. Relevant legislation and meaning of 'adoption'.**

If a child has been adopted, the legislation governing his legal status as an adopted child depends on when his adoption took place<sup>1</sup>: if he was adopted before 30 December 2005, his status is governed by the Adoption Act 1976<sup>2</sup>; and if he was adopted since that date his status is governed by the Adoption and Children Act 2002<sup>3</sup>. This is the general rule; there are, however, transitional arrangements relating to adoptions or applications for adoption orders pending on 30 December 2005<sup>4</sup>.

For these purposes, 'adoption' means adoption:

- 482 (1) by an adoption order<sup>5</sup>;
- 483 (2) by an order made in Scotland, Northern Ireland, the Isle of Man or in any of the Channel Islands<sup>6</sup>;
- 484 (4) which is a 'Convention adoption'<sup>7</sup>;
- 485 (5) which is an overseas adoption<sup>8</sup>; or
- 486 (6) which is an adoption recognised by the law of England and Wales and effected under the law of any other country<sup>9</sup>.

Cognate expressions must be construed accordingly<sup>10</sup>.

1 See the Adoption Act 1976 s 38(2) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 19); the Adoption and Children Act 2002 s 66(2); and the Adoption and Children Act 2002 (Commencement No 9) Order 2005, SI 2005/2213.

2 See the Adoption Act 1976 Pt IV (ss 38-49) (as amended); and para 376 et seq post.

3 See the Adoption and Children Act 2002 Pt I Ch 4 (ss 66-76); and para 377 et seq post.

4 See the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897. The date of an adoption effected by an order is the date of the making of the order: Adoption Act 1976 s 38(2).

5 Ibid s 38(1)(a); Adoption and Children Act 2002 s 66(1)(a). For the purposes of the Adoption Act 1976 Pt IV (as amended), an 'adoption order' is an order under s 12(1) (repealed subject to savings): s 72(1) (amended by the Children Act 1989 s 88(1), Sch 10 para 30(1), (3)). The Adoption Act 1976 s 38(1)(b) provides that 'adoption' can also mean adoption by an order made under the Children Act 1975, the Adoption Act 1958 or the Adoption Act 1950 (all repealed) or any enactment repealed by the Adoption Act 1950, and includes, where the context admits, an adoption effected before 12 November 1975; however, this may be disregarded since no person adopted under any of these provisions can any now be a 'child' for the purposes of that Act (see the definition of 'child' in para 327 note 2 ante). For the meaning of 'adoption order' in the Adoption and Children Act 2002 see para 359 ante.

6 Adoption Act 1976 s 38(1)(c); Adoption and Children Act 2002 s 66(1)(a), (b). For the purposes of the Adoption and Children Act 2002, orders made in Scotland and Northern Ireland are referred to as 'Scottish or Northern Irish adoption orders': see s 66(1)(a); and as to such orders see para 331 note 9 ante. The Adoption Act 1976 s 38(2) (as amended) (see note 1 supra) also provides that for the purposes of that Act 'adoption' does not include an adoption of a kind mentioned in s 38(1)(c)-(e) effected on or after 30 December 2005.

7 Ibid s 38(1)(cc) (added by the Adoption (International Aspects) Act 1999 s 4(1)); Adoption and Children Act 2002 s 66(1)(c). A 'Convention adoption' is an adoption effected under the law of a Convention country outside



the British Islands and certified in pursuance of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May, 1993; TS 40 (1994); Cm 2691) art 23(1): Adoption Act 1976 s 72(1) (amended by the Adoption (Intercountry Aspects) Act 1999 s 8); Adoption and Children Act 2002 ss 66(1)(c), 147, Sch 6. As to the implementation of the Convention see para 483 et seq post. A 'Convention country' means a country or territory in which the Convention is in force: Adoption Act 1976 s 72(1) (as so amended); Adoption and Children Act 2002 s 144(1), Sch 6. See further para 490 post. The Adoption Act 1976 s 38(1)(cc) (as added) does not apply to an adoption order or an adoption under the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (The Hague, 15 November 1965; TS 94 (1978); Cmnd 7342) or an application for such an order: see the Adoption (Intercountry Aspects) Act 1999 s 17.

8 Adoption Act 1976 s 38(1)(d); Adoption and Children Act 2002 s 66(1)(d). In connection with the Adoption Act 1976 s 38(1)(d) see also note 6 supra. For the purposes of the Adoption Act 1976, 'overseas adoption' means an adoption of such a description as the Secretary of State may by order specify, being a description of adoptions of children appearing to him to be effected under the law of any country outside Great Britain; and such an order may contain provision as to the manner in which evidence of an overseas adoption may be given: s 72(1), (2) (s 72(2) amended by the Adoption (Intercountry Aspects) Act 1999 s 15(1), Sch 2 para 3(8)); Adoption (Intercountry Aspects) Act 1999 s 17. For the meaning of 'overseas adoption' in the Adoption and Children Act 2002 see s 87; and para 485 post.

As to the Secretary of State see para 155 ante. For the meaning of 'Great Britain' see para 102 note 7 ante. A declaration that an overseas adoption was a valid adoption may be obtained by making an application under the Family Proceedings Rules 1991, SI 1991/1247: see rr 3.15, 3.16. The Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, art 3, Schedule (art 3 amended by SI 1993/690) specifies for this purpose adoptions made by statute law (but not customary or common law) in any of 39 Commonwealth countries and United Kingdom dependent territories or in 22 other named countries. To qualify for recognition in this way, the adoption must have been in respect of a person who, at the time when the application for adoption was made, had not attained the age of 18 years and had not been married: see art 3 (as so amended). For specific guidance on the practice and procedure to be followed in intercountry adoption cases see *Re R (intercountry adoptions: practice)* [1999] 4 All ER 1015, [1999] 1 FLR 1042. Evidence of the overseas adoption may be given by the production of specified documents: see the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, art 4. The fact that the adoption is recognised does not mean that the child will be entitled to British citizenship, since only adoption by a United Kingdom court has this effect: see the British Nationality Act 1981 s 1(5) (as substituted), s 1(5A) (as added), s 1(6) (as amended); para 382 post; and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 26. For the meaning of 'United Kingdom' see para 102 note 7 ante.

9 Adoption Act 1976 s 38(1)(e); Adoption and Children Act 2002 s 66(1)(e). In connection with the Adoption Act 1976 s 38(1)(e) see also note 6 supra. See also CONFLICT OF LAWS vol 8(3) (Reissue) paras 343-348.

10 Adoption Act 1976 s 38(1); Adoption and Children Act 2002 s 66(1).

## UPDATE

### 375 Relevant legislation and meaning of 'adoption'

NOTE 4--SI 2005/2897 amended: SI 2010/986.

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### **376. Legal status of children adopted before 30 December 2005.**

A child<sup>1</sup> adopted before 30 December 2005<sup>2</sup> is to be treated in law from the date of the adoption<sup>3</sup> (but subject to any contrary intention<sup>4</sup>):

- 487 (1) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnised)<sup>5</sup>; and
- 488 (2) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter)<sup>6</sup>.

A relationship existing by virtue of these provisions<sup>7</sup> may be referred to as an 'adoptive relationship'; male and female adopters may be referred to respectively as 'adoptive fathers' and 'adoptive mothers'; and any other relative of any degree under an adoptive relationship may be referred to as an 'adoptive relative' of that degree<sup>8</sup>.

A child<sup>1</sup> adopted before 30 December 2005 is also to be treated in law as if he were not the child of any person other than the adopters or adopter<sup>9</sup>, except that, in the case of a child adopted by one of its natural parents as sole adoptive parent, this has no effect as respects entitlement to property depending on relationship to that parent, or as respects anything else depending on that relationship<sup>10</sup>. An adopted child is, however, specifically prevented by these provisions from being illegitimate<sup>11</sup>.

These provisions do not apply for the purposes of:

- 489 (a) determining the prohibited degrees of kindred and affinity in relation to marriage and civil partnership<sup>12</sup>;
- 490 (b) the former law of incest<sup>13</sup>;
- 491 (c) any provision of the British Nationality Act 1981 or the Immigration Act 1971 or any instrument having effect under those Acts<sup>14</sup>; or
- 492 (d) any other provision of the law for the time being in force determining British citizenship, British overseas territories citizenship, the status of a British national (overseas) or British overseas citizenship<sup>15</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 For the meaning of 'adoption', and as to the relevant legislation for adoptions before and after 30 December 2005, see para 375 ante.

3 Adoption Act 1976 s 39(5)(b). Section 39 (as amended) applies for the construction of enactments or instruments passed or made before the adoption or later (s 39(6)(a)), and has effect as respects things done, or events occurring, after the adoption (s 39(6)(b)).

4 Ibid s 39(6)(a).

5 Ibid s 39(1)(a).

6 Ibid s 39(1)(b). An adopted child is not prevented by s 39 (as amended) from being legitimated under the Legitimacy Act 1976 s 2 (as amended) or s 3 if either natural parent is the sole adoptive parent: s 4(1) (s 4(1), (2) amended by the Adoption Act 1976 s 73(2), Sch 3 para 23). As to legitimation see para 125 et seq ante.

7 le the Adoption Act 1976 s 39 (as amended).

8 Ibid s 41(1)(a)-(c). This does not prevent the term 'parent', or any other term not qualified by the word 'adoptive', being treated as including an adoptive relative: s 41(1).

9 Ibid s 39(2) (s 39(2) amended, and s 39(3A), (3B) added, by the Adoption (Intercountry Aspects) Act 1999 s 4(2), (3)). This is subject to the Adoption Act 1976 s 39(3) (see the text and note 10 infra) and s 39(3A) (as added): s 39(2) (as so amended). See *Re C (Minors) (adoption: residence order)* [1994] Fam 1, [1993] 3 All ER 313, sub nom *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FCR 431, [1993] 1 FLR 505, CA. The Adoption Act 1976 s 39(2) (as amended) does not affect the entitlement to a pension which is payable to or for the benefit of a child and is in payment at the time of his adoption (s 48) and does not prejudice any interest vested in possession in the adopted child before the adoption or any interest expectant (whether immediately or not) upon an interest so vested (s 42(4)); and see *Staffordshire County Council v B* [1999] 2 FCR 333, [1998] 1 FLR 261 (a contingent interest under a will remains vested in a child after his adoption)).

Where, in the case of a Convention adoption (see para 375 note 7 ante), the High Court is satisfied on an application under the Adoption Act 1976 s 39 (as amended): (1) that under the law of the country in which the adoption was effected the adoption is not a full adoption (s 39(3A)(a) (as so added)); (2) that the consents referred to in art 4(c), (d) of the Convention have not been given for a full adoption, or that the United Kingdom is not the receiving state within the meaning of art 2 (Adoption Act 1976 s 39(3A)(b) (as so added)); and (3) that it would be more favourable to the adopted child for a direction to be given under s 39(3A) (as added) (s 39(3A) (c) (as so added)), the court may direct that s 39(2) (as amended) is not to apply, or is not to apply to such extent as may be specified in the direction: s 39(3A) (as so added). 'Full adoption' means an adoption by virtue of which the adopted child falls to be treated in law as if he were not the child of any person other than the adopters or adopter: s 39(3A) (as so added). The Family Law Act 1986 ss 59, 60 (both as amended) (see para 381 post) apply in relation to, and to an application for, a direction under the Adoption Act 1976 s 39(3A) (as added) as they apply in relation to, and to an application for, a declaration under the Family Law Act 1986 Pt III (ss 55-63) (as amended) (see para 381 post): Adoption Act 1976 s 39(3B) (as so added). For the meaning of 'United Kingdom' see para 102 note 7 ante.

Where an adoptive child (with a sole adoptive parent) is legitimated (see note 6 supra), s 39(2) (as amended) does not apply after the legitimation to the natural relationship with the other natural parent: Legitimacy Act 1976 s 4(2)(a) (as amended: see note 6 supra). Revocation of the adoption order in consequence of the legitimation does not affect the Adoption Act 1976 ss 39, 41, 42 in its application to any instrument made before the date of the legitimation: Legitimacy Act 1976 s 4(2)(b) (as so amended).

10 Adoption Act 1976 s 39(3).

11 Ibid s 39(4).

12 See *ibid* s 47(1) (amended by the Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order 2005, SI 2005/3129, art 4(4), Sch 4 para 3). For the tables of kindred and affinity see the Marriage Act 1949 s I, Sch 1 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 36-37. See also the Civil Partnership Act 2004 Sch 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 38, 39 135, 138.

13 Adoption Act 1976 s 47(1). As to the former law of incest see the Sexual Offences Act 1956 ss 10, 11 (repealed). For the current law relating to familial sex offences (other than those relating to children), which is not specifically excluded from the application of the Adoption Act 1976 s 39, see the Sexual Offences Act 2003 ss 64, 65; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 188-190.

14 Adoption Act 1976 s 47(2)(a)-(c) (s 47(2)(a) added, and s 47(2)(d) amended, by the British Nationality Act 1981 s 52(6), (8), Schs 7, 9). As to the British Nationality Act 1981 and the Immigration Act 1971 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

15 Adoption Act 1976 s 47(2)(d) (as amended (see note 13 supra); and further amended by the British Overseas Territories Act 2002 s 2(3); and the Hong Kong (British Nationality) Order 1986, SI 1986/948, art 8, Schedule). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 44-57; as to the status of British national (overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 63-65; and as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 58-62.

## UPDATE

### 376 Legal status of children adopted before 30 December 2005

TEXT AND NOTES 12, 13--Adoption Act 1976 s 47(1) further amended: Criminal Justice and Immigration Act 2008 Sch 15 para 7.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(5) LEGAL STATUS OF ADOPTED CHILDREN/377. Legal status of children adopted after 30 December 2005.

### **377. Legal status of children adopted after 30 December 2005.**

A person adopted<sup>1</sup> after 30 December 2005<sup>2</sup> is to be treated in law from the date of the adoption<sup>3</sup> (but subject to any contrary intention<sup>4</sup>) as if born as the legitimate child of the adopters or adopter<sup>5</sup>. A person adopted either by a couple<sup>6</sup> or by a partner of one of his parents<sup>7</sup> is treated as the child of the relationship of the couple in question<sup>8</sup>. A relationship existing by virtue of these provisions<sup>9</sup> may be referred to as an 'adoptive relationship'<sup>10</sup>; an adopter may be referred to as an 'adoptive parent' or (as the case may be) as an 'adoptive father' or 'adoptive mother'<sup>11</sup>; and any other relative of any degree under an adoptive relationship may be referred to as an 'adoptive relative' of that degree<sup>12</sup>.

A person adopted after 30 December 2005 is also to be treated in law as not being the child of any person other than the adopters or adopter<sup>13</sup> (although in the case of a person adopted by one of his natural parents as sole adoptive parent this has no effect as respects entitlement to property depending on relationship to that parent, or as respects anything else depending on that relationship<sup>14</sup>); a person adopted by one of a couple<sup>15</sup> is to be treated in law as not being the child of any person other than the adopter and the other one of the couple<sup>16</sup>.

These provisions do not apply for the purposes of:

- 493 (1) determining the prohibited degrees of kindred and affinity in relation to marriage and civil partnership<sup>17</sup>;
- 494 (2) the law relating to sex with an adult relative<sup>18</sup>;
- 495 (3) any provision of the British Nationality Act 1981 or the Immigration Act 1971 or any instrument having effect under those Acts<sup>19</sup>; or
- 496 (4) any other provision of the law for the time being in force determining British citizenship, British overseas territories citizenship, the status of a British national (overseas) or British overseas citizenship<sup>20</sup>.

1 A reference in any enactment to an 'adopted person' within the meaning of the Adoption and Children Act 2002 Pt I Ch 4 (ss 66-76) includes a reference to an 'adopted child' within the meaning of the Adoption Act 1976 Pt IV (ss 38-49) (as amended) (see para 376 et seq ante); Adoption and Children Act 2002 s 66(3). For the meaning of 'child' see para 327 note 2 ante.

2 For the meaning of 'adoption', and as to the relevant legislation for adoptions before and after 30 December 2005, see para 375 ante.

3 Adoption and Children Act 2002 s 67(5). Section 67 applies for the interpretation of enactments or instruments passed or made before the adoption or later (s 67(6)(a)), and has effect as respects things done, or events occurring, after the adoption (s 67(6)(b)).

4 Ibid s 67(6)(a).

5 Ibid s 67(1), (2). An adopted child is not prevented by s 67 from being legitimated under the Legitimacy Act 1976 s 2 (as amended) or s 3 if either natural parent is the sole adoptive parent: s 4(1) (s 4(1), (2) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 16, 17). As to legitimation see para 125 et seq ante.

6 Ibid s 67(2)(a). For the meaning of 'couple' see para 355 note 2 ante. As to adoption by couples see s 50; and para 362 ante.

7 Ibid s 67(2)(b). These are adoptions under s 51(2) (see para 363 ante). For the meaning of 'partner of a parent' see para 355 note 2 ante.

8 Ibid s 67(2).

9 Ie ibid s 67.

10 These provisions do not, however, affect the interpretation of any reference, not qualified by the word 'adoptive', to a relationship: ibid s 68(2).

11 Ibid s 68(1)(a). A reference (however expressed) to the adoptive mother and father of a child adopted by a couple of the same sex or a partner of the child's parent, where the couple are of the same sex, is to be read as a reference to the child's adoptive parents: s 68(3).

12 Ibid s 68(1)(b).

13 Ibid s 67(3)(b). Section 67(3) does not affect the entitlement to a pension which is payable to or for the benefit of a person and is in payment at the time of his adoption (s 75), does not prejudice any interest vested in possession in the adopted person before the adoption or any interest expectant (whether immediately or not) upon an interest so vested (s 69(4); and see *Staffordshire County Council v B* [1999] 2 FCR 333, [1998] 1 FLR 261 (a contingent interest under a will remains vested in a child after his adoption)), and does not affect any reference in the Adoption and Children Act 2002 to a person's natural parent or to any other natural relationship (s 67(3)).

Where, in the case of a Convention adoption (see para 375 note 7 ante), the High Court is satisfied on an application under the Adoption and Children Act 2002 s 88: (1) that under the law of the country in which the adoption was effected the adoption is not a full adoption (s 88(1), (2)(a)); (2) that the consents referred to in the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May, 1993; TS 40 (1994); Cm 2691) art 4(c), (d) have not been given for a full adoption, or that the United Kingdom is not the receiving state within the meaning of art 2 (Adoption and Children Act 2002 s 88(2)(b)); and (3) that it would be more favourable to the adopted child for a direction to be given under s 88(1) (s 88(2)(c)), the court may direct that s 67(3) is not to apply, or is not to apply to such extent as may be specified in the direction: s 88(1). 'Full adoption' means an adoption by virtue of which the child falls to be treated in law as if he were not the child of any person other than the adopters or adopter: s 88(3). The Family Law Act 1986 ss 59, 60 (both as amended) (see para 381 post) apply in relation to, and to an application for, a direction under the Adoption and Children Act 2002 s 88 as they apply in relation to, and to an application for, a declaration under the Family Law Act 1986 Pt III (ss 55-63) (as amended) (see para 381 post): Adoption and Children Act 2002 s 88(3). As to the court see para 511 post. As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

Where an adoptive child (with a sole adoptive parent) is legitimated (see note 5 supra), s 67(3)(b) does not apply after the legitimation to the natural relationship with the other natural parent: Legitimacy Act 1976 s 4(2) (a) (as amended: see note 5 supra). Revocation of the adoption order in consequence of the legitimation does not affect the Adoption and Children Act 2002 ss 67-69 in its application to any instrument made before the date of the legitimation: Legitimacy Act 1976 s 4(2)(b) (as so amended).

14 Adoption and Children Act 2002 s 67(4).

15 Ie under ibid s 51(2) (see para 363 ante).

16 Ibid s 67(3)(a). See note 13 supra.

17 See ibid s 74(1)(a) (substituted by the Civil Partnership Act 2004 s 79(1), (7)). For the tables of kindred and affinity see the Marriage Act 1949 s 1, Sch 1 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 36-37. See also the Civil Partnership Act 2004 Sch 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 38, 39, 135, 139.

18 Adoption and Children Act 2002 s 74(1)(b). As to the law relating to sex with an adult relative see the Sexual Offences Act 2003 ss 64, 65; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 188-190.

19 Adoption and Children Act 2002 s 74(2)(a)-(c). As to the British Nationality Act 1981 and the Immigration Act 1971 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

20 Adoption and Children Act 2002 s 74(2)(d). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 44-57; as to the status of British national (overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 63-65; and as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 58-62.

## UPDATE

### **377 Legal status of children adopted after 30 December 2005**

NOTE 5--Once orders for adoption have been lawfully and properly made, only in highly exceptional and very particular circumstances will court permit them to be set aside: *Re Webster; Webster v Norfolk CC* [2009] EWCA Civ 5, [2009] 2 All ER 1156, (public policy considerations and binding authority made it impossible to set aside adoption orders even if parents had suffered serious injustice).

NOTE 13--See *Re N (recognition of foreign adoption order)* [2010] 1 FLR 1102 (recognition of foreign adoption order allowing husband of child's natural mother to adopt child did not remove mother's parental responsibility).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(5) LEGAL STATUS OF ADOPTED CHILDREN/378. Devolution on death and inter vivos.

### **378. Devolution on death and inter vivos.**

An adoption<sup>1</sup> does not affect the descent of any peerage or dignity or title of honour<sup>2</sup>, nor does an adoption affect the devolution of any property limited (expressly or not) to devolve (as nearly as the law permits) along with any peerage or dignity or title of honour<sup>3</sup>. The status conferred by adoption<sup>4</sup> generally applies for the construction of enactments or instruments passed or made before the adoption or later, and so applies subject to any contrary indication<sup>5</sup>. Rules of construction are provided by statute for instruments concerning property<sup>6</sup> and for dispositions depending on the date of birth<sup>7</sup>. Statutory protection is also provided for a trustee or personal representative, who is not under a duty, by virtue of the law relating to trusts or the administration of estates, to inquire, before conveying or distributing any property, whether any adoption has been effected or revoked if that fact could affect entitlement to the property<sup>8</sup>. A trustee or personal representative is not liable to any person by reason of a conveyance or distribution of the property made without regard to any such fact if he has not received notice of the fact before the conveyance or distribution<sup>9</sup>, but this does not prejudice the right of a person to follow the property, or any property representing it, into the hands of another person, other than a purchaser, who has received it<sup>10</sup>.

1 For the meaning of 'adoption', and as to the relevant legislation for adoptions before and after 30 December 2005, see para 375 ante.

2 Adoption Act 1976 s 44(1); Adoption and Children Act 2002 s 71(1). As to peerages, dignities, titles etc see PEERAGES AND DIGNITIES vol 79 (2008) PARA 801 et seq.

3 Adoption Act 1976 s 44(2); Adoption and Children Act 2002 s 71(2). These provisions apply only and if so far as a contrary intention is not expressed in the instrument, and has effect subject to the terms of the instrument: Adoption Act 1976 s 44(3); Adoption and Children Act 2002 s 71(3).

4 As to this status in relation to adoptions before 30 December 2005 see para 376 ante; and as to this status in relation to adoptions after 30 December 2005 para 377 ante.

5 Adoption Act 1976 s 39(6)(a); Adoption and Children Act 2002 s 67(6)(a). This has effect as respects things done or events occurring on or after the adoption: Adoption Act 1976 s 39(6)(b); Adoption and Children Act 2002 s 67(6)(b).

6 See para 379 post.

7 See para 379 post.

8 Adoption Act 1976 s 45(1); Adoption and Children Act 2002 s 72(1).

9 Adoption Act 1976 s 45(2); Adoption and Children Act 2002 s 72(2). As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

10 Adoption Act 1976 s 45(3); Adoption and Children Act 2002 s 72(3). As to following property see EQUITY vol 16(2) (Reissue) para 861 et seq.



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### **379. Construction of instruments concerning property.**

In applying the general rule that an adopted person is treated in law as the child of the adopters<sup>1</sup> to a disposition<sup>2</sup> which depends on the date of birth of a child or children of the adoptive parent or parents<sup>3</sup>, the disposition must be construed as if the adopted child had been born on the date of the adoption<sup>4</sup> and as if two or more children adopted on one date had been born on that day in the order of their actual births<sup>5</sup>. This does not affect any reference to a person's age<sup>6</sup> or the property rights of illegitimate children<sup>7</sup>.

The general rule that an adopted person is to be treated as the child of no person other than the adopter<sup>8</sup> does not prejudice any interest vested in possession in the adopted child before the adoption, or any interest expectant (whether immediately or not) upon any interest so vested<sup>9</sup>.

Where it is necessary to determine for the purposes of a disposition of property effected by instrument whether a woman can have a child, it must be presumed that after attaining the age of 55 she will not adopt after the execution of the instrument<sup>10</sup> and if she does so the child will not be treated as her child or as the child of her spouse, if any, for the purposes of the instrument<sup>11</sup>.

1 For this general rule in relation to adoptions before 30 December 2005 see the Adoption Act 1976 s 39(1); and para 376 ante. For this general rule in relation to adoptions after 30 December 2005 see the Adoption and Children Act 2002 s 67(1), (2); and para 377 ante.

2 'Disposition' includes the conferring of a power of appointment and any other disposition of an interest in or right over property; and 'power of appointment' includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration: Adoption Act 1976 s 46(1); Adoption and Children Act 2002 ss 73(1), (2), 147, Sch 6. These provisions apply to an oral disposition as if contained in an instrument made when the disposition was made (Adoption Act 1976 s 46(2); Adoption and Children Act 2002 s 73(3)) and to any instrument so far as it contains a disposition of property (Adoption Act 1976 s 42(1); Adoption and Children Act 2002 s 69(1)). 'Instrument' includes a private Act settling property, but no other enactment: Adoption Act 1976 s 42(6); Adoption and Children Act 2002 s 69(6). The death of a testator is the date at which his will or codicil is to be regarded as made: Adoption Act 1976 s 46(3); Adoption and Children Act 2002 s 73(4). Provisions as to the law of intestate succession applicable to the estate of a deceased person are to be treated as if contained in an instrument executed by him, while of full capacity, immediately before his death: Adoption Act 1976 s 46(4); Adoption and Children Act 2002 s 73(5). As to intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 583 et seq. In relation to an adopted child with a sole adoptive parent who is subsequently legitimated see further the Legitimacy Act 1976 s 4(2) (as amended); and paras 376 notes 6, 9, 377 notes 5, 13 ante.

3 Examples of phrases in wills on which this can operate are: (1) children of A 'living at my death or born afterwards'; (2) children of A 'living at my death or born afterwards before any one of such children for the time being in existence attains a vested interest and who attain the age of 21 years' (note that the Adoption Act 1976 s 42(2) and the Adoption and Children Act 2002 s 69(2) do not affect this reference to 'the age of 21 years'); (3) as in example (1) or (2) supra but referring to grandchildren of A instead of children of A; and (4) A for life 'until he has a child' and then to his child or children: Adoption Act 1976 s 42(3); Adoption and Children Act 2002 s 69(3).

4 Adoption Act 1976 s 42(2)(a); Adoption and Children Act 2002 s 69(2)(a).

5 Adoption Act 1976 s 42(2)(b); Adoption and Children Act 2002 s 69(2)(b).

6 Adoption Act 1976 s 42(2); Adoption and Children Act 2002 s 69(2).

7 Adoption Act 1976 s 43; Adoption and Children Act 2002 s 70. Section 70(1) provides that where a disposition depends on the date of birth of a child who was born illegitimate and who is adopted by one of the natural parents as sole adoptive parent, s 69(2) (ie the applicable provision in relation to persons adopted after 30 December 2005: see para 375 ante) does not affect entitlement by virtue of the Family Law Act 1987 Pt III (ss 18-21) (property rights: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 588-589). Examples of the application of the Adoption and Children Act 2002 s 70(1) are given as follows: (1) a testator dies in 2001 bequeathing a legacy to his eldest grandchild living at a specified time (s 70(2)(a)); (2) his unmarried daughter has a child in 2002 who is the first grandchild (s 70(2)(b)); (3) his married son has a child in 2003 (s 70(2)(c)); and (4) subsequently his unmarried daughter adopts her child as sole adoptive parent (s 70(2)(d)), and in all those cases the daughter's child remains the eldest grandchild of the testator throughout (s 70(2)). The Adoption Act 1976 s 43 makes similar provision in relation to persons adopted before 30 December 2005.

8 For this general rule in relation to adoptions before 30 December 2005 see *ibid* s 39(2); and para 376 ante. For this general rule in relation to adoptions after 30 December 2005 see the Adoption and Children Act 2002 s 67(3); and para 377 ante.

9 Adoption Act 1976 s 42(4); Adoption and Children Act 2002 s 69(4). A person who is qualified to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 has to be qualified to make such a claim at the time of the application: see s 1 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 665 et seq. A child who is subsequently adopted ceases to be so qualified by virtue of the Adoption Act 1976 s 39(2) (and, presumably, the Adoption and Children Act 2002 s 67(3)): *Re Collins* [1990] Fam 56, [1990] 2 All ER 47. However, the Adoption Act 1976 s 39(2) and the Adoption and Children Act 2002 s 67(3) do not affect entitlement to a pension which is payable to or for the benefit of the child and is in payment at the time of his adoption: Adoption Act 1976 s 48; Adoption and Children Act 2002 s 75.

10 Adoption Act 1976 s 42(5); Adoption and Children Act 2002 s 69(5)(a).

11 Adoption Act 1976 s 42(5); Adoption and Children Act 2002 s 69(5)(b). This provision applies notwithstanding the Adoption Act 1976 s 39 or the Adoption and Children Act 2002 s 67 (as the case may be): Adoption Act 1976 s 42(5); Adoption and Children Act 2002 s 69(5)(b).

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### **380. Insurance.**

Where a child<sup>1</sup> is adopted<sup>2</sup> whose natural parent has effected an insurance with a friendly society, a collecting society or an industrial insurance company for the payment on the child's death of money for funeral expenses, the rights and liabilities under the policy must by virtue of the adoption be transferred to the adoptive parents<sup>3</sup> who, for the purposes of the enactments relating to such societies and companies, must be treated as the person who took out the policy<sup>4</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 For the meaning of 'adoption', and as to the relevant legislation for adoptions before and after 30 December 2005, see para 375 ante.

3 Where, in the case of an adoption effected after 30 December 2005, the adoption is effected by an order made by virtue of the Adoption and Children Act 2002 s 51(2) (see para 363 ante), the references in s 76(1) to the 'adoptive parents' are to be read as references to the adopter and the other one of the couple: s 76(2). For the meaning of 'couple' see para 355 note 2 ante.

4 Adoption Act 1976 s 49; Adoption and Children Act 2002 s 76(1).

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### **381. Declarations as to legal status of persons adopted overseas.**

Any person whose status as an adopted child of any person depends on whether he has been adopted by that person by either a Convention adoption<sup>1</sup> or an overseas adoption<sup>2</sup>, or an adoption recognised by the law of England and Wales and effected under the law of any country outside the British Islands<sup>3</sup>, may apply to the High Court or county court<sup>4</sup> for one, or for one or, in the alternative, the other, of two available declarations<sup>5</sup>. Those are:

- 497 (1) a declaration that the applicant is the adopted child<sup>6</sup> of that person<sup>7</sup>; and
- 498 (2) a declaration that the applicant is not the adopted child<sup>8</sup> of that person<sup>9</sup>.

No declaration which may be applied for under these provisions may be made otherwise than under these provisions by any court<sup>10</sup>.

Where on an application to a court for such a declaration the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy<sup>11</sup>. Any such declaration made is binding on Her Majesty and on all other persons<sup>12</sup>, but any proceedings for such a declaration do not affect any final judgment or decree already pronounced or made by any court of competent jurisdiction<sup>13</sup>. On the dismissal of an application for a declaration a court does not have power to make any declaration for which an application has not been made<sup>14</sup>.

1 For the meaning of 'Convention adoption' see para 375 note 7 ante (definition applied by the Family Law Act 1986 s 57(1)(a) (s 57(1)(a) substituted, and s 57(2)(a) amended, by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 46, 49)). As to Convention adoptions see para 490 et seq post.

2 Family Law Act 1986 s 57(1)(a) (as substituted: see note 1 supra). For the meaning of 'overseas adoption' see para 485 post; definition applied by s 57(1)(a) (as so substituted).

3 Ibid s 57(1)(b). For the meaning of 'British Islands' see para 103 note 6 ante.

4 A court has jurisdiction to entertain an application under ibid s 57(1) (as amended) if, and only if, the applicant is domiciled in England and Wales on the date of the application (s 57(3)(a)) or has been habitually resident in England and Wales throughout the period of one year ending with that date (s 57(3)(b)). As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

The court hearing an application may direct that the whole, or part, of the proceedings is to be heard in camera; and an application for a direction under s 60 (as amended) must be heard in camera unless the court otherwise directs: s 60(4). Any declaration or application for a declaration must be made in the prescribed form (s 60(1)); and rules of court may make provision as to the information required to be given by any applicant for a declaration under these provisions (s 60(2)(a)), as to the persons who are to be parties to proceedings on such an application (s 60(2)(b)), and requiring notice of an application to be served on the Attorney General and on persons who may be affected by any declaration applied for (s 60(2)(c) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 96). See the Family Proceedings Rules 1991, SI 1991/1247, rr 3.15, 3.16 (amended by SI 2001/821; SI 2005/2922).

On an application to a court for a declaration, the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney General (Family Law Act 1986 s 59(1) (ss 57(1), 58(1), (3), 59 amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 6-8)); whether or not he is sent papers in relation to an application to a court for a declaration the Attorney General may intervene in the proceedings in such manner as he thinks necessary and expedient (Family Law Act 1986 s 59(2)(a) (as so amended)) and argue before the court any question in relation to the application which the court considers it necessary to have fully argued (s

59(2)(b) (as so amended)). Where any costs are incurred by the Attorney General in connection with any application to a court for a declaration, the court may make such order as it considers just as to the payment of those costs by parties to the proceedings: s 59(3) (as so amended).

5 Ibid s 57(1) (as amended: see note 4 supra).

6 le for the purposes of either the Adoption Act 1976 s 39 (as amended) (adoptions before 30 December 2005: see para 376 ante) or the Adoption and Children Act 2002 s 67 (adoptions after 30 December 2005: see para 377 ante). For the meaning of 'adoption', and as to the relevant legislation for adoptions before and after 30 December 2005, see para 375 ante.

7 Family Law Act 1986 s 57(2)(a) (as amended: see note 1 supra).

8 le for the purposes mentioned in note 6 supra.

9 Family Law Act 1986 s 57(2)(b).

10 Ibid s 58(4).

11 Ibid s 58(1) (as amended: see note 4 supra).

12 Ibid s 58(2).

13 Ibid s 60(3).

14 Ibid s 58(3) (as amended: see note 4 supra).

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### **382. Citizenship of adopted children.**

An adopted person becomes a British citizen<sup>1</sup> or, as the case may be, a British overseas territories citizen<sup>2</sup>, as from the day on which an adoption order is made or a Convention adoption<sup>3</sup> is effected in respect of him<sup>4</sup> provided that:

- 499 (1) on that date the adopter or, in the case of a joint adoption, one of the adopters has the citizenship in question<sup>5</sup>; and
- 500 (2) in the case of a Convention adoption effected under the law of a country or territory outside the United Kingdom (or, in connection with the acquisition of British overseas territories citizenship, a designated territory<sup>6</sup>), the adopter is (or, in the case of a joint adoption, both of the adopters are) habitually resident<sup>7</sup> in the designated territory or (for the acquisition of British citizenship) the United Kingdom<sup>8</sup>.

The effect of these provisions is to confer British citizenship where:

- 501 (a) any court in the United Kingdom or any court in a qualifying territory makes an order authorising the adoption of a minor<sup>9</sup> who is not a British citizen<sup>10</sup>; or
- 502 (b) a child who is not a British citizen is adopted under a Convention adoption effected under the law of a country or territory outside the United Kingdom<sup>11</sup>,

and to confer British overseas territories citizenship where:

- 503 (i) an order authorising the adoption of a minor who is not a British overseas territories citizen is made by a court in any British overseas territory<sup>12</sup>; or
- 504 (ii) a minor who is not a British overseas territories citizen is adopted under a Convention adoption effected under the law of a country or territory outside the designated territory<sup>13</sup>.

Without prejudice to this, however, a child is treated as not having been adopted and still related to his natural family for the purposes of certain provisions relating to the determination of nationality or citizenship<sup>14</sup>.

1 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 23-43. As to the acquisition of British citizenship by birth or adoption see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 26-27. See also para 483 post.

2 As to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 44-57. As to the acquisition of British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 47-48. See also para 483 post.

3 A 'Convention adoption' is an adoption effected under the law of a country or territory in which the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May, 1993; TS 40 (1994); Cm 2691) (the 'Convention') is in force, and certified in pursuance of art 23(1): British Nationality Act 1981 s 50(1) (definition added by the Adoption and Children Act 2002 s 137(3), (6)(a)).

4 British Nationality Act 1981 ss 1(5), 15(5), (5A) (s 1(5) substituted, s 1(5A) added, and s 1(6) amended, by the Adoption (Intercountry Aspects) Act 1999 s 7(1), (2); the British Nationality Act 1981 s 1(5)(b), (5A), 15(6)

amended, and ss 15(5A), 50(14) added, by the Adoption and Children Act 2002 s 137(3), (4), (5), (7); and the British Nationality Act 1981 s 15(5), (6) amended by the British Overseas Territories Act 2002 ss 1(1)(b), 2(2) (b)). Where an order or a Convention adoption in consequence of which any person became a British citizen by virtue of the British Nationality Act 1981 s 1(5) (as substituted and amended) or a British overseas territories citizen by virtue of s 15(5) (as amended) ceases to have effect, whether on annulment or otherwise, the cesser does not affect the status of that person as a British citizen: ss 1(6), 15(6) (as so amended). For the approach to be taken by the court faced with an adoption application where there has been an illegal placement see *Re C (adoption: illegality)* [1999] Fam 128, sub nom *Re C (adoption: legality)* [1999] 1 FLR 370.

5 British Nationality Act 1981 ss 1(5A)(a), 15(5), (5A)(b)(i) (as added and amended: see note 4 supra).

6 'Designated territory' means a qualifying territory, or the Sovereign Base Areas of Akrotiri and Dhekelia, which is designated by Her Majesty by Order in Council under *ibid* s 50(14) (as added: see note 4 supra) (which provides that for the purposes of the definition of 'designated territory', an Order in Council may designate any qualifying territory, or the Sovereign Base Areas of Akrotiri and Dhekelia, if the Convention is in force there, and may make different designations for the purposes of s 1 and s 15, any such Order in Council being subject to annulment in pursuance of a resolution of either House of Parliament). At the date at which this volume states the law no such order had been made. 'Qualifying territory' means a British overseas territory (ie a territory mentioned in the British Nationality Act 1981 Sch 6: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 44) other than the Sovereign Base Areas of Akrotiri and Dhekelia: s 50(1) (ss 1(5)(a), 50(1) amended by the British Overseas Territories Act 2002 s 5, Sch 1 paras 1(1), (4), 5(1), (2), (4)).

7 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

8 British Nationality Act 1981 ss 1(5A)(b), 15(5), (5A)(b)(ii) (as added and amended: see note 4 supra). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

9 'Minor' means a person who has not attained the age of 18 years: *ibid* s 50(1).

10 *Ibid* s 1(5)(a) (as substituted and amended: see notes 4, 6 supra).

11 *Ibid* s 1(5)(b) (as substituted and amended: see note 4 supra).

12 *Ibid* s 15(5) (as amended: see note 4 supra).

13 *Ibid* s 15(5A)(a), (c) (as added: see note 4 supra).

14 See the Adoption Act 1976 s 47(2) (as amended); the Adoption and Children Act 2002 s 74(2); and paras 376-377 ante. As to the effect of adoption on citizenship see *R v Secretary of State for the Home Department, ex p Brassey* [1989] FCR 423, [1989] 2 FLR 486, DC; *Tahid v Secretary of State for the Home Department* [1991] Imm AR 157, CA.

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## **(6) REGISTRATION**

### **(i) The Adopted Children Register**

#### **383. The register.**

The Registrar General must continue to maintain in the General Register Office<sup>1</sup> a register called the Adopted Children Register<sup>2</sup> and an index thereto<sup>3</sup>. The register is not open to public inspection or search<sup>4</sup> but any person may search the index<sup>5</sup> and have a certified copy of any entry in the register<sup>6</sup> (although access to copies of entries relating to persons aged under 18 is restricted<sup>7</sup>). A certified copy of an entry in the register, if purporting to be sealed or stamped with the seal of the General Register Office, must, without any further or other proof, be received as evidence of the adoption to which it relates<sup>8</sup>; and a certified copy of an entry containing a record of the date of birth of an adopted person<sup>9</sup> or of the country, or the district and sub-district, of the birth of an adopted person<sup>10</sup>, must also be received without any further or other proof as evidence of that date, country, district or sub-district (as the case may be) in all respects as if the copy were a certified copy of an entry in the registers of live births<sup>11</sup>.

1 As to the Registrar General and the General Register Office see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

2 Adoption and Children Act 2002 ss 77(1), 147, Sch 6. Any register, record or index maintained under Pt 1 Ch 5 (ss 77-82) may be maintained in any form the Registrar General considers appropriate; and references (however expressed) to entries in such a register, or to their amendment, marking or cancellation, are to be read accordingly: s 82(2).

3 Ibid s 78(1).

4 Ibid s 77(2).

5 Ibid s 78(2)(a). The terms, conditions and regulations as to payment of fees, and otherwise, applicable under the Births and Deaths Registration Act 1953, and the Registration Service Act 1953 (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 501 et seq), in respect of searches in the index kept in the General Register Office of certified copies of entries in the registers of live births (Adoption and Children Act 2002 s 78(4)(a)) and the supply from that office of certified copies of entries in those certified copies (s 78(4)(b)) also apply in respect of searches, and supplies of certified copies under s 78(2) (s 78(4)).

It was decided under the legislation which formerly required the Registrar General to maintain an index of the register and to make available copies of entries in the register (ie the Adoption Act 1976 s 50(3) (repealed), which was drafted in a way corresponding to the Adoption and Children Act 2002 s 78(1), (2)) that the court cannot interfere with the Registrar General's duty but can attach a provision to an adoption order preventing disclosure of a particular entry without leave of the court: *Re X (a minor) (adoption details: disclosure)* [1994] Fam 174, [1994] 3 All ER 372, CA (such an order must be made where the child's welfare depends on protection from the natural parent or parents who may try to breach the register's confidentiality). As to the court see para 511 post. See also *Re W (minor) (adoption details: disclosure)* [1999] 2 FCR 283, [1998] 2 FLR 625 (the court has an inherent jurisdiction to order that information on the register must not be disclosed to a third party without the leave of the court, where it is in the interests of the child so to order); and *Presidents Direction (Adopted Children's Register: restriction on disclosure)* [1999] 1 FCR 97, [1999] 1 FLR 315. Applications for orders to restrict disclosure of the details entered on the register must be made to, or transferred to, the High Court: *Presidents Direction (Adopted Children's Register: restriction on disclosure)* supra. No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority has obtained the leave of the court: Children Act 1989 s 100(3).

6 Adoption and Children Act 2002 s 78(2)(b). See note 5 supra. Where an adoption order has been amended, any certified copy of the relevant entry in the register which may be issued pursuant to s 78(2)(b) must be a



copy of the entry as amended, without the reproduction of any note or marking relating to the amendment (Sch 1 para 4(7)(a)) or any matter cancelled in pursuance of it (Sch 1 para 4(7)(b)). A copy or extract of an entry in any register or other record, being an entry the marking of which has been cancelled, is not to be treated as an accurate copy unless both the marking and the cancellation are omitted from it: Sch 1 para 4(8). For the meaning of 'adoption order', and as to the making of orders, see para 359 et seq ante.

7 A person is not entitled to have a certified copy of an entry in the register relating to an adopted person who has not attained the age of 18 years unless the applicant has provided the Registrar General with particulars prescribed by regulations made by the Registrar General with the approval of the Chancellor of the Exchequer: *ibid* s 78(3). The prescribed particulars are the full name of the adopted person, the date of birth of the adopted person and the full name of the adoptive parent or parents: see the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 10.

8 Adoption and Children Act 2002 s 77(4).

9 *Ibid* s 77(5)(a).

10 *Ibid* s 77(5)(b).

11 *Ibid* s 77(5). 'Registers of live births' means the registers of live births made under the Births and Deaths Registration Act 1953 (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 504 et seq): Adoption and Children Act 2002 s 82(1).

## UPDATE

### 383 The register

NOTE 7--Reference to the Chancellor of the Exchequer is now to the Secretary of State: Adoption and Children Act 2002 s 78(3) (amended by SI 2008/678).

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### **384. Entries in the register.**

No entries may be made in the Adopted Children Register<sup>1</sup> other than entries directed to be made in the register by adoption orders<sup>2</sup> and entries otherwise required to be made by statute<sup>3</sup>. Pursuant to these statutory requirements<sup>4</sup> it is provided that every adoption order must contain a direction to the Registrar General<sup>5</sup> to make in the register an entry in the prescribed form and that any adoption order made in pursuance of an application for an adoption order in respect of an identified child must contain a direction to the Registrar General to secure that the entry in the register or record in question is marked with the word 'Adopted'<sup>6</sup>. There are also requirements relating to:

- 505 (1) the registration of particulars of certain foreign adoptions<sup>7</sup>;
- 506 (2) the amendment of the register where an adoption order is amended<sup>8</sup>; and
- 507 (3) the amendment and marking of the register on the re-registration of the birth of a legitimated person or the revocation of an adoption order made in relation to a legitimated person<sup>9</sup>.

1 As to the requirement for such a register see para 383 ante.

2 Adoption and Children Act 2002 s 77(3)(a). For the meaning of 'adoption order', and as to the making of orders, see para 359 et seq ante.

3 Ibid s 77(3)(b).

4 Ie pursuant to the requirements of ibid Sch 1.

5 As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

6 See the Adoption and Children Act 2002 s 77(6), Sch 1 paras 1, 2; and para 368 ante.

7 See ibid Sch 1 paras 3, 4(9), (10), 5(2); and para 488 post.

8 See ibid Sch 1 para 4(1)-(5); and para 369 ante.

9 See ibid Sch 1 paras 5(1), (2), 6; and paras 363, 369 ante, 488 post.

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### **385. Connection between register and live births.**

In addition to maintaining the Adopted Children Register<sup>1</sup> and the index to it, the Registrar General<sup>2</sup> must make traceable the connection between any entry<sup>3</sup> in the registers of live births<sup>4</sup> or other records<sup>5</sup> which has been marked 'Adopted' and any corresponding entry in the Adopted Children Register<sup>6</sup>. Like the register itself<sup>7</sup>, the information<sup>8</sup> kept by the Registrar General for the purposes of tracing entries in the register is not open to public inspection or search<sup>9</sup>; it and any other information which would enable an adopted person to obtain a certified copy of the record of his birth may in general be disclosed by the Registrar General only:

- 508 (1) in relation to a person adopted after 30 December 2005<sup>10</sup>, to an appropriate adoption agency on an application by that agency<sup>11</sup>;
- 509 (2) in relation to a person adopted before 30 December 2005 who has attained the age of 18 years, to that person on an application by him<sup>12</sup>; or
- 510 (3) in exceptional circumstances, by order of the court<sup>13</sup>.

The Registrar General is also required, on an application<sup>14</sup> by an adopted person who is under the age of 18 years<sup>15</sup> and intends to be married or form a civil partnership<sup>16</sup>, to inform the applicant whether or not it appears from information contained in the registers of live births or other records that the applicant and the intended spouse or civil partner may be<sup>17</sup> within the prohibited degrees of relationship<sup>18</sup>.

Before the Registrar General gives any information by virtue of these provisions, any prescribed fee which he has demanded must be paid<sup>19</sup>.

1 As to the requirement for such a register see para 383 ante.

2 As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

3 As to the meaning of 'entry' see para 383 note 2 ante.

4 For the meaning of 'registers of live births' see para 383 note 11 ante.

5 'Records' includes certified copies kept by the Registrar General of entries in any register of births: Adoption and Children Act 2002 s 82(1).

6 Ibid s 79(1).

7 See ibid s 77(2); and para 383 ante.

8 'Information' means information recorded in any form: ibid ss 144(1), 147, Sch 6.

9 Ibid s 79(2).

10 Ie the day appointed for the coming into force of ibid ss 56-65 (see para 472 post): s 79(9); Adoption and Children Act 2002 (Commencement No 9) Order 2005, SI 2005/2213; Adoption and Children Act 2002 (Commencement No 11) (Wales) Order 2005, SI 2005/3112.

11 Ibid s 79(3), (5). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 post. For the meaning of 'appropriate adoption agency' see s 65(1); and para 472 note 9 post (definition applied by s 79(5)). The application must be made in writing (Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 11), and the Registrar General's duty to give information arises only if a record of the adopted person's birth is kept by the Registrar General (Adoption and Children Act 2002 s 79(5)).

12 Ibid s 79(6), Sch 2 para 1. The application must be made in writing and signed by the applicant (Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 12) and the Registrar General's duty to give information arises only if a record of the adopted person's birth is kept by the Registrar General (Adoption and Children Act 2002 Sch 2 para 1).

Before giving any such information to an applicant the Registrar General must inform the applicant that counselling services are available to him:

- 238 (1) from a registered adoption society, an organisation within s 144(3)(b) (voluntary organisations providing registered adoption services in Scotland) or an adoption society which is registered under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 4 (Adoption and Children Act 2002 Sch 2 para 2(1)(a));
- 239 (2) if the applicant is in England and Wales, at the General Register Office or from any local authority (see para 327 note 7 ante) or registered adoption support agency (ie an adoption support agency in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE) (Adoption and Children Act 2002 Sch 2 para 2(1)(b), (2));
- 240 (3) if the applicant is in Scotland, from any council constituted under the Local Government etc (Scotland) Act 1994 s 2 (Adoption and Children Act 2002 Sch 2 para 2(1)(c)); and
- 241 (4) if the applicant is in Northern Ireland, from any Board (ie a Health and Social Services Board established under the Health and Personal Social Services (Northern Ireland) Order 1972, SI 1972/1265, art 16 or, where the functions of a Board are exercisable by a Health and Social Services Trust, the Health and Social Services Trust) (Adoption and Children Act 2002 Sch 2 para 2(1)(d), (3)).

If the applicant chooses to receive counselling from any such person or body the Registrar General must send to the person or body the information to which the applicant is entitled under Sch 2 para 1: Sch 2 para 2(4).

Where an adopted person who is in England and Wales applies for information under Sch 2 para 1 or under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 54, or is supplied with information under the Adoption (Scotland) Act 1978 s 45, the Registrar General, any local authority, a registered adoption society, an organisation within the Adoption and Children Act 2002 s 144(3)(b) or an adoption society which is registered under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 4 must, if asked by the applicant to do so, provide counselling for the applicant: Adoption and Children Act 2002 Sch 2 para 3.

Where a person was adopted before 12 November 1975 and applies for information under Sch 2 para 1, the Registrar General must not give the information to the applicant unless the applicant has attended an interview with a counsellor arranged by a person or body from whom counselling services are available as mentioned in Sch 2 para 2: Sch 2 para 4(1). Where the Registrar General is prevented by this requirement from giving information to a person who is not living in the United Kingdom, the Registrar General may give the information to any body which he is satisfied is suitable to provide counselling to that person and has notified him that it is prepared to provide such counselling: Sch 2 para 4(2). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

For the purposes of the Adoption and Children Act 2002, an 'adoption support agency' is an undertaking the purpose of which, or one of the purposes of which, is the provision of adoption support services (s 8(1)), although an undertaking is not an adoption support agency merely because it provides information in connection with adoption other than for the purpose mentioned in s 98(1) (information concerning pre-commencement adoptions: see para 453 post) (s 8(1)(a)), or if it is an excepted undertaking (s 8(1)(b)). For the meaning of 'undertaking' see the Care Standards Act 2000 s 121(1); and para 167 note 8 ante (definition applied by the Adoption and Children Act 2002 s 8(1)). The following are 'excepted undertakings' for these purposes: (a) a registered adoption society (see para 395 note 3 post), whether or not the society is registered in respect of the provision of adoption support services (s 8(2)(a)); (b) a local authority (s 8(2)(b)); (c) a local education authority (s 8(2)(c)); (d) a special health authority, primary care trust, or, in Wales, a health authority or local health board, NHS trust or NHS foundation trust (s 8(2)(d) (amended by the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 125, 126)); (e) the Registrar General (Adoption and Children Act 2002 s 8(2)(e)); and (f) any person, or description of persons, excepted by regulations (s 8(2)(f); Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 4 (excepting, in England, certain legal practitioners and undertakings providing discussion services and respite care)). For the meaning of 'local education authority' see the Education Act 1996

s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption and Children Act 2002 s 8(2)(c)). As to special health authorities see the National Health Service Act 2006 ss 28, 29; the National Health Service (Wales) Act 2006 ss 22-25; and HEALTH SERVICES vol 54 (2008) PARAS 74, 136 et seq. As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq. As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74. As to NHS trusts see the National Health Service Act 2006 ss 25-27; the National Health Service (Wales) Act 2006 ss 18-21; and HEALTH SERVICES vol 54 (2008) PARAS 74, 155 et seq. As to NHS foundation trusts (which exist only in England) see the National Health Service Act 2006 ss 30-65; and HEALTH SERVICES vol 54 (2008) PARA 174 et seq.

13 Adoption and Children Act 2002 s 79(4). As to the court see para 511 post. See eg *Re H (adoption: disclosure of information)* [1995] 1 FCR 546, [1995] 1 FLR 236 (woman with a treatable genetic disorder wished to trace her half brother who had been adopted so that he could be screened for the disorder and receive treatment if necessary); *Re L (adoption: disclosure of information)* [1998] Fam 19, sub nom *D v Registrar General* [1997] 1 FLR 715, CA (exceptional circumstances would be necessary to persuade a court to override the statutory duty of non-disclosure imposed on the Registrar General) (both cases decided under the Adoption Act 1976 s 50(5) (repealed), which made provision corresponding to that now made by the Adoption and Children Act 2002 s 79(4)). See also *Lawson v Registrar-General* (1956) 106 L Jo 204. The court's discretion to grant an order under the Adoption Act 1976 s 50(5) (repealed) (ie in 'exceptional circumstances') did not have to be exercised sparingly, as there was no express provision to that effect in the Adoption Act 1976 (*Re H (adoption: disclosure of information)* supra (order granted by the High Court for disclosure of information about an adopted child where his half sister had a genetic degenerative disease)); there is also no express provision to that effect in the Adoption and Children Act 2002. However, see also *Re L (adoption: disclosure of information)* supra (court's discretion under the Adoption Act 1976 s 50(5) (repealed) could be exercised only where there was some need or benefit to the adopted person).

14 The application must be made in writing and signed by the applicant (Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 13) and the Registrar General's duty to give information arises only if a record of the adopted person's birth is kept by the Registrar General (Adoption and Children Act 2002 s 79(7)).

15 Ibid s 79(7)(a).

16 Ibid s 79(7)(b) (amended by the Civil Partnership Act 2004 s 79(1), (8)(a)).

17 Ie for the purposes of the Marriage Act 1949 (see s 1, Sch 1 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 36-37) or the Civil Partnership Act 2004 (see s 3(1)(d), Sch 1 Pt 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 38, 39, 135, 139), as the case may be.

18 Adoption and Children Act 2002 s 79(7) (amended by the Civil Partnership Act 2004 s 79(8)(b); and the Civil Partnership Act 2004 (International Immunities and Privileges, Companies and Adoption) Order 2005, SI 2005/3542, art 4).

19 Adoption and Children Act 2002 s 79(8).

## UPDATE

### 385 Connection between register and live births

NOTES 10, 12--Adoption and Children Act 2002 s 79(9), Sch 2 para 1 amended: SI 2008/678.

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## **(ii) The Adoption Contact Register**

### **386. The register.**

The Registrar General must continue to maintain at the General Register Office<sup>1</sup> a register called the Adoption Contact Register<sup>2</sup>. The register is in two parts: Part 1 contains information<sup>4</sup> about adopted persons who have given notice<sup>5</sup> expressing their wishes as to making contact with their relatives<sup>6</sup>; and Part 2 contains information about persons who have given notice<sup>7</sup> expressing their wishes, as relatives of adopted persons, as to making contact with those persons<sup>8</sup>. Although the register is not to be open to public inspection or search<sup>9</sup>, the Registrar General must give an adopted person whose name is in Part 1 the name and address of any relative of his whose name is in Part 2 and who has asked for contact with that person<sup>10</sup>.

1 As to the Registrar General and the General Register Office see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

2 Adoption and Children Act 2002 ss 80(1), 147, Sch 6. Any register, record or index maintained under Pt 1 Ch 5 (ss 77-82) may be maintained in any form the Registrar General considers appropriate; and references (however expressed) to entries in such a register, or to their amendment, marking or cancellation, are to be read accordingly: s 82(2).

4 For the meaning of 'information' see para 385 note 8 ante.

5 The notice is set out in the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, Sch 3: see reg 6(2). As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

6 Ibid s 80(2). 'Relative', in relation to an adopted person, means any person who (but for his adoption) would be related to him by blood (including half blood), marriage or civil partnership: s 81(2) (amended by the Civil Partnership Act 2004 s 79(1), (9)). As to the information in Part 1 of the register see para 387 post.

7 The notice is set out in the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, Sch 4: see reg 7(2).

8 Adoption and Children Act 2002 s 80(4). As to the information in Part 2 of the register see para 388 post.

9 Ibid s 81(1).

10 Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 8 (made under the Adoption and Children Act 2002 s 80(6)(a), under which regulations made by the Registrar General with the approval of the Chancellor of the Exchequer (s 81(4)) may provide for the disclosure of information contained in one Part of the register to persons for whom there is an entry in the other Part). The address required to be given under these provisions is the address at or through which the relative may be contacted, and the name and address of the relative must be given in writing: Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 8. The Registrar General must not give any information entered in the register to any person except in accordance with the Adoption and Children Act 2002 s 80(6)(a) or regulations made by virtue of s 64(4)(b) (see para 472 post): s 81(3).

## **UPDATE**

### **386 The register**

NOTE 10--Reference to the Chancellor of the Exchequer is now to the Secretary of State: Adoption and Children Act 2002 s 81(4) (amended by SI 2008/678).



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### **387. Entries in Part 1 of the register.**

The information to be recorded in Part 1 of the Adoption Contact Register<sup>1</sup> is the full name, address and date of birth of the adopted person<sup>2</sup>, any relative<sup>3</sup> with whom that person wishes to have contact together with the name of that relative if known<sup>4</sup>, and any relative with whom the adopted person does not wish to have contact together with the name of that relative if known<sup>5</sup>. However, the Registrar General<sup>6</sup> may make an entry in Part 1 only if:

- 511 (1) a record<sup>7</sup> of the adopted person's birth is kept by the Registrar General<sup>8</sup>;
- 512 (2) the adopted person has attained the age of 18 years<sup>9</sup>; and
- 513 (3) the Registrar General is satisfied that the adopted person has such information<sup>10</sup> as is necessary to enable him to obtain a certified copy of the record of his birth<sup>11</sup>.

A fee is payable for making an entry in Part 1<sup>12</sup>.

1 The fee for the purposes of the Adoption and Children Act 2002 s 80(2) (information in Part 1 of the register about adopted persons: see para 386 ante).

2 Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 6(1).

3 For the meaning of 'relative' see para 386 note 6 ante.

4 Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 6(1)(a).

5 Ibid reg 6(1)(b).

6 As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

7 For the meaning of 'record' see para 385 note 5 ante.

8 Adoption and Children Act 2002 s 80(3)(a).

9 Ibid s 80(3)(b).

10 For the meaning of 'information' see para 385 note 8 ante.

11 Adoption and Children Act 2002 s 80(3)(c).

12 The fee payable in respect of the making of an entry in Part 1 of the Adoption Contact Register is £15: Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 9(1) (made under the Adoption and Children Act 2002 s 80(6)(b), under which regulations may provide for the payment of prescribed fees in respect of the making or alteration of entries in the register and the disclosure of information contained in the register).



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### **388. Entries in Part 2 of the register.**

The information to be recorded in Part 2 of the Adoption Contact Register<sup>1</sup> is the full name, address and date of birth of the relative<sup>2</sup> of an adopted person<sup>3</sup>, together with the name of the adopted person with whom he wishes to have contact<sup>4</sup> or the fact that he does not wish to have contact with the named adopted person<sup>5</sup>. However, the Registrar General<sup>6</sup> may make an entry in Part 2 only if:

- 514 (1) the person giving notice<sup>7</sup> has attained the age of 18 years<sup>8</sup>; and
- 515 (2) the Registrar General is satisfied that the person is a relative of an adopted person and has such information as is necessary to enable him to obtain a certified copy of the record<sup>9</sup> of the adopted person's birth<sup>10</sup>.

A fee is payable for making an entry in Part 2<sup>11</sup>.

1    le for the purposes of the Adoption and Children Act 2002 s 80(4) (information in Part 2 of the register about relatives of adopted persons: see para 386 ante).

2    For the meaning of 'relative' see para 386 note 6 ante.

3    Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 7(1).

4    Ibid reg 7(1)(a).

5    Ibid reg 7(1)(b).

6    As to the Registrar General see the Registration Service Act 1953 s 1 et seq; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

7    As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante. See also para 386 note 7 ante.

8    Ibid s 80(5)(a).

9    For the meaning of 'record' see para 385 note 5 ante.

10    Adoption and Children Act 2002 s 80(5)(b).

11    The fee payable in respect of the making of an entry in Part 2 of the Adoption Contact Register is £30: Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 9(2) (made under the Adoption and Children Act 2002 s 80(6)(b): see para 387 note 12 ante).

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### **(iii) The Adoption and Children Act Register**

#### **389. The register.**

As from a day to be appointed<sup>1</sup>, provision may be made by Order in Council<sup>2</sup> for the Secretary of State<sup>3</sup> to establish and maintain a register, to be called the Adoption and Children Act Register, containing prescribed information<sup>4</sup> about:

- 516 (1) children<sup>5</sup> who are suitable for adoption<sup>6</sup>;
- 517 (2) prospective adopters who are suitable to adopt a child<sup>7</sup>; and
- 518 (3) persons included in the register by virtue of these provisions in respect of things occurring after their inclusion<sup>8</sup>.

For the purpose of giving assistance in finding persons with whom children may be placed for purposes other than adoption, an Order in Council may provide for the register to contain information about such persons and the children who may be placed with them<sup>9</sup>.

1 At the date at which this volume states the law no day had been appointed for the commencement of the Adoption and Children Act 2002 ss 125-131 (see the text and notes 2-9 infra; and paras 390-392 post).

2 In England, no recommendation to make such an order is to be made to Her Majesty in Council unless a draft has been laid before and approved by resolution of each House of Parliament: *ibid* s 131(4). No recommendation to make an order under s 125 containing any provision in respect of the Adoption and Children Act Register is to be made to Her Majesty in Council if the register applies to Wales or the order would provide for the register to apply to Wales, unless a draft has been laid before, and approved by resolution of, the National Assembly for Wales: s 131(6). Similar provision is made in relation to Scotland: see s 131(5). At the date at which this volume states the law no such Order in Council had been made.

3 As to the Secretary of State see para 155 ante.

4 For the meaning of 'information' see para 385 note 8 ante. Information kept in the register may be kept in any form the Secretary of State considers appropriate: Adoption and Children Act 2002 s 125(5).

5 For the meaning of 'child' see para 327 note 2 ante.

6 Adoption and Children Act 2002 ss 125(1)(a), 147, Sch 6. A child is 'suitable for adoption' if an adoption agency is satisfied that the child ought to be placed for adoption: s 131(2)(a). 'Adoption agency' means a local authority in England (s 130(1)(a)) or a registered adoption society whose principal office is in England (s 130(1)(b)). For the meaning of 'registered adoption society' see para 395 note 3 post. For the meaning of 'local authority' see para 327 note 7 ante. An Order in Council under s 125 may provide for any requirements imposed on adoption agencies in respect of the register to apply to Scottish local authorities and to voluntary organisations providing a registered adoption service (s 130(2)(a)) and to local authorities in Wales and to registered adoption societies whose principal offices are in Wales (s 130(2)(b)); and, in relation to the register, references to adoption agencies in ss 125-131 include any such authorities or societies to which such an order applies those requirements (s 130(2)). At the date at which this volume states the law no such provision had been made. 'Scottish local authority' means a local authority within the meaning of the Regulation of Care (Scotland) Act 2001: Adoption and Children Act 2002 s 131(1)(d). As to the meaning of 'voluntary organisation providing a registered adoption service' see, by virtue of s 131(1)(e), para 352 note 2 ante.

7 *Ibid* s 125(1)(a). Prospective adopters are 'suitable to adopt a child' if an adoption agency is satisfied that they are suitable to have a child placed with them for adoption: s 131(2)(b).

8 *Ibid* s 125(1)(b).

9 Ibid s 125(2)(a). An Order in Council making provision under s 125(2)(a) may apply any of the other provisions of ss 125-131 with or without modifications: s 125(2)(b). At the date at which this volume states the law no Order in Council had been made under s 125(2).

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### **390. Supply of information.**

As from a day to be appointed<sup>1</sup>, an Order in Council providing for the establishment and maintenance of the Adoption and Children Act Register<sup>2</sup> may require adoption agencies<sup>3</sup> to give<sup>4</sup> prescribed information<sup>5</sup> for entry in the register<sup>6</sup>, although an agency must not, pursuant to any such requirement, disclose any information about prospective adopters who are suitable to adopt a child<sup>7</sup>, or persons who were included in the register as such prospective adopters, without their consent<sup>8</sup>, or about children suitable for adoption<sup>9</sup>, or persons who were included in the register as such children, without the consent of the prescribed person<sup>10</sup>.

1 At the date at which this volume states the law no day had been appointed for the commencement of the statutory provisions relating to the establishment and maintenance of the Adoption and Children Act Register (ie the Adoption and Children Act 2002 ss 125-131: see the text and notes 2-10 infra; and paras 389 ante, 391-392 post).

2 Ie an Order in Council under *ibid* s 125: see para 389 ante.

3 For the meaning of 'adoption agency' see para 389 note 6 ante.

4 Ie to the Secretary of State (see para 389 ante) or, as the case may be, the registration organisation: Adoption and Children Act 2002 s 128(1). As to the Secretary of State see para 155 ante. References in ss 125-131 to the 'registration organisation' are to any organisation for the time being performing functions in respect of the register by virtue of arrangements under s 126 (see para 392 post): s 126(5).

5 Ie prescribed by order under *ibid* s 125 (see para 389 ante): s 131(1)(b). For the meaning of 'information' see para 385 note 8 ante. Information is to be given to the Secretary of State or the registration organisation when required by the order and in the prescribed form and manner: s 128(2). An order may require an agency giving information which is entered on the register to pay a prescribed fee to the Secretary of State or the registration organisation: s 128(3).

6 *Ibid* s 128(1).

7 For the meaning of 'child' see para 327 note 2 ante. As to when prospective adopters are 'suitable to adopt a child' see para 389 note 7 ante.

8 Adoption and Children Act 2002 s 128(4)(a). Consent is to be given in the prescribed form: s 128(5). At the date at which this volume states the law no such form had been prescribed.

9 As to when a child is suitable for adoption see para 389 note 6 ante.

10 Adoption and Children Act 2002 s 128(4)(b). At the date at which this volume states the law no person had been prescribed for these purposes.

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### **391. Disclosure and retention of information.**

As from a day to be appointed<sup>1</sup>, the Adoption and Children Act Register<sup>2</sup> is not to be open to public inspection or search<sup>3</sup>, and an Order in Council<sup>4</sup> may prescribe:

- 519 (1) such information entered in the register<sup>5</sup> as may, where an adoption agency<sup>6</sup> is acting on behalf of a child who is suitable for adoption<sup>7</sup>, be disclosed to the agency to assist in finding prospective adopters with whom it would be appropriate for the child to be placed<sup>9</sup>;
- 520 (2) such information entered in the register as may, where an adoption agency is acting on behalf of prospective adopters who are suitable to adopt a child<sup>10</sup>, be disclosed<sup>11</sup> to the agency to assist in finding a child appropriate for adoption by them<sup>12</sup>; and
- 521 (3) such information entered in the register, or compiled from information entered in the register, as may be disclosed<sup>13</sup> to any prescribed person for use for statistical or research purposes, or for other prescribed purposes<sup>14</sup>.

Subject to specific exemptions relating to authorised disclosures<sup>15</sup>, information entered in or compiled from information entered in the register may be disclosed only in accordance with these provisions<sup>16</sup>, and any disclosure in contravention of these provisions is an offence<sup>17</sup>.

An Order in Council<sup>18</sup> may make provision about the retention of information in the register<sup>19</sup>.

1 At the date at which this volume states the law no day had been appointed for the commencement of the statutory provisions relating to the establishment and maintenance of the Adoption and Children Act Register (ie the Adoption and Children Act 2002 ss 125-131: see the text and notes 2-19 infra; and paras 389-390 ante, 392 post).

2 As to the requirement for such a register see para 389 ante.

3 Adoption and Children Act 2002 s 125(3).

4 Ie an Order in Council under *ibid* s 125: see para 389 ante.

5 For the meaning of 'information' see para 385 note 8 ante. As to the supply of information see para 390 ante.

6 For the meaning of 'adoption agency' see para 389 note 6 ante.

7 For the meaning of 'child' see para 327 note 2 ante. As to when a child is suitable for adoption see para 389 note 6 ante.

8 Ie by the Secretary of State (see para 389 ante) or, as the case may be, the registration organisation (see paras 390 note 4 ante, 392 post): Adoption and Children Act 2002 s 129(2), (3). As to the Secretary of State see para 155 ante. Information disclosed to any person under s 129(2) or (3) may be given on any prescribed terms or conditions (s 129(6)), and an Order in Council under s 125 (see para 389 ante) may prescribe the steps to be taken by adoption agencies in respect of information received by them by virtue of s 129(2) (s 129(4)). At the date at which this volume states the law no such terms, conditions or steps had been prescribed. An Order under in Council under s 125 may, in prescribed circumstances, require a prescribed fee to be paid to the Secretary of State or the registration organisation by a prescribed adoption agency in respect of information disclosed under s 129(2) (s 129(7)(a)) or by a person to whom information is disclosed under s 129(3) (s 129(7)(b)).

9 Ibid s 129(2)(a). At the date at which this volume states the law no such information had been prescribed.

10 As to when prospective adopters are 'suitable to adopt a child' see para 389 note 7 ante.

11 See note 8 supra.

12 Adoption and Children Act 2002 s 129(2)(b). At the date at which this volume states the law no such information had been prescribed.

13 See note 8 supra.

14 Adoption and Children Act 2002 s 129(3). At the date at which this volume states the law no such person or purposes had been prescribed.

15 Ibid s 129(1) (see the text and note 16 infra) does not apply to a disclosure of information with the authority of the Secretary of State (s 129(5)(a)) or to a disclosure by the registration organisation of prescribed information to the Scottish Ministers (if the register applies to Scotland) or the Welsh Ministers (if the register applies to Wales) (s 129(5)(b)). References to the register applying to Scotland or Wales are to those requirements applying as mentioned in s 130(2) (see para 389 note 6 ante): s 130(3).

16 Ibid s 129(1).

17 Ibid s 129(8). Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)). A person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 129(9). As to the standard scale see para 132 note 2 ante. Apart from this offence nothing authorised or required to be done by virtue of ss 125-131 constitutes an offence under s 93 (see para 507 note 15 post), s 94 (see para 508 post) or s 95 (see para 509 post): s 131(3).

Where an offence under the Adoption and Children Act 2002 committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, that person as well as the body is guilty of the offence and liable to be proceeded against and punished accordingly (s 143(1)); where the affairs of a body corporate are managed by its members, this applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director of a body corporate (s 143(2)). Proceedings for an offence alleged to have been committed under the Adoption and Children Act 2002 by an unincorporated body are to be brought in the name of that body (and not in that of any of its members) and, for the purposes of any such proceedings in England and Wales or Northern Ireland, any rules of court relating to the service of documents have effect as if that body were a corporation: s 143(3). A fine imposed on an unincorporated body on its conviction of an offence under the Adoption and Children Act 2002 is to be paid out of the funds of that body: s 143(4).

If an unincorporated body is charged with an offence under the Adoption and Children Act 2002, then the Criminal Justice Act 1925 s 33 and the Magistrates' Courts Act 1980 Sch 3 (procedure on charge of an offence against a corporation: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1161; MAGISTRATES vol 29(2) (Reissue) para 666), and corresponding Northern Irish provision, have effect in like manner as in the case of a corporation so charged: Adoption and Children Act 2002 s 143(5).

Where an offence under the Adoption and Children Act 2002 committed by an unincorporated body (other than a partnership) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer of the body or any member of its governing body, he as well as the body is guilty of the offence and liable to be proceeded against and punished accordingly: s 143(6). Where an offence under the Adoption and Children Act 2002 committed by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly: s 143(7).

18 See note 4 supra.

19 Adoption and Children Act 2002 s 125(4). At the date at which this volume states the law no such Order in Council had been made.

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### **392. Contracting-out of establishment and maintenance of register.**

As from a day to be appointed<sup>1</sup>, the Secretary of State<sup>2</sup> may make an arrangement with an organisation<sup>3</sup> under which any function of his<sup>4</sup> of establishing and maintaining the Adoption and Children Act Register<sup>5</sup>, and disclosing information<sup>6</sup> entered in, or compiled from information entered in, the register to any person, is performed wholly or partly by the organisation on his behalf<sup>7</sup>. An Order in Council<sup>8</sup> may also authorise an organisation with which such an arrangement is made to act as agent for the payment or receipt of sums payable by adoption agencies<sup>9</sup> to other adoption agencies and may require adoption agencies to pay or receive such sums through the organisation<sup>10</sup>.

If the Secretary of State makes any such arrangement, the organisation is to perform the functions exercisable by virtue of the arrangement in accordance with any directions given by the Secretary of State<sup>11</sup>.

1 At the date at which this volume states the law no day had been appointed for the commencement of the statutory provisions relating to the establishment and maintenance of the Adoption and Children Act Register (ie the Adoption and Children Act 2002 ss 125-131: see the text and notes 2-11 infra; and paras 389-391 ante).

2 As to the Secretary of State see para 155 ante. An exercise of the Secretary of State's powers under these provisions requires the agreement of the Scottish Ministers (if the register or, as the case may be, any payment agency provision, applies to Scotland) and of the Welsh Ministers (if the register or, as the case may be, any payment agency provision, applies to Wales): *ibid* ss 126(4), 127(3). As to the Welsh Ministers see para 155 ante. References to a payment agency provision applying to Scotland or Wales is to such provision made by virtue of s 127 which applies in Scotland or Wales by virtue of s 130(4) (see note 10 infra): s 130(5).

3 'Organisation' includes a public body and a private or voluntary organisation: *ibid* s 131(1)(a). For the meaning of 'voluntary organisation' see s 2(5); and para 395 note 3 post.

4 Ie any function of the Secretary of State under an Order in Council made under *ibid* s 125 (see para 389 et seq ante).

5 As to the requirement for such a register see para 389 ante.

6 For the meaning of 'information' see para 385 note 8 ante. As to the supply of information to, and disclosure of information in, the register see paras 390-391 ante.

7 Adoption and Children Act 2002 s 126(1). The arrangement may include provision for payments to be made to the organisation by the Secretary of State: s 126(2).

8 Ie an Order in Council made under *ibid* s 125 (see paras 389 et seq ante).

9 For the meaning of 'adoption agency' see para 389 note 6 ante.

10 Adoption and Children Act 2002 s 127(1). An Order in Council under s 125 may apply any provision made by virtue of s 127 to Scottish local authorities and to voluntary organisations providing a registered adoption service, or to local authorities in Wales and to registered adoption societies whose principal offices are in Wales: s 130(4). As to the meanings of 'Scottish local authority' and 'voluntary organisation providing a registered adoption service' see para 389 note 6 ante. No recommendation to make an order under s 125 containing any provision by virtue of s 127 is to be made to Her Majesty in Council if any payment agency provision applies to Wales or the order would provide for any payment agency provision to apply to Wales, unless a draft has been laid before, and approved by resolution of, the National Assembly for Wales: s 131(7).

11 Ibid ss 126(3), 127(2). Directions may be of general application (or general application in any part of Great Britain) or be special directions: ss 126(3), 127(3).



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## **(7) THE ADOPTION SERVICE**

### **(i) Provision of Services**

#### **A. DUTY TO PROVIDE**

##### **393. Duty to provide Adoption Service.**

It is the duty of every local authority<sup>1</sup> to continue to maintain within its area a service designed to meet the needs, in relation to adoption<sup>2</sup>, of:

- 522 (1) children<sup>3</sup> who may be adopted, their parents<sup>4</sup> and guardians<sup>5</sup>;
- 523 (2) persons wishing to adopt a child<sup>6</sup>; and
- 524 (3) adopted persons, their parents, natural parents and former guardians<sup>7</sup>.

This service is known as 'the Adoption Service'<sup>8</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 In the Adoption and Children Act 2002 Pt 1 Ch 2 (ss 2-16) (as amended) (see the text and notes 3-8 infra; and para 394 et seq post), 'adoption' means the adoption of persons, wherever they may be habitually resident, effected under the law of any country or territory, whether within or outside the British Islands: s 2(8). As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

3 For the meaning of 'child' see para 327 note 2 ante.

4 For the meaning of 'parent' see para 332 note 2 ante.

5 Adoption and Children Act 2002 s 3(1)(a). As to the meaning of 'guardian' see para 332 note 3 ante.

6 Ibid s 3(1)(b).

7 Ibid s 3(1)(c).

8 Ibid s 2(1).

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### **394. Duty to provide adoption support services.**

Local authorities<sup>1</sup> must provide the requisite facilities for the purposes of the Adoption Service<sup>2</sup>, which must include making and participating in, or securing the provision of<sup>3</sup>, arrangements for the adoption<sup>4</sup> of children<sup>5</sup> and for the provision of adoption support services<sup>6</sup>, that is:

- 525 (1) counselling, advice and information<sup>7</sup>;
- 526 (2) financial support<sup>8</sup>;
- 527 (3) services to enable groups of adoptive children<sup>9</sup>, adoptive parents<sup>10</sup> and natural parents of an adoptive child to discuss matters relating to adoption<sup>11</sup>;
- 528 (4) arrangements for contact<sup>12</sup>;
- 529 (5) services in relation to the therapeutic needs of an adoptive child<sup>13</sup>;
- 530 (6) assistance for the purpose of ensuring the continuance of the relationship between the child and his adoptive parent<sup>14</sup>; and
- 531 (7) assistance where an adoption placement is disrupted<sup>15</sup>.

Local authorities may also provide an intermediary service in respect of persons adopted before 30 December 2005<sup>16</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may for these purposes be referred to as an 'adoption agency': Adoption and Children Act 2002 s 2(1). Regulations made by the Secretary of State after consultation with the Welsh Ministers may provide for a reference in any provision of the Adoption and Children Act 2002 to an adoption agency to include a person who appears to the Secretary of State to exercise functions under the law of the Isle of Man or any of the Channel Islands which correspond to those of an adoption agency and for any reference in any provision of the Act to a child placed for adoption by an adoption agency to be read accordingly (s 108(1)(b), (3)), and may modify any provision of the Act, as such provision applies to any order made, or other thing done, under the law of the Isle of Man or any of the Channel Islands (s 108(2)). As to the Secretary of State and the Welsh Ministers see para 155 ante. At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 334 note 12 ante.

2 See *ibid* s 3(1); para 393 ante. The facilities of the service must be provided in conjunction with the local authority's other social services (ie the authority's functions which are social services functions within the meaning of the Local Authority Social Services Act 1970 s 1A, Sch 1 (as added and substituted) (which include, in particular, those functions in so far as they relate to children): see SOCIAL SERVICES AND COMMUNITY CARE) and with registered adoption societies in its area, so that help may be given in a co-ordinated manner without duplication, omission or avoidable delay: s 3(5), (6). As to registered adoption societies see para 395 note 3 post.

3 As to the contracting out of the provision of these services see para 395 post.

4 For the meaning of 'adoption' see para 393 note 2 ante.

5 Adoption and Children Act 2002 s 3(2)(a). For the meaning of 'child' see para 327 note 2 ante.

6 *Ibid* s 3(2)(b). In England, the adoption support services described in the text do not include any services that might be provided in the case of an adoption of a child by his natural parent or the partner of his natural parent (Adoption Support Services Regulations 2005, SI 2005/691, reg 3(2)); in Wales, arrangements in respect of adoption support services are required to be made whether or not the local authority has decided to provide a service to any person (Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(8)) and (with the exception of the provision of financial support: see the text and note 8 *infra*) may include making arrangements with other persons for the purpose of their provision (reg 4(9)). As to the meaning of 'child' see note 9 *infra*. Adoption support services may also be provided by adoption support agencies

established under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended): see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 3(1); the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 2(2); and para 985 post. For the meaning of 'adoption support agency' see para 385 note 12 ante. Specific services are also prescribed as 'adoption support services' for the purposes of the legislation regulating the operations of adoption support agencies (ie the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, and the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514): see para 464 note 5 post.

7 Adoption and Children Act 2002 ss 2(6)(a), 147, Sch 6. As to the provision of counselling, advice and information see further para 398 post.

8 Ibid s 2(6)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(a). The financial support for which provision must be made is that payable under the Adoption Support Services Regulations 2005, SI 2005/691, Pt 3 (regs 8-12) (see para 405 post) or, as the case may be, under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 11 (see para 405 post). Regulations under the Adoption and Children Act 2002 s 2(6) prescribing adoption support services are required to ensure that local authorities provide financial support: s 2(7).

9 In England, 'adoptive child' means either a child who has been adopted or in respect of whom a person has given notice of his intention to adopt under the Adoption and Children Act 2002 s 44 (see para 365 ante) or a child whom an adoption agency has matched with a prospective adopter or placed for adoption: Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1). A child has been 'matched with a prospective adopter' if an adoption agency is considering placing the child for adoption with that person: reg 2(3).

In Wales, 'adoptive child' means a child who is an agency adoptive child or a non-agency adoptive child; 'agency adoptive child' means a child in respect of whom an adoption agency has decided in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 (see para 444 post) that a person would be a suitable adoptive parent for the child, whom an adoption agency has placed for adoption or who has been adopted after having been placed for adoption by an adoption agency; 'non-agency adoptive child' means a child in respect of whom a person has given notice under the Adoption and Children Act 2002 s 44 (see para 365 ante) of intention to apply for an adoption order where that person is not the natural parent or step-parent of the child, or a child who has been adopted by a person who is not his natural parent and was not his step-parent before adopting him, but does not include an agency adoptive child: Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1). References to a person's adoptive child are references to a child who is an adoptive child in relation to that person; and references to a child's adoptive parent are references to a person who is an adoptive parent in relation to that child: reg 2(2)(b), (c). References (other than in this definition) to a child being placed, or being placed for adoption, are to the child being placed for adoption with a prospective adopter by an adoption agency and include, where a looked after child is living with a person, leaving the child with that person as a prospective adopter: reg 2(2)(d). As to the meaning of 'adoptive parent' see note 10 infra.

In both England and Wales, 'child' means a person who has not attained the age of 18 (Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)), although this is subject to the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(2) or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(3) (as the case may be) which provide that in any case where a person has attained the age of 18 years and is in full time education or training and immediately before he attained the age of 18 years he was an adoptive child and financial support was payable in relation to him, the definition of 'child' (and, in Wales, 'adoptive child') has effect, for the purposes of the continued provision of financial support and any review of financial support, in relation to the child as if he had not attained the age of 18 years.

10 In England, 'adoptive parent' means a person who has adopted a child or has given notice under the Adoption and Children Act 2002 s 44 (see para 365 ante) of his intention to adopt a child or a person with whom an adoption agency has matched a child or has placed a child for adoption: Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1). In Wales, 'adoptive parent' means a person whom an adoption agency has decided in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 would be a suitable adoptive parent for a particular child, a person with whom an adoption agency has placed a child for adoption, a person who has given notice under the Adoption and Children Act 2002 s 44 of intention to apply for an adoption order for a child, or a person who has adopted a child, but does not include a person where the child referred to has ceased to be a child, or where the person is the step-parent or natural parent of the child, or was the step-parent of the child before adopting the child: Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1).

11 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(b). As to these services see further para 399 post.

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(c). In England, these services are described as services for assistance, including mediation services, in relation to arrangements for contact between an adoptive child and a natural parent, natural sibling, former guardian or a related person of the adoptive child; and, in Wales, they are described as assistance to adoptive children, adoptive parents, natural parents of an adoptive child and related persons in relation to arrangements for contact between an adoptive child and a natural parent or a related person of the adoptive child. In both England and Wales, 'related person' in relation to an adoptive child means a relative within the meaning of the Adoption and Children Act 2002 s 144(1) (see para 329 note 11 ante) and any person with whom the adoptive child has a relationship which appears to the local authority to be beneficial to the welfare of the child having regard to the matters referred to in s 1(4)(f)(i)-(iii) (see para 329 note 12 ante); Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1). See further as to these services para 400 post.

13 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(d). In Wales these services are specifically required to be services that may be provided to an adoptive family: reg 3(d). See further as to these services para 401 post.

14 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(e); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(e). See further as to these services para 402 post.

15 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(f); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(f). In England, these services are described as assistance where disruption of an adoptive placement, or of an adoption arrangement following the making of an adoption order, has occurred or is in danger of occurring; and, in Wales, they are described as assistance where disruption of an adoption placement has occurred or is in danger of occurring. Local authorities in Wales are required to provide assistance where disruption of a placement has occurred or is in danger of occurring, including mediation and organising and holding meetings to discuss disruptions in adoption placements: Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 8(d).

16 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 3(1), (3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 3(1), (4). The date mentioned in the text (ie 30 December 2005) is the date at which date the Adoption and Children Act 2002 was brought fully into effect (having been commenced piecemeal over several dates since its enactment): see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897. In relation to Wales, such services may be provided only in respect of adopted persons who have attained the age of 18: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 3(2). See further as to these services para 480 et seq post.

## UPDATE

### 394 Duty to provide adoption support services

NOTE 16--SI 2005/2897 amended: SI 2010/986.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(7) THE ADOPTION SERVICE/(i) Provision of Services/A. DUTY TO PROVIDE/395. Contracted-out provision of adoption services.

### **395. Contracted-out provision of adoption services.**

A local authority<sup>1</sup> may provide any adoption services and adoption support services<sup>2</sup> by securing their provision by:

- 532 (1) registered adoption societies<sup>3</sup>;
- 533 (2) another local authority<sup>4</sup>;
- 534 (3) a registered adoption support agency<sup>5</sup>;
- 535 (4) a local health board<sup>6</sup>;
- 536 (5) a primary care trust<sup>7</sup>;
- 537 (6) a local education authority<sup>8</sup>;
- 538 (7) in England, a social worker<sup>9</sup>; and
- 539 (8) in Wales, an NHS trust<sup>10</sup>.

Registered adoption societies may also provide an intermediary service in respect of persons adopted before 30 December 2005<sup>11</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 For the meaning of 'adoption support services', and for the duty of a local authority to provide, or make arrangements for the provision of, adoption services and adoption support services (ie the 'requisite facilities'), see para 394 ante.

3 Adoption and Children Act 2002 s 3(4)(a). 'Registered adoption society' means a voluntary organisation which is an adoption society registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE); although in relation to the provision of any facility of the Adoption Service, a registered adoption society or an adoption agency does not include an adoption society which is not registered in respect of that facility: Adoption and Children Act 2002 ss 2(2), 147, Sch 6. A registered adoption society is to be treated as registered in respect of any facility of the Adoption Service unless it is a condition of its registration that it does not provide that facility: s 2(3). 'Voluntary organisation' means a body other than a public or local authority the activities of which are not carried on for profit; and 'adoption society' means a body whose functions consist of or include making arrangements for the adoption of children: s 2(5), Sch 6. 'Body' includes an unincorporated body (s 144(1)), but no application for registration under the Care Standards Act 2000 Pt 2 (as amended) may be made in respect of an adoption society which is an unincorporated body (Adoption and Children Act 2002 s 2(4)). A registered adoption society may for these purposes be referred to as an 'adoption agency': s 2(1). See also para 394 note 1 ante.

4 Ibid s 3(4)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(a).

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(b). For the meaning of 'adoption support agency' see para 385 note 12 ante. 'Registered adoption support agency' means an adoption support agency in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE) (but in Wales, in relation to the provision of any adoption support service, does not include an adoption support agency which is not registered in respect of that particular service): Adoption Support Services Regulations 2005, SI 2005/691, reg 5(2); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(2).

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(c). As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

7 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(e). As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(f). For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

9 Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005, SI 2005/3390, reg 6. The social worker in question must have at least three years' post-qualifying experience in child care social work, including direct experience of adoption work: reg 6.

10 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(d). As to NHS trusts in Wales see the National Health Service (Wales) Act 2006 ss 18-21; and HEALTH SERVICES vol 54 (2008) PARAS 74, 155.

11 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 3(1), (3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 3(1), (4). The date mentioned in the text (ie 30 December 2005) is the date at which date the Adoption and Children Act 2002 was brought fully into effect (having been commenced piecemeal over several dates since its enactment): see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897. In relation to Wales, such services may be provided only in respect of adopted persons who have attained the age of 18: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 3(2). See further as to these services para 480 et seq post.

## **UPDATE**

### **395 Contracted-out provision of adoption services**

NOTE 11--SI 2005/2897 amended: SI 2010/986.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(7) THE ADOPTION SERVICE/(i) Provision of Services/A. DUTY TO PROVIDE/396. Adoption support services advisor.

### **396. Adoption support services advisor.**

A local authority<sup>1</sup> must appoint at least one person (an 'adoption support services adviser') to:

- 540 (1) give advice and information<sup>2</sup> to persons who may be affected by the adoption<sup>3</sup> or proposed adoption of a child<sup>4</sup>;
- 541 (2) give advice, information and assistance to the local authority which appointed him<sup>5</sup>;
- 542 (3) in England, consult with, and give advice, information and assistance to, another local authority where appropriate<sup>6</sup>; and
- 543 (4) in Wales, give advice, information and assistance to another local authority<sup>7</sup> where a child is to be placed for adoption<sup>8</sup> by the local authority which appointed him in that other local authority's area<sup>9</sup> or a person in respect of whom there is a plan<sup>10</sup> in place moves from the area of the local authority which appointed the advisor to the area of that other local authority<sup>11</sup>.

A local authority must not appoint a person as an adoption support services adviser unless satisfied that his knowledge and experience of the process of adoption and the effect of the adoption of a child on persons likely to be affected by the adoption is sufficient for the purposes of the work that he is to perform<sup>12</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 For the meaning of 'information' see para 385 note 8 ante.

3 For the meaning of 'adoption' see para 393 note 2 ante.

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 6(1), (2)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(1), (2)(a). For the meaning of 'child' see para 394 note 9 ante. The advice and information given pursuant to this requirement may include advice and information as to services that may be appropriate to persons who may be affected by an adoption or proposed adoption and how those services may be made available to them: Adoption Support Services Regulations 2005, SI 2005/691, reg 6(2)(a)(i), (ii); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(2)(a)(i), (ii).

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 6(2)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(2)(b). The advice and information given pursuant to this requirement may include advice and information as to the assessment of needs for adoption support services in accordance with the Adoption Support Services Regulations 2005, SI 2005/691, reg 8 or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8 (see para 411 post), the availability of adoption support services (and, in Wales, other local services), and, in England, the preparation of plans required under the Adoption and Children Act 2002 s 4(5) (plans for the provision of adoption support services: see para 421 post) or, in Wales, the formulation of plans in accordance with the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 10 (plans for the provision of adoption support services: see para 421 post): Adoption Support Services Regulations 2005, SI 2005/691, reg 6(2)(b)(i)-(iii); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(2)(b)(i)-(iii). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services see paras 394-395 ante.

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 6(2)(c).

7 The advice, information and assistance given under this requirement may include advice, information and assistance as to the matters referred to in note 5 supra: Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(2)(c).

8 As to references to a child's being placed for adoption see para 394 note 9 ante.

9 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(2)(c)(i).

10 'Plan' is construed in accordance with *ibid* reg 10 (see para 421 post): reg 2(1).

11 *Ibid* reg 6(2)(c)(ii).

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 6(3)(a), (b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 6(3)(a), (b).



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### **397. Fees for services.**

Regulations<sup>1</sup> may prescribe:

- 544 (1) the fees which may be charged by adoption agencies<sup>2</sup> in respect of the provision of services to persons providing facilities as part of the Adoption Service<sup>3</sup>;
- 545 (2) the fees which may be paid by adoption agencies to persons providing or assisting in providing such facilities<sup>4</sup>;
- 546 (3) the fees which may be charged by local authorities in respect of the provision of prescribed facilities of the Adoption Service where the facilities are provided in connection with the adoption of a child<sup>5</sup> brought into the United Kingdom for the purpose of adoption<sup>6</sup> or a Convention adoption<sup>7</sup>, an overseas adoption<sup>8</sup> or an adoption effected under the law of a country or territory outside the British Islands<sup>9</sup>;
- 547 (4) the fees which may be charged by adoption agencies in respect of the provision of counselling, where the counselling is provided in connection with the disclosure of information in relation to a person's adoption<sup>10</sup>.

A number of such fees have been prescribed<sup>11</sup>.

1 The regulations under the Adoption and Children Act 2002 s 9: s 11(1). Section 9 provides that regulations (ie regulations made by the Secretary of State or the Welsh Ministers (where applicable, acting jointly), unless they are required to be made by the Lord Chancellor, the Secretary of State or the Registrar General (s 144(1))) may make provision for any purpose relating to the exercise by local authorities or voluntary adoption agencies of their functions in relation to adoption (s 9(1)(a)) or the exercise by adoption support agencies of their functions in relation to adoption (s 9(1)(b)). For the meaning of 'local authority' see para 327 note 7 ante. For the meaning of 'adoption' see para 393 note 2 ante. For the purposes of s 9, 'voluntary adoption agency' means a voluntary organisation which is an adoption society: s 9(4); and see para 395 note 3 ante. For the meaning of 'adoption support agency' see para 385 note 12 ante. The extent of the power to make regulations under s 9 is not limited by ss 10-12, 45, 54, 56-65, 98 or by any other powers exercisable in respect of local authorities, voluntary adoption agencies or adoption support agencies: s 9(2). Regulations may provide that a person who contravenes or fails to comply with any provision of regulations under s 9 is to be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 9(3). See eg the Disclosure of Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 21; and para 474 post. Proceedings for an offence by virtue of the Adoption and Children Act 2002 s 9 may not, without the written consent of the Attorney General, be taken by any person other than Her Majesty's Chief Inspector of Education, Children's Services and Skills or the Welsh Ministers: s 99 (amended by the Education and Inspections Act 2006 s 157, Sch 14 para 76). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. Proceedings under this Act in the High Court or a county court may be heard and determined in private: Adoption and Children Act 2002 s 101. Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)). As to the Secretary of State and the Welsh Ministers see para 155 ante. As to the making of regulations under the Adoption and Children Act 2002 generally see para 334 note 12 ante. As to the commission of offences by incorporated bodies see para 391 note 17 ante.

2 ie a local authority or a registered adoption society: see paras 394-395 ante.

3 Adoption and Children Act 2002 s 11(1)(a). As to the Adoption Service see para 393 ante.

4 Ibid s 11(1)(b).

5 For the meaning of 'child' see para 327 note 2 ante.

6 Adoption and Children Act 2002 s 11(2), (3)(a).

7 For the meaning of 'Convention adoption' see para 375 note 7 ante.

8 For the meaning of 'overseas adoption' for the purposes of the Adoption and Children Act 2002 see para 485 post.

9 Ibid s 11(3)(b). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

10 Ibid s 11(4).

11 See the Adoption Agencies Regulations 2005, SI 2005/389, reg 6 (fees to members of adoption panels); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 6 (fees to chair or independent person on adoption panel); the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, regs 20(2), 22 and the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, regs 18(2), 20 (fees in connection with the disclosure of information); and the Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005, SI 2005/3390, reg 5 and the Local Authorities (Prescribed Fees) (Adoptions with a Foreign Element) (Wales) Regulations 2005, SI 2005/3114 (fees relating to adoptions with a foreign element).

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## ***B. PERSONS TO WHOM ADOPTION SUPPORT SERVICES MUST BE EXTENDED***

### **398. Provision of counselling services.**

Pursuant to the provision of adoption support services<sup>1</sup> as part of the Adoption Service<sup>2</sup>, arrangements made by local authorities<sup>3</sup>, registered adoption societies<sup>4</sup> and other bodies<sup>5</sup> for the provision of counselling, advice and information<sup>6</sup> must extend to the provision of those services to:

- 548 (1) children<sup>7</sup> who may be adopted<sup>8</sup>, their parents and guardians<sup>9</sup>;
- 549 (2) persons wishing to adopt a child<sup>10</sup>;
- 550 (3) adopted persons, their parents (or, in Wales, adoptive parents<sup>11</sup>), natural parents and former guardians<sup>12</sup>;
- 551 (4) children who are natural siblings (whether full or half blood) of an adoptive child<sup>13</sup>;
- 552 (5) in England, children of adoptive parents (whether or not adopted)<sup>14</sup>; and
- 553 (6) in England, related persons<sup>15</sup> in relation to adoptive children<sup>16</sup>.

1 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services see paras 394-395 ante.

2 As to the Adoption Service see para 393 ante.

3 For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

4 For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

5 As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

6 *Ie* under the Adoption and Children Act 2002 s 2(6)(a) (see para 394 ante).

7 For the meaning of 'child' see para 394 note 9 ante.

8 For the meaning of 'adoption' see para 393 note 2 ante.

9 Adoption and Children Act 2002 s 3(3)(a), (b); Adoption Support Services Regulations 2005, SI 2005/691, reg 4(1), (2)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(1), (2)(a).

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(2)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(2)(b).

11 For the meaning of 'adoptive parent' see para 394 note 10 ante. As to references to a child's adoptive parent see para 394 note 9 ante.

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(2)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(2)(c).

13 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(2)(e); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(2)(d).

14 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(2)(d).

15 For the meaning of 'related person' see para 394 note 12 ante.

16 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(2)(f). For the meaning of 'adoptive child', and as to references to a person's adoptive child, see para 394 note 9 ante.

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### **399. Provision of services to enable discussion.**

Pursuant to the provision of adoption support services<sup>1</sup> as part of the Adoption Service<sup>2</sup>, arrangements made by local authorities<sup>3</sup>, registered adoption societies<sup>4</sup> and other bodies<sup>5</sup> for the provision of services to enable the discussion of matters relating to adoption<sup>6</sup> must extend to the provision of those services to:

- 554 (1) an adoptive parent<sup>7</sup> of an agency adoptive child<sup>8</sup>;
- 555 (2) an agency adoptive child<sup>9</sup>;
- 556 (3) in England, a natural parent or former guardian of an agency adoptive child<sup>10</sup>; and
- 557 (4) in Wales, a natural parent whose child has been placed for adoption by an agency or has been adopted following such a placement<sup>11</sup>.

1 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services see paras 394-395 ante.

2 As to the Adoption Service see para 393 ante.

3 For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

4 For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

5 As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

6 <sup>1</sup>le under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(b); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(b) (see para 394 ante). In England, these services may include giving assistance in cash: Adoption Support Services Regulations 2005, SI 2005/691, reg 3(3). For the meaning of 'adoption' see para 393 note 2 ante.

7 For the meaning of 'adoptive parent' see para 394 note 10 ante.

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(4)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(4)(a). For the meanings of 'child' and 'adoptive child', and as to references to a child's adoptive parent, see para 394 note 9 ante. For the meaning of 'agency adoptive child' in Wales see para 394 note 9 ante; in England, 'agency adoptive child' means a child who has been adopted after having been placed for adoption by an adoption agency, a child whom an adoption agency has matched with a prospective adopter or placed for adoption, and a child whose adoptive parent has been a local authority foster parent in relation to him (unless the local authority opposes the adoption): Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 ante. As to references to a child's being placed for adoption, and for the meaning of 'matched with a prospective adopter', see para 394 note 9 ante. As to the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 900 post (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1)).

9 <sup>1</sup>bid reg 4(4)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(4)(b).

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(4)(c).

- 11 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(4)(c).

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#### **400. Provision of services relating to contact.**

Pursuant to the provision of adoption support services<sup>1</sup> as part of the Adoption Service<sup>2</sup>, arrangements made by local authorities<sup>3</sup>, registered adoption societies<sup>4</sup> and other bodies<sup>5</sup> for the provision of services relating to contact<sup>6</sup> must extend to the provision of those services to:

- 558 (1) an adoptive parent<sup>7</sup> of an agency adoptive child<sup>8</sup>;
- 559 (2) an agency adoptive child<sup>9</sup>;
- 560 (3) in England, a child who is the natural sibling (whether full or half blood) of an adoptive child<sup>10</sup>;
- 561 (4) in England, a natural parent, former guardian or related person<sup>11</sup> in relation to an agency adoptive child<sup>12</sup>;
- 562 (5) in Wales, a natural parent whose child has been placed for adoption<sup>13</sup> by an agency or has been adopted following such placement<sup>14</sup>; and
- 563 (6) in Wales, a related person<sup>15</sup>.

<sup>1</sup> For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services see paras 394-395 ante.

<sup>2</sup> As to the Adoption Service see para 393 ante.

<sup>3</sup> For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

<sup>4</sup> For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

<sup>5</sup> As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

<sup>6</sup> In England, under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(c); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(c) (see para 394 ante). In Wales, these services may include giving assistance in cash: Adoption Support Services Regulations 2005, SI 2005/691, reg 3(3).

<sup>7</sup> For the meaning of 'adoptive parent' see para 394 note 10 ante.

<sup>8</sup> Adoption Support Services Regulations 2005, SI 2005/691, reg 4(5)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(5)(a). For the meanings of 'child', 'adoptive child' and 'agency adoptive child', and as to references to a child's adoptive parent, see para 394 note 9 ante.

<sup>9</sup> Adoption Support Services Regulations 2005, SI 2005/691, reg 4(5)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(5)(b).

<sup>10</sup> Adoption Support Services Regulations 2005, SI 2005/691, reg 4(5)(c).

<sup>11</sup> For the meaning of 'related person' see para 394 note 12 ante.

<sup>12</sup> Adoption Support Services Regulations 2005, SI 2005/691, reg 4(5)(d). As to references to a person's adoptive child see para 394 note 9 ante.

<sup>13</sup> As to references to a child's being placed for adoption see para 394 note 9 ante.

<sup>14</sup> Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(5)(c).

15 Ibid reg 4(5)(d).



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#### **401. Provision of therapeutic services.**

Pursuant to the provision of adoption support services<sup>1</sup> as part of the Adoption Service<sup>2</sup>, arrangements made by local authorities<sup>3</sup>, registered adoption societies<sup>4</sup> and other bodies<sup>5</sup> for the provision of therapeutic services<sup>6</sup> must extend to the provision of those services to:

- 564 (1) an agency adoptive child<sup>7</sup>;
- 565 (2) an adoptive child in circumstances where (or, in Wales, in respect of whom) restrictions on bringing children into the United Kingdom<sup>8</sup> apply<sup>9</sup>; and
- 566 (3) an adoptive child in the case of a Convention adoption (or, in Wales, a Convention adoption order)<sup>10</sup>.

1 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services see paras 394-395 ante.

2 As to the Adoption Service see para 393 ante.

3 For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

4 For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

5 As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

6 I.e. under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(d); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(d) (see para 394 ante). In England, these services may include giving assistance in cash: Adoption Support Services Regulations 2005, SI 2005/691, reg 3(3).

7 Ibid reg 4(6)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(6)(a). For the meanings of 'child', 'adoptive child' and 'agency adoptive child' see para 394 note 9 ante.

8 I.e. the restrictions in the Adoption and Children Act 2002 s 83 (see para 499 post).

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(6)(b).

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(6)(c). As to Convention adoptions and Convention adoption orders see paras 375 note 7 ante, 490 et seq post.

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#### **402. Provision of services for maintaining relationship between adoptive parent and child.**

The provision by local authorities<sup>1</sup>, registered adoption societies<sup>2</sup> and other bodies<sup>3</sup> of assistance for the purpose of ensuring the continuance of the relationship between a child<sup>4</sup> and his adoptive parent<sup>5</sup> is required to include training for adoptive parents for the purpose of meeting any special needs of the child<sup>6</sup> and respite care<sup>7</sup>, and pursuant to the provision of adoption support services as part of the Adoption Service<sup>8</sup> such arrangements must extend to the provision of those services to:

- 567 (1) an agency adoptive child<sup>9</sup>;
- 568 (2) an adoptive child in circumstances where (or, in Wales, in respect of whom) restrictions on bringing children into the United Kingdom<sup>10</sup> apply<sup>11</sup>;
- 569 (3) an adoptive child in the case of a Convention adoption (or, in Wales, a Convention adoption order)<sup>12</sup>;
- 570 (4) an adoptive parent of any such child<sup>13</sup>; and
- 571 (5) a child of such an adoptive parent (in England, whether or not adopted)<sup>14</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

2 For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

3 As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

4 For the meaning of 'child' see para 394 note 9 ante.

5 *Ie* under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(e); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(e) (see para 394 ante). In England, these services may include giving assistance in cash: Adoption Support Services Regulations 2005, SI 2005/691, reg 3(3). For the meaning of 'adoptive parent' see para 394 note 10 ante. As to references to a child's adoptive parent see para 394 note 9 ante.

6 *Ibid* reg 3(1)(e)(i); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(1)(e)(i).

7 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(e)(ii); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(1)(e)(ii). In England, this is subject to the proviso that respite care that consists of the provision of accommodation must be accommodation provided by or on behalf of a local authority under the Children Act 1989 s 23 (accommodation of looked after children: see para 877 post) or by a voluntary organisation under s 59 (see para 967 post): Adoption Support Services Regulations 2005, SI 2005/691, reg 3(4). For the meaning of 'voluntary organisation' see para 395 note 3 ante.

8 As to the Adoption Service see para 393 ante.

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(a). (7)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(a). For the meanings of 'child', 'adoptive child' and 'agency adoptive child' see para 394 note 9 ante.

10 *Ie* the restrictions in the Adoption and Children Act 2002 s 83 (see para 499 post).

11 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(b).

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(c). As to Convention adoptions and Convention adoption orders see paras 375 note 7 ante, 490 et seq post.

13 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(7)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(d).

14 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(7)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(e). In Wales, 'child of an adoptive parent', in any case where the provision of adoption support services, or any assessment in respect of adoption support services, is in relation to the adoption or prospective adoption of an adoptive child by an adoptive parent, means a child, other than that adoptive child, of the adoptive parent: reg 2(1).

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### **403. Provision of assistance during disruptions.**

The provision by local authorities<sup>1</sup>, registered adoption societies<sup>2</sup> and other bodies<sup>3</sup> of assistance where an adoption placement is disrupted<sup>4</sup> is required to include making arrangements for the provision of mediation services<sup>5</sup> (or, in Wales, simply mediation<sup>6</sup>) and organising and running meetings to discuss the disruptions in question<sup>7</sup>, and pursuant to the provision of adoption support services as part of the Adoption Service<sup>8</sup> such arrangements must extend to the provision of those services to:

- 572 (1) an agency adoptive child<sup>9</sup>;
- 573 (2) an adoptive child in circumstances where (or, in Wales, in respect of whom) restrictions on bringing children into the United Kingdom<sup>10</sup> apply<sup>11</sup>;
- 574 (3) an adoptive child in the case of a Convention adoption (or, in Wales, a Convention adoption order)<sup>12</sup>;
- 575 (4) an adoptive parent<sup>13</sup> of any such child<sup>14</sup>; and
- 576 (5) a child of such an adoptive parent (in England, whether or not adopted)<sup>15</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. As to the provision of adoption support services by local authorities see para 394 ante.

2 For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the provision of adoption support services by registered adoption societies see paras 394-395 ante.

3 As to the provision of adoption support services by specified bodies see paras 394-395 ante. For the meaning of 'body' see para 395 note 3 ante.

4 Ie under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(f); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(f) (see para 394 ante). In England, these services may include giving assistance in cash: Adoption Support Services Regulations 2005, SI 2005/691, reg 3(3).

5 Ibid reg 3(1)(f)(i).

6 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(1)(f)(i).

7 Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(f)(ii); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(1)(f)(ii).

8 As to the Adoption Service see para 393 ante.

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(a). (7)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(a). For the meanings of 'child', 'adoptive child' and 'agency adoptive child' see para 394 note 9 ante.

10 Ie the restrictions in the Adoption and Children Act 2002 s 83 (see para 499 post).

11 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(b).

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(6)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(c). As to Convention adoptions and Convention adoption orders see paras 375 note 7 ante, 490 et seq post.

13 For the meaning of 'adoptive parent' see para 394 note 10 ante. As to references to a child's adoptive parent see para 394 note 9 ante.

14 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(7)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(d).

15 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(7)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(7)(e). For the meaning, in Wales, of 'child of an adoptive parent' see para 402 note 14 ante.

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**404. Provision of financial support.**

The provision of financial support<sup>1</sup> must extend to an adoptive parent<sup>2</sup> of an agency adoptive child (in England)<sup>3</sup> or an adoptive child (in Wales)<sup>4</sup>.

1 Lie under the Adoption and Children Act 2002 s 2(6)(b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(a); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(a) (see para 394 ante). As to the provision of financial support see paras 405 et seq post.

2 For the meaning of 'adoptive parent' see para 394 note 10 ante. As to references to a child's adoptive parent see para 394 note 9 ante.

3 For the meaning of 'child' see para 394 note 9 ante. For the meaning of 'agency adoptive child' see para 399 note 8 ante.

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 4(3); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 4(3). For the meaning of 'adoptive child' see para 394 note 9 ante.

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### ***C. FINANCIAL SUPPORT***

#### **405. Circumstances in which financial support is payable.**

In England, financial support is payable<sup>1</sup> to an adoptive parent<sup>2</sup> for the purpose of supporting the placement of the adoptive child<sup>3</sup> or the continuation of adoption arrangements after an adoption order is made<sup>4</sup>. In Wales, financial support is payable to an adoptive parent<sup>5</sup>.

In England, support is payable only where:

- 577 (1) it is necessary to ensure that the adoptive parent can look after the child<sup>6</sup>;
- 578 (2) the child needs special care which requires greater expenditure of resources by reason of illness, disability, emotional or behavioural difficulties or the continuing consequences of past abuse or neglect<sup>7</sup>;
- 579 (3) it is necessary for the local authority<sup>8</sup> to make any special arrangements to facilitate the placement or the adoption by reason of the age or ethnic origin of the child<sup>9</sup> or the desirability of the child being placed with the same adoptive parent as his brother or sister (whether of full or half blood) or with a child with whom he previously shared a home<sup>10</sup>;
- 580 (4) such support is to meet recurring costs in respect of travel for the purpose of visits between the child and a related person<sup>11</sup>; or
- 581 (5) the local authority considers it appropriate to make a contribution to meet expenditure on legal costs<sup>12</sup>, expenditure for the purpose of introducing an adoptive child to his adoptive parent<sup>13</sup>, or expenditure necessary for the purpose of accommodating and maintaining the child<sup>14</sup>.

In Wales, support is payable<sup>15</sup> only where one or more of the following circumstances exists:

- 582 (a) the child has not been placed with the adoptive parent for adoption, and financial support is necessary to ensure that the adoptive parent can look after the child if so placed<sup>16</sup>;
- 583 (b) the child has been placed with the adoptive parent for adoption, and financial support is necessary to ensure that the adoptive parent can continue to look after the child<sup>17</sup>;
- 584 (c) the child has been adopted, and financial support is necessary to ensure that the adoptive parent can continue to look after the child<sup>18</sup>;
- 585 (d) the local authority is satisfied that the child has established a strong and important relationship with the adoptive parent before the adoption order is made<sup>19</sup>;
- 586 (e) it is desirable that the child be placed with the same adoptive parent as a brother or sister (whether of the full blood or half blood), or with a child with whom the child has previously shared a home<sup>20</sup>;
- 587 (f) the child needs special care which requires a greater expenditure of resources by reason of illness, disability, emotional or behavioural difficulties or the continuing consequences of past abuse or neglect<sup>21</sup>; and

588 (g) on account of the age, sex or ethnic origin of the child it is necessary for the local authority to make special arrangements to facilitate the placement of the child for adoption<sup>22</sup>.

1     Ie under the Adoption Support Services Regulations 2005, SI 2005/691, Pt 3 (regs 8-12) (see the text and notes 2-14 infra; and para 407 et seq post).

2     For the meaning of 'adoptive parent' see para 394 note 10 ante.

3     For the meaning of 'child' see para 394 note 9 ante. For the meaning of 'adoptive child' see para 394 note 9 ante.

4     Adoption Support Services Regulations 2005, SI 2005/691, reg 8(1).

5     Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 11(1).

6     Adoption Support Services Regulations 2005, SI 2005/691, reg 8(2)(a).

7     Ibid reg 8(2)(b).

8     For the meaning of 'local authority' see para 327 note 7 ante.

9     Adoption Support Services Regulations 2005, SI 2005/691, reg 8(2)(c)(i).

10    Ibid reg 8(2)(c)(ii).

11    Ibid reg 8(2)(d). For the meaning of 'related person' see para 394 note 12 ante.

12    Ibid reg 8(2)(e)(i). This includes fees payable to a court in relation to an adoption: reg 8(2)(e)(i). As to the court see para 511 post.

13    Ibid reg 8(2)(e)(ii).

14    Ibid reg 8(2)(e)(iii). This includes the provision of furniture and domestic equipment, alterations to and adaptations of the home, provision of means of transport and provision of clothing, toys and other items necessary for the purpose of looking after the child: reg 8(2)(e)(iii).

15    Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3(a) (see para 394 ante).

16    Ibid reg 11(2)(a).

17    Ibid reg 11(2)(b).

18    Ibid reg 11(2)(c).

19    Ibid reg 11(2)(d).

20    Ibid reg 11(2)(e).

21    Ibid reg 11(2)(f).

22    Ibid reg 11(2)(g).



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#### **406. Amount of financial support payable.**

Where a local authority<sup>1</sup> in England carries out an assessment<sup>2</sup> of a person's needs for financial support it must, in determining the amount of financial support, take account of any other grant, benefit, allowance or resource which is available to the person in respect of his needs as a result of the adoption of the child<sup>3</sup>. It must also take account of:

- 589 (1) the person's financial resources, including any tax credit or benefit, which would be available to him if the child lived with him<sup>4</sup>;
- 590 (2) the amount required by the person in respect of his reasonable outgoings and commitments (excluding outgoings in respect of the child)<sup>5</sup>; and
- 591 (3) the financial needs and resources of the child<sup>6</sup>,

although the local authority must disregard these considerations where it is considering providing financial support in respect of certain legal costs<sup>7</sup> or expenditure for the purpose of introducing an agency adoptive child to his adoptive parents<sup>8</sup>, and may disregard them where it is considering providing financial support in respect of specified costs of accommodation<sup>9</sup>, travel<sup>10</sup> and care<sup>11</sup> or where it is considering including an element of remuneration for former foster parents<sup>12</sup>.

Separate provision is made where a local authority in Wales carries out an assessment of a person's need for financial support<sup>13</sup>. If the authority is considering providing financial support in respect of expenditure for the purpose of introducing the child to the adoptive parent<sup>14</sup> or the legal costs of the adoptive parent where an adoption order is applied for in respect of a child who is looked after by the authority<sup>15</sup>, the authority supports the making of that order and the making of the order is opposed by another person<sup>16</sup>, then in determining the amount of financial support the authority may not take into account:

- 592 (a) any recommendations, in relation to the adoptive parent or the adoptive child, made by the adoption panel<sup>17</sup> to the authority as to whether a child should be placed for adoption<sup>18</sup> or whether a prospective adopter is suitable to adopt a child<sup>19</sup>;
- 593 (b) the financial resources available to the adoptive parents including child tax credit and any other financial benefit which would be available in respect of the child if the child lived with them<sup>20</sup>;
- 594 (c) the amount required by the adoptive parents in respect of their reasonable outgoings and commitments (excluding outgoings in respect of the child)<sup>21</sup>; and
- 595 (d) the financial needs and resources of the child<sup>22</sup>.

If, however, the authority is not considering providing financial support in respect of such expenditure, but is considering providing financial support in respect of expenditure for the purposes of supporting the placement of the child with the adoptive parents for adoption and the continuation of that placement following the making of an adoption order<sup>23</sup>, then in determining the amount of financial support the authority must take into account such of the considerations listed in heads (a) to (d) above as are relevant to the case in question<sup>24</sup>.

In Wales, financial support will not be paid to meet any needs in so far as any benefit or allowance applicable to the adoptive parents as a result of their adoption of the child is payable or available to them in respect of those needs<sup>25</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 As to assessments see para 415 et seq post.

3 Adoption Support Services Regulations 2005, SI 2005/691, reg 15(1), (2). For the meaning of 'child' see para 394 note 9 ante.

4 Ibid reg 15(3)(a). For the meaning of 'tax credit' see the Tax Credits Act 2002 s 1; and SOCIAL SECURITY AND PENSIONS (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1)).

5 Ibid reg 15(3)(b).

6 Ibid reg 15(3)(c).

7 Ie legal costs, including fees payable to a court, where an adoption order is applied for in respect of an agency adoptive child: ibid reg 15(4)(a). As to the court see para 511 post. For the meaning of 'adoptive child' see para 394 note 9 ante. For the meaning, in England, of 'agency adoptive child' see para 399 note 8 ante.

8 Ibid reg 15(4)(b). For the meaning of 'adoptive parent' see para 394 note 10 ante.

9 Ie the initial costs of accommodating an agency adoptive child: ibid reg 15(5)(a)(i).

10 Ie recurring costs in respect of travel for the purpose of visits between the child and a related person: ibid reg 15(5)(a)(ii). For the meaning of 'related person' see para 394 note 12 ante.

11 Ie any special arrangements or special care referred to in ibid reg 8(2)(b) or (c) (see para 405 ante) in relation to an agency adoptive child: reg 15(5)(a)(iii).

12 Ibid reg 15(5)(b). As to the inclusion in a financial support package of an element of remuneration for former foster parents see reg 9; and para 408 post.

13 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12(1).

14 Ibid reg 12(5)(a).

15 Any reference in the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, to a child who is looked after by a local authority has the same meaning as it has in the Children Act 1989 (see ss 22, 105(4); and para 867 post): Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(2)(a).

16 Ibid reg 12(5)(b).

17 As to the adoption panel see para 428 et seq post.

18 Ie a matter referred to in the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18 (see para 434 post).

19 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12(3), (6)(a). The matter of whether a prospective adopter is suitable to adopt a child is a matter referred to in the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(1) (see para 439 post).

20 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12(6)(b). For the meaning of 'child tax credit' see the Tax Credits Act 2002 s 1; and SOCIAL SECURITY AND PENSIONS (definition applied by the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

21 Ibid reg 12(6)(c).

22 Ibid reg 12(6)(d).

23 Ibid reg 12(4). Such expenditure may include legal costs, including fees payable to a court, in relation to the adoption of the child (reg 12(4)(a)); cost of equipment for the purpose of meeting any special needs of the child (reg 12(4)(b)); expenditure necessary for the purpose of continuing to accommodate the child, including

the provision of furniture and domestic equipment, alterations to and adaptations of the home, provision of means of transport and provision of clothing, toys and other items necessary for the purpose of looking after the child (reg 12(4)(c)); cost of damage in the home where the child is accommodated where such cost arises out of special behavioural difficulties of the child (reg 12(4)(d)); the cost of placing a child in a boarding school where the placement is necessary to meet the special needs of the child (reg 12(4)(e)); the cost of meeting the special needs of the child, including needs arising out of a serious disability or illness (reg 12(4)(f)); and expenditure on travel for the purpose of visits between the child and a related person (reg 12(4)(g)).

24 Ibid reg 12(2).

25 Ibid reg 12(7).

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#### **407. Mode of payment.**

In England, financial support<sup>1</sup> may be paid either periodically, if it is provided to meet a need which is likely to give rise to recurring expenditure<sup>2</sup> or in any other case, by a single payment or, if the local authority<sup>3</sup> and adoptive parent<sup>4</sup> agree, by instalments<sup>5</sup>.

Where a local authority in Wales decides that financial support is to be paid<sup>6</sup>, it must be paid as a single payment except that if the authority and the person to whom financial support is to be paid agree<sup>7</sup>, or the authority decides that financial support is to be paid to meet any needs which are likely to give rise to expenditure which is likely to be recurring<sup>8</sup>, it can be paid in instalments on such dates as the local authority may specify<sup>9</sup> or periodically until such date (if any) as the local authority may specify<sup>10</sup>.

1    Ie under the Adoption Support Services Regulations 2005, SI 2005/691, Pt 3 (regs 8-12) (see the text and notes 2-5 infra; and paras 405 ante, 408 et seq post).

2    Ibid reg 10(a).

3    For the meaning of 'local authority' see para 327 note 7 ante.

4    For the meaning of 'adoptive parent' see para 394 note 10 ante.

5    Adoption Support Services Regulations 2005, SI 2005/691, reg 10(b).

6    Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512 (see the text and notes 87-10 infra; and paras 405-406 ante, 408 et seq post).

7    Ibid reg 13(4)(a).

8    Ibid reg 13(4)(b).

9    Ibid reg 13(4)(c)(i).

10   Ibid reg 13(4)(c)(ii).

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**408. Limited element of remuneration for former foster parents.**

In both England and Wales provision is made for financial support<sup>1</sup> to include a limited element of remuneration where the adoptive parent<sup>2</sup> is a former foster parent<sup>3</sup>.

In England, financial support may include such an element of remuneration only where the decision to include it is taken before the adoption order is made and the local authority<sup>3</sup> considers it to be necessary to facilitate the adoption in a case where the adoptive parent has been a local authority foster parent<sup>4</sup> in respect of the child<sup>5</sup> and an element of remuneration was included in the payments made by the local authority to the adoptive parent in relation to his fostering the child<sup>6</sup>; however, that element of remuneration ceases to be payable at the end of the period of two years from the adoption order unless the local authority considers its continuation to be necessary having regard to the exceptional needs of the child or any other exceptional circumstances<sup>7</sup>.

In Wales, the financial support payable by the local authority may include an element of remuneration for the care of the child by the adoptive parents only if:

- 596 (1) the adoptive parent is or has been a foster parent in respect of the child<sup>8</sup>;
- 597 (2) it appears to the local authority that any financial assistance or allowances given to the adoptive parents in respect of their fostering of the child has ceased, or will cease<sup>9</sup>;
- 598 (3) the local authority has decided<sup>10</sup> that the adoptive parent would be a suitable adoptive parent for the child<sup>11</sup>; and
- 599 (4) before the adoption order is made the local authority decides to pay financial support and determines that the financial support is to be paid periodically<sup>12</sup>.

Such payments may be made: (a) at any time until the day ('the second anniversary') occurring two years after the date of the adoption in respect of the child<sup>13</sup>; and (b) in limited circumstances<sup>14</sup>, at any time after the second anniversary<sup>15</sup>.

1    Ie under the Adoption Support Services Regulations 2005, SI 2005/691, Pt 3 (regs 8-12) (see the text and notes 2-7 infra; and paras 405, 407 ante, 410 et seq post) or under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512 (see the text and notes 8-15 infra; and paras 405-406 ante, 410 et seq post).

2    For the meaning of 'adoptive parent' see para 394 note 10 ante.

3    'Foster parent' is not defined for the purposes of the Adoption Support Services Regulations 2005, SI 2005/691; in the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, by virtue of reg 2(1), it has the same meaning as in the Fostering Services (Wales) Regulations 2003, SI 2003/237 (see reg 2(1); and para 900 note 12 post).

3    For the meaning of 'local authority' see para 327 note 7 ante.

4    As to the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 900 post (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1)).

5    Ibid reg 9(1)(a). For the meaning of 'child' see para 394 note 9 ante.

6    Ibid reg 9(1)(b).

- 7 Ibid reg 9(2).
- 8 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12(8), (9)(a).
- 9 Ibid reg 12(9)(b).
- 10 le in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28 (see para 440 post).
- 11 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12(9)(c).
- 12 Ibid reg 12(9)(d).
- 13 Ibid reg 12(10)(a).
- 14 le in a case where any of the circumstances specified in ibid reg 11(2)(a), (b), (e), (f) or (g) (see para 405 ante) exists on the date on which the local authority decides to pay financial support.
- 15 Ibid reg 12(10)(b).

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#### **409. Conditions for payment.**

In England, where financial support is to be paid periodically<sup>1</sup> it is not payable until the adoptive parent<sup>2</sup> or, in the case of adoption by a couple<sup>3</sup>, each adoptive parent, has agreed that he will inform the local authority<sup>4</sup> immediately if:

- 600 (1) he changes his address<sup>5</sup>;
- 601 (2) the child dies<sup>6</sup>;
- 602 (3) the child ceases to have a home with him<sup>7</sup>;
- 603 (4) the child ceases full time education or training and commences employment<sup>8</sup>;
- 604 (5) the child qualifies for income support or jobseeker's allowance in his own right<sup>9</sup>;
- 605 (6) the child attains the age of 18 unless he continues in full time education or training<sup>10</sup>; or
- 606 (7) there is a change in his financial circumstances or the financial needs or resources of the child which may affect the amount of financial support payable to him<sup>11</sup>,

and that he will complete and supply the authority with an annual statement as to his financial circumstances<sup>12</sup>, the financial needs and resources of the child<sup>13</sup>, his address and whether the child still has a home with him<sup>14</sup>. The local authority may provide financial support subject to any other conditions it considers appropriate, including the timescale within which and purposes for which any payment of financial support should be utilised<sup>15</sup>. Where any condition imposed in accordance with these provisions is not complied with<sup>16</sup>, the authority may suspend or terminate payment of financial support<sup>17</sup> and seek to recover all or part of the financial support it has paid<sup>18</sup>.

In Wales, before financial support is payable<sup>19</sup> the local authority must require the adoptive parents to have agreed to:

- 607 (a) inform the local authority immediately if they change their address<sup>20</sup>, the child's home is no longer with them (or either of them), or the child dies<sup>21</sup>, or there is any change in their financial circumstances or the financial needs or resources of the child<sup>22</sup>;
- 608 (b) confirm any such information given orally in writing within seven days<sup>23</sup>; and
- 609 (c) complete and supply the authority with an annual statement of their financial circumstances and the needs and financial circumstances of the child<sup>24</sup>,

and may impose such conditions as it considers appropriate upon the payment of financial support, which may include conditions as to the timescale within which and the purposes for which the payment should be utilised<sup>25</sup> and the requirement to comply with the agreement referred to above<sup>26</sup>.

<sup>1</sup> Financial support under the Adoption Support Services Regulations 2005, SI 2005/691, Pt 3 (regs 8-12) (see the text and notes 2-26 infra; and paras 405, 407-408 ante, 410 et seq post) is payable either periodically or by a single payment: see reg 10; and para 407 ante.

- 2 For the meaning of 'adoptive parent' see para 394 note 10 ante.
- 3 For the meaning of 'couple' see para 355 note 2 ante.
- 4 For the meaning of 'local authority' see para 327 note 7 ante. The adoptive parent or couple must also agree that if he gives or they give any of the relevant information orally, he or they will confirm it in writing within seven days: Adoption Support Services Regulations 2005, SI 2005/691, reg 12(1)(a).
- 5 Ibid reg 12(1)(a)(i).
- 6 Ibid reg 12(1)(a)(ii). For the meaning of 'child' see para 394 note 9 ante.
- 7 Ibid regs 11(a), 12(1)(a)(iii).
- 8 Ibid reg 11(b).
- 9 Ibid reg 11(c). 'Income support' means income support under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 176-201); and 'jobseeker's allowance' has the same meaning as in the Jobseekers Act 1995 (see s 1 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 259): Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1).
- 10 Adoption Support Services Regulations 2005, SI 2005/691, reg 11(d).
- 11 Ibid reg 12(1)(a)(iv).
- 12 Ibid reg 12(1)(b)(i).
- 13 Ibid reg 12(1)(b)(ii).
- 14 Ibid reg 12(1)(b)(iii).
- 15 Adoption and Children Act 2002 s 4(7)(f), (g); Adoption Support Services Regulations 2005, SI 2005/691, reg 12(2).
- 16 Ie subject to the proviso that where the condition not complied with is a failure to provide an annual statement in accordance with an agreement referred to in ibid reg 12(1) (see the text and notes 12-14 supra), the authority must not take any steps referred to in reg 12(3) (see the text and notes 17-18 infra) until it has sent to the person who entered into the agreement a written reminder of the need to provide an annual statement (reg 12(4)(a)) and 28 days have expired since the date on which that notice was sent (reg 12(4)(b)).
- 17 Ibid reg 12(3)(a).
- 18 Ibid reg 12(3)(b).
- 19 Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512 (see the text and notes 20-26 infra; and paras 405-406, 408 ante, 410 et seq post).
- 20 Ibid reg 11(3)(a)(i).
- 21 Ibid reg 11(3)(a)(ii).
- 22 Ibid reg 11(3)(a)(iii).
- 23 Ibid reg 11(3)(b).
- 24 Ibid reg 11(3)(c).
- 25 Ibid reg 13(3)(a).
- 26 Ibid reg 13(3)(b).



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#### **410. Review of financial support.**

Where a local authority<sup>1</sup> in England provides financial support payable periodically<sup>2</sup>, and where a local authority in Wales provides financial support on any payment terms<sup>3</sup>, it must review the support annually<sup>4</sup>, if any relevant change of circumstances (or, in England any breach of a condition<sup>5</sup>) comes to its notice<sup>6</sup>, and (in England) at any stage in the implementation of the plan<sup>7</sup> that it considers appropriate<sup>8</sup>.

In the absence of particular provision being made with regard to reviews of financial support payable in instalments by local authorities in England<sup>9</sup>, the statutory procedure for the review of the provision of adoption support services generally is thought to be applicable<sup>10</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Adoption Support Services Regulations 2005, SI 2005/691, reg 20(1).

3 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(1).

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 20(2)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(1)(a). For the purposes of a local authority in England, it is provided that the annual review must be undertaken on receipt of the statement from the adoptive parent mentioned in the Adoption Support Services Regulations 2005, SI 2005/691, reg 12 (see para 409 ante) (reg 20(2)(a)); for the purposes of a local authority in Wales, it is provided that the annual review must be undertaken on receipt of the statement from the adoptive parents as to their financial circumstances, the financial needs and resources of the child, and their address and whether the child still has a home with them (or either of them) (Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(1)(a)(i)-(iii)). For the meaning of 'adoptive parent' see para 394 note 10 ante. For the meaning of 'child' see para 394 note 9 ante.

5 I.e. a condition mentioned in the Adoption Support Services Regulations 2005, SI 2005/691, reg 12 (see para 409 ante).

6 Ibid reg 20(2)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(1)(b). For the purposes of a local authority in England, a 'relevant change of circumstances' is any of the changes that the adoptive parent has agreed to notify under the Adoption Support Services Regulations 2005, SI 2005/691, reg 12 (reg 20(3)); for the purposes of a local authority in Wales, it is provided that a change of circumstances which triggers a review is any change in the circumstances of the adoptive parents or the child, including any change of address (Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(1)(b)).

7 As to the plan for the provision of support services see para 421 post.

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 20(2)(c).

9 See *ibid* reg 10(b); and para 407 ante.

10 See paras 423-427 post. For the meaning of 'adoption support services' see para 394 ante.

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#### **411. Procedure for reviewing financial support.**

Where a local authority<sup>1</sup> carries out a review of financial support<sup>2</sup> it must, where it considers it appropriate to do so, interview the person and, where the person is an adoptive child<sup>3</sup>, his adoptive parents<sup>4</sup>, and must prepare a written report of the review<sup>5</sup>. Where it appears to the authority that the person may have a need for services from a primary care trust<sup>6</sup>, a local health board<sup>7</sup> or a local education authority<sup>8</sup>, it must consult that trust, board or education authority as part of the review<sup>9</sup>. In Wales, the review must be carried out by, or under the supervision of, a person who has suitable qualifications, experience and skills necessary for the purposes of the review<sup>10</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Ie under the Adoption Support Services Regulations 2005, SI 2005/691, reg 20 or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17 (see para 410 ante).

3 For the meaning of 'child' see paras 327 note 2, 394 note 9 ante. For the meaning of 'adoptive child' see para 394 note 9 ante.

4 Adoption and Children Act 2002 s 4(7)(d); Adoption Support Services Regulations 2005, SI 2005/691, regs 14(3)(a), 20(4); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, regs 8(5)(a), 17(8). For the meaning of 'adoptive parent' see para 394 note 10 ante.

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(3)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(5)(b).

6 As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

7 As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

8 For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(4); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(4).

10 Ibid reg 8(2).

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#### **412. Considerations to which regard must be had in reviews.**

Where a local authority<sup>1</sup> in England carries out a review of financial support<sup>2</sup> it must have regard to such of the following considerations as are relevant to the review:

- 610 (1) the needs of the person being reviewed and how these might be met<sup>3</sup>;
- 611 (2) the needs of the adoptive family<sup>4</sup> and how these might be met<sup>5</sup>;
- 612 (3) the needs, including developmental needs, of the adoptive child and how these might be met<sup>6</sup>;
- 613 (4) the parenting capacity of the adoptive parent<sup>7</sup>;
- 614 (5) wider family and environmental factors<sup>8</sup>;
- 615 (6) in the case of a child who is, or was, placed<sup>9</sup> or matched for adoption, the circumstances that led to the child being so placed or matched<sup>10</sup>; and
- 616 (7) any previous assessment of needs for adoption support services undertaken in relation to the person in question<sup>11</sup>.

Where a local authority in Wales carries out an assessment of a person's needs for financial support it must, in carrying out the review, have regard to the following considerations:

- 617 (a) the needs of the person being reviewed and how these might be met<sup>12</sup>;
- 618 (b) the needs of the adoptive child and the adoptive family<sup>13</sup> and how these might be met<sup>14</sup>;
- 619 (c) in the case of a child who was placed for adoption, the circumstances that led to the child being placed for adoption<sup>15</sup>;
- 620 (d) any special needs of the adoptive child arising from the fact that he has been looked after by a local authority<sup>16</sup>;
- 621 (e) any special needs of the adoptive child arising from the fact that he has been habitually resident<sup>17</sup> outside the British Islands<sup>18</sup>; and
- 622 (f) any special needs of the adoptive child arising from the fact that the adoptive parent is a relative of the child<sup>19</sup>.

Authorities conducting reviews must also have regard to the considerations enumerated for the purpose of calculating the amount of financial support payable<sup>20</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 I.e. under the Adoption Support Services Regulations 2005, SI 2005/691, reg 20 (see para 410 ante).

3 Adoption and Children Act 2002 s 4(7)(e); Adoption Support Services Regulations 2005, SI 2005/691, regs 14(1)(a), 20(4).

4 I.e. the family consisting of the adoptive child, the adoptive parents and any other child of the adoptive parents (whether or not adopted): *ibid* reg 14(2). For the meaning of 'adoptive child' see para 394 note 9 ante. For the meaning of 'adoptive parent' see para 394 note 10 ante. For the meaning of 'child' see para 394 note 9 ante.

5 *Ibid* reg 14(1)(b).

6 Ibid reg 14(1)(c).

7 Ibid reg 14(1)(d).

8 Ibid reg 14(1)(e).

9 As to placing a child for adoption see para 329 note 8 ante.

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(1)(f).

11 Ibid reg 14(1)(g). For the meaning of 'adoption support services' see para 394 ante.

12 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, regs 8(1)(a), 17(8).

13 In Wales, 'adoptive family' means an adoptive child, the adoptive parent of the adoptive child, and any child of the adoptive parent; and references to the adoptive family of or in relation to a person are to be construed as the adoptive family of which that person is a member: *ibid* reg 2(1). As to references to a child's adoptive parent see para 394 note 9 ante. For the meaning of 'child of an adoptive parent' see para 402 note 14 ante.

14 Ibid reg 8(1)(b).

15 Ibid reg 8(1)(c).

16 Ibid reg 8(1)(d)(i). As to the meaning of 'child looked after by a local authority' see para 406 note 15 ante.

17 As to habitual residence see para 806 post; and *CONFLICT OF LAWS* vol 8(3) (Reissue) para 57 et seq.

18 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(1)(d)(ii). For the meaning of 'British Islands' see para 103 note 6 ante.

19 Ibid reg 8(1)(d)(iii).

20 See the Adoption Support Services Regulations 2005, SI 2005/691, reg 20(4); the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(8); and para 406 ante.

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#### **413. Variation, revision and termination of financial support following review.**

Where a local authority<sup>1</sup> in England has carried out a review of financial support<sup>2</sup>, it may propose to reduce or terminate the support or revise the plan<sup>3</sup>, but before making any such decision following a review it must give the person an opportunity to make representations<sup>4</sup>. This requirement does not prevent the authority from suspending financial support pending its decision<sup>5</sup>. The authority must give the person notice<sup>6</sup> of its proposed decision and of the time allowed for making representations, which must contain:

- 623 (1) a statement as to the person's needs for adoption support services<sup>7</sup>;
- 624 (2) where the review relates to his need for financial support, the basis upon which financial support is determined<sup>8</sup>;
- 625 (3) information as to whether the authority proposes to provide him with adoption support services<sup>9</sup>;
- 626 (4) information identifying the services (if any) that are proposed to be provided<sup>10</sup>;
- 627 (5) if financial support is to continue to be paid to him, the proposed amount that would be payable<sup>11</sup>;
- 628 (6) any conditions<sup>12</sup> proposed to be included<sup>13</sup>;
- 629 (7) if applicable, a draft of the revised plan<sup>14</sup>.

The authority must then, having regard to the review and after considering any representations received within the period specified in the notice, decide whether to vary or terminate payment of the financial support or whether to seek to recover all or part of any financial support that has been paid<sup>15</sup> and, where appropriate, revise the plan<sup>16</sup>, and give the person notice of its decision including the reasons for it and, if applicable, the revised plan<sup>17</sup>.

Where financial support is payable in Wales in instalments or periodically, the local authority may vary, suspend or terminate payment of the support if, as a result of a review<sup>18</sup>, it considers that the adoptive parents<sup>19</sup> need for it has changed or ceased since the amount of support was last determined<sup>20</sup>. The authority may also impose such conditions as it considers appropriate upon the payment of financial support, which may include conditions as to the timescale within which and the purposes for which the payment should be utilised<sup>21</sup> and the requirement to comply with the agreement into which the adoptive parents were required to have entered<sup>22</sup> before financial support was initially payable<sup>23</sup>. Where financial support is so payable the authority may also review, suspend or cease payment of the support<sup>24</sup>, and seek to recover all or part of the support it has paid<sup>25</sup>, if any condition imposed on the payment of the support<sup>26</sup> is not complied with<sup>27</sup>. If a local authority in Wales decides to vary, suspend or terminate payment of financial support, or revise the plan, it must give notice<sup>28</sup> of the proposal, which must include the reasons for the proposal<sup>29</sup> and:

- 630 (a) a statement of the needs for adoption support services of the person whose support was reviewed<sup>30</sup>;
- 631 (b) information as to the services, if any, which it is proposed to provide to the person<sup>31</sup>;
- 632 (c) information as to the basis on which the person's financial support is now determined<sup>32</sup> and the proposed amount payable<sup>33</sup>; and

633 (d) details of any conditions which the authority proposes to impose<sup>34</sup> on the provision of that financial support<sup>35</sup>.

Where a local authority in Wales decides that financial support is to be paid after a review, it must be paid as a single payment except that if the authority and the person to whom financial support is to be paid agree<sup>36</sup>, or the authority decides that financial support is to be paid to meet any needs which are likely to give rise to expenditure which is likely to be recurring<sup>37</sup>, it can be paid in instalments on such dates as the authority may specify<sup>38</sup> or periodically until such date (if any) as the authority may specify<sup>39</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Ie under the Adoption Support Services Regulations 2005, SI 2005/691, reg 20 (see para 410 ante).

3 As to the plan for the provision of support services see para 421 post.

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 20(5).

5 Ibid reg 20(6).

6 Any notice required to be given under the Adoption Support Services Regulations 2005, SI 2005/691, must be given in writing: reg 22(1). If the person to whom notice is to be given is a child and it appears to the local authority that the child is not of sufficient age and understanding for it to be appropriate to give him such notice, or in all the circumstances it is not appropriate to give him such notice, the notice must be given to his adoptive parent or to the adult that the local authority considers most appropriate: reg 22(2)(a), (b).

7 Ibid regs 17(2), (3)(a), 20(7). For the meaning of 'adoption support services' see para 394 ante.

8 Ibid reg 17(3)(b).

9 Ibid reg 17(3)(c).

10 Ibid reg 17(3)(d).

11 Ibid reg 17(3)(e).

12 Ie under ibid reg 12(2) (see para 409 ante).

13 Ibid reg 17(3)(f).

14 Ibid reg 20(7).

15 Ibid reg 20(8)(a).

16 Ibid reg 20(8)(b).

17 Ibid reg 20(9).

18 Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17 (see para 410 ante).

19 For the meaning of 'adoptive parent' see para 394 note 10 ante.

20 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(2), (3).

21 Ibid regs 13(3)(a), 17(9).

22 Ie under ibid reg 11(3) (see para 409 ante).

23 Ibid reg 13(3)(b).

24 Ibid reg 17(4)(a).

25 Ibid reg 17(4)(b).

26 le in accordance with *ibid* reg 13(3) (see para 409 ante).

27 *Ibid* reg 17(4). This is subject to the proviso that where the condition not complied with is the requirement to provide an annual statement in accordance with an agreement referred to in reg 11(3)(c) (see para 409 ante), the authority must not take any steps under reg 17(4) (see the text and notes 24-26 *supra*) until it has sent to the person who entered into the agreement a written reminder of the need to provide an annual statement (reg 17(5)(a)) and 28 days have expired since the date on which that reminder was sent (reg 17(5)(b)). Where, having taken these steps, the authority determines under reg 17(4) that payment of financial support should be suspended, it may lift that suspension on receipt of the annual statement referred to in reg 11(3)(c): reg 17(6).

28 In Wales, any information required to be supplied, or notice required to be given, under reg 9 (see notes 30-35 *infra*; and paras 418-419 post), reg 10 (see paras 421-422 post) and reg 13 (see paras 420-421 post), must be given in writing: reg 14. Where the person whose needs for adoption support services have been assessed is an adult, the notice must be given to that person: reg 14(a). Where the person whose needs for such services is a child, the notice must be given: (1) to the child (reg 14(b)(i)); and (2) except where it appears inappropriate to the local authority to do so: (a) to the person whom an adoption agency has decided in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 (see para 444 post) would be a suitable adoptive parent for the child (Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 14(b)(ii)(aa)); (b) to the person with whom the child has been placed for adoption (reg 14(b)(ii)(bb)); and (c) to the person by whom the child has been adopted (reg 14(b)(ii)(cc)). If no person falls within any of heads (a)-(c) *supra*, the notice must be given to the person who proposes to adopt the child: reg 14(b). 'Adoption agency' means a local authority or a registered adoption society: see paras 394-395 ante. For the meaning of 'child' see para 394 note 9 ante. For the meaning of 'adoptive parent' see para 394 note 10 ante.

29 *Ibid* reg 17(9).

30 *Ibid* regs 9(1)(a), (2)(a), 17(9).

31 *Ibid* reg 9(2)(b).

32 *Ibid* reg 9(2)(c)(i).

33 *Ibid* reg 9(2)(c)(ii).

34 le in accordance with *ibid* regs 13(3), 17(9) (see the text and notes 21-23 *supra*).

35 *Ibid* reg 9(2)(d).

36 *Ibid* regs 13(4)(a), 17(9).

37 *Ibid* reg 13(4)(b).

38 *Ibid* reg 13(4)(c)(i).

39 *Ibid* reg 13(4)(c)(ii).

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#### **414. Cessation of financial support.**

Financial support ceases to be payable if:

- 634 (1) the child<sup>1</sup> ceases to have a home with the adoptive parent<sup>2</sup> (or, in Wales, either of them)<sup>3</sup>;
- 635 (2) the child ceases full time education or training and commences employment<sup>4</sup>;
- 636 (3) the child qualifies for income support or jobseeker's allowance in his own right<sup>5</sup>; or
- 637 (4) the child attains the age of 18 (unless he continues in full time education or training)<sup>6</sup>.

1 For the meaning of 'child' see para 394 note 9 ante.

2 For the meaning of 'adoptive parent' see para 394 note 10 ante.

3 Adoption Support Services Regulations 2005, SI 2005/691, reg 11(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(7)(a).

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 11(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(7)(b).

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 11(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(7)(c). As to income support and jobseeker's allowance for these purposes see para 409 note 9 ante.

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 11(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(7)(d). If the child attains the age of 18 but continues in full time education or training, financial support may continue to be payable until the end of the course or training he is then undertaking: Adoption Support Services Regulations 2005, SI 2005/691, reg 11(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17(7)(d).

#### **UPDATE**

#### **414 Cessation of financial support**

NOTE 5--SI 2005/1512 reg 17(7)(c) amended: SI 2008/1879.



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## ***D. ASSESSMENTS AND PLANS FOR ADOPTION SUPPORT SERVICES***

### **415. Duties of local authorities.**

Local authorities<sup>1</sup> may, at the request of any person<sup>2</sup>, carry out an assessment of that person's needs for adoption support services<sup>3</sup>. They also must carry out such an assessment at the request of:

- 638 (1) children<sup>4</sup> who may be adopted, their parents<sup>5</sup> and guardians<sup>6</sup>;
- 639 (2) persons wishing to adopt a child<sup>7</sup>;
- 640 (3) adopted persons, their parents, natural parents and former guardians<sup>8</sup>;
- 641 (4) a child of an adoptive parent (in England, whether or not adopted)<sup>9</sup>;
- 642 (5) a child who is the natural sibling (in England), or brother or sister (in Wales), whether of the full blood or half blood, of an adoptive child<sup>10</sup>;
- 643 (6) in England, a related person<sup>11</sup> in relation to an adoptive child<sup>12</sup>; and
- 644 (7) in Wales, a related person in relation to arrangements for contact between that person and an adoptive child where arrangements for such contact have been made before the request for an assessment<sup>13</sup>.

The statutory provisions relating to local authority assessments for adoption support services<sup>14</sup> apply to a local authority in respect of specified persons who are outside the authority's area<sup>15</sup>, namely:

- 645 (a) an agency adoptive child<sup>16</sup> whom the authority has placed for adoption or who has been adopted after being placed for adoption by the authority<sup>17</sup>;
- 646 (b) an adoptive parent of such a child<sup>18</sup>;
- 647 (c) a child of such an adoptive parent (in England, whether or not adopted)<sup>19</sup>.

However, those provisions cease to apply in those circumstances at the end of the period of three years from the date of the adoption order (in England) or the adoption (in Wales), except in relation to any financial support provided by the local authority where the decision to provide that support was made before the adoption<sup>20</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 In England, in assessing a person's needs for adoption support services a local authority is not required to assess the person's need for a service if he is not within the description of persons to whom provision of the service must be extended by virtue of the Adoption Support Services Regulations 2005, SI 2005/691, reg 4 (see paras 398-404 ante); reg 13(3).

3 Adoption and Children Act 2002 s 4(2). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante. A local authority may carry out an assessment of the needs of any person under s 4 at the same time as an assessment of his needs is made under any other enactment: s 4(8).

4 For the meaning of 'child' see paras 327 note 2, 394 note 9 ante.

5 For the meaning of 'parent' see para 332 note 2 ante.

6 Adoption and Children Act 2002 ss 3(1)(a), 4(1)(a). As to the meaning of 'guardian' see para 332 note 3 ante.

7 Ibid s 3(1)(b).

8 Ibid s 3(1)(c).

9 Ibid s 4(1)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 13(1)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(1)(a). For the meaning of 'adoptive parent' see para 394 note 10 ante. As to references to a child's adoptive parent see para 394 note 9 ante. For the meaning, in Wales, of 'child of an adoptive parent' see para 402 note 14 ante.

Regulations may make provision as to the circumstances in which a person having a right to request an assessment by virtue of the Adoption and Children Act 2002 s 4(1)(b) (ie such a person as is mentioned in heads (4)-(7) in the text) is to have a right to request an assessment of his needs in accordance with s 4(1); s 4(6), (7)(a). At the date at which this volume states the law no such provision had been made. As to the making of regulations generally see para 334 note 12 ante.

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 13(1)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(1)(b). For the meaning of 'adoptive child' see para 394 note 9 ante.

11 For the meaning of 'related person' see para 394 note 12 ante.

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 13(1)(c).

13 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(1)(c).

14 Ie the Adoption and Children Act 2002 s 4 (see the text and notes 1-13 supra, 17 infra; and para 416 et seq post).

15 Nothing in the Adoption Support Services Regulations 2005, SI 2005/691, reg 7 or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(1), (2) (see the text and notes 16-20 infra) prevents a local authority from providing adoption support services to persons outside its area where it considers it appropriate to do so: Adoption Support Services Regulations 2005, SI 2005/691, reg 7(3); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(5).

16 For the meaning of 'agency adoptive child' see para 399 note 8 ante.

17 Adoption and Children Act 2002 s 4(7)(h); Adoption Support Services Regulations 2005, SI 2005/691, reg 7(1)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(1)(a). For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante.

18 Adoption Support Services Regulations 2005, SI 2005/691, reg 7(1)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(1)(b).

19 Adoption Support Services Regulations 2005, SI 2005/691, reg 7(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(1)(c).

20 Adoption Support Services Regulations 2005, SI 2005/691, reg 7(2); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(2). In these circumstances, in Wales, reg 17(9) (see para 413 ante) applies: reg 15(2).

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#### **416. Procedure for assessments.**

Where a local authority<sup>1</sup> carries out an assessment of a person's needs for adoption support services<sup>2</sup> it must, where it considers it appropriate to do so, interview the person and, where the person is an adoptive child<sup>3</sup>, his adoptive parents<sup>4</sup>, and must prepare a written report of the assessment<sup>5</sup>. The authority may request the help of:

- 648 (1) a registered adoption society<sup>6</sup>;
- 649 (2) another local authority<sup>7</sup>;
- 650 (3) a registered adoption support agency<sup>8</sup>;
- 651 (4) a local health board<sup>9</sup>;
- 652 (5) a primary care trust<sup>10</sup>;
- 653 (6) a local education authority<sup>11</sup>;
- 654 (7) in England, a social worker<sup>12</sup>; and
- 655 (8) in Wales, an NHS trust<sup>13</sup>,

and where it appears to the authority that the person may have a need for services from a primary care trust, a local health board or a local education authority, it must notify that trust, board or authority<sup>14</sup> and, as part of the assessment, consult it<sup>15</sup>.

Where the request of a person<sup>16</sup> for an assessment relates to a particular adoption support service, or it appears to the authority that the person's needs for adoption support services may be adequately assessed by reference to a particular adoption support service, the authority may carry out the assessment by reference only to that service<sup>17</sup>.

In Wales, the assessment of a person's needs for adoption support services must be carried out by, or under the supervision of, a person who has suitable qualifications, experience and skills necessary for the purposes of the assessment<sup>18</sup>.

In England, provision is also made for the procedure for assessments for financial support<sup>19</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Under the Adoption and Children Act 2002 s 4 (see para 415 ante). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 For the meaning of 'child' see paras 327 note 2, 394 note 9 ante. For the meaning of 'adoptive child' see para 394 note 9 ante.

4 Adoption and Children Act 2002 s 4(7)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 14(3)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(5)(a). For the meaning of 'adoptive parent' see para 394 note 10 ante.

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(3)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(5)(b).

6 Adoption and Children Act 2002 ss 3(4)(a), 4(3). For the meaning of 'registered adoption society' see para 395 note 3 ante.

7 Ibid s 3(4)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(a).

Where it appears to a local authority that another local authority could, by taking any specified action, help in the exercise of any of its functions under the Adoption and Children Act 2002 s 4, it may request the help of that other authority, specifying the action in question (s 4(10)), and a local authority whose help is so requested must comply with the request if it is consistent with the exercise of its functions (s 4(11)). Where a local authority in England ('the recovering authority') provides adoption support services to any person following a request under s 4(10) from another local authority ('the paying authority'), the recovering authority may recover the expenses of providing those services from the paying authority (s 4(7)(i); Adoption Support Services Regulations 2005, SI 2005/691, reg 23(1)); and where a local authority in Wales ('the placing authority') has placed a child for adoption, fewer than three years have elapsed from the date of the adoption, the placing authority has requested the help of another local authority ('the recovering authority') pursuant to the Adoption and Children Act 2002 s 4(10), and the recovering authority has complied with that request in accordance with s 4(11), the recovering authority may recover from the placing authority the expenses of providing such help (Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(3)). These provisions do not, however, apply where the service provided by the recovering authority is advice and information under the Adoption and Children Act 2002 s 2(6)(a) (see para 394 ante) (Adoption Support Services Regulations 2005, SI 2005/691, reg 23(2)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15(4)); nor in respect of local authorities in England if the recovering authority is, by virtue of the Adoption Support Services Regulations 2005, SI 2005/691, reg 7 (see para 415 ante), a local authority to which the Adoption and Children Act 2002 s 4 applies in respect of the person to whom adoption support services are provided following the applicable request (Adoption Support Services Regulations 2005, SI 2005/691, reg 23(2)(a)). Nothing in the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 15 prevents a local authority from providing adoption services to person outside its area where it considers it appropriate to do so: reg 15(5).

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(b). For the meaning of 'adoption support agency' see para 385 note 12 ante. For the meaning of 'registered adoption support agency' see para 395 note 5 ante.

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(c). As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(e). As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

11 Adoption Support Services Regulations 2005, SI 2005/691, reg 5(1)(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(f). For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

12 Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005, SI 2005/3390, reg 6. The social worker in question must have at least three years' post-qualifying experience in child care social work, including direct experience of adoption work: reg 6.

13 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1)(d). As to NHS trusts in Wales see the National Health Service (Wales) Act 2006 ss 18-21; and HEALTH SERVICES vol 54 (2008) PARAS 74, 155.

14 Adoption and Children Act 2002 s 4(9)(a), (b).

15 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(4); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(4).

16 I.e. a person falling within the Adoption and Children Act 2002 s 4(1)(a), the Adoption Support Services Regulations 2005, SI 2005/691, reg 13(1) or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(1) (see para 415 ante).

17 Adoption Support Services Regulations 2005, SI 2005/691, reg 13(2); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 7(2). In Wales, a reference for these purposes to a particular adoption support service is to any of counselling, advice and information in relation to adoption and a service specified in reg 3 (see para 394 ante): reg 7(3).

18 Ibid reg 8(2).

- 19 See the Adoption Support Services Regulations 2005, SI 2005/691, reg 15; and para 406 ante.

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#### **417. Considerations to which regard must be had.**

In England, where a local authority<sup>1</sup> carries out an assessment of a person's needs for adoption support services<sup>2</sup>, it must have regard to such of the following considerations as are relevant to the assessment:

- 656 (1) the needs of the person being assessed and how these might be met<sup>3</sup>;
- 657 (2) the needs of the adoptive family<sup>4</sup> and how these might be met<sup>5</sup>;
- 658 (3) the needs, including developmental needs, of the adoptive child and how these might be met<sup>6</sup>;
- 659 (4) the parenting capacity of the adoptive parent<sup>7</sup>;
- 660 (5) wider family and environmental factors<sup>8</sup>;
- 661 (6) in the case of a child who is, or was, placed<sup>9</sup> or matched for adoption, the circumstances that led to the child being so placed or matched<sup>10</sup>; and
- 662 (7) any previous assessment of needs for adoption support services undertaken in relation to the person in question<sup>11</sup>.

In Wales, where an assessment of needs for adoption support services is requested by a person entitled to be assessed<sup>12</sup> and the local authority carries out an assessment of that person's needs for those services, it must, in carrying out the assessment, have regard to the following considerations:

- 663 (a) the needs of the person being assessed and how these might be met<sup>13</sup>;
- 664 (b) the needs of the adoptive child and the adoptive family<sup>14</sup> and how these might be met<sup>15</sup>;
- 665 (c) in the case of a child who was placed for adoption, the circumstances that led to the child being placed for adoption<sup>16</sup>;
- 666 (d) any special needs of the adoptive child arising from the fact that he has been looked after by a local authority<sup>17</sup>;
- 667 (e) any special needs of the adoptive child arising from the fact that he has been habitually resident<sup>18</sup> outside the British Islands<sup>19</sup>; and
- 668 (f) any special needs of the adoptive child arising from the fact that the adoptive parent is a relative of the child<sup>20</sup>,

and where the assessment is being carried out at the request of a related person<sup>21</sup>, the local authority must have regard to the needs of that person only so far as they relate to his need for assistance so as to enable him to take part in arrangements for contact with the adoptive child that were made before the request for an assessment<sup>22</sup>.

Provision is also made as to the matters to which authorities must have regard when carrying out an assessment of a person's needs for financial support<sup>23</sup>.

<sup>1</sup> For the meaning of 'local authority' see para 327 note 7 ante.

<sup>2</sup> Ie under the Adoption and Children Act 2002 s 4 (see para 415 ante). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 Ibid s 4(7)(e); Adoption Support Services Regulations 2005, SI 2005/691, reg 14(1)(a).

4 le the family consisting of the adoptive child, the adoptive parents and any other child of the adoptive parents (whether or not adopted): *ibid* reg 14(2). For the meaning of 'adoptive child' see para 394 note 9 ante. For the meaning of 'adoptive parent' see para 394 note 10 ante. For the meaning of 'child' see para 394 note 9 ante.

5 Ibid reg 14(1)(b).

6 Ibid reg 14(1)(c).

7 Ibid reg 14(1)(d).

8 Ibid reg 14(1)(e).

9 As to placing a child for adoption see para 329 note 8 ante.

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(1)(f).

11 Ibid reg 14(1)(g).

12 'Person entitled to be assessed' means a person specified in the Adoption and Children Act 2002 s 4(1)(a) (see para 415 ante) or in the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 5(1) (see para 395 ante): reg 2(1).

13 Ibid reg 8(1)(a). This is subject to the requirement that where the assessment referred to in reg 8(1) is being carried out at the request of a related person, the local authority must have regard to the needs of that person only so far as they relate to his need for assistance so as to enable him to take part in arrangements for contact with the adoptive child that were made before the request for an assessment: reg 8(1)(a), (2).

14 In Wales, 'adoptive family' means an adoptive child, the adoptive parent of the adoptive child, and any child of the adoptive parent; and references to the adoptive family of or in relation to a person are to be construed as the adoptive family of which that person is a member: *ibid* reg 2(1). As to references to a child's adoptive parent see para 394 note 9 ante. For the meaning of 'child of an adoptive parent' see para 402 note 14 ante.

15 Ibid reg 8(1)(b).

16 Ibid reg 8(1)(c).

17 Ibid reg 8(1)(d)(i). As to the meaning of 'child looked after by a local authority' see para 406 note 15 ante.

18 As to habitual residence see para 806 post; and *CONFLICT OF LAWS* vol 8(3) (Reissue) para 57 et seq.

19 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(1)(d)(ii). For the meaning of 'British Islands' see para 103 note 6 ante.

20 Ibid reg 8(1)(d)(iii).

21 For the meaning of 'related person' see para 394 note 12 ante.

22 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(3).

23 See the Adoption Support Services Regulations 2005, SI 2005/691, reg 15; the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 12; and para 406 ante.

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#### **418. Notification of assessments and proposals.**

Local authorities<sup>1</sup> who have carried out assessments of a person's needs for adoption support services<sup>2</sup> must notify that person of the findings of the assessment<sup>3</sup>. In England, the notification process must take place before the authority makes any decision<sup>4</sup> as to whether to provide adoption support services<sup>5</sup>, and in Wales it must take place after the carrying out<sup>6</sup> of an assessment<sup>7</sup>.

Local authorities in England are required to give the person notice<sup>8</sup> of the proposed decision, which must contain:

- 669 (1) a statement as to the person's needs for adoption support services<sup>9</sup>;
- 670 (2) where the assessment relates to his need for financial support, the basis upon which financial support is determined<sup>10</sup>;
- 671 (3) information as to whether the local authority proposes to provide him with adoption support services<sup>11</sup>;
- 672 (4) information identifying the services (if any) that are proposed to be provided<sup>12</sup>;
- 673 (5) if financial support is to be paid to him, the proposed amount that would be payable<sup>13</sup>; and
- 674 (6) any conditions<sup>14</sup> proposed to be included<sup>15</sup>.

In a case where the authority proposes to provide adoption support services and is required<sup>16</sup> to prepare a plan, the notice must be accompanied by a draft of that plan<sup>17</sup>.

Local authorities in Wales are required to supply:

- 675 (a) a statement of the needs for adoption support services of the person whose needs were assessed<sup>18</sup>;
- 676 (b) information as to the services, if any, which it is proposed to provide to the person<sup>19</sup>;
- 677 (c) where the assessment relates to the person's need for financial support, information as to the basis on which that financial support is determined<sup>20</sup> and the proposed amount which would be payable<sup>21</sup>; and
- 678 (d) details of any conditions which the authority proposes to impose<sup>22</sup> on the provision of that financial support<sup>23</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 ie under the Adoption and Children Act 2002 s 4 (see para 415 ante). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 See the Adoption Support Services Regulations 2005, SI 2005/691, reg 17(1)-(4); the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(1), (2); and the text and notes 4-23 infra. Persons in respect of whom assessments have been carried out must also be informed of their right to make representations: see para 419 post. As to the supply of information, and the giving of notices, required under reg 9 see para 413 note 258 ante.



- 4    le under the Adoption and Children Act 2002 s 4(4) (see para 420 post).
- 5    Adoption Support Services Regulations 2005, SI 2005/691, reg 17(1).
- 6    le under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8 (see paras 416-417 ante).
- 7    Ibid reg 9(1).
- 8    As to the giving of notices in England see para 413 note 6 ante.
- 9    Adoption Support Services Regulations 2005, SI 2005/691, reg 17(2), (3)(a).
- 10   Ibid reg 17(3)(b).
- 11   Ibid reg 17(3)(c).
- 12   Ibid reg 17(3)(d).
- 13   Ibid reg 17(3)(e).
- 14   le under ibid reg 12(2) (see para 409 ante).
- 15   Ibid reg 17(3)(f).
- 16   le under the Adoption and Children Act 2002 s 4(5) (see para 421 post).
- 17   Adoption Support Services Regulations 2005, SI 2005/691, reg 17(4).
- 18   Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(1)(a), (2)(a).
- 19   Ibid reg 9(2)(b).
- 20   Ibid reg 9(2)(c)(i).
- 21   Ibid reg 9(2)(c)(ii).
- 22   le in accordance with ibid reg 13(3) (see para 413 ante).
- 23   Ibid reg 9(2)(d).

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#### **419. Making of representations by persons assessed.**

When local authorities<sup>1</sup> notify persons in respect of whom assessments of need for adoption support services have been carried out<sup>2</sup> of the findings of the assessment<sup>3</sup>, they must also inform those persons of their right to make representations<sup>4</sup>. Notices issued by local authorities in England<sup>5</sup> must give notice of the time allowed for making representations<sup>6</sup>, and notices issued by local authorities in Wales must inform the person of, and give details in relation to, his right to make representations and specify the period within which such representations may be made<sup>7</sup>. In both England and Wales, the authority must not make a decision as to the provision of support until the person has made representations to the authority or notified the authority that he is satisfied with the proposed decision<sup>8</sup> or the period of time for making representations has expired<sup>9</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Ie under the Adoption and Children Act 2002 s 4 (see para 415 ante). For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 Ie under the Adoption Support Services Regulations 2005, SI 2005/691, reg 17(1)-(4) or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(1), (2) (see para 418 ante).

4 Adoption Support Services Regulations 2005, SI 2005/691, reg 17(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(1)(b). As to the supply of information, and the giving of notices, required under reg 9 (ie in respect of Wales) see para 413 note 28 ante. As to the giving of notices in England see para 413 note 6 ante.

5 See para 418 ante.

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 17(2).

7 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(1)(b), (2)(e), (3).

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 17(5)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(4)(a)(i), (ii). In England, where applicable, the authority must not make a decision as to the provision of support until the person has notified the authority that he is satisfied with the draft plan: Adoption Support Services Regulations 2005, SI 2005/691, reg 17(5)(a).

9 Ibid reg 17(5)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 9(4)(b).

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#### **420. Notification of decision as to provision of support services.**

Where, as a result of an assessment of need for adoption support services<sup>1</sup>, a local authority<sup>2</sup> decides that a person has needs for such services<sup>3</sup>, it must then decide whether to provide any such services to that person<sup>4</sup> and, after making that decision, must give the person notice of it<sup>5</sup>. The notice must include the reasons for the decision<sup>6</sup> and, if the authority decides that financial support is to be provided<sup>7</sup>, must include the following information (or, in Wales, specify the following matters):

- 679 (1) the method of the determination of the amount of financial support<sup>8</sup>;
- 680 (2) details of how periodical payments of financial support, or payment in instalments, is to be structured<sup>9</sup>;
- 681 (3) where financial support is to be paid as a single payment, when the payment is to be made<sup>10</sup>;
- 682 (4) where financial support is to be paid subject to any conditions<sup>11</sup>, those conditions; the date (if any) by which the conditions are to be met; and the consequences of failing to meet the conditions<sup>12</sup>;
- 683 (5) the arrangements and procedure for review, variation and termination of financial support<sup>13</sup>;
- 684 (6) the responsibilities of the local authority regarding reviews of the provision of support services<sup>14</sup>;
- 685 (7) the responsibilities of the adoptive parent<sup>15</sup> pursuant to any agreement<sup>16</sup>.

In England, where the local authority is required<sup>17</sup> to prepare a plan, the notice must also include details of that plan and the person nominated<sup>18</sup> to monitor the provision of the services in accordance with the plan<sup>19</sup>; in Wales, the notice is merely required to include a copy of the plan<sup>20</sup>.

1 As to assessments see para 415 et seq ante. For the meaning of 'adoption support services' see para 394 ante.

2 For the meaning of 'local authority' see para 327 note 7 ante.

3 As to the provision of adoption support services by local authorities see para 394 ante.

4 Adoption and Children Act 2002 s 4(4); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(1)(a), (b). In coming to this decision, local authorities in Wales are required to have regard to the assessment and to any representations made following the notice given in accordance with reg 9 (see paras 418-419 ante): reg 13(1). As to the making of representations see para 419 ante.

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(1). As to the supply of information, and the giving of notices, required under reg 13 (ie in respect of Wales) see para 413 note 28 ante. As to the giving of notices in England see para 413 note 6 ante.

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(1). In Wales, the notice must be in writing: reg 13(1).

7 As to the provision of financial support see paras 405 et seq ante.

8 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(a).

9 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(b). These details are stated to include the amount of financial support, the frequency with which the payment will be made, the period for which (or, in Wales, the date, if any, until which) financial support is to be paid, and when the first payment of financial support is to be made: Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(b)(i)-(iv); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(b)(i)-(iv).

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(c); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(c).

11 *Ie* conditions imposed in accordance with the Adoption Support Services Regulations 2005, SI 2005/691, reg 12 or the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(1)(c), (3) (see para 409 ante).

12 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(d); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(d).

13 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(e); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(e).

14 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(f)(i); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(f)(i). In England, these responsibilities arise under the Adoption Support Services Regulations 2005, SI 2005/691, and are not limited to reviews of financial support (see para 411 et seq ante); in Wales, these responsibilities arise under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17, and relate only to financial support (see para 411 ante).

15 For the meaning of 'adoptive parent' see para 394 note 10 ante.

16 Adoption Support Services Regulations 2005, SI 2005/691, reg 18(3)(f)(ii); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(5)(f)(ii). The agreements referred to in the text are those under the Adoption Support Services Regulations 2005, SI 2005/691, reg 12 (see para 409 ante) in relation to England or under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 11(3) (see para 409 ante) in relation to Wales.

17 *Ie* under the Adoption and Children Act 2002 s 4(5) (see para 421 post).

18 *Ie* under the Adoption Support Services Regulations 2005, SI 2005/691, reg 16(4) (see para 422 post).

19 *Ibid* reg 18(1).

20 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13(1). For these purposes, 'the plan' is that referred to in reg 10 (see para 421 post).

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#### **421. Plan for provision of support services.**

If a local authority<sup>1</sup> decides to provide any adoption support services<sup>2</sup> to a person<sup>3</sup> and proposes to provide those services to that person on more than one single occasion<sup>4</sup>, the authority must prepare a plan in accordance with which services are to be provided to the person and keep that plan under review<sup>5</sup>. In England, this requirement is subject to the further proviso that the services to be provided are not limited to the provision of advice or information<sup>6</sup>.

Where it appears to the authority that the person may have a need for services from a primary care trust<sup>7</sup>, a local health board<sup>8</sup>, a local education authority<sup>9</sup> or (in Wales) an NHS trust<sup>10</sup>, it must consult that trust, board or authority before preparing the plan<sup>11</sup>. In Wales, the local authority must also, for the purpose of preparing the plan, consult any person who is to be given statutory notice<sup>12</sup> in connection with the provision of adoption support services<sup>13</sup>; and, where the plan includes the provision of services by a local health board, NHS trust, primary care trust or a local education authority, must give notice of the plan to that body<sup>14</sup> and give a copy of that part of the plan that refers to such services to the appropriate board, trust, or authority<sup>15</sup>. In Wales, where the person to whom the plan relates lives in another local authority area, the local authority must also provide a copy of the plan to that local authority<sup>16</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 Adoption and Children Act 2002 s 4(5)(a); Adoption Support Services Regulations 2005, SI 2005/691, reg 16(1); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 10(1).

4 Adoption and Children Act 2002 s 4(5)(b); Adoption Support Services Regulations 2005, SI 2005/691, reg 16(2); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 10(1).

5 Adoption and Children Act 2002 s 4(5).

6 Adoption Support Services Regulations 2005, SI 2005/691, reg 16(2).

7 As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

8 As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

9 For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

10 As to NHS trusts in Wales see the National Health Service (Wales) Act 2006 ss 18-21; and HEALTH SERVICES vol 54 (2008) PARAS 74, 155.

11 Adoption and Children Act 2002 s 4(7)(c); Adoption Support Services Regulations 2005, SI 2005/691, reg 16(3); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 10(3)(b)(i), (ii) (providing, in relation to Wales, that where it appears to the local authority that there may be a need for the provision of services to the person by a local health board, NHS trust or primary care trust, or there may be a need for the provision to that person of any services which fall within the functions of a local education

authority, the local authority must for the purpose of preparing the plan consult that local health board, NHS trust or primary care trust or local education authority).

12     Ie under *ibid* reg 14 (see para 413 ante).

13     *Ibid* reg 10(3)(a).

14     *Ibid* reg 10(2).

15     *Ibid* regs 10(5)(a)-(c), 13(2). As to the supply of information, and the giving of notices, required under regs 10, 13 see para 413 note 28 ante.

16     *Ibid* regs 10(5)(d).

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## ***E. MONITORING AND REVIEW OF ADOPTION SUPPORT SERVICES***

### **422. Monitoring of provision of support services.**

In England, the local authority<sup>1</sup> must nominate a person to monitor the provision of adoption support services<sup>2</sup> in accordance with the plan<sup>3</sup>. If a local authority in Wales decides<sup>4</sup> to provide any adoption support services to a person, and is required under that regulation to give notice of that decision<sup>5</sup>, it must nominate an individual who must monitor the provision of the services that are to be provided<sup>6</sup> and notify the person of the nomination when it notifies that person<sup>7</sup> of its decision<sup>8</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 Adoption Support Services Regulations 2005, SI 2005/691, reg 16(4). As to the plan see reg 16(1)-(3); and para 421 ante.

4 Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 13 (see para 420 ante).

5 Ie under ibid reg 13 (see para 420 ante).

6 Ibid reg 10(4)(a).

7 Ie under ibid reg 13 (see para 420 ante).

8 Ibid reg 10(4)(b). As to the supply of information, and the giving of notices, required under reg 10 see para 413 note 28 ante.

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#### **423. Review of adoption support services other than financial support.**

Where a local authority<sup>1</sup> in England provides adoption support services for a person<sup>2</sup> (other than financial support payable periodically)<sup>3</sup>, and where a local authority in Wales is providing, or has in the preceding 12 months provided, adoption support services for a person<sup>4</sup>, it must review the provision of such services if any change in the person's circumstances comes to its notice<sup>5</sup>. Local authorities in England must additionally review the provision of such services at such stage in the implementation of the plan<sup>6</sup> as they consider appropriate<sup>7</sup> and, in any event, at least annually<sup>8</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 For the meaning of 'adoption support services' see para 394 ante. As to the provision of adoption support services by local authorities see para 394 ante.

3 Adoption Support Services Regulations 2005, SI 2005/691, reg 19(1). Specific provision is made for the review of financial support payable periodically in England: see paras 410-414 ante. It is presumed that the review provisions set out in this paragraph and paras 424-426 post are applicable, in the absence of particular provision being made, to reviews of financial support payable in instalments by local authorities in England.

4 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 16(1). Regulation 16 does not, unlike its English counterpart (ie the Adoption Support Services Regulations 2005, SI 2005/691, reg 19), specifically exclude financial support services from the scope of the review provisions set out in this paragraph and paras 424-426 post, but the existence of specific provision dealing with the review of the payment of financial support by local authorities in Wales (ie the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 17 (see paras 410-414 ante) suggests that such an exclusion should be applied.

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 19(2)(a); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 16(1). In England, a review may be triggered only if such a change in the person's circumstances may affect the provision of adoption support services: Adoption Support Services Regulations 2005, SI 2005/691, reg 19(2)(a).

6 As to the plan for the provision of support services see para 421 ante.

7 Adoption Support Services Regulations 2005, SI 2005/691, reg 19(2)(b).

8 Ibid reg 19(2)(c).



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#### **424. Procedure for reviews.**

Where a local authority<sup>1</sup> in England carries out a review of adoption support services<sup>2</sup> it must, where it considers it appropriate to do so, interview the person and, where the person is an adoptive child<sup>3</sup>, his adoptive parents<sup>4</sup>, and must prepare a written report of the review<sup>5</sup>. Where it appears to a local authority carrying out a review of adoption support services in either England<sup>6</sup> or Wales<sup>7</sup> that the person may have a need for services from a primary care trust<sup>8</sup>, a local health board<sup>9</sup> or a local education authority<sup>10</sup>, it must consult that trust, board or education authority as part of the review<sup>11</sup>. In Wales, the review must be carried out by, or under the supervision of, a person who has suitable qualifications, experience and skills necessary for the purposes of the review<sup>12</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Ie in accordance with the Adoption Support Services Regulations 2005, SI 2005/691, reg 19 (see para 423 ante). For the meaning of 'adoption support services' see para 394 ante.

3 For the meaning of 'child' see paras 327 note 2, 394 note 9 ante. For the meaning of 'adoptive child' see para 394 note 9 ante.

4 Adoption and Children Act 2002 s 4(7)(d); Adoption Support Services Regulations 2005, SI 2005/691, regs 14(3)(a), 19(3). For the meaning of 'adoptive parent' see para 394 note 10 ante.

5 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(3)(b); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(5)(b).

6 See note 2 supra.

7 Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 16 (see para 423 ante).

8 As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

9 As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

10 For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 (definition applied by the Adoption Support Services Regulations 2005, SI 2005/691, reg 2(1); and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 2(1)).

11 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(4); Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, regs 8(4), 16(2).

12 Ibid reg 8(2).

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#### **425. Considerations to which regard must be had in reviews.**

Where a local authority<sup>1</sup> in England carries out a review of adoption support services<sup>2</sup>, it must have regard to such of the following considerations as are relevant to the review:

- 686 (1) the needs of the person being reviewed and how these might be met<sup>3</sup>;
- 687 (2) the needs of the adoptive family<sup>4</sup> and how these might be met<sup>5</sup>;
- 688 (3) the needs, including developmental needs, of the adoptive child and how these might be met<sup>6</sup>;
- 689 (4) the parenting capacity of the adoptive parent<sup>7</sup>;
- 690 (5) wider family and environmental factors<sup>8</sup>;
- 691 (6) in the case of a child who is, or was, placed<sup>9</sup> or matched for adoption, the circumstances that led to the child being so placed or matched<sup>10</sup>; and
- 692 (7) any previous assessment of needs for adoption support services undertaken in relation to the person in question<sup>11</sup>.

Where a local authority in Wales carries out an assessment of a person's needs for adoption support services<sup>12</sup>, it must, in carrying out the review, have regard to the following considerations:

- 693 (a) the needs of the person being reviewed and how these might be met<sup>13</sup>;
- 694 (b) the needs of the adoptive child and the adoptive family<sup>14</sup> and how these might be met<sup>15</sup>;
- 695 (c) in the case of a child who was placed for adoption, the circumstances that led to the child being placed for adoption<sup>16</sup>;
- 696 (d) any special needs of the adoptive child arising from the fact that he has been looked after by a local authority<sup>17</sup>;
- 697 (e) any special needs of the adoptive child arising from the fact that he has been habitually resident<sup>18</sup> outside the British Islands<sup>19</sup>; and
- 698 (f) any special needs of the adoptive child arising from the fact that the adoptive parent is a relative of the child<sup>20</sup>.

An authority in England conducting a review of financial support payable in instalments<sup>21</sup> must also have regard to the considerations enumerated for the purpose of calculating the amount of financial support payable<sup>22</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante.

2 Ie in accordance with the Adoption Support Services Regulations 2005, SI 2005/691, reg 19 (see para 423 ante). For the meaning of 'adoption support services' see para 394 ante.

3 Adoption and Children Act 2002 s 4(7)(e); Adoption Support Services Regulations 2005, SI 2005/691, regs 14(1)(a), 19(3).

4 Ie the family consisting of the adoptive child, the adoptive parents and any other child of the adoptive parents (whether or not adopted): *ibid* reg 14(2). For the meaning of 'adoptive child' see para 394 note 9 ante. For the meaning of 'adoptive parent' see para 394 note 10 ante. For the meaning of 'child' see para 394 note 9 ante.

5 Ibid reg 14(1)(b).

6 Ibid reg 14(1)(c).

7 Ibid reg 14(1)(d).

8 Ibid reg 14(1)(e).

9 As to placing a child for adoption see para 329 note 8 ante.

10 Adoption Support Services Regulations 2005, SI 2005/691, reg 14(1)(f).

11 Ibid reg 14(1)(g).

12 Ie under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 16 (see para 423 ante).

13 Ibid regs 8(1)(a), 16(2).

14 In Wales, 'adoptive family' means an adoptive child, the adoptive parent of the adoptive child, and any child of the adoptive parent; and references to the adoptive family of or in relation to a person are to be construed as the adoptive family of which that person is a member: *ibid* reg 2(1). As to references to a child's adoptive parent see para 394 note 9 ante. For the meaning of 'child of an adoptive parent' see para 402 note 14 ante.

15 Ibid reg 8(1)(b).

16 Ibid reg 8(1)(c).

17 Ibid reg 8(1)(d)(i).

18 As to habitual residence see para 806 post; and *CONFLICT OF LAWS* vol 8(3) (Reissue) para 57 et seq.

19 Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 8(1)(d)(ii). For the meaning of 'British Islands' see para 103 note 6 ante.

20 Ibid reg 8(1)(d)(iii).

21 Particular provision is made for reviews of periodical payments of financial support in England and payments of financial support on any terms in Wales: see para 423 notes 3, 4 ante.

22 See the Adoption Support Services Regulations 2005, SI 2005/691, regs 15, 19(3); and para 406 ante.

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#### **426. Variation and termination of support services following review.**

Where a local authority<sup>1</sup> in England has carried out a review of adoption support services<sup>2</sup>, it may propose to vary or terminate the provision of services and revise the plan<sup>3</sup>; but, before making any such decision following a review, it must give the person an opportunity to make representations<sup>4</sup>. The authority must therefore give the person notice<sup>5</sup> of its proposed decision and of the time allowed for making representations, which must contain:

- 699 (1) a statement as to the person's needs for adoption support services<sup>6</sup>;
- 700 (2) where the review relates to his need for financial support<sup>7</sup>, the basis upon which financial support is determined<sup>8</sup>;
- 701 (3) information as to whether the authority proposes to provide him with adoption support services<sup>9</sup>;
- 702 (4) information identifying the services (if any) that are proposed to be provided<sup>10</sup>;
- 703 (5) if financial support is to continue to be paid to him, the proposed amount that would be payable<sup>11</sup>;
- 704 (6) any conditions<sup>12</sup> proposed to be included<sup>13</sup>; and
- 705 (7) if applicable, a draft of the revised plan<sup>14</sup>.

The authority must then, having regard to the review and after considering any representations received within the period specified in the notice, decide whether to vary or terminate the provision of adoption support services for the person<sup>15</sup> and, where appropriate, revise the plan<sup>16</sup>, and give the person notice of its decision including the reasons for it and, if applicable, details of the revised plan<sup>17</sup>.

Where a local authority in Wales has carried out a review of adoption support services<sup>18</sup>, it must, having regard to the review, decide whether to vary the provision of adoption support services for the person<sup>19</sup> and review, and where appropriate, revise the plan<sup>20</sup>. If the authority decides to vary the provision of adoption support services for the person or revise the plan, it must give notice<sup>21</sup> of the decision, which must include:

- 706 (a) a statement of the needs for adoption support services of the person whose support was reviewed<sup>22</sup>; and
- 707 (b) information as to the services, if any, which it is proposed to provide to the person<sup>23</sup>.

The person so notified has the right to make representations to the authority concerning the decision within a period specified by the authority<sup>24</sup>, and the authority must not make that decision until that person has either made representations to it<sup>25</sup> or notified it that he is satisfied with the proposed decision<sup>26</sup>, or the period for making representations specified in the notice has expired<sup>27</sup>.

<sup>1</sup> For the meaning of 'local authority' see para 327 note 7 ante.

- 2     le in accordance with the Adoption Support Services Regulations 2005, SI 2005/691, reg 19 (see para 423 ante). For the meaning of 'adoption support services' see para 394 ante.
- 3     As to the plan for the provision of support services see para 421 post.
- 4     Adoption Support Services Regulations 2005, SI 2005/691, reg 19(4).
- 5     As to the giving of notices in England see para 413 note 6 ante.
- 6     Adoption Support Services Regulations 2005, SI 2005/691, regs 17(2), (3)(a), 19(5).
- 7     Financial support payable in instalments in England may be reviewed under these provisions; particular provision is made for reviews of periodical payments of financial support: see para 423 note 3 ante.
- 8     Adoption Support Services Regulations 2005, SI 2005/691, reg 17(3)(b).
- 9     Ibid reg 17(3)(c).
- 10    Ibid reg 17(3)(d).
- 11    Ibid reg 17(3)(e).
- 12    le under ibid reg 12(2) (see para 409 ante).
- 13    Ibid reg 17(3)(f).
- 14    Ibid reg 19(5).
- 15    Ibid reg 19(6)(a).
- 16    Ibid reg 19(6)(b).
- 17    Ibid reg 19(7).
- 18    le under the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 16 (see para 423 ante).
- 19    Ibid reg 16(3)(a).
- 20    Ibid reg 16(3)(b).
- 21    As to the supply of information, and the giving of notices, required under ibid reg 9 see para 413 note 29 ante.
- 22    Ibid regs 9(1)(a), (2)(a), 16(4).
- 23    Ibid reg 9(2)(b).
- 24    Ibid regs 9(3), 16(4).
- 25    Ibid reg 9(4)(a)(i).
- 26    Ibid reg 9(4)(a)(ii).
- 27    Ibid reg 9(4)(b).

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## **(ii) Arrangements for Adoption Work**

### **A. POLICIES AND PROCEDURES**

#### **427. Adoption agencies to prepare and implement policies and procedures.**

An adoption agency<sup>1</sup> must, in consultation with its adoption panel<sup>2</sup> and, to a specified extent<sup>3</sup>, with its medical adviser<sup>4</sup>, prepare and implement written policy and procedural instructions governing the exercise of the agency's and the panel's functions in relation to adoption<sup>5</sup>. Such instructions must be kept under review and, where appropriate, revised by the agency<sup>6</sup>.

1     le a local authority or a registered adoption society: see paras 394-395 ante.

2     As to the establishment of adoption panels see para 428 post. In England, an adoption agency which operates only for the purpose of putting persons into contact with other adoption agencies and for the purpose of putting such agencies into contact with each other or for either of such purposes is exempt from the requirement to consult with an adoption panel: Adoption Agencies Regulations 2005, SI 2005/389, reg 3A (added by SI 2005/3482).

3     le to the extent specified in the Adoption Agencies Regulations 2005, SI 2005/389, reg 9 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 9 (see para 428 note 9 post).

4     As to the appointment of medical advisers see para 428 note 9 post.

5     Adoption Agencies Regulations 2005, SI 2005/389, reg 7; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 7.

6     Adoption Agencies Regulations 2005, SI 2005/389, reg 7; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 7.

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## ***B. DUTIES WHERE ADOPTION UNDER CONSIDERATION***

### **428. Establishment and membership of adoption panel.**

An adoption agency<sup>1</sup> must establish at least one adoption panel<sup>2</sup> and appoint to chair it a person who has the necessary skills and experience<sup>3</sup>. The panel must consist of not more than ten members, including the chair<sup>4</sup>, and must include:

- 708 (1) two social workers<sup>5</sup>;
- 709 (2) in the case of a registered adoption society<sup>6</sup>, one person who is a director, manager or other officer and is concerned in the management of that society<sup>7</sup>;
- 710 (3) in the case of a local authority, one member (in Wales, elected) of that authority<sup>8</sup>;
- 711 (4) the medical adviser to the adoption agency (or one of them if more than one medical adviser is appointed)<sup>9</sup>; and
- 712 (5) at least three other persons ('independent members') including where reasonably practicable at least two persons with personal experience of adoption<sup>10</sup>.

Two or more (but, in Wales, not more than three) local authorities<sup>11</sup> may jointly establish an adoption panel, to which the maximum number of members that may be appointed is eleven<sup>12</sup>. Appointments mirror the arrangements for the sole authority panel<sup>13</sup>.

Provision is made for the tenure of office<sup>14</sup> and remuneration<sup>15</sup> of panel members; and for the establishment and operation of panels established by local authorities in Wales<sup>16</sup>.

1     le a local authority or a registered adoption society: see paras 394-395 ante. In England, an adoption agency which operates only for the purpose of putting persons into contact with other adoption agencies and for the purpose of putting such agencies into contact with each other or for either of such purposes is exempt from the requirement to establish an adoption panel: Adoption Agencies Regulations 2005, SI 2005/389, reg 3A (added by SI 2005/3482).

2     Adoption Agencies Regulations 2005, SI 2005/389, reg 3(1) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(1).

3     Adoption Agencies Regulations 2005, SI 2005/389, reg 3(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(2). Certain interested persons are disqualified: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 3(2), (7), (8) (reg 3(7) amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(2). The adoption agency must also appoint one member of the adoption panel as vice chair, who must act as chair if the person appointed to chair the panel is absent or his office is vacant: Adoption Agencies Regulations 2005, SI 2005/389, reg 3(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(4).

4     Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3).

5     Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3)(a). 'Social worker' means a person who is registered as a social worker in a register maintained by the General Social Care Council or the Care Council for Wales under the Care Standards Act 2000 s 56 (see SOCIAL SERVICES AND COMMUNITY CARE) or in a corresponding register maintained under the law of Scotland or Northern Ireland: Adoption Agencies Regulations 2005, SI 2005/389, reg 2(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 2(1). In England, the social workers are required each to have at

least three years' relevant post-qualifying experience (ie post-qualifying experience in child care social work including direct experience in adoption work): Adoption Agencies Regulations 2005, SI 2005/389, regs 2(1), 3(3)(a).

6 For the meaning of 'registered adoption society' see para 395 note 3 ante.

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3)(b).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3)(c).

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3)(d). An adoption agency must appoint at least one registered medical practitioner to be its medical adviser (Adoption Agencies Regulations 2005, SI 2005/389, reg 9(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 9(1)), and that person must be consulted in relation to the arrangements for, access to, and disclosure of, health information which is required or permitted by virtue of the Adoption Agencies Regulations 2005, SI 2005/389 (as amended) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313 (Adoption Agencies Regulations 2005, SI 2005/389, reg 9(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 9(2)).

10 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(3)(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(3)(e). Certain persons are disqualified for appointment as independent members: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 3(6), (8); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(6), (7).

11 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(5).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 3(5)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(5)(a).

13 In England, by agreement between the local authorities, there must be appointed to a joint panel: (1) a person to chair it who has the skills and experience necessary for chairing an adoption panel (Adoption Agencies Regulations 2005, SI 2005/389, reg 3(5)(b)(i)); (2) two social workers each with at least three years' relevant post-qualifying experience (reg 3(5)(b)(ii)); (3) one member of any of the local authorities (reg 3(5)(b)(iii)); (4) the medical adviser to one of the local authorities (reg 3(5)(b)(iv)); and (5) at least three independent members including where reasonably practicable at least two persons with personal experience of adoption (reg 3(5)(b)(v)); and by agreement the local authorities must appoint one member of the panel as vice chair who must act as chair if the person appointed to chair the panel is absent or his office is vacant (reg 3(5)(c)). In Wales, each local authority must appoint two persons to the panel, one of whom must be a social worker and the other of whom must be an elected member of that authority (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(5)(b)); and by agreement between the authorities there must be appointed: (a) a person to chair the panel who is not an elected member of any of the local authorities whose panel it is and who has the skills and experience necessary for chairing the adoption panel (reg 3(5)(c)(i)); (b) at least three independent members including where reasonably practicable at least two persons with personal experience of adoption (reg 3(5)(c)(ii)); (c) two members of the panel either of whom will act as chair if the person appointed to chair the panel is absent or the office is vacant (reg 3(5)(c)(iii)); and (d) the medical adviser to one of the authorities (reg 3(5)(c)(iv)). Corresponding provision is also made for disqualifications: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 3(5)(b)(i), (6)-(8) (reg 3(7) amended by SI 2005/3482); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3(5)(c)(i), (6), (7).

14 In England, a member of an adoption panel holds office for a term not exceeding three years and may not hold office for the adoption panel of the same adoption agency for more than three terms in total (Adoption Agencies Regulations 2005, SI 2005/389, reg 4(1)); in Wales, a member of the panel must not hold office for a term exceeding five years and may not hold office for the adoption panel of the same adoption agency for more than two consecutive terms without an intervening period of at least three years (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 4(1)). Note that members of adoption panels established before 30 December 2005 (ie the date on which the Adoption and Children Act 2002 was brought fully into effect (having been commenced piecemeal over several dates since its enactment): see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897) ceased to hold office on that date and new panels were required to be established, subject to specific provisions as to tenure for persons who served on the old panels: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 10 (amended by SI 2005/3482); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 10. The medical adviser member of an adoption panel holds office only for so long as he is the medical adviser: Adoption Agencies Regulations 2005, SI 2005/389, reg 4(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 3(3)(d), 4(2). A panel member may resign his office at any time by giving one month's notice in writing to the agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 4(3); Adoption Agencies (Wales) Regulations



2005, SI 2005/1313, reg 4(3). Where an agency is of the opinion that any panel member is unsuitable or unable to remain in office, it may terminate his office at any time by giving him notice in writing with reasons (Adoption Agencies Regulations 2005, SI 2005/389, reg 4(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 4(4)); if the member whose appointment is to be so terminated is a member of a joint adoption panel, his appointment may be terminated only with the agreement of all the local authorities whose panel it is (Adoption Agencies Regulations 2005, SI 2005/389, reg 4(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 4(5)).

15 A local authority in England may pay to any member of its adoption panel such fee as it may determine, being a fee of a reasonable amount; and a local authority in Wales may pay to a person appointed to chair, or to any independent person on, its adoption panel or joint adoption panel such fee as that local authority may determine, being a fee of a reasonable amount: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 6; the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 6; and para 397 ante.

16 See the Local Authority Adoption Agencies (Wales) Regulations 2007, SI 2007/1357, reg 9.

## **UPDATE**

### **428 Establishment and membership of adoption panel**

NOTES 10, 13--SI 2005/1313 reg 3(7) amended: SI 2009/1892.

NOTE 14--SI 2005/2897 amended: SI 2010/986.

NOTE 16--SI 2007/1357 reg 9 amended: SI 2009/1892.

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#### **429. Meetings and quorum of adoption panel.**

No business may be conducted by an adoption panel<sup>1</sup> unless at least five of its members, including the person appointed to chair the panel or the vice chair and at least one of the social workers<sup>2</sup> and one of the independent members<sup>3</sup>, meet as the panel<sup>4</sup>; and no business may be conducted by a joint adoption panel<sup>5</sup> unless at least six of its members, including the person appointed to chair the panel or the vice chair and at least one of the social workers and one of the independent members, meet as the panel<sup>6</sup>.

A local authority is not bound to invite a children's guardian acting on behalf of a child being considered for adoption to a meeting of the adoption panel, although it must inform the children's guardian of the proposal for adoption and listen to his views<sup>7</sup>. It is good practice to allow a natural parent to make a short written submission to an adoption panel although a failure to do this will not vitiate a recommendation made by the panel, or amount to an unfair procedure<sup>8</sup>.

A panel must make a written record of its proceedings, its recommendations and the reasons for its recommendations<sup>9</sup>.

1 As to the establishment of adoption panels see para 428 ante.

2 For the meaning of 'social worker' see para 428 note 5 ante.

3 As to the independent members see para 428 notes 10, 13 ante.

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 5(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 5(1).

5 As to the establishment of joint adoption panels and para 428 ante.

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 5(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 5(2).

7 *R v North Yorkshire County Council, ex p M (No 2)* [1989] FCR 394, [1989] 2 FLR 79.

8 *R v Wokingham District Council, ex p J* [2000] 1 FCR 523, [1999] 2 FLR 1136.

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 5(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 5(3).

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#### **430. Agency advisers.**

An adoption agency<sup>1</sup> is obliged to appoint a senior member of staff<sup>2</sup> as the 'agency adviser'<sup>3</sup>. In England, the appointed person must be a social worker<sup>4</sup> and have at least five years' relevant post-qualifying experience and, in the opinion of the adoption agency, relevant management experience<sup>5</sup>; in Wales, the appointed person must have such qualifications, skills and experience as the agency considers appropriate<sup>6</sup>. The role of the agency adviser is:

- 713 (1) to assist the agency with the appointment (including re-appointment), termination and review of appointment of members of the adoption panel<sup>7</sup>;
- 714 (2) to be responsible for the induction and training of members of the adoption panel<sup>8</sup>;
- 715 (3) to be responsible for liaison between the agency and the adoption panel, monitoring the performance of members of the adoption panel and the administration of the adoption panel<sup>9</sup>; and
- 716 (4) to give such advice to the adoption panel as the panel may request in relation to any case or generally<sup>10</sup>.

1     Is a local authority or a registered adoption society: see paras 394-395 ante. In England, an adoption agency which operates only for the purpose of putting persons into contact with other adoption agencies and for the purpose of putting such agencies into contact with each other or for either of such purposes is exempt from the requirement to appoint an adviser: Adoption Agencies Regulations 2005, SI 2005/389, reg 3A (added by SI 2005/3482).

2     In the case of a joint adoption panel, the local authorities whose panel it is must by agreement appoint a senior member of staff of one of them for this purpose: Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8. As to the establishment of joint adoption panels see para 428 ante.

3     Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8.

4     For the meaning of 'social worker' see para 428 note 5 ante.

5     Adoption Agencies Regulations 2005, SI 2005/389, reg 8(2).

6     Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8.

7     Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8(a). As to the membership of the adoption panel see para 428 ante.

8     Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8(b).

9     Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8(c).

10    Adoption Agencies Regulations 2005, SI 2005/389, reg 8(1)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 8(d).

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### **431. Adoption agency report.**

Where an adoption agency<sup>1</sup> is considering adoption for a child<sup>2</sup>, it is obliged to obtain (so far as is reasonably practicable) prescribed information about the child<sup>3</sup>, and must arrange for the child to be examined by a registered medical practitioner<sup>4</sup> and obtain from him a written report on the child's health<sup>5</sup>, unless the agency has received advice from the medical adviser<sup>6</sup> that such an examination and report is unnecessary<sup>7</sup>. The agency must also make arrangements for such other medical and psychiatric examinations of, and other tests on, the child to be carried out as are recommended by the medical adviser<sup>8</sup> and for written reports of such examinations and tests to be obtained<sup>9</sup>. The child may refuse to submit to the examinations or tests<sup>10</sup>. The agency must also obtain (so far as is reasonably practicable) information about the child's family, including information as to the health of his natural parents and siblings<sup>11</sup>.

1    Is a local authority or a registered adoption society: see paras 394-395 ante.

2    Adoption Agencies Regulations 2005, SI 2005/389, reg 11 (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 11.

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(1). Provision is made as to the information and reports required to be obtained about the child whose adoption is being considered: see the Adoption Agencies Regulations 2005, SI 2005/389, Sch 1 Pt 1; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 1 Pt 1.

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(2)(a).

5    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(2)(b). Provision is made as to the content of such reports: see the Adoption Agencies Regulations 2005, SI 2005/389, reg 15(2)(b), Sch 1 Pt 2; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(2)(b), Sch 1 Pt 2.

6    As to the appointment of medical advisers see para 428 note 9 ante.

7    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(2).

8    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(3)(a).

9    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(3)(b).

10    Adoption Agencies Regulations 2005, SI 2005/389, reg 15(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(4). Thus the Adoption Agencies Regulations 2005, SI 2005/389, reg 15(2), (3) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(2), (3) do not apply if the child refuses to submit to the examinations or tests and is of sufficient understanding to make an informed decision in this regard: Adoption Agencies Regulations 2005, SI 2005/389, reg 15(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 15(4).

11    Adoption Agencies Regulations 2005, SI 2005/389, reg 16; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 16. In Wales, 'parent' means, in relation to a child, any parent who has parental responsibility for the child under the Children Act 1989 (see s 3; and para 134 ante): Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 2(1). As to the information required to be obtained about the child's family see the Adoption Agencies Regulations 2005, SI 2005/389, Sch 1 Pt 3; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 1 Pts 3, 4. As to the information required to be obtained about the health of the child's

natural parents and siblings see the Adoption Agencies Regulations 2005, SI 2005/389, Sch 1 Pt 4; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 1 Pt 5.

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1).

## **UPDATE**

### **431 Adoption agency report**

TEXT AND NOTES 3, 11, 12--SI 2005/1313 reg 17(1), Sch 1 Pts 1, 3 amended: SI 2009/1892.

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#### **432. Provision of counselling services.**

Where an adoption agency<sup>1</sup> is considering adoption for a child<sup>2</sup>, it is obliged (so far as is reasonably practicable) to provide a counselling service for the child<sup>3</sup>, and for the child's parent or guardian<sup>4</sup>. The child and his parent or guardian are also required to have explained to them by the agency the relevant legal procedures and implications<sup>5</sup>, and to have ascertained their wishes and feelings on matters involving the child's placement and adoption, his religious and cultural upbringing, and contact arrangements<sup>6</sup>. Special provision is made where the father of the child does not have parental responsibility for the child and the father's identity is known to the adoption agency<sup>7</sup>. Particular requirements are imposed on local authorities in Wales<sup>8</sup>.

1    le a local authority or a registered adoption society: see paras 394-395 ante.

2    Adoption Agencies Regulations 2005, SI 2005/389, reg 11 (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 11.

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 13(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 13(1)(a). In England, these services are not required if the adoption agency is satisfied that the applicable requirements have been carried out in respect of the child by another adoption agency (Adoption Agencies Regulations 2005, SI 2005/389, reg 13(2)); in Wales, these services are required to be provided in the light of the child's age and understanding (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 13(1)).

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 14(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 14(1)(a). As to the meaning of 'parent' in Wales see para 431 note 11 ante.

5    Adoption Agencies Regulations 2005, SI 2005/389, regs 13(1)(b), 14(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 13(1)(b), 14(1)(b).

6    Adoption Agencies Regulations 2005, SI 2005/389, regs 13(1)(c), 14(1)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 13(1)(c), 14(1)(c).

7    Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3), (4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 14(2)-(4).

8    See the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 7.

#### **UPDATE**

#### **432 Provision of counselling services**

TEXT AND NOTE 7--SI 2005/389 reg 14(4) amended, SI 2005/1313 reg 14(2) substituted, reg 14(3) amended: SI 2009/1892.

NOTE 8--SI 2007/1357 reg 7 amended: SI 2009/1892.

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### **433. Permanence report.**

Where an adoption agency<sup>1</sup> is considering adoption for a child<sup>2</sup> (and, in Wales, considers in light of all the information obtained<sup>3</sup> that adoption is the preferred option for permanence for the child), it must prepare a written report ('the child's permanence report') which must include:

- 717 (1) specified information<sup>4</sup> about the child and his family<sup>5</sup>;
- 718 (2) a summary, written by the agency's medical adviser, of the state of the child's health, his health history and any need for health care which might arise in the future<sup>6</sup>;
- 719 (3) the wishes and feelings of the child regarding his placement and adoption, his religious and cultural upbringing, and contact arrangements<sup>7</sup>;
- 720 (4) the wishes and feelings of the child's parent or guardian (and where applicable<sup>8</sup>, his father), and any other person the agency considers relevant, regarding those matters<sup>9</sup>;
- 721 (5) the views of the agency about the child's need for contact with his parent or guardian or other relative or with any other person the agency considers relevant<sup>10</sup> and the arrangements the agency proposes to make for allowing any person contact with the child<sup>11</sup>;
- 722 (6) an assessment of the child's emotional and behavioural development and any related needs<sup>12</sup>;
- 723 (7) an assessment of the parenting capacity of the child's parent or guardian (and where applicable<sup>13</sup>, his father)<sup>14</sup>;
- 724 (8) a chronology of the decisions and actions taken by the agency with respect to the child<sup>15</sup>;
- 725 (9) an analysis of the options for the future care of the child which have been considered by the agency and why placement for adoption is considered the preferred option<sup>16</sup>; and
- 726 (10) any other information which the agency considers relevant<sup>17</sup>.

This report, together with the child's health and other reports and the information relating to the health of the child's parents<sup>18</sup>, must be sent to the adoption panel<sup>19</sup>. The agency must also obtain, so far as is reasonably practicable, any other relevant information which may be requested by the adoption panel and send that information to the panel<sup>20</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the state of origin<sup>21</sup>.

<sup>1</sup> ie a local authority or a registered adoption society: see paras 394-395 ante.

<sup>2</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 11 (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 11.

<sup>3</sup> ie by virtue of ibid regs 12-16 (see paras 431-432 ante).

<sup>4</sup> ie the information specified in the Adoption Agencies Regulations 2005, SI 2005/389, Sch 1 Pts 1, 3 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 1 Pts 1, 3, 4 (see para 431 ante).

- 5 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(a).
- 6 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(b). As to the appointment of medical advisers see para 428 note 9 ante.
- 7 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(c). These are the matters set out in the Adoption Agencies Regulations 2005, SI 2005/389, reg 13(1)(c) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 13(1)(c) (see para 432 ante).
- 8 Ie where the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(4)(a) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 14(2) applies (see para 432 ante).
- 9 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(d). These are the matters set out in the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(1)(c) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 14(1)(c) (see para 432 ante). As to the meaning of 'parent' in Wales see para 431 note 11 ante.
- 10 Ie including, in Wales, the child's father where ibid reg 14(2) applies.
- 11 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(e).
- 12 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(f).
- 13 See note 8 supra.
- 14 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(g); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(g).
- 15 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(h); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(h).
- 16 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(i); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(i).
- 17 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1)(j); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1)(j).
- 18 Ie the reports required by the Adoption Agencies Regulations 2005, SI 2005/389, regs 15, 16 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 15, 16 (see para 431 ante).
- 19 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(2) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(2). In England, the agency must only send the child's health and other reports and the information relating to the health of the child's parents to the adoption panel if the agency's medical adviser advises it to do so: Adoption Agencies Regulations 2005, SI 2005/389, reg 17(2A) (added by SI 2005/3482).
- 20 Adoption Agencies Regulations 2005, SI 2005/389, reg 17(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(3).
- 21 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 38; and para 496 post.

## **UPDATE**

### **433 Permanence report**

TEXT AND NOTES 1-17--SI 2005/1313 reg 17(1) amended: SI 2009/1892.



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#### **434. Decision as to whether a child should be placed for adoption.**

The adoption panel<sup>1</sup> must consider the case of every child referred to it by the adoption agency<sup>2</sup> and make a recommendation to the agency as to whether the child should be placed for adoption<sup>3</sup>. In considering what recommendation to make, the panel must:

- 727 (1) have regard to the statutory duties imposed on the agency<sup>4</sup>;
- 728 (2) consider and take into account the reports and any other information passed<sup>5</sup> to it<sup>6</sup>; and
- 729 (3) obtain legal advice in relation to the case<sup>7</sup>,

and may request the agency to obtain any other relevant information which the panel considers necessary<sup>8</sup>.

Where the panel makes a recommendation to the agency that the child should be placed for adoption, it must consider and may at the same time give advice to the agency about the arrangements which the agency proposes to make for allowing any person contact with the child<sup>9</sup> and (where the agency is a local authority) whether an application should be made by the authority for a placement order<sup>10</sup> in respect of the child<sup>11</sup>.

The agency must take into account the panel's recommendation in coming to a decision about whether the child should be placed for adoption<sup>12</sup>; agencies in Wales must also take into account any advice given<sup>13</sup> by the panel<sup>14</sup> and have regard to the statutory considerations<sup>15</sup>. The agency must then give notification of its decision<sup>16</sup>. Agencies in Wales must also ascertain whether the child's parent or guardian consents to his placement for adoption<sup>17</sup>. Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the state of origin<sup>18</sup>.

1 As to the establishment of adoption panels see para 428 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 ante.

3 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(1).

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(2). The statutory duties imposed on the agency are those imposed under the Adoption and Children Act 2002 s 1(2), (4), (5), (6) (considerations applying to the exercise of powers in relation to the adoption of a child: see paras 327, 329-330 ante); Adoption Agencies Regulations 2005, SI 2005/389, reg 18(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(2).

5 I.e. in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 17 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17 (see para 433 ante).

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(2)(a).

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(2)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(2)(c). In Wales, the legal advice required to be obtained pursuant to this obligation is such advice as the panel considers necessary: reg 18(2)(c).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(2)(b).

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(3)(a).

10 As to placements and placement orders see para 331 et seq ante.

11 Adoption Agencies Regulations 2005, SI 2005/389, reg 18(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(3)(b).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 19(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(1)(a). No member of the panel may take part in any such decision made by the agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 19(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(2).

13 Ie in accordance with ibid reg 18(3) (see the text and notes 9-11 supra).

14 Ibid reg 19(1)(b).

15 Ibid reg 19(1)(c). The statutory considerations are those set out in the Adoption and Children Act 2002 s 1(2) (see para 327 ante).

16 In England, the agency must, if his whereabouts are known to it, notify in writing the parent or guardian and, where the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3) (see para 432 ante) applies and the agency considers it is appropriate, the father of the child of its decision: reg 19(3). In Wales, the agency must, if their whereabouts are known to it, notify its decision about whether the child should be placed for adoption and any decision in relation to contact arrangements in writing to the parent or guardian of the child (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(3)(a)), any relative or other significant person whom the agency consulted under reg 14(1) (see para 432 ante) including any person in whose favour a contact order under the Children Act 1989 s 8 (see para 251 ante) or an order under s 34 (see para 278 ante) (parental contact with children in care) may be in force immediately before the agency is authorised to place the child for adoption (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(3)(b)), and the father (where reg 14(2) (see para 432 ante) applies (reg 19(3)(c)); and the agency must in an appropriate manner and in the light of the child's age and understanding explain its decision to the child (reg 19(3)(d)).

17 Unless either an application has been made on which a care order might be made in respect of the child which has not been disposed of, or the child is less than six weeks old, the agency must ascertain whether the parent or guardian of the child is prepared to consent under the Adoption and Children Act 2002 s 19 (placing children with parental consent: see para 332 ante) to the child being placed for adoption with prospective adopters identified in the consent or being placed for adoption with any prospective adopters who may be chosen by the agency (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(4)(a)) and at the same time to consent to the making of a future adoption order under the Adoption and Children Act 2002 s 20 (advance consent to adoption: see para 333 ante) (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(4)(b)). Where the parent or guardian of the child is prepared to consent to the making of a future adoption order under the Adoption and Children Act 2002 s 20, the agency must explain and confirm in writing to the parent or guardian of the child that any consent given under s 20 may be withdrawn but that the withdrawal of consent is ineffective if it is given after an application for an adoption order is made (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(5)(a)), that notice given to the agency may at the same or any subsequent time state the wish of the parent or guardian not to be informed of any application for an adoption order (reg 19(5)(b)), and that such a statement may be withdrawn (reg 19(5)(c)). As to the meaning of 'parent' in Wales see para 431 note 11 ante.

18 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 39, 40; and para 496 post.

## **UPDATE**

### **434 Decision as to whether a child should be placed for adoption**

NOTE 16--SI 2005/1313 reg 19(3) amended: SI 2009/1892.

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### ***C. DUTIES IN RESPECT OF PROSPECTIVE ADOPTER***

#### **435. Duties of adoption agency in respect of a prospective adopter.**

An adoption agency<sup>1</sup> has a number of defined responsibilities towards a prospective adopter, including counselling<sup>2</sup> and the provision of information<sup>3</sup>. Once the agency has received an application<sup>4</sup> for an assessment as to suitability from a prospective adopter, it must set up a case record for that person<sup>5</sup> and consider his suitability to adopt<sup>6</sup>, taking steps to obtain police checks on him<sup>7</sup>. The agency must ensure that the prospective adopter receives proper preparation for adoption<sup>8</sup> and, where it considers that a prospective adopter may be suitable to adopt, must prepare a report on him<sup>9</sup>. The adoption panel<sup>10</sup> is then obliged to consider<sup>11</sup>, and make a decision as to, the suitability of the prospective adopter to adopt a child<sup>12</sup>. Approvals for adoption are subject to review<sup>13</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>14</sup>.

1    Ie a local authority or a registered adoption society: see paras 394-395 ante.

2    Where an adoption agency is considering a person's suitability to adopt a child, the agency must provide a counselling service for the prospective adopter: Adoption Agencies Regulations 2005, SI 2005/389, reg 21(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 21(1)(a).

3    In a case where a person who is habitually resident in the British Islands intends to bring, or to cause another to bring, a child into the United Kingdom in circumstances where the Adoption and Children Act 2002 s 83 (restriction on bringing children into the United Kingdom: see para 499 post) applies (a 'section 83 case'), the agency must explain to the prospective adopter the procedure in relation to, and the legal implications of, adopting a child from the country from which the prospective adopter wishes to adopt: Adoption Agencies Regulations 2005, SI 2005/389, regs 2(1), 21(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 2(1), 21(1)(b). In any other case, the agency must explain to the prospective adopter the procedure in relation to, and the legal implications of, placement for adoption (including, in Wales, placement by consent under the Adoption and Children Act 2002 s 19, consent to the making of a future adoption order under s 20 (see paras 332-333 ante), restriction of parental responsibility and placement orders) and adoption: Adoption Agencies Regulations 2005, SI 2005/389, reg 21(1)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 21(1)(c). The agency must also provide the prospective adopter with written information about these matters: Adoption Agencies Regulations 2005, SI 2005/389, reg 21(1)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 21(1)(d)). These requirements do not apply in England if the agency is satisfied that they have been carried out in respect of the prospective adopter by another adoption agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 21(2). As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

4    Ie an application in writing and (in England) in the form provided by the agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 22(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(1).

5    See the Adoption Agencies Regulations 2005, SI 2005/389, reg 22(1), (3); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(1), (3); and the text and note 6 infra.

6    Adoption Agencies Regulations 2005, SI 2005/389, reg 22(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(1). As to the consideration of suitability see further the Adoption Agencies Regulations 2005, SI 2005/389, regs 25, 26; the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 26, 27; and paras 438-439 post. In Wales, where reg 22(1) applies in relation to a couple, the assessment of their suitability to adopt a child will be considered jointly: reg 22(3). The agency may ask the prospective adopter to

provide any further information in writing it may reasonably require: Adoption Agencies Regulations 2005, SI 2005/389, reg 22(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(2).

7 An adoption agency must obtain (in Wales) or take steps to obtain (in England) an enhanced criminal record certificate in respect of a prospective adopter (Adoption Agencies Regulations 2005, SI 2005/389, reg 23(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(1)(a)) and any other member of his household aged 18 or over (Adoption Agencies Regulations 2005, SI 2005/389, reg 23(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(1)(b)). These provisions define an 'enhanced criminal record certificate' as such a certificate within the meaning of the Police Act 1997 s 115 (repealed), and including the matters specified in s 115(6A) (as added) (repealed): see now, however, s 113C (as added) (including the matters specified in s 113C(2) (as added)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 712 et seq. As to evidence of unsuitability to adopt arising from police checks see para 436 post.

8 See the Adoption Agencies Regulations 2005, SI 2005/389, reg 24; the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25; and para 437 post.

9 See the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(1)-(7), (7A) (as amended); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(1)-(5); and para 438 post.

10 As to the establishment of adoption panels see para 428 ante.

11 See the Adoption Agencies Regulations 2005, SI 2005/389, regs 25(8)-(10), 26 (reg 25 as amended); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 26(6)-(8), 27; and para 439 post.

12 See the Adoption Agencies Regulations 2005, SI 2005/389, regs 27, 28; the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 28, 29; and para 440 post.

13 See the Adoption Agencies Regulations 2005, SI 2005/389, reg 29; the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30; and para 441 post.

14 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 15; and para 491 post.

## UPDATE

### 435 Duties of adoption agency in respect of a prospective adopter

NOTE 7--In respect of the prospective adopter and any other member of the prospective adopter's household who is aged 18 or over, an adoption agency must obtain an enhanced criminal record certificate issued under the Police Act 1997 s 113B (SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq) which includes suitability information relating to children (within the meaning of the Police Act 1997 s 113BA(2)): SI 2005/389 reg 23(1) (substituted by SI 2009/1895). An adoption agency in Wales must now obtain an enhanced criminal record certificate issued under Police Act 1997 s 113B (SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq) which includes suitability information relating to children (within the meaning of the 1997 Act s 113BA(2)): SI 2005/1313 reg 23(1) (substituted by SI 2009/2541).

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#### **436. Unsuitability to adopt due to criminal record.**

An adoption agency<sup>1</sup> must not consider a person suitable to adopt a child (or, in Wales, must consider a person no longer suitable to adopt a child) if the person or any member of the person's household aged 18 or over has been convicted of any of the following offences aged 18 or over<sup>2</sup> or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, the person admitted<sup>3</sup>:

- 730 (1) an offence against a child<sup>4</sup>;
- 731 (2) rape<sup>5</sup>;
- 732 (3) assault by penetration<sup>6</sup>;
- 733 (4) causing a person to engage in sexual activity without consent<sup>7</sup>;
- 734 (5) an offence of sexual activity with a person with a mental disorder impeding choice<sup>8</sup>;
- 735 (6) an offence of causing or inciting a person with mental disorder impeding choice to engage in sexual activity<sup>9</sup>;
- 736 (7) an offence of inducement, threat or deception to procure sexual activity with a person with a mental disorder<sup>10</sup>;
- 737 (8) an offence of causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception<sup>11</sup>;
- 738 (9) a specified sexual offence under the law of Scotland or Northern Ireland<sup>12</sup>;
- 739 (10) certain customs offences relating to the prohibited importation of indecent or obscene articles<sup>13</sup>;
- 740 (11) any other offence involving bodily injury to a child, other than an offence of common assault or battery<sup>14</sup>;
- 741 (12) any of a number of statutory sexual offences which have been repealed<sup>15</sup>.

The fact that an adoption agency cannot support an application because the prospective adopter has a specified conviction does not act as a statutory bar preventing the court from making an adoption order, although the court must take it into consideration<sup>16</sup>.

A prospective adopter must be notified where his ineligibility to adopt a child arises through the carrying out of police checks<sup>17</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>18</sup>.

<sup>1</sup> ie a local authority or a registered adoption society: see paras 394-395 ante.

<sup>2</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 23(2)(a). (4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(2)(a), (4)(a).

<sup>3</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 23(2)(b), (4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(2)(b), (4)(a).

<sup>4</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 23(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(3)(a). The expression 'offence against a child' has the meaning given to it by the Criminal Justice and Court Services Act 2000 s 26(1) (see para 667 post) except that it does not include an offence contrary to the Sexual Offences Act 2003 s 9 (sexual activity with a child: see CRIMINAL LAW, EVIDENCE AND

PROCEDURE vol 11(1) (2006 Reissue) para 173) in a case where the offender was under the age of 20 and the child was aged 13 or over at the time the offence was committed: Adoption Agencies Regulations 2005, SI 2005/389, reg 23(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(3).

5 Adoption Agencies Regulations 2005, SI 2005/389, reg 23(3)(b), Sch 3 Pt 1 para 1(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(3)(b), Sch 3 Pt 1 para 1(a). As to this offence (ie an offence under the Sexual Offences Act 2003 s 1) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 165.

6 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(b). As to this offence (ie an offence under the Sexual Offences Act 2003 s 2) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 167.

7 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(c). As to this offence (ie an offence under the Sexual Offences Act 2003 s 4), which is relevant for these purposes only if the activity fell within s 4(4), see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 171.

8 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(d). As to this offence (ie an offence under the Sexual Offences Act 2003 s 30), which is relevant for these purposes only if the touching fell within s 30(3), see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 197, 201.

9 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(e). As to this offence (ie an offence under the Sexual Offences Act 2003 s 31), which is relevant for these purposes only if the activity caused or incited fell within s 31(3), see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 198, 201.

10 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(f). As to this offence (ie an offence under the Sexual Offences Act 2003 s 34), which is relevant for these purposes only if the touching involved fell within s 34(2), see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 202, 206.

11 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 para 1(g); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 para 1(g). As to this offence (ie an offence under the Sexual Offences Act 2003 s 35), which is relevant for these purposes only if the touching involved fell within s 35(2), see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 203, 206.

12 Adoption Agencies Regulations 2005, SI 2005/389, Sch 3 Pt 1 paras 2-11; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 3 Pt 1 paras 2-12.

13 Adoption Agencies Regulations 2005, SI 2005/389, reg 23(3)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(3)(c). As to these offences (ie offences under the Customs and Excise Management Act 1979 s 170 (as amended) (penalty for fraudulent evasion of duty etc) in relation to goods prohibited to be imported under the Customs Consolidation Act 1876 s 42 (repealed) (indecent or obscene articles), if the prohibited goods included indecent photographs of persons under 16): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 1178.

14 Adoption Agencies Regulations 2005, SI 2005/389, reg 23(3)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(3)(d). As to the offences of common assault and battery see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 147-148.

15 Ie the offence of rape under the Sexual Offences Act 1956 s 1 (repealed), the offences of procurement of a woman by threats (see s 2 (repealed)) or false pretences (see s 3 (repealed)), administering drugs to obtain or facilitate intercourse (see s 4 (repealed)), intercourse with a girl aged under 13 (see s 5 (repealed)) or, where the offender is aged 20 or over, under 16 (see s 6 (repealed)), intercourse with or procurement of a defective (see ss 7, 9 (repealed)), incest by a man (see s 10 (repealed)) or a woman (see s 11 (repealed)), buggery or gross indecency with a child (see ss 12, 13 (repealed)) (unless the offender was under the age of 20 when the offence was committed), indecent assault on a woman or man (see ss 14, 15 (both repealed)), assault with intent to commit buggery (see s 16 (repealed)), abduction of a woman by force or for the sake of her property (see s 17 (repealed)), abduction of an unmarried girl from her parent or guardian (see ss 18-20 (repealed)), abduction of a defective from his parent or guardian (see s 21 (repealed)), causing prostitution of women (see s 22 (repealed)), procuration of a girl aged under 21 (see s 23 (repealed)), detention of women in a brothel (see s 24 (repealed)), permitting a girl under 16 to use premises for intercourse (see ss 25, 26 (repealed)), permitting a defective to use premises for intercourse (see s 27 (repealed)), causing or encouraging the prostitution of, intercourse with or indecent assault on a girl under 16 (see s 28 (repealed)), causing or encouraging the prostitution of a defective (see s 29 (repealed)), living on earnings of prostitution (if a man) or exercising control of prostitutes (if a woman) (see ss 30, 31 (repealed)), sexual intercourse with child mental patients (see the

Mental Health Act 1959 (repealed)), indecent conduct towards a young child (see the Indecency with Children Act 1960 s 1 (repealed)), procuring others to commit homosexual acts (see the Sexual Offences Act 1967 s 4 (repealed)), living on the earnings of male prostitution (see s 5 (repealed)), burglary with intent to commit rape of a child (see the Theft Act 1968 s 9 (no longer in effect with regard to this offence)), inciting a girl under 16 to have incestuous sexual intercourse (see the Criminal Law Act 1977 s 54 (repealed)) and abuse of trust (see the Sexual Offences (Amendment) Act 2000 s 3 (repealed)): see the Adoption Agencies Regulations 2005, SI 2005/389, reg 23(4)(b), Sch 3 Pt 2; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23(4)(b), Sch 3 Pt 2.

16 *Re R (adoption: protection from offenders regulations)* [1999] 2 FCR 616, [1999] 1 FLR 472. As to the court see para 511 post.

17 See the Adoption Agencies Regulations 2005, SI 2005/389, reg 23(5); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 24; and para 440 post.

18 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 15; and para 491 post.

## **UPDATE**

### **436 Unsuitability to adopt due to criminal record**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **437. Preparation for adoption.**

Where an adoption agency<sup>1</sup> is considering a person's suitability to adopt a child, it must make arrangements for the prospective adopter to receive such preparation for adoption as the agency considers appropriate<sup>2</sup>, including the provision of information to the prospective adopter about:

- 742 (1) the age range, gender, likely needs and background of children who may be placed for adoption by the agency<sup>3</sup>;
- 743 (2) the significance (and, in Wales, legal implications) of adoption for a child and his family<sup>4</sup>;
- 744 (3) contact between a child and his parent or guardian (in England) or natural parents (in Wales), or other relatives, where a child is authorised to be placed for adoption or is adopted<sup>5</sup>;
- 745 (4) the skills which are necessary for an adoptive parent<sup>6</sup>;
- 746 (5) the agency's procedures in relation to the assessment of a prospective adopter and the placement of a child for adoption<sup>7</sup>;
- 747 (6) the procedure in relation to placement for adoption and adoption<sup>8</sup>; and
- 748 (7) in Wales, the perspective of the child and his family<sup>9</sup>.

These provisions do not apply if the adoption agency is satisfied that the requirements set out above have been carried out in respect of the prospective adopter by another adoption agency<sup>10</sup>. Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>11</sup>.

1 le a local authority or a registered adoption society: see paras 394-395 ante.

2 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(1). In Wales, where the prospective adopter is not prepared to undertake the preparation for adoption which the agency considers appropriate in his case, the agency may refuse to proceed further with the prospective adopter's application for an assessment of suitability to adopt: reg 25(3).

3 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(a).

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(b).

5 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(c).

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(d).

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(f).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(2)(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(g). Local authorities in Wales are required to provide prospective adopters with written information about the adoption process including information about the policy and procedures in respect of the adoption process, arrangements for the assessment of and the provision of Adoption Support Services,



the Adoption Register for England and Wales and local consortium arrangements: Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 8(c).

9 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(4)(e).

10 Adoption Agencies Regulations 2005, SI 2005/389, reg 24(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25(2).

11 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 15; and para 491 post.

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#### **438. Prospective adopter's assessment and report.**

Where an adoption agency<sup>1</sup> considers that a prospective adopter is suitable to adopt a child it must obtain the following information<sup>2</sup>:

- 749 (1) specified information about the prospective adopter's identity and personal circumstances, cultural background, education and employment, motivation and capacity to be an adoptive parent<sup>2</sup>;
- 750 (2) a written report from a registered medical practitioner about the health of the prospective adopter<sup>3</sup>;
- 751 (3) a written report of each of the interviews with the persons nominated by the prospective adopter to provide personal references for him<sup>4</sup>; and
- 752 (4) where applicable, a written report from the local authority in whose area the prospective adopter has his home<sup>5</sup>.

The agency must then prepare a written report<sup>6</sup> which must include:

- 753 (a) the information about the prospective adopter referred to in head (1) above<sup>7</sup>;
- 754 (b) a summary, written by the agency's medical adviser, of the state of health of the prospective adopter<sup>8</sup>;
- 755 (c) the agency's assessment of the prospective adopter's suitability to adopt a child<sup>9</sup>;
- 756 (d) any relevant information the agency obtains from the prospective adopter's local authority<sup>10</sup>;
- 757 (e) any observations of the agency relating to its duty to provide counselling and information<sup>11</sup>, the carrying out of police checks<sup>12</sup> and its duty to provide preparation for adoption<sup>13</sup>; and
- 758 (f) any other information which the agency considers relevant<sup>14</sup>.

Additional matters to be included in the report are imposed in a section 83 case<sup>15</sup>. Matters to be taken into account where an agency in England is preparing a report are also prescribed<sup>16</sup>. Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>17</sup>.

<sup>1</sup> ie a local authority or a registered adoption society: see paras 394-395 ante. In Wales, an adoption agency is required to take the steps described in this paragraph only after having followed the procedures referred to in the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 23, 25 (see paras 436-437 ante): reg 26(1).

<sup>2</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 25(1), (2), Sch 4 Pt 1 (reg 25(1) amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(1), (2), Sch 4 Pt 1.

<sup>3</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 25(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3)(a). This report must deal with the matters specified in the Adoption Agencies Regulations 2005, SI 2005/389, Sch 4 Pt 2 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 4 Pt 2 unless (in England) the agency has received advice from its medical adviser that such an examination and report is unnecessary or (in Wales) such a report has been made within six months of the panel's consideration of the case under reg 27 (see para 439 post) and is available to the agency: Adoption

Agencies Regulations 2005, SI 2005/389, reg 25(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3)(a). As to the appointment of medical advisers see para 428 note 9 ante.

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3)(b).

5 In England, it is provided that the adoption agency must ascertain whether the local authority in whose area the prospective adopter has his home has any information about the prospective adopter which may be relevant to the assessment and if so obtain from that authority a written report setting out that information (Adoption Agencies Regulations 2005, SI 2005/389, reg 25(4)); in Wales, the agency is required to obtain a written report from the local authority in whose area the prospective adopter lives, and where the prospective adopter has lived in that area for a period of less than 12 months the agency must obtain a written report also from the local authority in whose area the prospective adopter lived previously (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3)(c)).

6 Where an adoption agency in England receives information under the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(2), (3) or (4) (see the text and notes 2-5 supra) or other information in relation to the assessment of the prospective adopter and is of the opinion that a prospective adopter is unlikely to be considered suitable to adopt a child, it may make the prospective adopter's report under reg 25(5) (see the text and notes 7-14 infra) notwithstanding that the agency may not have obtained all the information about the prospective adopter which may be required by reg 25 (reg 25(7)), although the report must not be completed until the agency has carried out police checks in accordance with reg 23 (see para 436 ante) and made arrangements for the prospective adopter to receive preparation for adoption in accordance with reg 24 (see para 437 ante) (reg 25(7A) (added by SI 2005/3482)). For the matters to be taken into account in England see the Suitability of Adopters Regulations 2005, SI 2005/1712, reg 5.

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(a). The references to 'information' in the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4) include information obtained by the adoption agency or adoption panel as a consequence of the Adoptions with a Foreign Element Regulations 2005, SI 2005/392 (see para 491 post): reg 15(5).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(b).

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(c). In Wales, in determining the suitability of a couple to adopt a child, the agency must have proper regard to the need for stability and permanence in their relationship: reg 26(4)(c).

10 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(d). This is the information obtained under the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(4) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3)(c) (see the text and note 5 supra).

11 Ie the matters referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 21 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22 (see para 435 ante).

12 Ie the matters referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 23 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23 (see para 436 ante).

13 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(e). An agency's observations relating to its duty to provide preparation for adoption are its observations on the matters referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 24 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25 (see para 437 ante).

14 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5)(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4)(f).

15 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(6); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(6). For the meaning of 'section 83 case' see para 435 note 3 ante.

16 See the Suitability of Adopters Regulations 2005, SI 2005/1712, reg 3.

17 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 15, 18; and paras 491-492 post.

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#### **439. Reference to adoption panel.**

An adoption agency<sup>1</sup> must notify the prospective adopter that his application is to be referred to the adoption panel<sup>2</sup>, give him a copy of the prospective adopter's report<sup>3</sup> and invite him to make observations<sup>4</sup>, and then send the report and observations to the panel<sup>5</sup>, who must consider the case of the prospective adopter so referred and make a recommendation to the agency as to whether the prospective adopter is suitable to adopt a child<sup>6</sup>. Before making any recommendation, the panel must invite the prospective adopters to attend a meeting of the panel<sup>7</sup>. In considering what recommendation to make, the panel:

- 759 (1) must consider and take into account all the information and reports passed<sup>8</sup> to it<sup>9</sup>;
- 760 (2) may request the agency to obtain any other relevant information which the panel considers necessary<sup>10</sup>; and
- 761 (3) may (in England) or must (in Wales) obtain legal advice as it considers necessary in relation to the case<sup>11</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>12</sup>.

1 le a local authority or a registered adoption society: see paras 394-395 ante. In Wales, an adoption agency is required to take the steps described in this paragraph only after having followed the procedures referred to in the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 23, 25 (see paras 436-437 ante): reg 26(1).

2 As to the establishment of adoption panels see para 428 ante.

3 le the report referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(4) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4) (see para 438 ante). In Wales, the prospective adopter must be sent a copy of the agency's report at the same time as he is notified that his application is to be referred to the adoption panel: reg 26(6).

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 25(8); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(6).

5 The prospective adopter must be invited to send any observations in writing to the agency within 10 working days, beginning with the date on which the notification is sent (Adoption Agencies Regulations 2005, SI 2005/389, reg 25(8); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(6)); and at the end of that period (or earlier, if any observations made by the prospective adopter are received before that period has expired) the agency must send to the adoption panel the prospective adopter's report together with the prospective adopter's observations, if any (Adoption Agencies Regulations 2005, SI 2005/389, reg 25(9)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(7)(a)), the written reports referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(3), (4) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(3) (see para 438 heads (2)-(4) ante) (although in the case of reports obtained in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(3)(a), only if the agency's medical adviser advises it to do so) (reg 25(9)(b) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(7)(b)), and any other relevant information obtained by the agency pursuant to its duty to obtain, so far as is reasonably practicable, any other relevant information which may be required by the panel (Adoption Agencies Regulations 2005, SI 2005/389, reg 25(9)(c), (10); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(7)(c), (8)).

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 26(1) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(1). Where the panel makes a recommendation to the agency that the prospective adopter is suitable to adopt a child, it may consider and give advice to the agency about the number of children the prospective adopter may be suitable to adopt, including in England their age range, sex, likely needs and background, and in Wales their age range, gender and characteristics (health and social): Adoption Agencies Regulations 2005, SI 2005/389, reg 26(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(3).

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 26(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(4).

8 In accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26 (see the text and notes 1-5 supra; and para 438 ante). In relation to the case of a prospective adopter in respect of whom a report has been prepared in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(7) (see para 438 ante), the panel must either request the agency to prepare a further prospective adopter's report, covering all the matters set out in reg 25(5) (reg 26(2A)(a) (reg 26(2A) added by SI 2005/3482)) or recommend that the prospective adopter is not suitable to adopt a child (Adoption Agencies Regulations 2005, SI 2005/389, reg 26(2A)(b) (as so added)).

9 Ibid reg 26(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(2)(a).

10 Adoption Agencies Regulations 2005, SI 2005/389, reg 26(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(2)(b).

11 Adoption Agencies Regulations 2005, SI 2005/389, reg 26(2)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27(2)(c).

12 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 15, 18; and paras 491-492 post.

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#### 440. Decision and notification.

The adoption agency<sup>1</sup> must make a decision about whether the prospective adopter is suitable to adopt a child<sup>2</sup>, and must notify the prospective adopter of that decision<sup>3</sup> and, where the decision is that he is not suitable, inform him of his right to submit representations or apply for a review of the decision<sup>4</sup>. If the prospective adopter does not make<sup>5</sup> such representations or apply for a review, the agency must proceed to make its decision and must notify the prospective adopter in writing of it together with the reasons for it<sup>6</sup>; if, however, the prospective adopter makes representations<sup>7</sup>, the agency must not make its decision until it has taken into account any fresh recommendations (in addition to the original recommendations) of the adoption panel<sup>8</sup>, and if he applies for a review the agency must not make its decision until it has taken into account the review panel's recommendations (in England, along with the original recommendations of the adoption panel)<sup>9</sup>.

As soon as possible after making a decision following a review or a reference back to the panel, the agency must notify the prospective adopter in writing of the decision (stating its reasons for the decision if it does not consider the prospective adopter to be suitable to adopt a child) and of the adoption panel's recommendation<sup>10</sup> if this is different from the agency's decision<sup>11</sup>.

Where an agency approves a prospective adopter in a section 83 case<sup>12</sup>, it is required to send specified information to the Secretary of State or the Welsh Ministers, as applicable<sup>13</sup>.

A prospective adopter must also be notified where his ineligibility to adopt a child arises through the carrying out of police checks<sup>14</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the receiving state<sup>15</sup>.

1    ie a local authority or a registered adoption society: see paras 394-395 ante.

2    Adoption Agencies Regulations 2005, SI 2005/389, reg 27(1), (8); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(1), (8). For the matters to be taken into account in England see the Suitability of Adopters Regulations 2005, SI 2005/1712, reg 4. No member of the adoption panel may take part in any such decision (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(2)), but in Wales the agency is required to take into account the panel's recommendation (see para 439 ante) in coming to the decision (reg 28(1)). As to the establishment of adoption panels see para 428 ante.

3    Where the agency decides to approve the prospective adopter as suitable to adopt a child, it must notify him in writing of its decision (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(3)); where the agency considers that the prospective adopter is not suitable to adopt a child, it must notify him in writing that it proposes not to approve the prospective adopter as suitable to adopt a child ('qualifying determination') (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(4)(a)) and send with that notification its reasons together with a copy of the panel's recommendation, if different (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(4)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(4)(b)).

Provision is made for the review, on application, of any determination made by an adoption agency in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 27(4) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(4) that the agency does not propose to approve a prospective adopter as suitable to adopt a child or (in the context of the Welsh regulations) to be an adoptive parent (ie a 'qualifying determination': Adoption and Children Act 2002 s 12(2)): see the Independent Review of Determinations (Adoption) Regulations 2005, SI 2005/3332, reg 3; and the Independent Review of

Determinations (Adoption) (Wales) Regulations 2006, SI 2006/3100, reg 3(a). These regulations have been made under the Adoption and Children Act 2002 s 12, under which it is provided that regulations under s 9 (see para 397 ante) may establish a procedure under which any person in respect of whom a qualifying determination has been made by an adoption agency may apply to a panel constituted by the Secretary of State or the Welsh Ministers for a review of that determination: s 12(1). The regulations may include provision as to: (1) the duties and powers of a panel, including the power to recover the costs of a review from the adoption agency by which the determination reviewed was made (s 12(3)(a)); (2) the administration and procedures of a panel (s 12(3)(b)); (3) the appointment of members of a panel, including the number, or any limit on the number, of members who may be appointed and any conditions for appointment (s 12(3)(c)); (4) the payment of fees to members of a panel (s 12(3)(d) (amended by the Children Act 2004 s 57)); (5) the duties of adoption agencies in connection with reviews conducted under the regulations (Adoption and Children Act 2002 s 12(3)(e)); and (6) the monitoring of any such reviews (s 12(3)(f)). The Secretary of State and the Welsh Ministers may make an arrangement with an organisation (which in this context includes a public body and a private or voluntary organisation and, where the functions of the appropriate minister are carried out by the Welsh Ministers, the Secretary of State) under which functions in relation to the panel are performed by the organisation on his or their behalf: s 12(4), (7), (8). If the Secretary of State or the Welsh Ministers make such an arrangement with an organisation, the organisation is to perform its functions under the arrangement in accordance with any general or special directions given by him or them (s 12(5)), which may include provision for payments to be made to the organisation by the Secretary of State or the Welsh Ministers (s 12(6)). For the meaning of 'voluntary organisation' see para 395 note 3 ante. As to the making of regulations generally see para 334 note 12 ante. The Independent Review of Determinations (Adoption) Regulations 2005, SI 2005/3332, and the Independent Review of Determinations (Adoption) (Wales) Regulations 2006, SI 2006/3100, make provision accordingly. See also the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888 (as amended); the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689; and para 473 et seq post.

4 Where the agency notifies the prospective adopter that its decision is that he is not suitable to adopt a child (see the text and note 3 supra), it must also advise him that within 40 (in England) or 20 (in Wales) working days beginning with the date on which the notification was sent he may submit any representations to the agency (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(4)(c)(i); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(4)(c)(i)) or apply to the independent review panel (via the Secretary of State in England, or directly in Wales) for a review of the qualifying determination (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(4)(c)(ii); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(4)(c)(ii)).

If the agency receives notification from the Secretary of State (in England) or an independent review panel (in Wales) that a prospective adopter has applied for a review by an independent review panel of the qualifying determination, the agency must, within 10 working days of receipt of that notification, send to the Secretary of State or, as the case may be, the panel:

- 242 (1) all of the documents and information which were passed to the panel in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26 (see paras 438-439 ante) (Adoption Agencies Regulations 2005, SI 2005/389, reg 28(1), (2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 29(1), (2)(a));
- 243 (2) in England, any relevant information in relation to the prospective adopter which was obtained by the agency after the date on which such documents and information were passed to the panel (Adoption Agencies Regulations 2005, SI 2005/389, reg 28(2)(b));
- 244 (3) in England, the documents referred to in reg 27(4)(a), (b) (see note 3 supra) (reg 28(2)(c));
- 245 (4) in Wales, any written representations made by the prospective adopter in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(6) (see para 438 ante) (reg 29(2)(b));
- 246 (5) in Wales, any other reports or information sent by the agency to the panel (reg 29(2)(c));
- 247 (6) in Wales, the record of the proceedings of the panel, its recommendations and the reasons for its recommendations (reg 29(2)(d)); and
- 248 (7) in Wales, the notification, together with reasons sent by the agency to the prospective adopter in accordance with 28(4)(a), (b) (see note 3 supra) (reg 29(2)(e)).

'Working day' means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a day which is a bank holiday within the meaning of the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) para 321); Adoption Agencies Regulations 2005, SI 2005/389, reg 2(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 2(1).

- 5 le within the 40 or 20 working day period referred to in note 4 supra.
- 6 Adoption Agencies Regulations 2005, SI 2005/389, reg 27(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(5).
- 7 See note 5 supra.
- 8 Adoption Agencies Regulations 2005, SI 2005/389, reg 27(8)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(8). As to the establishment of adoption panels see para 428 ante. On receipt of representations from the prospective adopter, the agency may refer the case together with all the relevant information back to the panel for further consideration (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(6); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(6)), and the panel must consider any case so referred to it and make a fresh recommendation to the agency as to whether the prospective adopter is suitable to adopt a child (Adoption Agencies Regulations 2005, SI 2005/389, reg 27(7); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(7)).
- 9 Adoption Agencies Regulations 2005, SI 2005/389, reg 27(8)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(8).
- 10 le under the Adoption Agencies Regulations 2005, SI 2005/389, reg 27(7) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(7) (see note 8 supra).
- 11 Adoption Agencies Regulations 2005, SI 2005/389, reg 27(9); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28(9). In a case in England where an independent review panel has made a recommendation, the adoption agency must send to the Secretary of State a copy of the notification referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 27(9): reg 27(10).
- 12 For the meaning of 'section 83 case' see para 435 note 3 ante.
- 13 Where an adoption agency decides in a section 83 case to approve a prospective adopter as suitable to adopt a child, the agency must send to the Secretary of State or the Welsh Ministers, as applicable: written confirmation of the decision and any recommendation the agency may make in relation to the number of children the prospective adopter may be suitable to adopt, their age range, sex, likely needs and background (Adoption Agencies Regulations 2005, SI 2005/389, reg 30(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 31(a)); all the documents and information which were passed to the adoption panel in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26 (see paras 438-439 ante) (Adoption Agencies Regulations 2005, SI 2005/389, reg 30(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 31(b)); the record of the panel's proceedings, its recommendation and the reasons for its recommendation (Adoption Agencies Regulations 2005, SI 2005/389, reg 30(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 31(c)); if the prospective adopter applied for a review by an independent review panel of a qualifying determination, the record of the proceedings of that panel, its recommendation and the reasons for its recommendation (Adoption Agencies Regulations 2005, SI 2005/389, reg 30(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 31(d)); and any other information relating to the case which the Secretary of State (or, as the case may be, the Welsh Ministers) or the relevant foreign authority may require (Adoption Agencies Regulations 2005, SI 2005/389, reg 30(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 31(e)). As to the Secretary of State and the Welsh Ministers see para 155 ante.
- 14 Where an adoption agency in England becomes aware that a prospective adopter or a member of his household falls within the Adoption Agencies Regulations 2005, SI 2005/389, reg 23(2) or (4) (see para 436 ante), the agency must notify the prospective adopter as soon as possible that he cannot be considered suitable to adopt a child (reg 23(5)); and an adoption agency in Wales must notify a prospective adopter in writing as soon as possible after becoming aware that he is not suitable, or as the case may be, is no longer suitable, to adopt a child by virtue of the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, 23(2)-(4) (see para 436 ante) (reg 24).
- 15 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 15, 16; and para 491 post.

## UPDATE

### 440 Decision and notification

NOTE 3--Children Act 1989 s 12(2), (3)(a), (4) amended: Children and Young Persons Act 2008 s 34(2), (3), (5), Sch 4. Head (5). Regulations made by virtue of the Children Act 1989 s 12(3)(e) may impose a duty to pay to the appropriate minister such sum as he



may determine: see s 12(3A), (3B), (6A) (added by Children and Young Persons Act 2008 s 34(4), (6)).

SI 2005/3332 replaced: Independent Review of Determinations (Adoption and Fostering) Regulations 2009, SI 2009/395.

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#### **441. Reviews and terminations of approvals.**

An adoption agency<sup>1</sup> must review<sup>2</sup> the approval of each prospective adopter unless:

- 762 (1) a child is placed for adoption with the prospective adopter<sup>3</sup>;
- 763 (2) in England, the agency is considering placing a child with the prospective adopter<sup>4</sup>; or
- 764 (3) in a section 83 case<sup>5</sup>, the prospective adopter has visited the child in the country in which the child is habitually resident<sup>6</sup> and has confirmed in writing that he wishes to proceed with the adoption<sup>7</sup>.

A review must take place whenever the agency considers it necessary but otherwise not more than one year (in England) or two years (in Wales) after approval and thereafter at intervals of not more than one (in England) or two (in Wales) years<sup>8</sup>; and when undertaking such a review the agency must make such enquiries and obtain such information as it considers necessary in order to review whether the prospective adopter continues to be suitable to adopt a child<sup>9</sup> and seek and take into account the views of the prospective adopter<sup>10</sup>. Additional provision is made for the conduct of reviews in Wales<sup>11</sup>.

If at the conclusion of the review the agency considers that the prospective adopter may no longer be suitable to adopt a child (in England) or to be an adoptive parent (in Wales), it must prepare a written report<sup>12</sup>, notify the prospective adopter that his case<sup>13</sup> is to be referred to the adoption panel<sup>14</sup>, and invite him to send the agency his observations<sup>15</sup>. The agency must then<sup>16</sup> send to the panel a copy of the review report together with the prospective adopter's observations, any other relevant information<sup>17</sup> and, in Wales, the report prepared for the panel<sup>18</sup>; and the panel must consider the review report, the prospective adopter's observations (in England) and any other information passed to it by the agency, and make a recommendation to the agency as to whether the prospective adopter continues to be suitable to adopt a child<sup>19</sup>.

1    le a local authority or a registered adoption society: see paras 394-395 ante.

2    le in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 29 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30 (see the text and notes 3-19 infra).

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 29(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(1)(b).

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 29(1)(b) (amended by SI 2005/3482). An agency's considerations as to the placing of a child with a prospective adopter for these purposes are those carried out in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, regs 31-33 (see para 442 et seq post).

5    For the meaning of 'section 83 case' see para 435 note 3 ante.

6    As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

7    Adoption Agencies Regulations 2005, SI 2005/389, reg 29(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(1)(a).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(2).

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(3)(a).

10 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(3)(b).

11 As a part of each review the agency must consider why no child has yet been placed with the prospective adopter (ibid reg 30(4)(a)); any arrangements for the provision of adoption support services (see paras 394, 398 et seq ante) and whether they should continue or be modified (reg 30(4)(b)); where a child is returned to the adoption agency in accordance with the Adoption and Children Act 2002 s 35(1) (see para 350 ante) or s 35(2) (see para 351 ante), the reasons for the child's return (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(4)(c)); and whether the prospective adopter is still suitable to adopt a child (reg 30(4)(d)). The agency must also set out in writing the arrangements governing the manner in which the review of a prospective adopter is to be carried out and must draw the written arrangements to the attention of the prospective adopter and any other person the agency considers relevant (reg 30(5)(a)); and it must ensure that the information obtained in respect of the prospective adopter, details of the proceedings at any meeting arranged by the agency to consider any aspect of the review, and details of any decision made in the course of or as a result of the review, are recorded in writing and placed on the prospective adopter's case record (reg 30(5)(b)). As to the case record see para 447 post.

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(6). This report must include the agency's reasons (Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(6)(b)); in Wales, it must also include the information obtained on the matters referred to in reg 30(3), (4) (see the text and notes 9-11 supra) (reg 30(6)(a)) and any other information which the agency considers relevant (reg 30(6)(c)). The agency must give a copy of the report to the prospective adopter: Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(7).

13 Or, in Wales, the agency's report (see the text and note 12 supra).

14 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(7). As to the establishment of adoption panels see para 428 ante.

15 In England, the agency must invite the prospective adopter to send any observations to the agency within 10 working days beginning with the date on which the agency's report is given to him (Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(c) (amended by SI 2005/3482)); in Wales, the agency must invite any observations on the report to be sent in writing to the agency within 10 working days beginning with the date on which the notification was sent (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(7)).

16 Ie at the end of the period of 10 working days referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 29(4)(c) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(7) (see the text and note 15 supra) (or earlier if the prospective adopter's comments are received before the 10 working days have expired): Adoption Agencies Regulations 2005, SI 2005/389, reg 29(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(8).

17 The agency must obtain, so far as is reasonably practicable, any other relevant information which may be required by the panel: Adoption Agencies Regulations 2005, SI 2005/389, reg 29(6); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(9).

18 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(5), (6); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(8), (9). The report prepared for the panel in Wales is the report prepared under reg 30(4) (see the text and note 11 supra).

19 Adoption Agencies Regulations 2005, SI 2005/389, reg 29(7); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30(10). In England, the agency must make a decision as to whether the prospective adopter continues to be suitable to adopt a child, and the Adoption Agencies Regulations 2005, SI 2005/389, reg 27(2)-(10) (see para 440 ante) applies in relation to that decision by the agency (reg 29(8)); in Wales, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28 applies in relation to the decision by the agency about whether a prospective adopter continues to be suitable to adopt a child as it applies in relation to the decision by the agency about whether the prospective adopter is suitable to adopt a child (reg 30(11)), and provision is made for the review, on application, of any determination made by an adoption agency in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30 that it considers a prospective adopter to be no longer suitable to be an adoptive parent (see the Independent Review of Determinations (Adoption) (Wales) Regulations 2006, SI 2006/3100 (made under the Adoption and Children Act

2002 s 12); and para 440 note 3 ante). Note, in particular, the Independent Review of Determinations (Adoption) (Wales) Regulations 2006, SI 2006/3100, reg 3(a)(ii).

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**442. Duties in relation to the proposed placement of a child with a prospective adopter.**

Where an adoption agency<sup>1</sup> is considering placing a child for adoption<sup>2</sup> with a particular prospective adopter it must:

- 765 (1) provide the prospective adopter with the appropriate report<sup>3</sup> and any other information it considers relevant<sup>4</sup>;
- 766 (2) meet with the prospective adopter and discuss the proposed placement<sup>5</sup>;
- 767 (3) ascertain the views of the prospective adopter about the proposed placement<sup>6</sup> and the arrangements the agency proposes to make for allowing any person contact with the child<sup>7</sup>;
- 768 (4) in Wales, ascertain the views of the prospective adopter about the child's assessed needs for adoption support services<sup>8</sup>, the adoption support plan<sup>9</sup> and, where applicable, any restriction in the exercise of his parental responsibility<sup>10</sup>; and
- 769 (5) provide a counselling service for, and any further information to, the prospective adopter as may be required<sup>11</sup>.

In Wales, the child must also be counselled and informed<sup>12</sup>.

Where the agency considers that the proposed placement should proceed it must carry out or provide for an assessment of the need for adoption support services<sup>13</sup>, consider the arrangements for allowing any person contact with the child<sup>14</sup> (and, in Wales, whether the parental responsibility of any parent or guardian, or of prospective adopters, is to be restricted to any extent<sup>15</sup>), and prepare a written report<sup>16</sup>. The prospective adopter must then be notified that the proposed placement is to be referred to the adoption panel<sup>17</sup>; and he must be given a copy of the placement report and invited to make observations<sup>18</sup>.

Provision is made for the reference of proposed placements where more than one agency is involved<sup>19</sup>. Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the state of origin<sup>20</sup>.

1    le a local authority or a registered adoption society: see paras 394-395 ante.

2    As to placements see para 331 et seq ante.

3    le, in England, a copy of the child's permanence report (as to which see para 433 ante) (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1)(a)); and, in Wales, a report about the child which must include the information set out in the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 5 (reg 32(1)(a)).

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1)(a).

5    Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1)(b).

6    Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1)(c)(i); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1)(c)(i).

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1)(c)(ii); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1)(c)(iii).

8 As to the provision of adoption support services see para 394 et seq ante.

9 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1)(c)(ii).

10 Ibid reg 32(1)(c).

11 Ibid reg 32(1)(d).

12 Where the procedures set out in ibid reg 32(1) (see the text and notes 1-10 supra) have been followed and the prospective adopter has confirmed to the agency in writing his agreement to the proposed placement, the agency must, in such cases as it considers appropriate and so far as is reasonably practicable in the light of the child's age and understanding, counsel the child and tell him about the prospective adopter, his family circumstances and home environment and ascertain the child's views about the proposed placement, contact arrangements and any restriction of the prospective adopter's parental responsibility: reg 32(2).

13 Where the agency is a local authority in England, it must carry out an assessment of the needs of the child and the prospective adopter and any children of the prospective adopter ('the adoptive family') for adoption support services in accordance with regulations made under the Adoption and Children Act 2002 s 4(6) (ie the Adoption Support Services Regulations 2005, SI 2005/691, and the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512) (see para 393 et seq ante) (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(a)); and where it is a registered adoption society in England, it must notify the prospective adopter that he may request the local authority in whose area he has his home ('the relevant authority') to carry out an assessment of his needs for adoption support services under the Adoption and Children Act 2002 s 4(1) (see para 415 ante) and pass to the relevant authority, at its request, a copy of the child's permanence report and a copy of the prospective adopter's report (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(b)). Where the agency is a local authority in Wales, it must carry out an assessment of the needs of the child and the prospective adoptive family for adoption support services in accordance with regulations made under the Adoption and Children Act 2002 s 4(6): Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(a).

14 Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(b).

15 Ibid reg 32(3)(c).

16 This report (in England referred to as 'the adoption placement report') must include: the agency's reasons for proposing the placement (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d)(i); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d)(i)); the information obtained by the agency by virtue of the Adoption Agencies Regulations 2005, SI 2005/389, reg 31(1) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(1), (2) (see the text and notes 1-12 supra) (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d)(ii); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d)(ii)); where the agency is a local authority in England, its proposals for the provision of adoption support services for the adoptive family (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d)(iii)); where the agency is a local authority in Wales, its proposals for the provision of adoption support services, if any, in accordance with regulations made under the Adoption and Children Act 2002 s 4(6) (see note 13 supra; and para 393 et seq ante) (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d)(iii)); the arrangements the agency proposes to make for allowing any person contact with the child (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d)(iv); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d)(iv)); in Wales, the agency's proposals for restricting the parental responsibility of any parent or guardian, or prospective adopter (reg 32(3)(d)(v)); and any other relevant information (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d)(v); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d)(vi)).

17 As to the establishment of adoption panels see para 428 ante.

18 In England, where the adoption agency remains of the view that the proposed placement should proceed, it must notify the prospective adopter that the proposed placement is to be referred to the adoption panel and give him a copy of the adoption placement report, inviting him to send any observations in writing to the agency within 10 working days beginning with the date on which the notification is sent (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(3) (amended by SI 2005/3482)); and at the end of that period (or earlier if observations are received before the 10 working days has expired) it must send to the adoption panel the adoption placement report (Adoption Agencies Regulations 2005, SI 2005/389, reg 31(4)(a)), the child's permanence report (reg 31(4)(b)) and the prospective adopter's report and his observations (reg 31(4)(c)). In Wales, the agency must notify the prospective adopter that the proposed placement is to be referred to the adoption panel and send the prospective adopter a copy of the agency's report referred to in the Adoption

Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3) (see the text and note 16 *supra*) and invite any observations on the report to be sent in writing to the agency within 10 working days beginning with the date on which the notification was sent (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(4)); and at the end of that period (or earlier if observations are received before the 10 working days have expired) it must send to the adoption panel the report referred to in reg 32(3) (reg 32(5)(a)), the report referred to in reg 17 (ie the permanence report: see para 433 *ante*) (reg 32(5)(b)), the report referred to in reg 26 (ie the prospective adopter's report: see para 438 *ante*) and any observations made by the prospective adopter on that report (reg 32(5)(c)) and any other relevant information obtained by the agency under reg 32 (reg 32(5)(d)). In both England and Wales, the agency must obtain so far as is reasonably practicable any other relevant information which may be requested by the panel in connection with the proposed placement and send that information to the panel: Adoption Agencies Regulations 2005, SI 2005/389, reg 31(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(8).

19 In England, where an adoption agency ('agency A') intends to refer a proposed placement to the adoption panel and another agency ('agency B') made the decision (in accordance with the Adoption Agencies Regulations 2005, SI 2005/389) that the child should be placed for adoption (reg 31(6)(a)) or the prospective adopter is suitable to be an adoptive parent (reg 31(6)(b)), agency A may refer the proposed placement to the adoption panel only if it has consulted agency B about the proposed placement (reg 31(7)); agency A must also open a child's case record (where agency B has made the decision that the prospective adopter is suitable to be an adoptive parent) (reg 31(8)(a)) or a prospective adopter's case record (where agency B has made the decision that the child should be placed for adoption) (reg 31(8)(b)), and must place on the appropriate record, the information and documents received from agency B (reg 31(8)). In Wales, an agency may only refer to the adoption panel its proposal to place a child for adoption with a particular prospective adopter if any other adoption agency which has made a decision in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, that the child should be placed for adoption, or that the prospective adopter is suitable to adopt a child, has been consulted about the proposed placement (reg 32(6)); and where the agency proposes to place a child for adoption with a particular prospective adopter, it must set up case records in any case where it has not already set up such records and place on the appropriate record any information, report, recommendation or decision referred to it by another adoption agency together with any other information to be sent to the adoption panel by virtue of reg 32 (reg 32(7)).

20 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 43; and para 497 *post*.

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#### **443. Functions of adoption panel.**

Where an adoption agency<sup>1</sup> has referred a proposed placement to the adoption panel<sup>2</sup>, the panel must consider the proposed placement and make a recommendation to the agency as to whether the child should be placed for adoption with that particular prospective adopter<sup>3</sup>. In considering what recommendation to make, the panel:

- 770 (1) must have regard to the statutory duties imposed on the agency<sup>4</sup>;
- 771 (2) must consider and take into account all information and the reports passed<sup>5</sup> to it<sup>6</sup>;
- 772 (3) may request the agency to obtain any other relevant information which the panel considers necessary<sup>7</sup>; and
- 773 (4) may (or, in Wales, must) obtain legal advice as it considers necessary in relation to the case<sup>8</sup>.

The panel must also consider (and, where the panel makes a recommendation to the agency that the child should be placed for adoption with that particular prospective adopter, may consider and at the same time give advice to the adoption agency about):

- 774 (a) in a case where the agency is a local authority, the authority's proposals for the provision of adoption support services<sup>9</sup>;
- 775 (b) the arrangements the agency proposes to make for allowing any person contact with the child<sup>10</sup>;
- 776 (c) in Wales, whether an application should be made for a placement order<sup>11</sup>; and
- 777 (d) whether any restrictions on parental responsibility should be imposed<sup>12</sup>.

Additional requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the state of origin<sup>13</sup>.

<sup>1</sup> ie a local authority or a registered adoption society: see paras 394-395 ante.

<sup>2</sup> ie under the Adoption Agencies Regulations 2005, SI 2005/389, reg 31 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32 (see para 442 ante). As to the establishment of adoption panels see para 428 ante. As to placements see para 331 et seq ante.

<sup>3</sup> Adoption Agencies Regulations 2005, SI 2005/389, reg 32(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(1). The agency may make this recommendation only if the recommendation is to be made at the same meeting of the panel at which a recommendation has been made that the child should be placed for adoption (Adoption Agencies Regulations 2005, SI 2005/389, reg 32(5)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(4)(a)) or the agency, or another adoption agency, has already made a decision in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 19 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19 (see para 434 ante) that the child should be placed for adoption (Adoption Agencies Regulations 2005, SI 2005/389, reg 32(5)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(4)(b)), and in either case that recommendation is to be made at the same meeting of the panel at which a recommendation has been made that the prospective adopter is suitable to adopt a child or the agency, or another agency, has made a decision in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 27 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28 (see para 440 ante) that the prospective adopter is suitable to adopt a child (Adoption



Agencies Regulations 2005, SI 2005/389, reg 32(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(4)).

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(2). The statutory duties imposed on the agency are those imposed under the Adoption and Children Act 2002 s 1(2), (4), (5) (considerations applying to the exercise of powers in relation to the adoption of a child: see paras 327, 329 ante): Adoption Agencies Regulations 2005, SI 2005/389, reg 32(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(2).

5 le in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 31 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32 (see para 442 ante).

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(2)(a).

7 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(2)(b).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(2)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(2)(c).

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(3)(a), (4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(3)(i). As to the provision of adoption support services see para 394 et seq ante. In England, this duty is expressed as a duty to consider the authority's proposals for the provision of adoption support services for the adoptive family: Adoption Agencies Regulations 2005, SI 2005/389, reg 32(3)(a).

10 Ibid reg 32(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(3)(ii).

11 Ibid reg 33(3)(iii).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 32(3)(c) (requiring that the agency must consider whether the parental responsibility of any parent or guardian or the prospective adopter should be restricted and if so the extent of any such restriction); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(3)(iv) (providing that where the agency is authorised to place the child for adoption, it must consider whether it considers any person's parental responsibility should be restricted and, if so, the extent of any such restriction).

13 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 44; and para 497 post.

## **UPDATE**

### **443 Functions of adoption panel**

NOTE 4--See also *R (on the application of A) v Newham LBC* [2008] EWHC 2640 (Admin), [2009] 1 FCR 545.

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#### **444. Adoption agency decision.**

In coming to a decision about whether a child should be placed for adoption with a particular prospective adopter<sup>1</sup>, an adoption agency<sup>2</sup> must take into account the recommendation<sup>3</sup> of the adoption panel<sup>4</sup>; in Wales, an agency must also take into account any advice given<sup>5</sup> by the panel<sup>6</sup> and have regard to the child's continuing welfare<sup>7</sup>. As soon as possible after making its decision, the agency must give written notification of its decision about the proposed placement to the prospective adopter<sup>8</sup>, the parent or guardian (if their whereabouts are known to the agency<sup>9</sup>) and, in specified circumstances, the father of the child<sup>10</sup>; in Wales, the agency is also required, as soon as possible after making its decision, to notify the prospective adopter in writing of contact arrangements and the restriction of any person's parental responsibility<sup>11</sup>. Where the agency decides the proposed placement should proceed, it must also, in an appropriate manner and in the light of the child's age and understanding, explain its decision to the child<sup>12</sup>.

Where an agency receives from a relevant foreign authority<sup>13</sup> information about a child to be adopted by a prospective adopter in a section 83 case<sup>14</sup>, it is required to give specified additional information to the prospective adopter<sup>15</sup>. Further requirements are imposed in connection with a proposed Convention adoption where the United Kingdom is the state of origin<sup>16</sup>.

1 As to placements see para 331 et seq ante. No member of the adoption panel may take part in any decision made about whether a child should be placed for adoption with a particular prospective adopter under the Adoption Agencies Regulations 2005, SI 2005/389, reg 32(1) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(1); Adoption Agencies Regulations 2005, SI 2005/389, reg 33(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(2). As to the establishment of adoption panels see para 428 ante.

2 Ie a local authority or a registered adoption society: see paras 394-395 ante.

3 Ie the recommendation under the Adoption Agencies Regulations 2005, SI 2005/389, reg 32 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33 (see para 443 ante).

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 33(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(1)(a).

5 Ie in accordance with *ibid* reg 33(3) (see para 443 ante).

6 *Ibid* reg 34(1)(b).

7 *Ibid* reg 34(1)(c). This is the consideration set out in the Adoption and Children Act 2002 s 1(2) (ie the agency's paramount consideration: see para 327 ante).

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 33(3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(3). As to the liability of an agency in relation to information which should be shared with adopters see *A v Essex County Council* [2003] EWCA Civ 1848, [2004] 1 FLR 749.

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 33(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(4)(a).

10 In England, where the Adoption Agencies Regulations 2005, SI 2005/389, reg 14(3) applies (ie where the father of a child does not have parental responsibility for the child and his identity is known to the agency: see para 432 ante), the agency must, where it considers it is appropriate, give written notification to the father of

the child of the fact that the child is to be placed for adoption (reg 33(3)(b)); in Wales, where the corresponding provision of the Adoption Agencies Regulations 2005, SI 2005/389 (ie reg 14(2): see para 432 ante) applies, the agency must give written notification to the father of the child of its decision (reg 34(4)(b)).

11 Ibid reg 34(3).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 33(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(5).

13 'Relevant foreign authority' means a person outside the British Islands performing functions in the country in which the child is, or in which the prospective adopter is, habitually resident which correspond to the functions of an adoption agency or to the functions of the Secretary of State or the Welsh Ministers in respect of adoptions with a foreign element: Adoption Agencies Regulations 2005, SI 2005/389, reg 2(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 2(1). As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. For the meaning of 'British Islands' see para 103 note 6 ante. As to the Secretary of State and the Welsh Ministers see para 155 ante.

14 For the meaning of 'section 83 case' see para 435 note 3 ante.

15 The agency must send a copy of the information to the prospective adopter unless it is aware that the prospective adopter has received a copy (Adoption Agencies Regulations 2005, SI 2005/389, reg 34(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 35(2)(a)); consider that information and meet with the prospective adopter to discuss the information (Adoption Agencies Regulations 2005, SI 2005/389, reg 34(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 35(2)(b), (c)); and, if appropriate, provide a counselling service for, and any further information to, the prospective adopter as may be required (Adoption Agencies Regulations 2005, SI 2005/389, reg 34(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 35(2)(d)). In England, these requirements apply where in a section 83 case the adoption agency receives from the relevant foreign authority information about a child to be adopted by a prospective adopter (Adoption Agencies Regulations 2005, SI 2005/389, reg 34(1)); in Wales, these requirements apply where in a section 83 case an agency receives from the relevant foreign authority information about a child to be adopted by a prospective adopter whom the agency has approved as suitable to adopt a child (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 35(1)).

16 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 45; and para 497 post.

## **UPDATE**

### **444 Adoption agency decision**

NOTE 10--SI 2005/1313 reg 34(4)(b) amended: SI 2009/1892.

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#### **445. Pre-placement requirements.**

Where an adoption agency<sup>1</sup> has decided<sup>2</sup> to place a child for adoption with a particular prospective adopter<sup>3</sup> and has met with the prospective adopter to consider the arrangements it proposes to make for the placement of the child with him<sup>4</sup>, it must send the prospective adopter a placement plan in respect of the child<sup>5</sup> and, before the child is placed for adoption with the prospective adopter:

- 778 (1) notify the prospective adopter's general practitioner in writing of the proposed placement and send with that notification a written report of the child's health history and current state of health<sup>6</sup>;
- 779 (2) notify the local authority (if that authority is not the adoption agency) and, as applicable, the primary care trust<sup>7</sup> or the local health board<sup>8</sup> in whose area the prospective adopter resides in writing of the proposed placement<sup>9</sup>;
- 780 (3) notify the local education authority<sup>10</sup> in whose area the prospective adopter resides in writing of the proposed placement and send information about the child's educational history and whether the child has been or is likely to be assessed<sup>11</sup> for special educational needs<sup>12</sup>.

In Wales, the agency must, before the child is placed for adoption with the prospective adopter, arrange for the prospective adopter to meet the child and following that meeting counsel the prospective adopter and, so far as is reasonably practicable in the light of the child's age and understanding, the child about the prospective placement<sup>13</sup>.

1    le a local authority or a registered adoption society: see paras 394-395 ante.

2    le in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 33 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 (see para 444 ante).

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 35(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(1)(a).

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 35(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(1)(b).

5    Adoption Agencies Regulations 2005, SI 2005/389, reg 35(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(2). The plan (known as 'the adoption placement plan' in England and 'the placement plan' in Wales) must contain specified information concerning the proposed placement: see the Adoption Agencies Regulations 2005, SI 2005/389, Sch 5 (amended by SI 2005/3482); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 6. In England, it must be sent to the prospective adopter as soon as possible (Adoption Agencies Regulations 2005, SI 2005/389, reg 35(2)); in Wales, it must be sent at least seven days before the child is placed with the prospective adopter or, if the child already lives with the prospective adopter, must be sent within seven days of the agency's decision to place the child for adoption with the prospective adopter (Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(2), (3)). The agency must notify the prospective adopter in writing of any change to the plan: Adoption Agencies Regulations 2005, SI 2005/389, reg 35(7); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(5).

6    Adoption Agencies Regulations 2005, SI 2005/389, reg 35(6)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(4)(a).

7 As to primary care trusts, which exist only in England, see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

8 As to local health boards, which exist only in Wales (and which exercise the functions of, inter alia, the former health authorities in Wales), see the National Health Service (Wales) Act 2006 ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74.

9 Adoption Agencies Regulations 2005, SI 2005/389, reg 35(6)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(4)(b).

10 As to local education authorities see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

11 *Ie* under *ibid* s 323 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 988 et seq).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 35(6)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36(4)(c).

13 *Ibid* reg 36(6). Where following these procedures the prospective adopter confirms in writing his wish to proceed with the placement and the agency is authorised to place the child for adoption or the child is less than six weeks old, the agency may place the child for adoption with the prospective adopter: reg 36(7). Where the child already lives with the prospective adopter, the agency must notify the prospective adopter in writing of the date on which the child is placed there for adoption by the agency: reg 36(8).

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#### **446. Reviews of placements and pending placements.**

An adoption agency<sup>1</sup> is required to conduct regular reviews of children's cases, both before and after their placement for adoption<sup>2</sup>. Where an agency is authorised to place a child for adoption but the child is not for the time being placed for adoption, it must carry out a review of the child's case not more than three months after the date on which the agency first has authority to place<sup>3</sup> and thereafter not more than six months after the date of the previous review ('six months review')<sup>4</sup>, until the child is placed for adoption; and where a child is placed for adoption the agency must (in addition to specific requirements) carry out a review of his case not more than four weeks after the date on which the child is placed ('the first review')<sup>5</sup>, not more than three months after the first review<sup>6</sup> and thereafter not more than six months after the date of the previous review<sup>7</sup>, unless the child is returned to the agency by the prospective adopter or an adoption order is made<sup>8</sup>.

When carrying out a review the agency must consider:

- 781 (1) whether the agency remains satisfied that the child should be placed (or continue to be placed) for adoption<sup>9</sup>;
- 782 (2) the child's needs, welfare and development (and, in Wales, progress), and whether any changes need to be made to meet his needs or assist his development<sup>10</sup>;
- 783 (3) the existing arrangements for contact, and whether they should continue or be altered<sup>11</sup>;
- 784 (4) the arrangements in relation to the exercise of parental responsibility for the child, and whether they should continue or be altered<sup>12</sup>;
- 785 (5) the arrangements for the provision of adoption support services (in England, for the adoptive family) and whether there should be any re-assessment of the need for those services<sup>13</sup>;
- 786 (6) in consultation with the appropriate agencies, the arrangements for assessing and meeting the child's health care and educational needs<sup>14</sup>; and
- 787 (7) subject to the statutory timetable for reviews<sup>15</sup>, the frequency of the reviews<sup>16</sup>.

An agency must also visit the child<sup>17</sup> and must, so far as is reasonably practicable, ascertain the views of the child (having regard to his age and understanding)<sup>18</sup>, the prospective adopter (if the child is placed for adoption)<sup>19</sup> and any other person the agency considers relevant<sup>20</sup>, in relation to such of the matters set out in heads (1) to (7) above (in England) or heads (1) to (6) above (in Wales) as the agency considers appropriate<sup>21</sup>.

Particular provision is also made as to the carrying out of the first six months review where the child in question is subject to a placement order and has not been placed for adoption at the time of that review<sup>22</sup>.

A child's case must also be reviewed if he is returned to an adoption agency<sup>23</sup>, and an agency must also review a decision to place a child for adoption where consent to the adoption is withdrawn<sup>24</sup>.

1     le a local authority or a registered adoption society: see paras 394-395 ante.

2     See the Adoption Agencies Regulations 2005, SI 2005/389, reg 36(1); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37; and the text and notes 3-22 infra. Where on or after 30 December 2005 a child is free for adoption by virtue of a freeing order made under the Adoption Act 1976 s 18 (repealed as from that date by the Adoption and Children Act 2002 s 139, Sch 5) but is not placed for adoption, the Adoption Agencies Regulations 2005, SI 2005/389, reg 36 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37 apply as if the adoption agency was authorised to place the child for adoption but the child is not for the time being placed for adoption and the child was subject to a placement order: see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 4(b).

3     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(1)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(1), (3)(a).

4     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(3)(b).

5     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(2), (3)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(2), (4)(a).

6     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(3)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(4)(b).

7     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(3)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(4)(c).

8     As to the return of children who have been placed for adoption see para 348 et seq ante; and as to the making of adoption orders see para 359 ante.

9     Adoption Agencies Regulations 2005, SI 2005/389, reg 36(5), (6)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(a).

10    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(b).

11    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(c).

12    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(d) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(d). In Wales, this requirement applies only in connection with a child placed for adoption: reg 37(7)(d).

13    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(e) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(e). In England, this requirement applies only in connection with a child placed for adoption: Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(e) (as so amended). As to the provision of adoption support services see para 394 et seq ante.

14    Ibid reg 36(6)(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(f).

15    Ie subject to the Adoption Agencies Regulations 2005, SI 2005/389, reg 36(1), (3) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(3), (4) (see the text and notes 1-8 supra).

16    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(6)(g); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(7)(g).

17    Where a child is placed for adoption, the adoption agency must ensure that the child and the prospective adopter are visited within one week of the placement and thereafter at least once a week until the first review and thereafter at such frequency as the agency decides at each review (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(4)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(5)(a)); ensure that written reports are made of such visits (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(4)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(5)(b)); and provide such advice and assistance to the prospective adopter as the agency considers necessary (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(4)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(5)(c)).

18    Adoption Agencies Regulations 2005, SI 2005/389, reg 36(5)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(6)(a).

19 Adoption Agencies Regulations 2005, SI 2005/389, reg 36(5)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(6)(b).

20 Adoption Agencies Regulations 2005, SI 2005/389, reg 36(5)(c); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(6)(c).

21 Adoption Agencies Regulations 2005, SI 2005/389, reg 36(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(6).

22 In these circumstances, the local authority must at the review establish why the child has not been placed for adoption and consider what further steps the authority should take in relation to the placement of the child for adoption (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(7)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(8)(a)); and it must consider whether it remains satisfied that the child should be placed for adoption (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(7)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(8)(b)). The agency must ensure that the information obtained in the course of a review (or, in England, visit) in respect of a child's case including the views expressed by the child (in England) or the ascertainable wishes and feelings of the child (in Wales), the details of the proceedings of any meeting arranged by the agency to consider any aspect of the review of the case, and details of any decision made in the course of or as a result of the review (including, in Wales, as to frequency of visits) are recorded in writing and placed on the child's case record (Adoption Agencies Regulations 2005, SI 2005/389, reg 36(9); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(9)(b)). In Wales, the agency must also set out in writing the arrangements governing the manner in which the case of each child is to be reviewed and must draw the written arrangements to the attention of the child where reasonably practicable in the light of the child's age and understanding, the prospective adopter and any other person the agency considers relevant (reg 37(9)(a)). In both England and Wales, the agency must, so far as is reasonably practicable, notify the child (where it considers him to be of sufficient age and understanding), the prospective adopter and any other person whom it considers ought to be notified, of the outcome of the review and of any decision taken by the agency in consequence of the review: Adoption Agencies Regulations 2005, SI 2005/389, reg 36(8) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(10).

23 Ie under the Adoption and Children Act 2002 s 35(1) or (2): see paras 350-351 ante.

24 See para 371 ante.



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## **D. ADMINISTRATION**

### **447. The child's case record.**

Where an adoption agency<sup>1</sup> is considering adoption for a child<sup>2</sup> it must set up a case record in respect of the child<sup>3</sup>.

In England, the agency must place on the record:

- 788 (1) the information and reports obtained<sup>4</sup> by the agency<sup>5</sup>;
- 789 (2) the child's permanence report<sup>6</sup>;
- 790 (3) the written record of the relevant considerations and recommendation of the adoption panel<sup>7</sup>;
- 791 (4) the record of the agency's decision and any notification<sup>8</sup> of that decision<sup>9</sup>;
- 792 (5) any consent<sup>10</sup> to placement for adoption<sup>11</sup>;
- 793 (6) any consent<sup>12</sup> to the making of a future adoption order<sup>13</sup>;
- 794 (7) any form or notice withdrawing consent<sup>14</sup> or notice<sup>15</sup> requesting to be informed as to future applications for adoption orders (or withdrawing such request)<sup>16</sup>;
- 795 (8) a copy of any placement order in respect of the child<sup>17</sup>;
- 796 (9) the prospective adopter's report<sup>18</sup>;
- 797 (10) the adoption placement report<sup>19</sup> and the prospective adopter's observations on that report<sup>20</sup>;
- 798 (11) the written record of the proceedings of the adoption panel in relation to a proposed placement<sup>21</sup>, its recommendation, the reasons for its recommendation and any advice given by the panel to the agency<sup>22</sup>;
- 799 (12) the record and notification of the agency's decision<sup>23</sup> in relation to a proposed placement<sup>24</sup>;
- 800 (13) in the case of a child who is less than six weeks old and in respect of whom there is no placement order, a copy of the adoption agreement<sup>25</sup> relating to him<sup>26</sup>;
- 801 (14) a copy of the adoption placement plan and any changes to that plan<sup>27</sup>; and
- 802 (15) any other documents or information obtained by the agency which it considers should be included in that case record<sup>28</sup>.

In Wales, the agency must place on the child's case record any information obtained and any report, recommendation or decision made by virtue of the applicable legislation<sup>29</sup>, and if the agency is a local authority it is specifically required to place on the case record:

- 803 (a) any information and reports obtained by the authority in respect of the child<sup>30</sup>;
- 804 (b) the child's permanence report<sup>31</sup>;
- 805 (c) any written record of any proceedings of an adoption panel<sup>32</sup> in relation to a referred child, its recommendation as to whether or not a child should be placed for adoption and the reasons for its recommendation and any advice given by the panel to an adoption agency<sup>33</sup>;
- 806 (d) any record of an adoption agency's decision and any notification<sup>34</sup> of that decision<sup>35</sup>;

- 807 (e) details of any consent by a parent or guardian of a child to placement for adoption<sup>36</sup>;
- 808 (f) details of any consent by a parent or guardian of a child to the making<sup>37</sup> of a future adoption order<sup>38</sup>;
- 809 (g) any form or notice withdrawing consent<sup>39</sup> or notice<sup>40</sup> requesting to be informed as to future applications for adoption orders (or withdrawing such request)<sup>41</sup>;
- 810 (h) a copy of any placement order in respect of the child<sup>42</sup>; and
- 811 (i) any other documents or information obtained by the authority which it considers should be included in the case record<sup>43</sup>.

Where the child is looked after<sup>44</sup> or provided<sup>45</sup> with accommodation<sup>46</sup> the local authority or, as the case may be, the registered adoption society<sup>47</sup> must obtain any information which is required<sup>48</sup> to be obtained<sup>49</sup> by the agency and place that information on the case record<sup>50</sup>.

1    Ie a local authority or a registered adoption society: see paras 394-395 ante.

2    Adoption Agencies Regulations 2005, SI 2005/389, reg 11 (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 11.

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 12(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12(1).

4    Ie by virtue of the Adoption Agencies Regulations 2005, SI 2005/389, Pt 3 (regs 11-20A) (as amended). Provision is made as to the information and reports required to be obtained about the child whose adoption is being considered (reg 15, Sch 1 Pts 1, 2) and as to the information and reports required to be obtained about the child's family (reg 16, Sch 1 Pts 3, 4) (see para 431 ante).

5    Ibid reg 12(1)(a).

6    Ibid reg 12(1)(b). Provision is made for the preparation of the child's permanence report: see reg 17 (as amended); and para 433 ante.

7    Ibid reg 12(1)(c). As to the establishment of adoption panels see para 428 ante. The written record is of the proceedings of the panel under reg 18 (see para 434 ante), its recommendation and the reasons for its recommendation, and any advice given by the panel to the agency: reg 12(1)(c).

8    Ie under ibid reg 19 (see para 434 ante).

9    Ibid reg 12(1)(d).

10   Ie under the Adoption and Children Act 2002 s 19 (placing children with parental consent: see para 332 ante).

11   Adoption Agencies Regulations 2005, SI 2005/389, reg 12(1)(e).

12   Ie under the Adoption and Children Act 2002 s 20 (advance consent to adoption: see para 333 ante).

13   Adoption Agencies Regulations 2005, SI 2005/389, reg 12(1)(f).

14   Ie under the Adoption and Children Act 2002 s 19 or s 20 (see paras 332-333 ante).

15   Ie under ibid s 20(4)(a) or (b) (see para 333 ante). Where an agency places on the child's case record a notice under s 20(4)(a) or (b) it must send a copy of that notice to a court which has given the agency notice of the issue of an application for an adoption order: Adoption Agencies Regulations 2005, SI 2005/389, reg 12(2). As to the court see para 511 post.

16   Ibid reg 12(1)(g).

17   Ibid reg 12(1)(h). As to placements and placement orders see para 331 et seq ante.

18   Ibid reg 33(5)(a). As to the prospective adopter's report see reg 25(5); and para 438 ante.

- 19 As to the adoption placement report see para 442 ante.
- 20 Adoption Agencies Regulations 2005, SI 2005/389, reg 33(5)(b).
- 21 *Ie* under *ibid* reg 32 (see para 443 post).
- 22 *Ibid* reg 33(5)(c).
- 23 *Ie* under *ibid* reg 33 (see para 444 post).
- 24 *Ibid* reg 33(5)(d).
- 25 *Ie* the agreement referred to in *ibid* reg 35(4) (see para 331 ante).
- 26 *Ibid* reg 35(8)(a).
- 27 *Ibid* reg 35(8)(b). As to the adoption placement plan see reg 35; and para 445 ante.
- 28 *Ibid* reg 12(1)(i).
- 29 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12(1). The 'applicable legislation' is the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313.
- 30 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 6(1)(a).
- 31 *Ibid* reg 6(1)(b).
- 32 *Ie* under the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18 (see para 434 ante).
- 33 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 6(1)(c).
- 34 *Ie* under the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19 (see para 434 ante).
- 35 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 6(1)(d).
- 36 *Ibid* reg 6(1)(e). As to the placement referred to in the text see the Adoption and Children Act 2002 s 19; and para 332 ante.
- 37 *Ie* under *ibid* s 20 (see para 333 ante).
- 38 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 6(1)(f).
- 39 *Ie* under the Adoption and Children Act 2002 s 19 or s 20 (see paras 332-333 ante).
- 40 *Ie* under *ibid* s 20(4)(a) or (b) (see para 333 ante).
- 41 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 6(1)(g).
- 42 *Ibid* reg 6(1)(h).
- 43 *Ibid* reg 6(1)(i).
- 44 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12(2)(a).
- 45 *Ie* under the Children Act 1989 s 59(1) (provision of accommodation by voluntary organisations: see para 975 post).
- 46 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12(2)(b).
- 47 For the meaning of 'registered adoption society' see para 395 note 3 ante; definition applied by the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 2(1).
- 48 *Ie* by virtue of *ibid* Pt 3 (regs 11-20) (see para 431 et seq ante).
- 49 *Ie* from the records maintained with respect to the child under the Children Act 1989.
- 50 Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12(2).



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#### **448. The prospective adopter's case record.**

Where an adoption agency<sup>1</sup>, following the procedures in connection with the provision of counselling and information<sup>2</sup>, receives an application from a prospective adopter for an assessment of suitability to adopt a child, it must set up a case record in respect of that prospective adopter<sup>3</sup>.

In England, the agency must place on the prospective adopter's case record:

- 812 (1) the application by the prospective adopter for an assessment of his suitability to adopt a child<sup>4</sup>;
- 813 (2) the information and reports obtained<sup>5</sup> by the agency<sup>6</sup>;
- 814 (3) the prospective adopter's report and his observations on that report<sup>7</sup>;
- 815 (4) the written record of the proceedings of the adoption panel<sup>8</sup>, its recommendation and the reasons for its recommendation and any advice given by the panel to the agency<sup>9</sup>;
- 816 (5) the record of the agency's decision<sup>10</sup> as to approval<sup>11</sup>;
- 817 (6) where the prospective adopter applied to the Secretary of State for a review by an independent review panel<sup>12</sup>, the recommendation of that review panel<sup>13</sup>;
- 818 (7) where applicable, the prospective adopter's review report<sup>14</sup> and his observations on that report<sup>15</sup>; and
- 819 (8) any other documents or information obtained by the agency which it considers should be included in that case record<sup>16</sup>.

No specific provision as to the contents of the prospective adopter's case record is made in relation to Wales<sup>17</sup>.

1    Ie a local authority or a registered adoption society: see paras 394-395 ante.

2    Ie the procedures referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 21 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 21 (see para 435 ante).

3    Adoption Agencies Regulations 2005, SI 2005/389, reg 22(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(1). In Wales, where this provision applies in relation to a couple the agency must set up a single case record: reg 22(3).

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 22(3)(a). This is the assessment referred to in reg 22(1) (see para 435 ante).

5    Ie by virtue of *ibid* Pt 4 (regs 21-30) (see paras 435-441 ante).

6    *Ibid* reg 22(3)(b).

7    *Ibid* reg 22(3)(c). As to the prospective adopter's report see reg 25(5); and para 438 ante.

8    Ie under *ibid* reg 26 (and, where applicable, reg 27(6)): see paras 439-440 ante. As to the establishment of adoption panels see para 428 ante.

9    *Ibid* reg 22(3)(d).

10   Ie under *ibid* reg 27(3), reg 27(5) or, as the case may be, reg 27(9) (see para 440 ante).

- 11 Ibid reg 22(3)(e).
- 12 As to a review by an independent review panel see para 440 ante.
- 13 Adoption Agencies Regulations 2005, SI 2005/389, reg 22(3)(f).
- 14 As to the prospective adopter's review report see para 441 ante.
- 15 Adoption Agencies Regulations 2005, SI 2005/389, reg 22(3)(g).
- 16 Ibid reg 22(3)(h).
- 17 See the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22.

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#### **449. Administration of case records.**

Adoption agencies<sup>1</sup> must ensure that a child's case record<sup>2</sup> and a prospective adopter's case record<sup>3</sup>, and the contents thereof, are at all times kept in secure conditions and in particular that all appropriate measures are taken to prevent the theft, unauthorised disclosure, loss or destruction of, or damage to, the case record or its contents<sup>4</sup>.

Unless specifically excluded by regulations authorising disclosure<sup>5</sup>, an agency must keep case records for such period as it considers appropriate<sup>6</sup> (and in Wales, where an adoption order is made in relation to a child, the agency must keep all relevant case records for at least 100 years<sup>7</sup>); and, subject to the provisions as to access and disclosure set out below, an agency must treat the contents of case records (in England) and any information obtained or reports, recommendations or decisions made by virtue of the applicable regulations (in Wales) as confidential<sup>8</sup>. The provisions as to access and disclosure are that, unless specifically excluded<sup>9</sup>, an agency must provide such access to its case records and disclose such information in its possession as may be required:

- 820 (1) to persons holding an inquiry<sup>10</sup>, for the purposes of such an inquiry<sup>11</sup>;
- 821 (2) to the Secretary of State or the Welsh Ministers<sup>12</sup>;
- 822 (3) to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>13</sup> ('the registration authority') or, for the purposes of conducting an examination<sup>14</sup>, the Children's Commissioner for Wales<sup>15</sup>;
- 823 (4) for the purposes of an investigation into maladministration<sup>16</sup>, to the Commission for Local Administration in England<sup>17</sup> or the Public Services Ombudsman for Wales<sup>18</sup>;
- 824 (5) to any person appointed by the agency for the purposes of the consideration by the agency of any representations (including complaints)<sup>19</sup>;
- 825 (6) by and to the extent specified in the regulations governing adoption agencies<sup>20</sup>;
- 826 (7) to an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>21</sup> or a Welsh family proceedings officer for the purposes of the discharge of his duties under the Adoption and Children Act 2002<sup>22</sup>; and
- 827 (8) to a court having power to make an order under the Adoption and Children Act 2002 or the Children Act 1989<sup>23</sup>,

and that the agency may provide such access to its case records and disclose such information in its possession as it thinks fit for the purposes of carrying out its functions as an adoption agency<sup>24</sup>. A written record must be kept by the agency of any access provided or disclosure made by virtue of these provisions<sup>25</sup>. Provision is also made for the continuing application of former legislation governing the retention, storage, transfer and disclosure of information relating to a person adopted before 30 December 2005<sup>26</sup>.

1    le local authorities and registered adoption societies: see paras 394-395 ante.

2    See para 447 ante.

3    See para 448 ante.

4 Adoption Agencies Regulations 2005, SI 2005/389, reg 39; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 40.

5 The Adoption Agencies Regulations 2005, SI 2005/389, regs 40-42 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 41-43 (see the text and notes 6-25 *infra*) do not apply to case records which are subject to the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, or the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689 (see paras 473-479 *post*): Adoption Agencies Regulations 2005, SI 2005/389, reg 44; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 45.

6 Adoption Agencies Regulations 2005, SI 2005/389, reg 40; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 41.

7 *Ibid* reg 41.

8 Adoption Agencies Regulations 2005, SI 2005/389, reg 41; Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 42. For these purposes, 'the applicable regulations', in Wales, are the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313.

In connection with the confidentiality requirement see *R v Bournemouth Justices, ex p Grey, R v Bournemouth Justices, ex p Rodd* [1987] 1 FLR 36, [1986] Fam Law 337; *Re an ex parte originating summons in an adoption application* [1990] 1 All ER 639n, sub nom *Re an adoption application* [1990] 1 WLR 520; *Re R (a child) (adoption: disclosure)* [2001] 1 FCR 238, sub nom *Z County Council v R* [2001] 1 FLR 365. The confidentiality applies to documents in the custody or control of an adoption agency which have never been placed before the court: *Re H (a minor) (originating application in adoption proceedings)* [1995] 2 FCR 711, sub nom *Re H (criminal proceedings: disclosure of adoption records)* [1995] 1 FLR 964; *Re L (adoption: disclosure of information)* [1998] Fam 19, sub nom *D v Registrar General* [1997] 1 FLR 715, CA. As to confidentiality generally see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 401 *et seq*.

9 See note 5 *supra*.

10 *Ie*, in England, an inquiry under the Children Act 2004 ss 3, 4 (inquiries held by the Children's Commissioner: see para 165 *ante*) or under the Inquiries Act 2005 (see ADMINISTRATIVE LAW) or, in Wales, under the Children Act 1989 s 81 (repealed) or the Adoption and Children Act 2002 s 17 (repealed): Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(a) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(a).

11 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(a) (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(a).

12 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(b). As to the Secretary of State and the Welsh Ministers see para 155 *ante*.

13 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 *ante*; and EDUCATION.

14 *Ie* for the purposes of any examination conducted in accordance with the Care Standards Act 2000 Pt V (ss 72-78) (as amended) (see para 167 *et seq ante*), subject to the provisions of s 74(5): Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(c).

15 Adoption Agencies Regulations 2005, SI 2005/389, regs 2(1), 42(1)(c) (reg 2(1) amended by SI 2007/603); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(c). As to the Children's Commissioner for Wales see para 167 *ante*.

16 *Ie* for the purposes of any investigation into maladministration conducted in accordance with the Local Government Act 1974 Pt 3 (ss 23-34) (as amended) (investigations and disclosure: see LOCAL GOVERNMENT vol 69 (2009) PARA 839 *et seq*), subject to the provisions of ss 29(7), 32(3): Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(d) (amended by SI 2006/362).

17 As to the Commission for Local Administration in England see LOCAL GOVERNMENT vol 69 (2009) PARA 839 *et seq*.

18 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(d); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(d) (amended by SI 2006/362). As to the Public Services Ombudsman for Wales see the Public Services Ombudsman (Wales) Act 2005; and ADMINISTRATIVE LAW.



19 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(e); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(e).

20 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(f); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(f). The regulations governing adoption agencies are the Adoption Agencies Regulations 2005, SI 2005/389, and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313.

21 As to CAFCASS see para 230 et seq ante.

22 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(g); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(g).

23 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(1)(h); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(1)(h). As to the court see para 511 post.

24 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(2); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(2).

25 Adoption Agencies Regulations 2005, SI 2005/389, reg 42(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 43(3).

26 See the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 13, which provides that, notwithstanding the repeal of the provisions of the Adoption Act 1976 set out in the Adoption and Children Act 2002 Sch 5, the provisions of the Adoption Agencies Regulations 1983, SI 1983/1964, continue to have effect in so far as they relate to the retention, storage, transfer and disclosure of information in relation to the adoption of a person adopted before 30 December 2005, and the Adoption Act 1976 s 9 (repealed) continues to have effect for the purposes of amending or revoking the Adoption Agencies Regulations 1983, SI 1983/1964. For the relevant provisions see in particular regs 15, 16 (amended by SI 1997/649; SI 2002/3220; SI 2003/367; SI 2005/774). As to the relevant legislation for adoptions generally before and after 30 December 2005 see para 375 ante.

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#### **450. Transfer of case records.**

An adoption agency<sup>1</sup> may transfer a copy of a child's case record<sup>2</sup> or prospective adopter's case record<sup>3</sup> (or part of that record) to another adoption agency when it considers this to be in the interests of the child or prospective adopter to whom the record relates; a written record must be kept of any such transfer<sup>4</sup>. A registered adoption society which intends to cease to act or exist as such must forthwith either transfer its case records to another adoption agency having first obtained the registration authority's approval for such transfer, or transfer its case records to the local authority in whose area the society's principal office is situated<sup>5</sup> or in the case of a society which amalgamates with another registered adoption society to form a new registered adoption society, to the new body<sup>6</sup>; an agency to which case records are so transferred must notify the registration authority in writing of such transfer<sup>7</sup>. In Wales, where a registered adoption society intends to cease to provide for the adoption of children but is registered to provide adoption support services, it may retain all its case records having first obtained the registration authority's approval in writing for such retention<sup>8</sup>. Provision is also made for the continuing application of former legislation governing the retention, storage, transfer and disclosure of information relating to a person adopted before 30 December 2005<sup>9</sup>.

1    The local authorities and registered adoption societies: see paras 394-395 ante.

2    See para 447 ante.

3    See para 448 ante.

4    Adoption Agencies Regulations 2005, SI 2005/389, reg 43(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 44(1).

5    Adoption Agencies Regulations 2005, SI 2005/389, reg 43(2)(a); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 44(2)(a).

6    Adoption Agencies Regulations 2005, SI 2005/389, reg 43(2)(b); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 44(2)(b).

7    Adoption Agencies Regulations 2005, SI 2005/389, reg 43(3); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 44(4).

8    Ibid reg 44(3). As to the provision of adoption support services see para 394 et seq ante.

9    See para 449 note 26 ante.

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#### **451. Information concerning adoption.**

Every adoption agency<sup>1</sup> must give to the Secretary of State or the Welsh Ministers<sup>2</sup> any statistical or other general information<sup>3</sup> he or they require regarding the performance of all or any of its functions relating to adoption<sup>4</sup> and the children<sup>5</sup> and other persons in relation to whom it has exercised those functions<sup>6</sup>. In addition, the designated officer for each magistrates' court<sup>7</sup>, the relevant officer<sup>8</sup> of each county court<sup>9</sup>, and the relevant officer of the High Court<sup>10</sup>, must give to the Secretary of State or the Welsh Ministers any statistical or other general information he or they require about adoption proceedings in the court in question<sup>11</sup>. The Secretary of State and the Welsh Ministers may publish from time to time abstracts of the information given to them under these provisions<sup>12</sup>.

1 The local authorities and registered adoption societies: see paras 394-395 ante.

2 As to the Secretary of State and the Welsh Ministers see para 155 ante.

3 For the meaning of 'information' see para 385 note 8 ante. The information required to be given to the Secretary of State and the Welsh Ministers must be given at the times, and in the form, directed by him or them: Adoption and Children Act 2002 s 13(4).

4 Ibid s 13(1)(a). For the meaning of 'adoption' see para 393 note 2 ante.

5 For the meaning of 'child' see para 327 note 2 ante.

6 Adoption and Children Act 2002 s 13(1)(b).

7 Ibid s 13(2)(a) (amended by the Courts Act 2003 s 109(1), Sch 8 para 411).

8 'Relevant officer', in relation to a county court or the High Court, means the officer of that court who is designated to act for the purposes of the Adoption and Children Act 2002 s 13(2) (as amended) by a direction given by the Lord Chancellor: s 13(3).

9 Ibid s 13(2)(b).

10 Ibid s 13(2)(c).

11 Ibid s 13(2).

12 Ibid s 13(5).

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### **(iii) Regulation of Adoption Societies**

#### **452. Registration of adoption societies.**

A registered adoption society<sup>1</sup> is to be treated as registered in respect of any facility of the Adoption Service<sup>2</sup> unless it is a condition of its registration that it does not provide that facility<sup>3</sup>. No application for registration<sup>4</sup> may be made in respect of an adoption society which is an unincorporated body<sup>5</sup>. Where, by virtue of the cancellation of its registration<sup>6</sup>, a body has ceased to be a registered adoption society, the Secretary of State and the Welsh Ministers<sup>7</sup> may direct the body to make such arrangements as to the transfer of its functions relating to children and other transitional matters as seem to him or them expedient<sup>8</sup>.

Where it appears to the Secretary of State or the Welsh Ministers that a body which is or has been a registered adoption society is inactive or defunct<sup>9</sup>, or that a body which has ceased to be a registered adoption society by virtue of the cancellation of its registration<sup>10</sup> has not made such arrangements for the transfer of its functions relating to children as are specified in a direction<sup>11</sup>, the Secretary of State or the Welsh Ministers may, in relation to such functions of the society as relate to children, direct what appears to him or them to be the appropriate local authority<sup>12</sup> to take any such action as might have been taken by the society or by the society jointly with the authority<sup>13</sup>. A local authority is entitled to take any action which it would not be entitled to take, or would not be entitled to take without joining the society in the action<sup>14</sup>, but which it is directed to take under these provisions<sup>15</sup>.

1 As to adoption societies see para 395 note 3 ante.

2 As to the Adoption Service see para 393 et seq ante.

3 Adoption and Children Act 2002 s 2(3).

4 Ie an application under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE).

5 Adoption and Children Act 2002 s 2(4).

6 Ie under the Care Standards Act 2000 Pt 2 (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE).

7 As to the Secretary of State and the Welsh Ministers see para 155 ante.

8 Adoption and Children Act 2002 s 6. The Secretary of State and the Welsh Ministers may charge the society for expenses necessarily incurred by them or on their behalf in securing the transfer of the society's functions relating to children: s 7(4).

9 Ibid s 7(1)(a).

10 See note 6 supra.

11 Adoption and Children Act 2002 s 7(1)(b).

12 For the meaning of 'local authority' see para 327 note 7 ante.

13 Adoption and Children Act 2002 s 7(2). Before giving such a direction the Secretary of State and the Welsh Ministers must, if practicable, consult both the society and the authority: s 7(5).

14 Ibid s 7(3)(a).

15 Ibid s 7(3)(b).

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## **(iv) Regulation of Adoption Agencies and Adoption Support Agencies**

### **A. INTRODUCTION**

#### **453. Regulation of adoption agencies and adoption support agencies.**

Regulations<sup>1</sup> making provision for any purpose relating to the exercise by local authorities<sup>2</sup>, voluntary adoption agencies<sup>3</sup> and adoption support agencies<sup>4</sup> of their functions in relation to adoption may make provision as to:

- 828 (1) the persons who are fit to work for them for the purposes of their functions<sup>5</sup> in relation to adoption<sup>6</sup>;
- 829 (2) the fitness of premises<sup>7</sup>;
- 830 (3) the management and control of their operations<sup>8</sup>;
- 831 (4) the number of persons, or persons of any particular type, working for the purposes of those functions<sup>9</sup>;
- 832 (5) the management and training of persons working for the purposes of those functions<sup>10</sup>; and
- 833 (6) the keeping of information<sup>11</sup>.

In relation to voluntary adoption agencies and adoption support agencies, regulations<sup>12</sup> may:

- 834 (a) make provision as to the persons who are fit to manage an agency, including provision prohibiting persons from doing so unless they are registered social care workers<sup>13</sup>;
- 835 (b) impose requirements as to the financial position of an agency<sup>14</sup>;
- 836 (c) make provision requiring the appointment of a manager<sup>15</sup>;
- 837 (d) in the case of a voluntary adoption agency, make provision for securing the welfare of children placed by the agency, including provision as to the promotion and protection of their health<sup>16</sup>; and
- 838 (e) in the case of an adoption support agency, make provision as to the persons who are fit to carry on the agency<sup>17</sup>.

Regulations<sup>18</sup> may make provision as to the conduct of voluntary adoption agencies and adoption support agencies, and may in particular make provision:

- 839 (i) as to the facilities and services to be provided by an agency<sup>19</sup>;
- 840 (ii) as to the keeping of accounts<sup>20</sup>;
- 841 (iii) as to the notification to the registration authority<sup>21</sup> of events occurring in premises used for the purposes of an agency<sup>22</sup>;
- 842 (iv) as to the giving of notice<sup>23</sup> to the registration authority of periods during which the manager of an agency proposes to be absent, and specifying the information to be given in such a notice<sup>24</sup>;
- 843 (v) as to the making of adequate arrangements for the running of an agency during a period when its manager is absent<sup>25</sup>;

- 844 (vi) as to the giving of notice to the registration authority of any intended change in the identity of the manager<sup>26</sup>;
- 845 (vii) as to the giving of notice to the registration authority of changes in the ownership of an agency or the identity of its officers<sup>27</sup>;
- 846 (viii) requiring the payment of a prescribed fee to the registration authority in respect of any notification required to be made under head (vii) above<sup>28</sup>; and
- 847 (ix) requiring arrangements to be made for dealing with complaints made by or on behalf of those seeking, or receiving, any of the services provided by an agency and requiring the agency or manager to take steps for publicising the arrangements<sup>29</sup>.

Regulations<sup>30</sup> may also require adoption agencies in prescribed circumstances to disclose in accordance with the regulations prescribed information to prospective adopters<sup>31</sup> and may make provision for the purpose of assisting persons adopted before 30 December 2005<sup>32</sup> who have attained the age of 18 to obtain information in relation to their adoption and facilitating contact between such persons and their relatives<sup>33</sup>.

A number of sets of regulations have been made pursuant to these provisions<sup>34</sup>.

1    Ie regulations under the Adoption and Children Act 2002 s 9: s 10(1). As to such regulations see para 397 note 1 ante.

2    For the meaning of 'local authority' see para 327 note 7 ante.

3    For the meaning of 'voluntary adoption agency' for these purposes see para 397 note 1 ante. In connection with the operation of voluntary adoption agencies see also the Care Standards Act 2000 s 36A (as added and amended); and SOCIAL SERVICES AND COMMUNITY CARE.

4    For the meaning of 'adoption support agency' see para 385 note 12 ante.

5    Ie the functions mentioned in the Adoption and Children Act 2002 s 9(1) (see para 397 note 1 ante).

6    Ibid s 10(1)(a). Regulations made by virtue of s 10(1)(a) may, in particular, make provision for prohibiting persons from working in prescribed positions unless they are registered in, or in a particular part of, one of the registers maintained under the Care Standards Act 2000 s 56(1) (see SOCIAL SERVICES AND COMMUNITY CARE): Adoption and Children Act 2002 s 10(2).

7    Ibid s 10(1)(b).

8    Ibid s 10(1)(c).

9    Ibid s 10(1)(d).

10   Ibid s 10(1)(e).

11   Ibid s 10(1)(f). For the meaning of 'information' see para 385 note 8 ante.

12   See note 1 supra.

13   Adoption and Children Act 2002 s 10(3)(a). As to the registration of social care workers see the Care Standards Act 2000 s 56(1); and SOCIAL SERVICES AND COMMUNITY CARE.

14   Adoption and Children Act 2002 s 10(3)(b).

15   Ibid s 10(3)(c).

16   Ibid s 10(3)(d).

17   Ibid s 10(3)(e).

18   See note 1 supra.

19   Adoption and Children Act 2002 s 10(4)(a).

20 Ibid s 10(4)(b).

21 For the meaning of 'registration authority' see the Care Standards Act 2000 s 5 (as amended); and para 984 post (definition applied by the Adoption and Children Act 2002 ss 144(1), 147, Sch 6).

22 Ibid s 10(4)(c).

23 As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

24 Ibid s 10(4)(d).

25 Ibid s 10(4)(e).

26 Ibid s 10(4)(f).

27 Ibid s 10(4)(g).

28 Ibid s 10(4)(h).

29 Ibid s 10(4)(i).

30 See note 1 supra.

31 Adoption and Children Act 2002 s 54.

32 Ie the date on which ibid ss 56-65 were brought into force: see para 375 ante.

33 Ibid s 98(1). For this purpose, 'relative', in relation to an adopted person, means any person who (but for his adoption) would be related to him by blood (including half blood), marriage or civil partnership: s 98(7) (amended by the Civil Partnership Act 2004 s 79(1), (10)). For this purpose, the regulations may confer functions on registered adoption support agencies (ie adoption support agencies in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE)), the Registrar General and adoption agencies (Adoption and Children Act 2002 s 98(2), (7)); authorise or require any such person to disclose information (such authorisation or requirement having effect in spite of any restriction on the disclosure of information in Pt 1 Ch 5 (ss 77-82) (see para 383 et seq ante); authorise or require the disclosure of information contained in records kept under the Public Records Act 1958 s 8 (court records: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 839, 841); and may impose conditions on the disclosure of information, including conditions restricting its further disclosure (Adoption and Children Act 2002 s 98(3), (5)). The regulations may authorise the charging of prescribed fees by registered adoption support agencies, the Registrar General or adoption agencies or in respect of the disclosure of information contained in records kept under the Public Records Act 1958 s 8: Adoption and Children Act 2002 s 98(4). The making of regulations by virtue of s 98(2)-(4) which relate to the Registrar General requires the approval of the Chancellor of the Exchequer: s 98(6).

34 In connection with local authorities see (by virtue of the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 15) the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370; the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357; and para 456 et seq post. In connection with adoption support agencies see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720; the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514; and para 464 et seq post. In connection with the disclosure of information see the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890 (as amended); the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701 (as amended); and paras 472 et seq post. Note also, particularly in connection with the provision of information, the Adoption Agencies Regulations 2005, SI 2005/389; and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313.

## UPDATE

### 453 Regulation of adoption agencies and adoption support agencies

NOTE 33--Reference to the Chancellor of the Exchequer is now to the Secretary of State: Adoption and Children Act 2002 s 98(6) (amended by SI 2008/678).



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#### **454. Inspection of agency records.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may require an adoption agency<sup>2</sup> to give him or them any information<sup>3</sup>, or to allow him or them to inspect any records<sup>4</sup>, relating to the discharge of any of the agency's functions in relation to adoption which the Secretary of State or the Welsh Ministers specify<sup>5</sup>. An inspection under these provisions must be conducted by a person authorised by the Secretary of State or the Welsh Ministers<sup>6</sup>. A person authorised to inspect any records may at any reasonable time have access to, and inspect and check the operation of, any computer and associated apparatus which is being or has been used in connection with the records in question<sup>7</sup>, and may require any person to give him any reasonable assistance he may require<sup>8</sup>. A person who intentionally obstructs another in the exercise of a power under these provisions is guilty of an offence<sup>9</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 I.e. a local authority or a registered adoption society: see paras 394-395 ante.

3 Adoption and Children Act 2002 s 15(2)(a).

4 Ibid s 15(2)(b). Records may be inspected pursuant to these provisions whatever the form in which they are held: s 15(2)(b).

5 Ibid s 15(2).

6 Ibid s 15(3). An officer of a local authority may only be so authorised with the consent of the authority: s 15(4). A person exercising a power under these provisions must, if required to do so, produce a duly authenticated document showing his authority: s 15(8).

7 Ibid s 15(6).

8 Ibid s 15(7)(b).

9 Ibid s 15(9). As to the commission of offences by incorporated bodies see para 391 note 17 ante.

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#### **455. Inspection of agency premises.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may arrange for the inspection from time to time of any premises in which a child<sup>2</sup> is living with a person with whom the child has been placed by an adoption agency<sup>3</sup>, or a child in respect of whom a notice of intention to adopt has been given<sup>4</sup> is, or will be, living<sup>5</sup>. An inspection under these provisions must be conducted by a person authorised by the Secretary of State or the Welsh Ministers<sup>6</sup>. A person authorised to inspect any premises under these provisions may enter the premises for that purpose at any reasonable time<sup>7</sup>, and may require any person to give him any reasonable assistance he may require<sup>8</sup>; and a person so inspecting any premises may visit the child there<sup>9</sup> and may make any examination into the state of the premises and the treatment of the child there which he thinks fit<sup>10</sup>. Any person who intentionally obstructs another in the exercise of a power under these provisions is guilty of an offence<sup>11</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 For the meaning of 'child' see para 327 note 2 ante.

3 Adoption and Children Act 2002 s 15(1)(a). Ie a local authority or a registered adoption society: see paras 394-395 ante. As to placement with an agency see para 329 note 8 ante.

4 Ie under *ibid* s 44 (see para 365 ante). As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

5 *Ibid* s 15(1)(b).

6 *Ibid* s 15(3). An officer of a local authority may only be so authorised with the consent of the authority: s 15(4). A person exercising a power under these provisions must, if required to do so, produce a duly authenticated document showing his authority: s 15(8).

7 *Ibid* s 15(7)(a).

8 *Ibid* s 15(7)(b).

9 *Ibid* s 15(5)(a).

10 *Ibid* s 15(5)(b).

11 *Ibid* s 15(9). As to the commission of offences by incorporated bodies see para 391 note 17 ante.

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## **B. LOCAL AUTHORITY ADOPTION SERVICE**

### **456. Statement of purpose and children's guide.**

Each local authority<sup>1</sup> must compile in relation to the adoption service<sup>2</sup> a written statement of purpose<sup>3</sup>, must provide a copy of that statement to the Commission<sup>4</sup> (in England) and the Welsh Ministers (in Wales)<sup>5</sup>, and must make a copy of it available, upon request, for inspection by:

- 848 (1) any person working for the purposes of the adoption service<sup>6</sup>;
- 849 (2) children who may be adopted, their parents and guardians<sup>7</sup>;
- 850 (3) persons wishing to adopt a child<sup>8</sup>;
- 851 (4) adopted persons, their parents, natural parents and former guardians<sup>9</sup>;
- 852 (5) in England, any person receiving adoption support services<sup>10</sup> from the authority or acting on behalf of a child receiving such services from the authority<sup>11</sup>;
- 853 (6) in England, any person making enquiries about receiving adoption support services from the authority on his own or a child's behalf<sup>12</sup>; and
- 854 (7) in Wales, persons who are seeking an assessment of their needs for the provision of adoption support services by the authority<sup>13</sup>.

The authority must ensure that its adoption service is at all times conducted in a manner which is consistent with its statement of purpose<sup>14</sup>.

Each local authority must produce a written children's guide to the adoption service<sup>15</sup> and provide a copy of the guide to the Commission<sup>16</sup> (in England) and the Welsh Ministers (in Wales)<sup>17</sup>, to every prospective adopter with whom the authority has placed a child for adoption<sup>18</sup>, to every child (subject to his age and understanding) who may be, or has been placed for adoption by the authority (or, in England, is receiving adoption support services from the authority)<sup>19</sup>, and, in England, to every adult acting on behalf of a child to whom the authority provides adoption support services<sup>20</sup>.

Each local authority must keep under review and, where appropriate, revise the statement of purpose and children's guide<sup>21</sup> and notify the Commission<sup>22</sup> (in England) and the Welsh Ministers (in Wales) of any such revision within 28 days<sup>23</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 ante.

2 'Adoption service' means the discharge by a local authority of relevant adoption functions within the meaning of the Care Standards Act 2000 s 43(3)(a) (see para 993 note 3 post) and, in relation to a local authority in England, means the discharge by that authority of those functions: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 1(3); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 2(1).

3 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(1). The statement of purpose must consist of a statement as to the matters listed in the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, Sch 1 (amended by SI 2005/3339) or the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, Sch 1 (as the case may be): Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(1); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 3(1).

4 'The Commission' is not defined for the purposes of the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, but it is thought to be a reference to the National Care Standards Commission formerly established under the Care Standards Act 2000 s 6 (repealed), whose functions have been transferred to the Commission for Social Care Inspection established under the Health and Social Care (Community Health and Standards) Act 2003 s 42 (see SOCIAL SERVICES AND COMMUNITY CARE).

5 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(a); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 3(2). As to the Welsh Ministers see para 155 ante.

6 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(i); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(2)(e).

7 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(ii); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(2)(a). For the meaning of 'guardian' see the Children Act 1989 s 5 (as amended); and para 145 ante (definition applied by the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 1(3); and the Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 2(1)).

8 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(iii) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(2)(b).

9 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(iv); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(2)(c).

10 'Adoption support services' means, in addition to the services set out in the Adoption and Children Act 2002 s 2(6)(a), the services prescribed for the purposes of s 2(6)(b) by the Secretary of State (see para 394 ante): Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 1(3) (added by SI 2005/3339).

11 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(v) (added by SI 2005/3339).

12 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(2)(b)(vi) (added by SI 2005/3339).

13 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(2)(d).

14 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(3); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(3). This requirement is subject to the proviso that it does not require or authorise the authority to contravene, or not to comply with any other provision of the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370 (as amended) or the Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 2(4); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(4).

15 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 4(1). The children's guide must consist of a statement as to the matters listed in the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, Sch 2 (amended by SI 2005/3339) or the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, Sch 2 (as the case may be): Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(1); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 4(1).

16 See note 4 supra.

17 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(2)(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 4(2)(a).

18 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(2)(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 4(2)(b).

19 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(2)(c) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 4(2)(c).

20 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 3(2)(ba) (added by SI 2005/3339).

21 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 4(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 5(1)(a). In England, if the children's guide is revised, the authority must supply a copy to any adult acting on behalf of a child to whom the authority provides adoption support services and (subject to his age and understanding) to each such child: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 4(c) (added by SI 2005/3339).

22 See note 4 *supra*.

23 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 4(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 5(1)(b).

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#### **457. Managers.**

Each local authority<sup>1</sup> must appoint one of its officers to manage the adoption service<sup>2</sup>, and must forthwith notify the Commission<sup>3</sup> (in England) or the Welsh Ministers (in Wales)<sup>4</sup> of the name of any person so appointed<sup>5</sup> and the date on which the appointment is to take effect<sup>6</sup>. A person may manage an adoption service only if, by virtue of his character, qualifications and physical and mental aptitude, he is fit to do so<sup>7</sup>; he must manage the service with sufficient care, competence and skill<sup>8</sup>, and must immediately notify the Commission or the Welsh Ministers if he is convicted of any criminal offence<sup>9</sup>. Arrangements must also be made for the management of the service in the manager's absence<sup>10</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 For the meaning of 'adoption service' see para 456 note 2 ante.

3 Ie the Commission for Social Care Inspection: see para 456 note 4 ante.

4 As to the Welsh Ministers see para 155 ante.

5 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 5(1)(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 10(1)(a). The authority must also forthwith notify the Commission or the Welsh Ministers if the person so appointed ceases to manage the adoption service: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 5(2); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 10(3).

6 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 5(1)(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 10(1)(b).

7 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 6(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 11(1). A person is not fit to manage an adoption service unless he is of integrity and good character, having regard to the size of the local authority and its statement of purpose (see para 456 ante) he has the qualifications, skills and experience necessary for managing the service and is physically and mentally fit to do so, and full and satisfactory information is available in relation to him in respect of specified matters relating to his fitness to manage: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 6(2)(a)-(c), Sch 3; Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 11(2)(a)-(c), Sch 3. It is additionally provided in Wales that the officer appointed by the local authority to manage the adoption service must be a social worker who either: (1) has a qualification of at least level 4 NVQ in management or another qualification which matches the competencies of level 4 NVQ, will commence undertaking the qualification when appointed to manage the service and will obtain the qualification within three years of the date of appointment, or will obtain the qualification by such later date as the Welsh Ministers may in exceptional circumstances agree; or (2) has at least two years' experience of working in a child care setting, which may include managing a voluntary adoption agency or a local authority adoption service within the past five years: reg 10(2). 'Social worker' means a person who is registered in the register for social workers maintained in accordance with the Care Standards Act 2000 s 56 (see SOCIAL SERVICES AND COMMUNITY CARE): Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 3(1).

8 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 7(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 12(1). Pursuant to managing the service with sufficient care, competence and skill, the manager must have regard to the size of the local authority and its statement of purpose, the need to safeguard and promote the welfare of children who may be, or have been, placed for adoption by the authority (or, in England, may or have been receiving adoption support services from the authority), and (in England) the number and needs of those receiving adoption support services from the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 7(1)(a)-(c) (amended

by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 12(1)(a), (b). For the meaning of 'adoption support services' see para 456 note 10 ante. The manager must also undertake from time to time such training as is appropriate to ensure that he has the experience and skills necessary to manage the service: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 7(2); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 12(2).

9 Where the manager is convicted of any criminal offence, whether in England and Wales or elsewhere, he must forthwith give notice in writing to the Commission or the Welsh Ministers of the date and place of the conviction, the offence of which he was convicted, and the penalty imposed on him in respect of the offence: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 8(a)-(c); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 13(a)-(c).

10 Each local authority must establish a system to ensure that where the manager proposes to be or is absent from the authority for a continuous period of 28 days (in England) or 20 working days (in Wales) or more, an identified person is responsible for the management of the adoption service until such time as the manager returns or (as the case may be) a new manager is appointed by the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 14; Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 19. 'Working day' means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a day which is a bank holiday within the meaning of the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 2(1).

## **UPDATE**

### **457 Managers**

NOTE 7--SI 2007/1357 Sch 3 amended: SI 2009/2541. SI 2003/370 Sch 3 amended: SI 2009/1895.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(7) THE ADOPTION SERVICE/(iv) Regulation of Adoption Agencies and Adoption Support Agencies/B. LOCAL AUTHORITY ADOPTION SERVICE/458. Staffing.

#### **458. Staffing.**

Each local authority<sup>1</sup> must ensure that there is a sufficient number of suitably qualified, competent, and experienced persons working for the purposes of the adoption service<sup>2</sup>. Authorities in Wales must also ensure that they have a clear written recruitment policy for staff<sup>3</sup>. A local authority must not employ a person<sup>4</sup> to work for the purposes of the adoption service unless that person is fit to work for the purposes of an adoption service<sup>5</sup>, nor may it allow any person not employed by it<sup>6</sup> to work for the purposes of the service unless that person is fit to work for the purposes of an adoption service<sup>7</sup>; and the authority must ensure that other persons are appropriately supervised<sup>8</sup>.

Each local authority must operate a disciplinary procedure which, in particular, provides for the suspension of an employee where necessary<sup>9</sup> and provides that a failure to report abuse<sup>10</sup> is a ground on which disciplinary proceedings may be instituted<sup>11</sup>, and must keep and maintain records with respect to staff<sup>12</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 10; Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 15. For the meaning of 'adoption service' see para 456 note 2 ante. Pursuant to ensuring that there is a sufficient number of suitably qualified, competent, and experienced persons working for the purposes of the service, an authority must have regard to the size of the authority and its statement of purpose (see para 456 ante), the need to safeguard and promote the welfare of children who may be, or have been, placed for adoption by the authority or who are receiving adoption support services from the authority, and (in England) the number and needs of those receiving adoption support services from the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 10(a)-(c) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 15(a), (b).

Each local authority must ensure that all permanent appointments made by the authority for the purposes of the adoption service are subject to the satisfactory completion of a period of probation, and must provide all employees employed by the authority for the purposes of the service with a job description outlining their responsibilities: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 12(1)(a), (b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 17(1)(a), (b). The authority must also ensure that all persons employed by the authority for the purposes of the adoption service receive appropriate training, supervision and appraisal and are enabled from time to time to obtain further qualifications appropriate to the work they perform: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 12(2)(a), (b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 17(2)(a), (b).

3 Ibid reg 15.

4 References to 'employing' a person include employing a person whether or not for payment, and whether under a contract of service or a contract for services, and allowing a person to work as a volunteer; and references to an 'employee' or to a person being 'employed' are to be construed accordingly: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 1(4); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 1(3).

5 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(1)(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 16(1)(a). For these purposes, a person is not fit to work for the purposes of an adoption service unless he is of integrity and good character, he has the qualifications, skills and experience necessary for the work he is to perform, he is physically and mentally fit for the work he is to perform, full and satisfactory information is available in relation to him in respect of specified matters relating to his fitness to work, and (in Wales) he has an up to date CRB certificate of the appropriate



level (such CRB certificate to be renewed every three years): Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(3)(a)-(d), Sch 3; Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 16(3)(a)-(e), Sch 3.

6     le any person who is employed by a person other than the authority, in a position in which he may in the course of his duties have regular contact with children who may be, or have been, placed for adoption by the authority, or children who may receive or are receiving adoption support services from the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(2); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 16(2). For the meaning of 'adoption support services' see para 456 note 10 ante.

7     Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(1)(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 16(1)(b).

8     An authority must take reasonable steps to ensure that any person working for the adoption service who is not employed by the authority and to whom the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(2) or the Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 16(2) (see note 6 supra) does not apply is appropriately supervised while carrying out his duties: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 11(4); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 16(4).

9     le where necessary in the interests of the safety or welfare of children who are receiving adoption support services from the authority or who may be, or have been, placed for adoption by the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 13(1)(a) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 18(1)(a).

10    le a failure on the part of an employee to report, to an appropriate person, an incident of abuse or suspected abuse of a child receiving adoption support services from the authority or placed for adoption by the authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 13(1)(b) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 18(1)(b). For this purpose, an 'appropriate person' is the manager of the adoption service (see para 457 ante), an officer of the Commission for Social Care Inspection (in England) (see para 456 note 4 ante) or the Welsh Ministers (in Wales), a police officer, an officer of the National Society for the Prevention of Cruelty to Children, or, where the child is placed for adoption in the area of another local authority, an officer of that authority: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 13(2)(a)-(e); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 18(2)(a)-(e). As to the Welsh Ministers see para 155 ante.

11    Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 13(1); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 18(1).

12    Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 15(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 20(1). As to the records specified see the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, Sch 4 (amended by SI 2005/3339); and the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, Sch 4. Records must be retained for at least 15 years from the date of the last entry: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 15(2); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 20(2).

## **UPDATE**

### **458 Staffing**

NOTE 5--SI 2007/1357 Sch 3 amended: SI 2009/2541.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(7) THE ADOPTION SERVICE/(iv) Regulation of Adoption Agencies and Adoption Support Agencies/B. LOCAL AUTHORITY ADOPTION SERVICE/459. Premises and security.

#### **459. Premises and security.**

A local authority<sup>1</sup> may not use premises for the purposes of the adoption service<sup>2</sup> unless the premises are suitable for the purpose of achieving the aims and objectives set out in the statement of purpose<sup>3</sup>, and the authority must ensure:

- 855 (1) that there are adequate security arrangements at the premises, and in particular, that there are secure facilities for the storage of records<sup>4</sup>;
- 856 (2) that any records which are, for any reason, not on the authority's premises are kept in conditions of appropriate security<sup>5</sup>; and
- 857 (3) in Wales, case records<sup>6</sup> are kept for at least 100 years<sup>7</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 For the meaning of 'adoption service' see para 456 note 2 ante.

3 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 16(1); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 21(1). As to the statement of purpose see para 456 ante.

4 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 16(2)(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 21(2)(a).

5 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 16(2)(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 21(2)(b).

6 Ie the child's case record and the prospective adopter's case record set up under the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 12, 22 (see paras 447-448 ante).

7 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 21(2)(c).

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#### **460. Policies and plans.**

Each local authority<sup>1</sup> must prepare and implement a written policy which is intended to safeguard from abuse or neglect every child placed for adoption by the authority or who may receive or is receiving adoption support services<sup>2</sup> from the authority<sup>3</sup>, and which sets out the procedure to be followed in the event of any allegation of abuse or neglect<sup>4</sup>. In Wales, this policy must also ensure that separate records are kept in respect of: all staff, and any other persons employed or who are contracted for services; complaints; and any allegations made against any person<sup>5</sup>.

A local authority in Wales must:

- 858 (1) have written plans on its strategy to recruit sufficient numbers of adopters<sup>6</sup>; and
- 859 (2) have comprehensive plans for preparation and approval processes for adopters contained within its policies and procedures<sup>7</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 For the meaning of 'adoption support services' see para 456 note 10 ante.

3 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9(1)(a) (amended by SI 2005/3339); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 14(a).

4 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9(1)(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 14(b). In England, this procedure must provide in particular for: (1) where the child is placed with prospective adopters in the area of another local authority, the prompt referral to that authority of any allegation of abuse or neglect (Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9(2)(a)); (2) written records to be kept of any allegation of abuse or neglect and the action taken in response (reg 9(2)(b)); (3) consideration to be given to the measures that may be necessary to protect children placed with prospective adopters following an allegation of abuse or neglect (reg 9(2)(c)); and (4) arrangements to be made for persons working for the adoption service, prospective adopters, children who have been placed for adoption by the authority and any person to whom the authority provides adoption support services, to have access to information that would enable them to contact the Commission for Social Care Inspection (see para 456 note 4 ante) regarding any concern about child welfare and safety (reg 9(2)(d) (amended by SI 2005/3339)). In Wales, the written policy must ensure that the procedure to be followed in the event of any allegation of abuse or neglect is consistent with the local safeguarding children board procedures (Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 14(c)) and that all allegations and incidents of abuse in relation to the agency's staff or volunteers are investigated promptly and details of the investigation and action taken are recorded on a file set up and kept specially for that purpose, and that details are also placed on the service user's record (reg 14(d)). 'Local safeguarding children board' means the board established under the Children Act 2004 s 31 (see para 194 ante); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 2(1). Local authorities in Wales must supply to the Welsh Ministers a summary of any allegations of abuse against children in the last 12 months and outcomes of investigations and action taken: reg 25(c). As to the Welsh Ministers see para 155 ante.

5 Ibid reg 14(e).

6 Ibid reg 8(a).

7 Ibid reg 8(b).



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#### **461. Assessment and review of services.**

A local authority<sup>1</sup> in England must ensure that adoption support services<sup>2</sup> provided to any person are appropriate having regard to the needs for such services identified by an assessment carried out by the authority<sup>3</sup>; and a local authority in Wales must make suitable arrangements to establish and maintain a system for monitoring, reviewing and improving the quality of adoption services<sup>4</sup> provided by the local authority<sup>5</sup>. The Welsh Ministers may at any time request a local authority in Wales to undertake an assessment of the service provided to service users using its adoption services<sup>6</sup>, and may at any time notify a local authority of the action that in the Welsh Ministers' view the authority must take to ensure compliance with the applicable legislation<sup>7</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 For the meaning of 'adoption support services' see para 456 note 10 ante.

3 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9A (added by SI 2005/3339).

4 For the meaning of 'adoption service' see para 456 note 2 ante.

5 Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 22(1). This system must make provision by the authority for the quality of service to be reviewed at least annually; and for the authority to obtain the views of adoptive and natural parents and children being adopted, any person receiving services from the local authority or their representatives in relation to adoption, staff employed by the authority, and any local authority, on the quality of care provided, as part of any review undertaken: reg 22(2). Following a review of the quality of care, the authority must within 28 working days prepare a report of that review and make a copy of the available report in an appropriate format when requested by the Welsh Ministers, service users, representatives of service users and staff employed by the authority: reg 22(3). As to the Welsh Ministers see para 155 ante.

6 Ibid reg 23(1). Within 28 days of receiving such a request the local authority must supply to the Welsh Ministers the assessment in the form required by them (reg 23(2)), taking reasonable steps to ensure that the assessment is neither misleading nor inaccurate (reg 23(3)).

7 Ibid reg 24(1). The 'applicable legislation' for these purposes is the Care Standards Act 2000 and regulations made under it: Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 24(1).

The Welsh Ministers may specify the timescale within which the authority must take the action required under this provision (reg 24(2)); and the local authority must advise the Welsh Ministers of the completion of any action so required (reg 24(3)).

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## **462. Complaints.**

Every local authority<sup>1</sup> must:

- 860 (1) ensure that a written record is made of any complaint, including details of the investigation made, the outcome and any action taken in consequence<sup>2</sup>; and
- 861 (2) supply to the Commission<sup>3</sup> (in England) and the Welsh Ministers (in Wales)<sup>4</sup> at its or their request a statement containing a summary of any complaints made in respect of the adoption service<sup>5</sup> during the preceding 12 months<sup>6</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 17(a); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 25(a). A local authority must ensure that the record is retained for at least three years from the date that it is made: Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 17(a); Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 25(a).

3 Ie the Commission for Social Care Inspection: see para 456 note 4 ante.

4 As to the Welsh Ministers see para 155 ante.

5 For the meaning of 'adoption service' see para 456 note 2 ante.

6 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 17(b); Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357, reg 25(b). In England, the statement must summarise any action taken in consequence of the complaint (Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 17(b)); in Wales, it must summarise the action (if any) taken as a result of the outcome of the investigation (Local Authority Adoption Service (Wales) Regulations 2005, SI 2007/1357, reg 25(b)).

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#### **463. Records.**

A local authority<sup>1</sup> in England must maintain records indicating in respect of each person to whom it provides adoption support services<sup>2</sup>:

- 862 (1) his full name<sup>3</sup>;
- 863 (2) his date of birth<sup>4</sup>;
- 864 (3) whether he is an adoptive child<sup>5</sup> or an adopted person who has attained the age of 18 or, if not, his relationship to an adoptive child or adopted person<sup>6</sup>;
- 865 (4) a description of services requested<sup>7</sup>;
- 866 (5) a description of needs as assessed by the authority<sup>8</sup>; and
- 867 (6) a description of services provided<sup>9</sup>.

Such records must be retained for such period as the authority considers appropriate<sup>10</sup>.

1 For the meaning of 'local authority' see para 327 note 7 ante. A local authority may be referred to as an 'adoption agency' for the purposes of the Adoption and Children Act 2002: see para 394 note 1 ante.

2 For the meaning of 'adoption support services' see para 456 note 10 ante.

3 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9B(1)(a) (reg 9B added by SI 2005/3339).

4 Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9B(1)(b) (as added: see note 3 supra).

5 For the meaning of 'adoptive child' for these purposes see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(1); and para 464 note 5 post (definition applied by the Local Authority Adoption Service (England) Regulations 2003, SI 2003/370, reg 9B(3) (as added: see note 3 supra)).

6 Ibid reg 9B(1)(c) (as added: see note 3 supra).

7 Ibid reg 9B(1)(d) (as added: see note 3 supra).

8 Ibid reg 9B(1)(e) (as added: see note 3 supra).

9 Ibid reg 9B(1)(f) (as added: see note 3 supra).

10 Ibid reg 9B(2) (as added: see note 3 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/5. ADOPTION/(7) THE ADOPTION SERVICE/(iv) Regulation of Adoption Agencies and Adoption Support Agencies/C. ADOPTION SUPPORT AGENCIES/464. Statement of purpose and children's guide.

### **C. ADOPTION SUPPORT AGENCIES**

#### **464. Statement of purpose and children's guide.**

The registered person<sup>1</sup> must compile in relation to an adoption support agency a written statement of purpose<sup>2</sup>; and it must provide a copy of that statement to the registration authority<sup>3</sup>, and must make a copy of it available, upon request, for inspection by:

- 868 (1) any person working for the purposes of the agency<sup>4</sup>;
- 869 (2) any person receiving adoption support services<sup>5</sup> from the agency or acting on behalf of a child receiving such services from the agency<sup>6</sup>;
- 870 (3) any person making enquiries about receiving adoption support services from the agency on his own or a child's behalf<sup>7</sup>; and
- 871 (4) any local authority<sup>8</sup>.

The registered person must also ensure that the agency is at all times conducted in a manner that is consistent with its statement of purpose<sup>9</sup>. The registered person in relation to an agency which provides adoption support services to children must also produce a written children's guide to the agency<sup>10</sup> and provide a copy to the registration authority, to any adult acting on behalf of a child to whom the agency provides adoption support services and (subject to the child's age and understanding) to each such child<sup>11</sup>.

The registered person must keep under review and, where appropriate, revise the statement of purpose and children's guide<sup>12</sup>, notify the registration authority of any such revision within 28 days<sup>13</sup> and, if the guide is revised, supply a copy to any adult acting on behalf of a child to whom the agency provides adoption support services and (subject to the child's age and understanding) to each such child<sup>14</sup>.

Failure to comply with any of these requirements is an offence<sup>15</sup>.

1    Ie, in relation to an adoption support agency, any person who is the registered provider (ie a person who, in relation to an agency, is registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE) as the person carrying on the agency) or the registered manager (ie a person who, in relation to an agency, is registered under Pt 2 (as amended) as the manager of the agency): Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 1(4). For the meaning of 'adoption support agency' see para 385 note 12 ante. As to the management of an adoption support agency see para 465 post.

2    Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(1). The statement of purpose must consist of a statement as to the matters listed in the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, Sch 1 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, Sch 1 (as the case may be): Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(1).

3    Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(2). The registration authority in England is Her Majesty's Chief Inspector of Education, Children's Services and Skills, and the registration authority in Wales is the Welsh Ministers: Adoption Support Agencies (England) and



Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(1) (amended by SI 2007/603); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 1(4). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the Welsh Ministers see para 155 ante.

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(3)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(3)(a).

5 For the purposes of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, 'adoption support services' are, in addition to other services prescribed for the purposes of the Adoption and Children Act 2002 s 2(6)(b) (see para 394 ante):

- 249 (1) any services prescribed in the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1)(b)-(f) (see para 394 ante) that are provided in the case of an adoption of a child by his natural parent or the partner of his natural parent (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 3(1)(a));
- 250 (2) assistance to adoption agencies in preparing and training adoptive parents (reg 3(1)(b)); and
- 251 (3) assistance to adopted persons who have attained the age of 18 or relatives of such persons to facilitate contact between such adopted persons and their relatives (ie, in relation to an adopted person, any person who, but for his adoption, would be related to him by blood, including half blood, marriage or civil partnership) (reg 3(1)(c)).

'Child' means a person who has not attained the age of 18 years; and 'adoptive parent' means a person who has adopted a child or has given notice under the Adoption and Children Act 2002 s 44 (see para 365 ante) of his intention to adopt a child or a person with whom an adoption agency has matched a child or has placed a child for adoption: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(1). In the case of an adoption of a child by his natural parent or the partner of his natural parent, respite care that consists of the provision of accommodation must be accommodation provided by or on behalf of a local authority under the Children Act 1989 s 23 (accommodation of looked after children: see para 877 post) or by a voluntary organisation under s 59 (see para 975 post): Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 3(2).

For the purposes of the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, 'adoption support services' are:

- 252 (a) assistance to adoptive parents, adoptive children, and related persons in relation to arrangements for contact between an adoptive child and a natural parent or a related person of the adoptive child (reg 2(2)(a));
- 253 (b) services that may be provided in relation to the therapeutic needs of the child in relation to that adoption (reg 2(2)(b));
- 254 (c) assistance for the purpose of ensuring the continuance of the relationship between the child and adoptive parent, including training for adoptive parents for the purpose of meeting any special needs of the child arising from that adoption (reg 2(2)(c));
- 255 (d) assistance where disruption in an adoption arrangement or placement has occurred or is in danger of occurring, including mediation and organising and running meetings to discuss disruptions in adoptions or placements (reg 2(2)(d));
- 256 (e) assistance to adopted persons who have attained the age of 18 in obtaining information in relation to their adoption or facilitating contact between such persons and their relatives (ie any person who but for his adoption would be related to the adopted person by blood, including half blood or marriage) (reg 2(2)(e), (3));
- 257 (f) assistance to relatives of adopted persons who have attained the age of 18, in obtaining information in relation to that adoption or facilitating contact between such persons and the adopted person (reg 2(2)(f)).

In Wales, special provision is made in connection with the provision by adoption support agencies of the services described in reg 2(2)(e), (f) (reg 10): see reg 11 (no obligation to proceed if not appropriate); reg 12 (consent of subject to disclosure); reg 13 (veto by adopted person or relative); reg 14 (provision of background information where consent refused); and reg 15 (counselling).

'Adoptive parent' means a person whom an adoption agency has decided in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(1) (see para 444 ante) is a suitable adoptive parent for a particular child, a person with whom an adoption agency has placed a child for adoption, a person who has given notice under the Adoption and Children Act 2002 s 44 (see para 365 ante) of his intention to apply for an adoption order for a child, a person who has adopted a child or a person who has adopted a child who has subsequently attained the age of 18, but does not include a person who is the step-parent or natural parent of the child or was the step-parent of the child before he adopted the child; 'adoptive child' means a child who is an agency adoptive child or a non-agency adoptive child; 'agency adoptive child' means a child in respect of whom an adoption agency has decided in accordance with the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19(1) (see para 434 ante) is a child who should be placed for adoption, a child whom an adoption agency has placed for adoption or a child who has been adopted after having been placed for adoption by an adoption agency; 'non-agency adoptive child' means a child in respect of whom a person has given notice under the Adoption and Children Act 2002 s 44 of his intention to apply for an adoption order and is not the natural parent or step-parent of the child, or a child who has been adopted by a person who is not the natural parent of the child and was not the step-parent of the child before he adopted the child, but does not include an agency adoptive child; 'child' means a person who has not attained the age of 18 years; any reference to a person's adoptive child is to a child who is an adoptive child in relation to that person; any reference to a child's adoptive parent is to a person who is an adoptive parent in relation to that child; references to a child being placed for adoption are to the child being placed for adoption with a prospective adopter by an adoption agency and include where the child has been placed with a person by an adoption agency, leaving the child with him as a prospective adopter; and 'related person' means a relative within the meaning of the Adoption and Children Act 2002 s 144(1) (see para 329 note 11 ante) or any person with whom the adoptive child has a relationship which appears to the local authority to be beneficial to the welfare of the child having regard to the matters referred to in s 1(4)(f)(i)-(iii) (see para 329 note 12 ante): Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 1(3)-(5).

6 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(3)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(3)(b).

7 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(3)(c); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(3)(c).

8 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(3)(d); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(3)(d).

9 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(7); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(7). This requirement is subject to the proviso that it does not require or authorise the registered person to contravene, or not comply with any other provision of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514 (as the case may be) or any conditions for the time being in force in relation to the registration of the registered provider under the Care Standards Act 2000 Pt 2 (as amended): Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(8); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(8). In England, pursuant to the requirement that the agency is at all times conducted in a manner that is consistent with its statement of purpose, requirements are imposed as to ensuring the financial viability of the agency: see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 25.

10 Ibid reg 5(4); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(4). The children's guide must be produced in a form appropriate to the age, understanding and communication needs of the children to whom the agency provides adoption support services (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(5); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(5)), and must include a summary of the agency's statement of purpose, a summary of the complaints procedure (as to which see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16; the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19; and para 470 post), and the address and telephone number of the registration authority (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(4); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(4)).

11 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 5(6); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 3(6).

12 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 6(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 4(a).

13 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 6(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 4(b).

14 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 6(c); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 4(c).

15 In England, a person who contravenes or fails to comply with any of the provisions of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, regs 5(1)-(7), 6, 7(1), (4), 8(2), 9(1), 10, 11, 12(1), (2), 13, 14, 16-18, 19(1), 20, 21(1), 22, 23, 24(1), (2), 25, 26, 27(1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 29(1). As to the standard scale see para 132 note 2 ante. Where the registration authority considers that a registered person has contravened or failed to comply with any of these provisions it may serve a notice on the registered person specifying in what respect in its opinion the registered person has contravened or is contravening any of the regulations, or has failed or is failing to comply with the requirements of any of the regulations (reg 29(3)(a)), what action, in the opinion of the registration authority, the registered person should take so as to comply with any of those regulations (reg 29(3)(b)), and the period, not exceeding three months, within which the registered person should take action (reg 29(3)(c)). The registration authority may not bring proceedings against a person in respect of any contravention or failure to comply with any of these provisions unless he is a registered person (although the registration authority may bring proceedings against a person who was once, but no longer is, a registered person, in respect of a failure to comply with reg 14 or reg 22, and for this purpose, references in reg 29(2), (3) to a registered person are taken to include such a person) (reg 29(2)(a), (4)), notice has been given to him in accordance with reg 29(3) (reg 29(2)(b)), the period specified in the notice within which the registered person may make representations to the registration authority has expired (reg 29(2)(c)) and, in a case where, in accordance with reg 29(3)(b), the notice specifies any action that is to be taken within a specified period, the period has expired and the action has not been taken within that period (reg 29(2)(d)).

In Wales, a contravention or failure to comply with any of the provisions of the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, regs 3-8, 12, 16-30 is an offence by virtue of the Adoption and Children Act 2002 s 9(3) (see para 397 note 1 ante) (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 32(1)), and a contravention or failure to comply with any of the provisions of reg 9 or reg 31 is an offence by virtue of the Adoption and Children Act 2002 s 25(2) (see paras 334, 337 ante) (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 32(2)). The registration authority may bring proceedings against a person who was once, but no longer is, a registered person, in respect of a failure to comply with reg 18 or reg 25: reg 32(3).

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#### **465. Management.**

A person is fit to carry on an adoption support agency<sup>1</sup> only if he is of integrity (or, in Wales, suitable integrity) and good character<sup>2</sup>, he is physically and mentally fit to carry on the agency<sup>3</sup>, and full and satisfactory information (or, in Wales, documentation) is available in relation to him in respect of specified matters relating to his identity and his fitness to carry on the agency<sup>4</sup>. In England, an agency may be carried on by an individual, whether or not in partnership with others<sup>5</sup>, by a partnership<sup>6</sup>, or by an organisation<sup>7</sup>; in Wales, an agency may be carried on only by an organisation<sup>8</sup>.

In Wales, the registered provider<sup>9</sup> is required to appoint an individual ('the registered manager') to manage the agency<sup>10</sup>; in England, this obligation arises only if the registered provider is an organisation or a partnership<sup>11</sup>, is not a fit person to manage an agency<sup>12</sup> or is not, or does not intend to be, in full time day-to-day charge of the agency<sup>13</sup>. In all cases a person may not manage an agency unless he is fit to do so<sup>14</sup>. The appointment of a manager must be notified to the registration authority<sup>15</sup>. The registered person<sup>16</sup> and, where applicable, the responsible individual and the registered manager<sup>17</sup> must<sup>18</sup> carry on or (as the case may be) manage the agency with sufficient care, competence and skill<sup>19</sup>; and the registration authority must be notified of changes to the management structure<sup>20</sup>, of matters relating to the insolvency of the registered provider<sup>21</sup>, or if any person involved in the management of the agency is convicted of a criminal offence<sup>22</sup>. Arrangements must also be made for the management of the agency in the manager's or provider's absence<sup>23</sup>.

Failure to comply with any of these requirements<sup>24</sup> is an offence<sup>25</sup>.

1 For the meaning of 'adoption support agency' see para 385 note 12 ante. A person may not carry on an agency unless he is fit to do so: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(1).

2 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(3)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(3)(a).

3 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(3)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(3)(b).

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(3)(c); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(3)(c). As to the relevant matters see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, Sch 2; and the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, Sch 2.

5 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(2)(a). Where an individual carries on an agency otherwise than in partnership with others, he must satisfy the requirements as to suitability, and where an individual carries on an agency in partnership with others he and each of the partners must satisfy those requirements: reg 7(2)(a)(i), (ii). In England, a person may not carry on an agency if he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged and the bankruptcy order has not been annulled or rescinded (reg 7(4)(a)), or if he is a person in respect of whom a bankruptcy restrictions order or an interim bankruptcy restrictions order under the Insolvency Act 1986 Sch 4A (as added) has effect (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY) (Adoption Support Agencies (England) and Adoption Agencies

(Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(4)(a)), or if he has made a composition or arrangement with his creditors and has not been discharged in respect of it (reg 7(4)(c)). The registered person must give notice in writing to the registration authority as soon as it is practicable to do so if a registered provider who is an individual changes his name: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 27(1)(c). As to the notification of management changes see also note 20 infra.

6 Ibid reg 7(2)(b). Where the person who carries on the agency is a partnership, each of the partners must satisfy the requirements as to suitability (reg 7(2)(b)), and the registered person must give notice in writing to the registration authority as soon as it is practicable to do so if there is any change in the membership of the partnership (reg 27(1)(d)). As to the notification of management changes see also note 20 infra.

7 Ibid reg 7(2)(c). An 'organisation' is a body corporate (in England and Wales) or (in England) any unincorporated association other than a partnership: reg 2(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 1(4). Where an organisation carries on an agency it must give notice to the registration authority of the name, address and position in the organisation of an individual ('the responsible individual') who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the agency, and that individual must satisfy the requirements as to suitability: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(2)(c)(i), (ii); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(2)(a), (b). As to the registration authority see para 464 note 3 ante.

In England, where the registered provider is an organisation, the registered person must give notice in writing to the registration authority as soon as it is practicable to do so if the name or address of the organisation is changed; there is any change of director, manager, secretary or similar officer of the organisation; there is any change in the identity of the responsible individual; or if any of these events is proposed to take place: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 27(1)(e). As to the notification of management changes see also note 20 infra.

8 Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 5(2). See note 7 supra.

9 For the meaning of 'registered provider' see para 464 note 1 ante.

10 Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 6(1).

11 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 8(1)(a).

12 Ibid reg 8(1)(b).

13 Ibid reg 8(1)(c).

14 Ibid reg 9(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 7(1). A person is not fit to manage an agency unless he is of integrity and good character; having regard to the size of the agency and the agency's statement of purpose, he has the qualifications, skills and experience necessary for managing the agency and is physically and mentally fit to manage the agency; and full and satisfactory information is available in relation to him in respect of each of the matters listed in the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, Sch 2 or (as the case may be) the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, Sch 2: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 9(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 7(2). As to the statement of purpose see para 464 ante.

15 The registered provider must forthwith notify the registration authority of the name of any person appointed in accordance with the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 8 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 6 and the date on which the appointment is to take effect: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 8(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 6(2).

16 For the meaning of 'registered person' see para 464 note 1 ante.

17 For the meaning of 'registered manager' see para 464 note 1 ante.

18 Ie, in England, having regard to the size of the agency, the statement of purpose and the number and needs of those receiving adoption support services from the agency; and, in Wales, having regard to the size of the agency, the agency's statement of purpose and the need to safeguard and promote the welfare of those receiving adoption support services from the agency: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 10(1); Adoption Support Agencies

(Wales) Regulations 2005, SI 2005/1514, reg 8(1). As to the adoption support services for these purposes see para 464 note 5 ante.

19 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 10(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 8(1). In England, the registered provider must:

- 258 (1) undertake (if he is an individual);
- 259 (2) ensure that the responsible individual undertakes (if the registered provider is an organisation); or
- 260 (3) ensure that one of the partners undertakes (if the registered provider is a partnership),

from time to time such training as is appropriate to ensure that he has the experience and skills necessary for carrying on the agency (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 10(2)), and must ensure that the registered manager undertakes from time to time such training as is appropriate to ensure that he has the experience and skills necessary for managing the agency (reg 10(3)); in Wales, the registered provider must ensure that the responsible individual undertakes from time to time such training as is appropriate to ensure that he has the experience and skills and expertise necessary for carrying on the agency (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 8(2)) and that the registered manager undertakes from time to time such training as is appropriate to ensure that he has the experience and skills necessary for managing the agency (reg 8(3)).

20 The registered person must give notice in writing to the registration authority as soon as it is practicable to do so if a person other than the registered person (in England) or the registered provider (in Wales) carries on or manages the agency, if a person ceases to carry on or manage (in England) or simply to manage (in Wales) the agency, or if any such event is proposed to take place: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 27(1)(a), (b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 30(1)(a), (b). In Wales, the registered person must give notice in writing to the registration authority as soon as it is practicable to do so if the name or address of the registered provider is changed; there is any change of trustee, or director, manager, secretary or other similar officer of the registered provider; there is to be any change in the identity of the responsible individual; the agency intends to cease to act or exist as such; or any such event is proposed to take place: reg 30(1)(c)-(e), (g).

In England, if more than one person is registered in respect of an agency, and a registered person dies, the other registered person must without delay notify the registration authority of the death, in writing (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 27(2)), and if only one person is registered in respect of an agency, and he dies, his personal representatives must without delay notify the registration authority of the death, in writing (reg 27(3)); in Wales, the registered provider must notify the registration authority in writing and without delay of the death of the responsible individual or the registered manager (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 30(2)). See also the provisions relating to the notification of management changes in notes 5-7 supra.

21 In England, the registered person must give notice in writing to the registration authority as soon as it is practicable to do so if (where the registered provider is an individual) a trustee in bankruptcy is appointed or he makes any composition or arrangement with his creditors, or (where the registered provider is a company or a partnership) a receiver, manager, liquidator or provisional liquidator is appointed in respect of the registered provider, or if any such event is proposed to take place (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 27(1)(f), (g)); and, in Wales, the registered person must give notice in writing to the registration authority as soon as it is practicable to do so if a receiver, manager, liquidator or provisional liquidator is appointed in respect of the registered provider or any such event is proposed to take place (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 30(1)(f)). Provision is made in connection with the appointment of liquidators: see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 28; and the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 31.

22 Where the registered person or the responsible individual is convicted of any criminal offence, whether in England and Wales or elsewhere, he must immediately give notice in writing to the registration authority of the date and place of the conviction, the offence of which he was convicted, and the penalty imposed on him in respect of the offence: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 11; Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 9.

23 See the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 26; and the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 29.

24 See the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, regs 7(1), (4), 8(2), 9(1), 10, 11, 26, 27(1) or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, regs 5-9, 29, 30 (see the text and notes 1-21 *supra*).

25 See para 464 note 15 *ante*.

## **UPDATE**

### **465 Management**

NOTES 4, 14--SI 2005/2720 Sch 2 amended: SI 2009/1895. SI 2005/1514 Sch 2 amended: SI 2009/2541.

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#### **466. Staffing.**

The registered person<sup>1</sup> must ensure that there is<sup>2</sup> a sufficient number of suitably qualified, competent and experienced persons working for the purposes of an adoption support agency<sup>3</sup>; and may not employ a person to work for the purposes of the agency unless that person is fit to work for the purposes of the agency<sup>4</sup> or allow a person who is employed by a person other than the registered provider<sup>5</sup> to work for the purposes of the agency unless that person is fit to work for the purposes of the agency<sup>6</sup>. The registered person must also operate a disciplinary procedure which, in particular, provides for the suspension of an employee where necessary<sup>7</sup> and provides that a failure to report abuse<sup>8</sup> is a ground on which disciplinary proceedings may be instituted<sup>9</sup>; and the registered person must keep and maintain records with respect to staff<sup>10</sup>. Failure to comply with any of these requirements<sup>11</sup> is an offence<sup>12</sup>.

1 For the meaning of 'registered person' see para 464 note 1 ante.

2 Ie, in England, having regard to the size of the adoption support agency, the statement of purpose and the number and needs of persons to whom the agency provides adoption support services; and, in Wales, having regard to the size of the agency, the agency's statement of purpose and the need to safeguard and promote the welfare of children to whom the agency provides adoption support services: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 18; Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 21(1). For the meaning of 'adoption support agency' see para 385 note 12 ante. As to the adoption support services for these purposes see para 464 note 5 ante. As to the statement of purpose see para 464 ante.

3 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 18; Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 21(1). Pursuant to this requirement, the registered person must ensure that all permanent appointments of staff employed for the purposes of the agency are subject to the satisfactory completion of a period of probation and provide all employees with a job description outlining their responsibilities (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 20(1)(a), (b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 23(1)(a), (b)) and that all persons employed by the agency receive appropriate training, supervision and appraisal and are enabled from time to time to obtain further qualifications appropriate to the work they perform (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 20(2)(a), (b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 23(2)(a), (b)). Any reference to 'employing' a person includes employing a person whether or not for payment, and whether under a contract of service or a contract for services, and allowing a person to work as a volunteer; and references to an 'employee' or to a person being 'employed' are to be construed accordingly: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 1(5)(d).

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 19(1)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 22(1)(a). A person is not fit to work for the purposes of an agency unless he is of integrity (in Wales, suitable integrity) and good character, he has the qualifications, skills and experience (and, in Wales, competence) necessary for the work he is to perform, he is physically and mentally fit for the work he is to perform, and full and satisfactory information is available in relation to him in respect of each of the matters specified in the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, Sch 2 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, Sch 2: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 19(2)(a)-(d); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 22(2)(a)-(d).

5 For the meaning of 'registered provider' see para 464 note 1 ante.



6 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 19(1)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 22(1)(b).

7 Ie where necessary in the interests of the safety or welfare of persons to whom the agency provides adoption support services: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 21(1)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 24(1)(a).

8 Ie a failure on the part of an employee to report, to an appropriate person, an incident of abuse, or suspected abuse of a child to whom the agency provides adoption support services (or, in Wales, any child): Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 21(1)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 24(1)(b). For this purpose an 'appropriate person' is the registered person, an officer of the registration authority (see para 464 note 3 ante), a police officer, an officer of the National Society for the Prevention of Cruelty to Children, an officer of the local authority in whose area the agency is situated, or (in England) an officer of the local authority in whose area the child is living: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 21(2)(a)-(e); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 24(2)(a)-(d).

9 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 21(1)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 24(1)(b).

10 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 22(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 25(1). As to the records specified see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, Sch 3; and the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, Sch 3. Records must be retained for at least 15 years from the date of the last entry: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 22(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 25(2).

11 Ie the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, regs 18, 19(1), 20, 21(1), 22 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, regs 21-25 (see the text and notes 1-10 supra).

12 See para 464 note 15 ante.

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#### **467. Premises and security.**

The registered person<sup>1</sup> may not use premises for the purposes of an adoption support agency<sup>2</sup> unless the premises are suitable for the purpose of achieving the aims and objectives set out in the statement of purpose<sup>3</sup>, and must ensure:

- 872 (1) that there are adequate security arrangements at the premises, and in particular, that there are secure facilities for the storage of records<sup>4</sup>; and
- 873 (2) that any records which are, for any reason, not on the agency's premises are nevertheless kept in conditions of appropriate security<sup>5</sup>.

Failure to comply with any of these requirements<sup>6</sup> is an offence<sup>7</sup>.

1 For the meaning of 'registered person' see para 464 note 1 ante.

2 For the meaning of 'adoption support agency' see para 385 note 12 ante.

3 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 23(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26(1). As to the statement of purpose see para 464 ante.

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 23(2)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26(2)(a). In connection with old case records held by adoption support agencies in England which were formerly adoption agencies see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 15.

5 Ibid reg 23(2)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26(2)(b).

6 I.e. the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 23 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26 (see the text and notes 1-5 supra).

7 See para 464 note 15 ante.

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#### **468. Policies.**

The registered person<sup>1</sup> in relation to an adoption support agency<sup>2</sup> providing adoption support services<sup>3</sup> (in England, to children) must prepare and implement a written policy which is intended to safeguard from abuse or neglect children receiving adoption support services from the agency<sup>4</sup> and which sets out the procedure to be followed in the event of any allegation of abuse or neglect<sup>5</sup>. Failure to comply with any of these requirements<sup>6</sup> is an offence<sup>7</sup>.

1 For the meaning of 'registered person' see para 464 note 1 ante.

2 For the meaning of 'adoption support agency' see para 385 note 12 ante.

3 As to the adoption support services for these purposes see para 464 note 5 ante.

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(1)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16(1)(a).

5 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(1)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16(1)(b). This procedure must provide in particular for: (1) liaison and co-operation with any local authority which is, or may be, making child protection enquiries (ie any enquiries carried out by a local authority in the exercise of any of its functions conferred by or under the Children Act 1989 relating to the protection of children) in respect of the child (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(2)(a), (3); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16(2)(a), (3)); (2) written records to be kept of any allegation of abuse or neglect and the action taken in response (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(2)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16(2)(b)); and (3) arrangements to be made for persons working for the purposes of the agency, and adults and children to whom the agency has provided adoption support services, to have access to information that would enable them to contact the local authority in whose area the agency is situated, any other local authority on behalf of whom the agency is providing adoption support services to a child, and the registration authority, regarding any concern about child welfare or safety (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(2)(c); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16(2)(c)). As to the registration authority see para 464 note 3 ante.

6 Ie the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 12(1), (2) or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16 (see the text and notes 1-5 supra).

7 See para 464 note 15 ante.

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#### **469. Assessment and review of services.**

The registered person<sup>1</sup> must ensure that adoption support services<sup>2</sup> provided to any person<sup>3</sup> are appropriate having regard to the needs for such services identified by an assessment carried out by a local authority or (in England) the adoption support agency<sup>4</sup>.

In Wales, the registered person must make suitable arrangements to establish and maintain a system for monitoring, reviewing and improving the quality of adoption support services provided by the agency<sup>5</sup>. The Welsh Ministers may at any time request the registered person to undertake an assessment of the service provided by the agency<sup>6</sup>, and may at any time notify the registered person of the action that in their view he must take to ensure compliance with the applicable legislation<sup>7</sup>.

Failure to comply with any of these requirements<sup>8</sup> is an offence<sup>9</sup>.

1 For the meaning of 'registered person' see para 464 note 1 ante.

2 As to the adoption support services for these purposes see para 464 note 5 ante.

3 Ie, in Wales, as part of a local authority assessment: Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 17.

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 13; Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 17. For the meaning of 'adoption support agency' see para 385 note 12 ante.

5 Ibid reg 26A(1) (regs 26A-26C added by SI 2006/3251). The system so established must make provision for the quality of service to be reviewed at least annually and for the registered person to obtain the views of any person receiving adoption support services from the agency, representatives of any person receiving adoption support services from the agency, any local authority which has arranged for the provision of an adoption support service by the agency, and staff employed by the agency, on the quality of service provided, as part of any review undertaken: Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26A(2) (as so added). Following such a review, the registered person must within 28 days prepare a report of that review and make a copy of the report available in an appropriate format when requested by any person receiving adoption support services from the agency, representatives of any person receiving adoption support services from the agency, any local authority which has arranged for the provision of an adoption support service by the agency, staff employed by agency, and the Welsh Ministers: Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26A(3) (as so added). As to the Welsh Ministers see para 155 ante.

6 Ibid reg 26B(1) (as added: see note 5 supra). Within 28 days of receiving such a request, the registered person must supply to the Welsh Ministers the assessment in the form required: reg 26B(2) (as so added). The registered person must take reasonable steps to ensure that the assessment is not misleading nor inaccurate: reg 26B(3) (as so added).

7 Ibid reg 26C(1) (as added: see note 5 supra). The 'applicable legislation' for these purposes is the Care Standards 2000, the Adoption and Children Act 2002 and any regulations made under them: Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 26C(1) (as so added). The Welsh Ministers may specify the timescale within which the registered person must take the action so required (reg 26C(2) (as so added)); and the registered person must notify the Welsh Ministers of the completion of any such action (reg 26C(3) (as so added)).

8 Ie the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 13 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, regs 17, 26A-26C (see the text and notes 1-7 supra).

9 See para 464 note 15 ante.

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#### **470. Complaints.**

Adoption support agencies<sup>1</sup> are required to establish and implement written procedures for considering complaints made by or on behalf of persons in receipt of adoption support services<sup>2</sup> (and, in England, persons to whom the agency has refused to provide such services)<sup>3</sup>. The procedure must in particular provide for both formal and informal (in England) or local (in Wales) resolution of a complaint<sup>4</sup>, for dealing with complaints made about the registered person (or, in England, the responsible individual)<sup>5</sup> and for complaints to be made by a person acting on behalf of a child<sup>6</sup>; in England, the procedure must also provide that no person who is the subject of a complaint takes part in its consideration other than, if the registered person considers it appropriate, at the informal resolution stage<sup>7</sup>. The procedure is required to be brought to the notice of agency staff<sup>8</sup> and, where applicable, persons in receipt of adoption support services<sup>9</sup>.

In England, the registered person must ensure that any complaint made under the complaints procedure is fully investigated<sup>10</sup> and keep the complainant informed of the outcome of the investigation<sup>11</sup>; in Wales, provision is made for the referral of complaints to the Welsh Ministers or local authorities<sup>12</sup> and for the provision of advocacy, conciliation and mediation services<sup>13</sup>. In both England and Wales, written records of complaints must be made and reported<sup>14</sup>. Provision is also made in Wales where complaints are subject to concurrent consideration by a court or tribunal<sup>15</sup>.

Failure to comply with any of these requirements<sup>16</sup> is an offence<sup>17</sup>.

1 For the meaning of 'adoption support agency' see para 385 note 12 ante.

2 As to the adoption support services for these purposes see para 464 note 5 ante.

3 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(1) (regs 19, 20 substituted, and regs 20A-20D added, by SI 2006/3251). The registered person is required to establish (in England) or prepare and follow (in Wales) this procedure: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(1); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(1) (as so substituted). For the meaning of 'registered person' see para 464 note 1 ante. In England, the registered person must take all reasonable steps to ensure that children are enabled to make a complaint and no person is subject to any reprisal by the agency for making a complaint: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 17(4). In Wales, the complaints procedure must be appropriate to the needs of person receiving adoption support services from the agency (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(2) (as so substituted)); and it must be operated in accordance with the principle that the welfare of the persons receiving adoption support services from the agency is safeguarded and promoted and account must be taken of the ascertainable wishes and feelings of such persons (reg 20(1) (as so substituted)).

4 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(2)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(7) (as substituted: see note 3 supra). In Wales, where the complaints procedure includes provision for a formal consideration, this provision must be approved by the Welsh Ministers (reg 19(8) (as so substituted)), and such approval will only be given where the procedure includes provision for the formal consideration to be undertaken by a person who is independent of the management of the agency (reg 19(9) (as so substituted)). Detailed provision is made in connection with the local resolution (see reg 20A (as so added)) and the formal consideration (see reg 20B (as so added)) of complaints in Wales.

5 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(2)(c); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(3) (as substituted: see note 3 supra). As to the 'responsible individual' see the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 7(2)(c); and para 465 note 7 ante.

6 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(2)(d); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(1) (as substituted: see note 3 supra).

7 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(2)(b).

8 In England, the registered person must provide a copy of the complaints procedure to every person working for the purposes of the agency; and, in Wales, the registered person must ensure that the staff employed by the agency are informed about, given a copy of and appropriately trained in the operation of the procedure: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(3); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(5) (as substituted: see note 3 supra). As to references to 'employing' a person see para 466 note 3 ante. In England, the copy of the complaints procedure supplied under these requirements must include the name, address and telephone number of the registration authority and details of the procedure (if any) which has been notified to the registered person by the registration authority for the making of complaints to the registration authority that relate to the agency: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(4). Similar requirements apply in Wales: see the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(6) (as so substituted). As to the registration authority see para 464 note 3 ante.

9 In England, the registered person must provide, upon request, a copy of the procedure to any person to whom the agency has provided adoption support services or to whom the agency has refused to provide adoption support services or any person acting on behalf of a child; and, in Wales, the registered person must ensure that persons receiving adoption support services from the agency, representatives of such persons and any authority which has arranged for the provision of an adoption support service by the agency are aware of the existence of the complaints procedure, and the registered person must take all reasonable steps to give a copy of the complaints procedure in an appropriate format or such format as may be requested to such persons: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 16(3); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 19(4) (as substituted: see note 3 supra).

10 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 17(1).

11 Ibid reg 17(2) (providing that the registered person must, so far as is reasonably practicable, within a period of 28 days beginning on the date on which the complaint is received by the agency, inform the complainant of the outcome of the investigation and the action (if any) that is to be taken in consequence).

12 When a complaint is made, the registered person must advise the complainant of his right to at any time complain to the Welsh Ministers or, where relevant, to the local authority which has arranged for the provision of adoption support services by the agency: Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 20(2) (as substituted: see note 3 supra). As to the Welsh Ministers see para 155 ante.

13 The registered person must inform the complainant of the availability of any advocacy services which the registered person believes may be of assistance to the complainant: *ibid* reg 20(3) (as substituted: see note 3 supra). Where relevant and the complainant is a child, the registered person must advise the complainant that a local authority receiving a complaint must provide information and assistance for complainants, and must in particular offer help in obtaining an advocate: reg 20(3) (as so added). The registered person may in any case where it is appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the complaint: reg 20(4) (as so substituted).

14 In England, the registered person must ensure that a written record is made of any complaint (including details of the investigation made, the outcome and any action taken in consequence) which must be retained for at least three years from the date that it is made (Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 17(3)); and the registered person must supply to the registration authority at its request a statement containing a summary of any complaints made during the preceding 12 months and the action that was taken in consequence (reg 17(5)). In Wales, the registered person must keep a written record of any complaint, the outcome of the investigation and any action taken in response (Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 20(5) (as substituted: see note 3 supra)); and the registered person must supply to the Welsh Ministers at their request a

statement containing a summary of the complaints made during the preceding 12 months and the action taken in response to each complaint (reg 20(6) (as so substituted)).

15 See *ibid* reg 20D (as added: see note 3 *supra*).

16 See the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, regs 16, 17 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, regs 19, 20, 20A-20D (see the text and notes 1-15 *supra*).

17 See para 464 note 15 *ante*.



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#### **471. Records.**

The registered person<sup>1</sup> must maintain (and, in Wales, keep up to date) and retain<sup>2</sup> records indicating in respect of each person to whom an adoption support agency<sup>3</sup> provides adoption support services<sup>4</sup>:

- 874 (1) his full name<sup>5</sup>;
- 875 (2) his date of birth<sup>6</sup>;
- 876 (3) a description of services requested<sup>7</sup>;
- 877 (4) a description of needs as assessed by a local authority (or, in England, the agency)<sup>8</sup>;
- 878 (5) a description of services provided<sup>9</sup>;
- 879 (6) whether the services are provided<sup>10</sup> on behalf of a local authority<sup>11</sup>;
- 880 (7) in England, whether the person is an adoptive child<sup>12</sup> or an adopted person who has attained the age of 18 or, if not, his relationship to an adoptive child or adopted person<sup>13</sup>; and
- 881 (8) in Wales, whether the persons are children who may be adopted, their parents and guardians, persons wishing to adopt a child, adopted persons, their parents, natural parents, former guardians and related persons<sup>14</sup>.

Failure to comply with any of these requirements<sup>15</sup> is an offence<sup>16</sup>.

1 For the meaning of 'registered person' see para 464 note 1 ante.

2 In England, records must be retained for such period as the registered provider considers appropriate; in Wales, records must be retained for at least 75 years from the date of the last entry: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(2); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(2).

3 For the meaning of 'adoption support agency' see para 385 note 12 ante.

4 As to the adoption support services for these purposes see para 464 note 5 ante.

5 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(a); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(a).

6 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(b); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(b).

7 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(d); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(d).

8 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(e); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(e).

9 Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(f); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(f).

10     le by virtue of the Adoption and Children Act 2002 s 3(4)(b) (see para 395 ante).

11     Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14(1)(g); Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(g).

12     For the purposes of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, 'adoptive child' means a child who has been adopted or in respect of whom a person has given notice of his intention to adopt under the Adoption and Children Act 2002 s 44 (see para 365 ante) or a child whom an adoption agency has matched with a prospective adopter or placed for adoption: Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 2(1). For the meaning of 'child' see para 464 note 5 ante.

13     Ibid reg 14(1)(c).

14     Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 18(1)(c). For the meaning of 'related person' see para 464 note 5 ante.

15     le the requirements of the Adoption Support Agencies (England) and Adoption Agencies (Miscellaneous Amendments) Regulations 2005, SI 2005/2720, reg 14 or the Adoption Support Agencies (Wales) Regulations 2005, SI 2005/1514, reg 16 (see the text and notes 1-14 supra).

16     See para 464 note 15 ante.

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## ***D. DISCLOSURE OF INFORMATION IN RELATION TO A PERSON'S ADOPTION***

### **(A) ADOPTIONS ON OR AFTER 30 DECEMBER 2005**

#### **472. Power to regulate the disclosure of information.**

Regulations<sup>1</sup> may prescribe, in relation to a person adopted on or after 30 December 2005<sup>2</sup>, the information<sup>3</sup> which an adoption agency<sup>4</sup> must keep in relation to a person's adoption<sup>5</sup> (known as 'section 56 information'<sup>6</sup>) and the form and manner in which it must keep that information<sup>7</sup>, and may provide for the transfer in prescribed circumstances of information held, or previously held, by an adoption agency to another adoption agency<sup>8</sup>. Such regulations may be made for a variety of purposes connected with the provisions on disclosure of information relating to adoption, including the disclosure of information by the Registrar General and the payment of fees<sup>9</sup>.

1    Ie regulations under the Adoption and Children Act 2002 s 9: s 65(1). As to such regulations see para 397 note 1 ante.

2    Ie the date on which the Adoption and Children Act 2002 was brought fully into effect: see para 325 note 1 ante.

3    For the meaning of 'information' see para 385 note 8 ante.

4    Ie a local authority or a registered adoption society: see paras 394-395 ante.

5    Adoption and Children Act 2002 s 56(1)(a). As to the making of regulations generally see para 334 note 12 ante.

6    Ibid s 56(2). This definition applies for the purposes of ss 56-65: s 56(2). As to the section 56 information see para 473 post.

7    Ibid s 56(1)(b).

8    Ibid s 56(3).

9    Regulations may make provision for the purposes of ibid ss 56-65 (see paras 473-479 post) including provision as to the performance by adoption agencies of their functions (s 64(1)(a)) and the manner in which information may be received (s 64(1)(b)); may prescribe the manner in which agreements made by virtue of s 57(5) are to be recorded (s 64(1)(c), (2)(a)) and the information to be provided by any person on an application for the disclosure of information under ss 56-65 (s 64(2)(b)); may require adoption agencies to give to prescribed persons prescribed information about the rights or opportunities to obtain information, or to give their views as to its disclosure, given by ss 56-65 (s 64(3)(a)) and to seek prescribed information from, or give prescribed information to, the Registrar General in prescribed circumstances (s 64(3)(b)); may require the Registrar General to disclose to any person (including an adopted person) at his request any information which the person requires to assist him to make contact with the adoption agency which is the appropriate adoption agency in the case of an adopted person specified in the request (or, as the case may be, in the applicant's case) (s 64(4)(a)) or to disclose to the appropriate adoption agency any information which the agency requires about any entry relating to the adopted person on the Adoption Contact Register (and may provide for the payment of a prescribed fee by an adoption agency so obtaining information) (s 64(4)(b), (6)); may provide for the payment of a prescribed fee in respect of the disclosure in prescribed circumstances of any information in pursuance of s 60, s 61 or s 62 (although an adopted person may not be required to pay any fee in respect of

any information disclosed to him in relation to any person who (but for his adoption) would be related to him by blood (including half blood), marriage or civil partnership) (s 64(5) (amended by the Civil Partnership Act 2004 s 79(1), (6))). Regulations prescribing any fee by virtue of the Adoption and Children Act 2002 s 64(6) require the approval of the Chancellor of the Exchequer: s 65(4). Regulations making any provision as to the manner in which any application is to be made for the disclosure of information by the Registrar General require his approval: s 65(5). As to the Adoption Contact Register see paras 386-388 ante.

'Appropriate adoption agency', in relation to an adopted person or to information relating to his adoption, means: (1) if the person was placed for adoption by an adoption agency, that agency or (if different) the agency which keeps the information in relation to his adoption; and (2) in any other case, the local authority to which notice of intention to adopt (see para 365 ante) was given: s 65(1). As to the regulations see ss 57-63; the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888 (as amended); the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689; and paras 473-479 post. As to the payment of fees see the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 22; and the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 20.

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#### **473. The section 56 information.**

The information which an adoption agency<sup>1</sup> must keep in relation to a person's<sup>2</sup> adoption (the 'section 56 information'<sup>3</sup>) is:

- 882 (1) the case record that was set up<sup>4</sup> in respect of the adopted person<sup>5</sup>;
- 883 (2) any information that has been supplied by a natural parent or relative<sup>6</sup> (in England) or birth parent<sup>7</sup> or other birth relative<sup>8</sup> (in Wales) of the adopted person, or other significant person in the adopted person's life, with the intention that the adopted person may, should he wish to, be given that information<sup>9</sup>;
- 884 (3) any information supplied by the adoptive parents or other persons which is relevant to matters arising after the making of the adoption order<sup>10</sup>;
- 885 (4) any information that the adopted person has requested should be kept<sup>11</sup>;
- 886 (5) any information that would enable an adopted person to obtain a certified copy of the record of his birth<sup>12</sup> given to the adoption agency in respect of an adopted person by the Registrar General<sup>13</sup>;
- 887 (6) any information disclosed to the adoption agency about an entry relating to the adopted person on the Adoption Contact Register<sup>14</sup>;
- 888 (7) any information required to be recorded pursuant to the requirements relating to disclosure<sup>15</sup>;
- 889 (8) any information recording the views of a person about the disclosure of information<sup>16</sup>;
- 890 (9) any information disclosed for the purposes of counselling<sup>17</sup>;
- 891 (10) the record of any agreement for the disclosure of protected information<sup>18</sup>; and
- 892 (11) in Wales, any information that has been supplied by a former foster carer of the adopted person with the intention that the adopted person may, should he so wish, be given that information<sup>19</sup>.

An adoption agency in Wales must also keep a record of any objects and mementoes that are not retained because they are not reasonably practicable to store<sup>20</sup>.

An agency must keep section 56 information in relation to a person's adoption for at least 100 years from the date of the adoption order<sup>21</sup>, and must ensure that section 56 information in relation to a person's adoption is at all times kept in secure conditions and in particular that all appropriate measures are taken to prevent theft, unauthorised disclosure, damage, loss or destruction<sup>22</sup>. Provision is also made for the transfer of section 56 information where a registered adoption society intends to cease to act or exist as such<sup>23</sup>.

1     le, in England, the adoption agency that placed the relevant person for adoption or an adoption agency to which the case record in respect of the adopted person (or any information mentioned in the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3) (see notes 9-15 infra)) has been transferred (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 3); or, in Wales, the adoption agency that placed for adoption a person adopted on or after 30 December 2005 or to which the case records in respect of an adopted person have been transferred (Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(1), (2)). An 'adoption agency' can be a local authority or a registered adoption society: see paras 394-395 ante. As to

the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante.

2     le a person adopted on or after 30 December 2005: see para 472 ante.

3     For the meaning of 'section 56 information' see para 472 ante. For these purposes, in Wales, 'information' includes information in any form, including paper or electronic records and photographs (Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(4)); the word is not defined for the purposes of the English regulations.

4     le under the Adoption Agencies Regulations 2005, SI 2005/389, Pt 3 (regs 11-20A) (as amended) (see para 447 ante), the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 12 (see para 447 ante), or the Adoption Agencies Regulations 1983, SI 1983/1964 (as amended): Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(1), (2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(2).

5     Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(1), (2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(2).

6     In England 'relative' in relation to an adopted person means a person who, but for the adoption, would be related to him by blood (including half blood) or marriage: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 2.

7     In Wales 'birth parent' in relation to an adopted person means a person who, but for the adoption, would be his parent: Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 2.

8     In Wales 'birth relative' in relation to an adopted person means a person who, but for the adoption, would be related to him by blood (including half blood) or marriage: *ibid* reg 2.

9     Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(a); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(a). In England, an adoption agency is not required to keep any information falling within the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(a)-(c) if the agency considers that it would be prejudicial to the adopted person's welfare to keep it or that it would not be reasonably practicable to keep it: reg 3(4).

10    *Ibid* reg 4(3)(b); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(c). See note 9 *supra*.

11    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(c); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(d). See note 9 *supra*.

12    le information given under the Adoption and Children Act 2002 s 79(5) (see para 385 ante).

13    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(d); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(e).

14    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(e); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(f). As to the Adoption Contact Register see paras 386-388 ante.

15    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(f); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(g). As to such information see the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 10; the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 9; and para 474 post.

16    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(f); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(g). As to such information see the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 14; the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 13; and para 477 note 10 post.

17 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(f); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(g). As to such information see the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 18; the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 16; and para 479 post.

18 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 4(3)(g); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 3(3)(h). As to such agreements see the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11; the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, regs 10, 11; and paras 475, 477 post.

19 Ibid reg 3(3)(b).

20 Ibid reg 3(5).

21 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 6; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 5.

22 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 5; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 4.

23 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 7; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 6.

## **UPDATE**

### **473 The section 56 information**

NOTE 6--Definition of 'relative' in SI 2005/888 reg 2 amended: SI 2009/1892.

NOTE 8--Definition of 'birth relative' in SI 2005/2689 reg 2 amended: SI 2009/1892.

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#### **474. Restrictions on disclosure of protected information.**

The disclosure of specified information<sup>1</sup> kept by an adoption agency<sup>2</sup> is restricted and may be disclosed only in accordance with the statutory provisions<sup>3</sup>. The information in question is:

- 893 (1) any section 56 information<sup>4</sup> kept by an adoption agency which is about an adopted person or any other person, and is or includes identifying information<sup>5</sup> about the person in question<sup>6</sup>; and
- 894 (2) any information kept by an adoption agency which the agency has obtained from the Registrar General<sup>7</sup> and any other information which would enable the adopted person to obtain a certified copy of the record of his birth, or which is information about an entry relating to the adopted person in the Adoption Contact Register<sup>8</sup>.

Information the disclosure of which is so restricted is referred to (in relation to the person in question) as 'protected information'<sup>9</sup>, and disclosure in contravention of these provisions<sup>10</sup> is an offence<sup>11</sup>. However, notwithstanding these provisions, regulations may authorise or require an adoption agency to disclose protected information to a person who is not an adopted person<sup>12</sup>, and disclosure has accordingly been authorised where it is required for the purposes of statutory inquiries and inspections<sup>13</sup>. An adoption agency may also disclose section 56 information (including protected information) to a registered adoption support agency<sup>14</sup> (or, in England, another adoption agency) which provides services to the adoption agency in connection with any of its functions<sup>15</sup> relating to the disclosure of protected information about adults or about children<sup>16</sup> and to a person who is authorised in writing by the Secretary of State or the Welsh Ministers to obtain information for the purposes of research<sup>17</sup>, and may disclose section 56 information that is not protected information as it thinks fit for the purposes of carrying out its functions as an adoption agency<sup>18</sup>. A written record must be made of any such disclosures<sup>19</sup>.

Protected information may also be disclosed by agreement<sup>20</sup>.

<sup>1</sup> For the meaning of 'information' see para 385 note 8 ante.

<sup>2</sup> I.e. a local authority or a registered adoption society: see paras 394-395 ante.

<sup>3</sup> I.e. may be disclosed only in pursuance of the Adoption and Children Act 2002 ss 56-65 (see the text and notes 4-20 infra; and paras 472-473 ante, 475 et seq post. These provisions apply only in relation to a person adopted on or after 30 December 2005: see para 472 ante.

<sup>4</sup> For the meaning of 'section 56 information' see paras 472-473 ante.

<sup>5</sup> 'Identifying information' about a person means information which, whether taken on its own or together with other information disclosed by an adoption agency, identifies the person or enables the person to be identified: Adoption and Children Act 2002 s 57(4).

<sup>6</sup> Ibid s 57(1). Any information kept by an adoption agency which the agency has obtained from the Registrar General on an application under s 79(5) (see para 385 ante) and any other information which would enable the adopted person to obtain a certified copy of the record of his birth or which is information about an



entry relating to the adopted person in the Adoption Contact Register may only be disclosed to a person by the agency in accordance with the statutory provisions: s 57(2).

7 le on an application under *ibid* s 79(5) (see para 385 ante).

8 As to the Adoption Contact Register see paras 386-388 ante.

9 Adoption and Children Act 2002 s 57(3).

10 le in contravention of *ibid* s 57 (see the text and notes 1-9 supra).

11 See *ibid* s 59; the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 21; and the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 19 (a registered adoption society which discloses any information in contravention of the Adoption and Children Act 2002 s 57 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale). As to the standard scale see para 132 note 2 ante. Proceedings for an offence by virtue of s 59 may not, without the written consent of the Attorney General, be taken by any person other than Her Majesty's Chief Inspector of Education, Children's Services and Skills or the Welsh Ministers: s 99 (amended by the Education and Inspections Act 2006 s 157, Sch 14 para 76). Proceedings in the High Court or a county court may be heard and determined in private: Adoption and Children Act 2002 s 101. Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

12 *Ibid* s 57(6). See also s 58(1), (3), which provide that an adoption agency must, in prescribed circumstances, disclose prescribed section 56 information other than protected information to a prescribed person.

13 An adoption agency must disclose section 56 information (including protected information) as may be required: (1) to the Secretary of State and the Welsh Ministers (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(b); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(c)); (2) subject to the provisions of the Local Government Act 1974 ss 29(7), 32(3) (investigations and disclosure: see LOCAL GOVERNMENT vol 69 (2009) PARA 859), to the Commission for Local Administration in England (or, as the case may be, Wales), for the purposes of any investigation conducted in accordance with Pt III (ss 23-34) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 839 et seq) (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(d); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(d)); (3) to any person appointed by the adoption agency for the purposes of the consideration by the agency of any representations (including complaints) (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(e); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(e)); (4) to a panel constituted under the Adoption and Children Act 2002 s 12 (see para 440 note 3 ante) to consider a qualifying determination in relation to the disclosure of section 56 information (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(f); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(f)); and (5) to a court having power to make an order under the Adoption and Children Act 2002 or under the Children Act 1989 (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(g); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(h)). As to the court see para 511 post. In England, an agency must also disclose section 56 information (including protected information) as may be required to those holding an inquiry under the Children Act 2004 ss 3, 4 (inquiries held by the Children's Commissioner: see para 165 ante) or under the Inquiries Act 2005 (see ADMINISTRATIVE LAW) for the purposes of such an inquiry (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(a)), to the registration authority (reg 9(c)) and to the Public Services Ombudsman for Wales for the purposes of an inquiry held by him under the Public Services Ombudsman (Wales) Act 2005 s 2 (see ADMINISTRATIVE LAW) (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 9(h) (added by SI 2005/3482)). In Wales, an agency must disclose section 56 information (including protected information) as may be required to those holding an inquiry under the Adoption and Children Act 2002 s 17 (repealed), the Children Act 1989 s 81 (repealed) or the Inquiries Act 2005 s 1 (see ADMINISTRATIVE LAW) for the purposes of such an inquiry (Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(a)), subject to the provisions of the Care Standards Act 2000 s 74(5) (see para 170 ante), to the Children's Commissioner for Wales for the purposes of any examination conducted in accordance with Pt V (ss 72-78) (as amended) (see para 167 et seq ante) (Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(b)) and to a Welsh family proceedings officer or an officer of CAFCASS for the purposes of the discharge of the officer's duties under the Adoption and Children Act 2002 (Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 8(g)). As to the Secretary of State and the Welsh Ministers see para 155 ante. In England, 'the registration authority' means Her Majesty's Chief Inspector of Education,

Children's Services and Skills: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 2 (amended by SI 2007/603). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. In Wales, 'Welsh family proceedings officer' has the meaning given in the Children Act 2004 s 35(4) (see para 230 note 9 ante); and 'CAFCASS' means the Children and Family Court Advisory and Support Service (see para 230 ante): Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 2.

14 'Registered adoption support agency' means an adoption support agency in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE): Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 2; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 2.

15 le under the Adoption and Children Act 2002 s 61 (see para 477 post) or s 62 (see para 478 post).

16 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 8(2)(a); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 7(2).

17 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 8(2)(b); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 7(3).

18 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 8(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 7(1) (made pursuant to the Adoption and Children Act 2002 s 58(1), (2), which provide that an adoption agency may for the purposes of its functions disclose to any person in accordance with prescribed arrangements any section 56 information other than protected information). As to the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante.

19 The adoption agency must make a written record of any disclosure made under the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 8 or reg 9 or the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 7 or reg 8 (see the text and notes 13-18 supra) which must include a description of the information disclosed, the date on which the information is disclosed, the person to whom the information is disclosed and the reason for disclosure: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 10; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 9.

20 See para 475 post.

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#### **475. Agreements for disclosure of protected information.**

Protected information<sup>1</sup> may be disclosed<sup>2</sup> in pursuance of:

- 895 (1) an agreement to which the adoption agency<sup>3</sup> is a party made between the agency and a person aged 18 or over at the time the agreement is made as to the disclosure of protected information about him<sup>4</sup>; or
- 896 (2) an agreement to which the adoption agency is a party made between the agency and both the adoptive parent<sup>5</sup> of the adopted person and each person who, before the adoption order was made, was a parent with parental responsibility for the adopted person, as to the disclosure of protected information about them or about the adopted person<sup>6</sup>.

A written record must be made of any such agreements<sup>7</sup>.

1 As to protected information see para 474 ante.

2 Ie its disclosure is not prevented by the Adoption and Children Act 2002 s 57 (see para 474 ante): s 57(5). These provisions apply only in relation to a person adopted on or after 30 December 2005: see para 472 ante.

3 Ie a local authority or a registered adoption society: see paras 394-395 ante.

4 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11(1)(a); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10(1)(a). As to the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante.

5 Or in the case of adoption by a couple, both adoptive parents: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11(1)(b)(i); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10(1)(b)(i).

6 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11(1)(b); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10(1)(b).

7 The adoption agency must make a written record of any agreement made under Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11 or the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10 (see the text and notes 1-6 supra) which must include the full names and signatures of the persons who are parties, the date on which it is made, the reasons for making it, the information that may be disclosed in accordance with the agreement and any agreed restrictions on the circumstances in which information may be disclosed: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10(2).

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#### **476. Disclosure of information to adopted adult.**

An adopted person<sup>1</sup> who has attained the age of 18 years has the right, at his request, to receive from the appropriate adoption agency<sup>2</sup>:

- 897 (1) any information which would enable him to obtain a certified copy of the record of his birth, unless the High Court orders otherwise<sup>3</sup>; and
- 898 (2) any prescribed information disclosed to the adopters by the agency<sup>4</sup>.

The adopted person also has the right, at his request, to receive from the court which made the adoption order a copy of any prescribed document or prescribed order relating to the adoption<sup>5</sup>.

1    Ie a person adopted on or after 30 December 2005: see para 472 ante.

2    Ie, in relation to an adopted person or to information relating to his adoption: (1) if the person was placed for adoption by an adoption agency, that agency or (if different) the agency which keeps the information in relation to his adoption; (2) in any other case, the local authority to which notice of intention to adopt was given: Adoption and Children Act 2002 s 65(1). For the meaning of 'notice of intention to adopt' see s 44(2); and para 365 ante. An adoption agency can be a local authority or a registered adoption society: see paras 394-395 ante. For the meaning of 'child placed for adoption by an adoption agency' see para 329 note 8 ante. As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

3    Ibid s 60(1), (2)(a). The High Court may make an order under s 60(2)(a), on an application by the appropriate adoption agency, if satisfied that the circumstances are exceptional: s 60(3). Where an adopted person who has attained the age of 18 years requests information from an adoption agency under s 60(2)(a) that would enable him to obtain a certified copy of the record of his birth and the agency does not have that information, it must seek the information from the Registrar General (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 19(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 17(1)), and where an adoption agency seeks such information from the Registrar General the agency must provide him in writing with, so far as it is known, the name, date of birth and country of birth of the adopted person, the names of that person's adoptive father and mother and the date of the adoption order (Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 19(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 17(2)).

The Registrar General must disclose to any person (including an adopted person) at his request any information that the person requires to assist him to make contact with the adoption agency which is the appropriate adoption agency in the case of the person specified in the request (or, as the case may be, in the applicant's case), and must disclose to the appropriate adoption agency any information that the agency requires, in relation to an application under the Adoption and Children Act 2002 s 60, s 61 (see para 477 post) or s 62 (see para 478 post) about any entry relating to an adopted person on the Adoption Contact Register: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(1). As to the Adoption Contact Register see paras 386-388 ante. The appropriate adoption agency must pay any fee that the Registrar General determines is reasonable for the disclosure of such information: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(2).

4    Ibid s 60(2)(b).

5    Ibid s 60(4). This does not apply to a document or order so far as it contains information which is protected information: s 60(5). As to the meaning of 'protected information' see s 57(3); and para 474 ante. As to the court see para 511 post.



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#### **477. Disclosing protected information about adults.**

Where a person<sup>1</sup> applies<sup>2</sup> to the appropriate adoption agency<sup>3</sup> for protected information<sup>4</sup> to be disclosed to him<sup>5</sup> and none of the information<sup>6</sup> is about a person who is a child<sup>7</sup> at the time of the application<sup>8</sup>, the agency is not required to proceed with the application unless it considers it appropriate to do so<sup>9</sup>. If the agency does proceed with the application it must take all reasonable steps to obtain the views of any person the information is about as to the disclosure of the information about him<sup>10</sup>, and may then disclose the information if it considers it appropriate to do so<sup>11</sup>.

Provision is made for the independent review of a determination not to proceed with an application from any person for the disclosure of protected information, a determination to disclose information against the express views of the person the information is about (or, in Wales, a determination to disclose information to an applicant about a person when that person has withheld consent to the disclosure of the information), and a determination not to disclose information about a person to the applicant where that person has expressed the view that the information should be disclosed (or, in Wales, has given consent to the disclosure)<sup>12</sup>.

1    Ie a person adopted on or after 30 December 2005: see para 472 ante.

2    An application to an adoption agency (ie a local authority or a registered adoption society: see paras 394-395 ante) for the disclosure of protected information under the Adoption and Children Act 2002 s 61 (see the text and notes 3-11 infra) must be in writing and must state the reasons for the application: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 12; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 11. As to protected information see para 474 ante. On receipt of an application for the disclosure of protected information under the Adoption and Children Act 2002 s 61 an adoption agency must take reasonable steps to confirm the identity of the applicant or of any person acting on his behalf and that any person acting on behalf of the applicant is authorised to do so, and must also (in Wales) ensure that it has sufficient information from the applicant about the reasons for the application to enable the agency to discharge its functions under s 61: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 13; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 12. As to the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante.

3    For the meaning of 'appropriate adoption agency' see para 476 note 2 ante.

4    These provisions (ie the Adoption and Children Act 2002 s 61 (see the text and notes 5-13 infra)) do not apply to a request for information by an adopted adult under s 60(2) (see para 476 ante) or to a request for information which the agency is authorised or required to disclose in pursuance of regulations made by virtue of s 57(6) (see para 474 et seq ante): s 61(6).

5    Ibid s 61(1)(a).

6    For the meaning of 'information' see para 385 note 8 ante.

7    For the meaning of 'child' see para 327 note 2 ante.

8    Adoption and Children Act 2002 s 61(1)(b).

9    Ibid s 61(2). In deciding whether it is appropriate to proceed with the application the agency must consider the welfare of the adopted person, any views obtained under s 61(3) (see the text and note 10 infra), any prescribed matters and all the other circumstances of the case: s 61(5).

The Registrar General must disclose to any person (including an adopted person) at his request any information that the person requires to assist him to make contact with the adoption agency which is the appropriate adoption agency in the case of the person specified in the request (or, as the case may be, in the applicant's case), and must disclose to the appropriate adoption agency any information that the agency requires, in relation to an application under the Adoption and Children Act 2002 s 61 about any entry relating to an adopted person on the Adoption Contact Register: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(1). As to the Adoption Contact Register see paras 386-388 ante. The appropriate adoption agency must pay any fee that the Registrar General determines is reasonable for the disclosure of such information: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(2).

10 Adoption and Children Act 2002 s 61(3). An adoption agency must ensure that any views obtained under s 61(3) are recorded in writing: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 14; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 13.

11 Adoption and Children Act 2002 s 61(4). In deciding whether it is appropriate to disclose the information the agency must consider the welfare of the adopted person, any views obtained under s 61(3) (see the text and notes 10 supra), any prescribed matters and all the other circumstances of the case: s 61(5).

12 See the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 15; and the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 13A (added by SI 2006/3100). As to the conduct of such reviews see the Independent Review of Determinations (Adoption) Regulations 2005, SI 2005/3332; and the Independent Review of Determinations (Adoption) (Wales) Regulations 2006, SI 2006/3100 (made under the Adoption and Children Act 2002 s 12 (see para 440 note 3 ante)).

## **UPDATE**

### **477 Disclosing protected information about adults**

NOTE 12--SI 2005/3332 replaced: Independent Review of Determinations (Adoption and Fostering) Regulations 2009, SI 2009/395.

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#### **478. Disclosing protected information about children.**

Where a person<sup>1</sup> applies<sup>2</sup> to the appropriate adoption agency<sup>3</sup> for protected information<sup>4</sup> to be disclosed to him<sup>5</sup>, and any of the information<sup>6</sup> is about a person who is a child<sup>7</sup> at the time of the application<sup>8</sup>, the agency is not required to proceed with the application unless it considers it appropriate to do so<sup>9</sup>. If the agency does proceed with the application, then:

899 (1) so far as the information is about a person who is at the time a child, the agency must take all reasonable steps to obtain the views of any parent<sup>10</sup> or guardian<sup>11</sup> of the child, and the views of the child, if the agency considers it appropriate to do so having regard to his age and understanding and to all the other circumstances of the case, as to the disclosure of the information<sup>12</sup>; and

900 (2) so far as the information is about a person who has at the time attained the age of 18 years, the agency must take all reasonable steps to obtain his views as to the disclosure of the information<sup>13</sup>,

and the agency may then disclose the information if it considers it appropriate to do so<sup>14</sup>.

1    Ie a person adopted on or after 30 December 2005: see para 472 ante.

2    An application to an adoption agency (ie a local authority or a registered adoption society: see paras 394-395 ante) for the disclosure of protected information under the Adoption and Children Act 2002 s 62 (see the text and notes 3-14 infra) must be in writing and must state the reasons for the application: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 12; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 11. As to protected information see para 474 ante. On receipt of an application for the disclosure of protected information under the Adoption and Children Act 2002 s 62 an adoption agency must take reasonable steps to confirm the identity of the applicant or of any person acting on his behalf and that any person acting on behalf of the applicant is authorised to do so, and must also (in Wales) ensure that it has sufficient information from the applicant about the reasons for the application to enable the agency to discharge its functions under s 62: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 13; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 12. As to the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante.

3    For the meaning of 'appropriate adoption agency' see para 476 note 2 ante.

4    These provisions (ie the Adoption and Children Act 2002 s 62 (see the text and notes 5-14 infra)) do not apply to a request for information by an adopted adult under s 60(2) (see para 476 ante) or to a request for information which the agency is authorised or required to disclose in pursuance of regulations made by virtue of s 57(6) (see para 474 et seq ante): s 62(8).

5    Ibid s 62(1)(a).

6    For the meaning of 'information' see para 385 note 8 ante.

7    For the meaning of 'child' see para 327 note 2 ante.

8    Adoption and Children Act 2002 s 62(1)(b).

9    Ibid s 62(2). In deciding whether it is appropriate to proceed with the application where any of the information is about a person who is at the time a child, the child's welfare must be the paramount



consideration (if the child is an adopted child); in the case of any other child, the agency must have particular regard to the child's welfare: s 62(6). In deciding whether it is appropriate to proceed with the application the agency must also consider the welfare of the adopted person (unless that person is a child who is an adopted child), any views obtained under s 62(3) or (4) (see the text and notes 12-13 *infra*), any prescribed matters and all the other circumstances of the case: s 62(7).

The Registrar General must disclose to any person (including an adopted person) at his request any information that the person requires to assist him to make contact with the adoption agency which is the appropriate adoption agency in the case of the person specified in the request (or, as the case may be, in the applicant's case), and must disclose to the appropriate adoption agency any information that the agency requires, in relation to an application under the Adoption and Children Act 2002 s 62 about any entry relating to an adopted person on the Adoption Contact Register: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(1). As to the Adoption Contact Register see paras 386-388 *ante*. The appropriate adoption agency must pay any fee that the Registrar General determines is reasonable for the disclosure of such information: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 20(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 18(2).

10 For the meaning of 'parent' see para 332 note 2 *ante*.

11 For the meaning of 'guardian' see para 332 note 3 *ante*.

12 Adoption and Children Act 2002 s 62(3). An adoption agency must ensure that any views obtained under s 62(3), (4) are recorded in writing: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 14; Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 13.

13 Adoption and Children Act 2002 s 62(4). Any views obtained must be recorded: see note 12 *supra*.

14 *Ibid* s 62(5). In deciding whether it is appropriate to disclose the information, where any of the information is about a person who is at the time a child, the child's welfare must be the paramount consideration (if the child is an adopted child); in the case of any other child, the agency must have particular regard to the child's welfare: s 62(6). In deciding whether it is appropriate to disclose the information the agency must also consider the welfare of the adopted person (unless that person is a child who is an adopted child), any views obtained under s 62(3) or (4) (see the text and notes 12-13 *supra*), any prescribed matters and all the other circumstances of the case: s 62(7).

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#### **479. Counselling.**

An adoption agency<sup>1</sup> must provide written information<sup>2</sup> about the availability of counselling to any person who is seeking information<sup>3</sup> about adoption, any person whose views have been sought<sup>4</sup> as to the disclosure of information about him, and any person who enters into, or is considering entering into, a disclosure agreement<sup>5</sup> with the agency<sup>6</sup>, and where such a person requests that counselling be provided for him, the agency must make arrangements to secure counselling for him<sup>7</sup>. The agency may provide the counselling itself or make arrangements with other bodies<sup>8</sup> to secure counselling for the person in question<sup>9</sup>. An agency may disclose any information (which may include protected information<sup>10</sup>) which is required for the purposes of providing counselling to any person with whom it has made arrangements to provide counselling<sup>11</sup>.

1    Ie a local authority or a registered adoption society: see paras 394-395 ante.

2    For the meaning of 'information' see para 385 note 8 ante. The information so provided must include information about the fees that may be charged by persons providing counselling: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 16(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 14(2).

3    Ie under the Adoption and Children Act 2002 s 60 (see para 476 ante), s 61 (see para 477 ante) or s 62 (see para 478 ante).

4    Ie under *ibid* s 61(3) (see para 477 ante) or s 62(3), (4) (see para 478 ante).

5    Ie an agreement under the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 11 or the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 10 (see para 475 ante).

6    Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 16(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 14(1). These provisions have effect under the Adoption and Children Act 2002 s 63, under which it is provided that regulations under s 9 (see para 397 note 1 ante) may require adoption agencies to give information about the availability of counselling to persons seeking information from them in pursuance of the provisions on the disclosure of information relating to adoption, persons considering objecting or consenting to the disclosure of information by the agency in pursuance of the provisions on the disclosure of information relating to adoption, or persons considering entering into a prescribed agreement with the agency: s 63(1). Regulations may require adoption agencies to make arrangements to secure the provision of counselling for persons seeking information from them in prescribed circumstances in pursuance of ss 56-65 (see para 472 et seq ante): s 63(2). The regulations may authorise adoption agencies to disclose information which is required for the purposes of such counselling to the persons providing the counselling and, where the person providing the counselling is outside the United Kingdom, to require a prescribed fee to be paid: s 63(3). The regulations may require any of the following persons to provide counselling for the purposes of arrangements under s 63(2): (1) a local authority, a council constituted under the Local Government etc (Scotland) Act 1994 s 2 or a Health and Social Services Board established under the Health and Personal Social Services (Northern Ireland) Order 1972, SI 1972/1265, art 16; (2) a registered adoption society, an organisation within the Adoption and Children Act 2002 s 144(3)(b) (see para 352 note 2 ante) or an adoption society which is registered under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 4; (3) an adoption support agency in respect of which a person is registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended): Adoption and Children Act 2002 s 63(4). As to the making of regulations under s 63(2) in relation to Scotland and Northern Ireland see also s 65(2), (3). As to the making of regulations generally see para 334 note 12 ante; and as to the power to regulate the disclosure of information see para 472 ante. As to the United Kingdom see paras 102 note 7 ante, 341 note 8 ante.

7 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 17(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 15(1).

8 le: (1) if the person is in England or Wales, another adoption agency or a registered adoption support agency; (2) if the person is in Scotland, a Scottish adoption agency; (3) if the person is in Northern Ireland, an adoption society which is registered under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 4 (or any Health and Social Services Board established under the Health and Personal Social Services (Northern Ireland) Order 1972, SI 1972/1265, art 16 or, where the functions of a Board are exercisable by a Health and Social Services Trust, that Trust); or (4) if the person is outside the United Kingdom, any person or body outside the United Kingdom who appears to the agency to correspond in its functions to a body mentioned above: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 17(2), (3); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 15(2), (3).

9 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 17(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 15(2).

10 As to protected information see para 474 ante.

11 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 18(1); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 16(1). An agency must make a written record of any disclosure made by virtue of this provision: Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888, reg 18(2); Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2689, reg 16(2).

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## (B) ADOPTIONS BEFORE 30 DECEMBER 2005

### **480. Provision of intermediary services.**

A registered adoption support agency<sup>1</sup> or an adoption agency<sup>2</sup> may provide a service for the purpose of assisting persons aged 18 or over<sup>3</sup> who were adopted before 30 December 2005<sup>4</sup> to obtain information in relation to their adoption and facilitating contact between such persons and their relatives<sup>5</sup> (an 'intermediary service')<sup>6</sup>. An intermediary agency<sup>7</sup> may accept an application<sup>8</sup> from such a person for assistance in contacting a relative of his<sup>9</sup> or from a relative of such a person for assistance in contacting that person<sup>10</sup> and must give priority to applications in respect of adoptions before 12 November 1975<sup>11</sup>; an agency is not, however, required to proceed with any application if it would be inappropriate so to do<sup>12</sup>. Both the applicant and the person with whom the applicant seeks contact (or, in Wales, about whom he seeks information) must be aged 18 or over<sup>13</sup>.

1 'Registered adoption support agency' means an adoption support agency in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended) (see para 985 post; and SOCIAL SERVICES AND COMMUNITY CARE): Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 2; Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 2.

2 I.e. a local authority or a registered adoption society: see paras 394-395 ante.

3 If at any time an intermediary agency ascertains that the subject of an application for intermediary services is under the age of 18 it must not proceed further with the application in relation to that subject: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 6(4); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 6(4).

4 I.e. the date on which the Adoption and Children Act 2002 was brought fully into effect: see para 325 note 1 ante.

5 For the meaning of 'relative' see para 453 note 33 ante (definition applied by the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 2; and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 2).

6 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, regs 3(1), 4(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, regs 3(1), (2), 4(1). An intermediary service is an 'adoption support service' for the purposes of the Adoption and Children Act 2002 s 2(6) (see para 394 ante) and must be provided in accordance with the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701 (see para 481 et seq post): Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 3(2), (3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 3(3), (4). An adoption agency does not provide an intermediary service for these purposes if it is the appropriate adoption agency in relation to an adopted person and only provides information in relation to that person's adoption: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 4(2); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 4(3).

7 A registered adoption support agency or an adoption agency that provides an intermediary service is referred to as an 'intermediary agency': Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 4(3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 4(2).

8 Provision is made for the handling and processing of applications, including the charging of fees: see the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, regs 11-15, 18(1), (3)-(5); and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, regs 11-15, 18(1), (3)-(5) (making provision in connection with procedures on receipt, confirming the identities of applicants, liaising with adoption agencies and the Registrar General and accessing court records). Provision is also made for controlling disclosures of information pursuant to the administration of applications: see the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 16; and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 16.

9 And, in Wales, for assistance in obtaining information about his adoption: *ibid* reg 5(1)(a).

10 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 5(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 5(1).

11 In England it is provided that where the intermediary agency has limited capacity to deal with applications, it must give priority to applications in respect of adoptions before 12 November 1975 (Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 5(2)), and in Wales it is provided that an intermediary agency may accept an application in relation to an adoption on or after 12 November 1975 but must give priority to applications in respect of adoptions before that date (Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 5(2)).

12 An intermediary agency that accepts an application under these provisions is not required to proceed with it, or having begun to proceed with it is not required to continue, if the agency considers that it would not be appropriate to do so: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 6(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 6(1). In deciding whether it is appropriate to proceed (or continue proceeding) with an application the intermediary agency must have regard to all the circumstances of the case including the welfare of the applicant, the subject and any other persons who may be identified or otherwise affected by the application (having particular regard to the welfare of any such person who is under the age of 18), any views of the appropriate adoption agency (obtained under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 12 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 12), and any information (obtained under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 13 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 13) obtained from the Adoption Contact Register; in Wales, the agency must also have regard to any veto recorded under reg 8: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 6(2), (3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 6(2), (3). As to the Adoption Contact Register see paras 386-388 ante.

13 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 5(3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 5(3).

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#### **481. Requirement for consent and subject's power of veto.**

An intermediary agency<sup>1</sup> must not in general disclose to an applicant<sup>2</sup> for intermediary services<sup>3</sup> any identifying information<sup>4</sup> about the subject without the subject's consent<sup>5</sup>. Further, an adopted person may put on record<sup>6</sup> either that he does not wish to be contacted by an intermediary agency in relation to an application under these provisions or that he wishes to be contacted only in specified circumstances<sup>7</sup>, and this must be made known to any intermediary agency that contacts the appropriate adoption agency in relation to an application under these provisions which relates to that person<sup>8</sup>. An intermediary agency must not proceed with an application if it is aware that such a veto applies (unless, in England, the adopted person's veto is limited to his having stated that he only wishes to be contacted in specified circumstances)<sup>9</sup>.

In a case where the consent of the subject is refused or cannot be obtained<sup>10</sup> or a veto applies<sup>11</sup>, the intermediary agency is not prevented from disclosing to the applicant any information about the subject that is not identifying information and that the agency considers it appropriate to disclose<sup>12</sup>.

1 For the meaning of 'intermediary agency' see para 480 note 7 ante.

2 'Applicant' means an adopted person or a relative of an adopted person who makes an application under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 5 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 5: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 2; Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 2. As to the meaning of 'relative' see para 480 note 5 ante.

3 For the meaning of 'intermediary services' see para 480 ante.

4 For these purposes 'identifying information' means information which, whether taken on its own or together with other information possessed by the applicant, enables the subject to be identified or traced: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 7(4); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 7(4). 'Subject', in relation to an application under these provisions, is a person with whom the applicant seeks contact: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 2; Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 2.

5 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 7(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 7(1). An intermediary agency that discloses information in contravention of these provisions without reasonable excuse is guilty of an offence and is liable on conviction to a fine not exceeding level 5 on the standard scale: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 17; Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 17. As to the standard scale see para 132 note 2 ante. The agency must take all reasonable steps to ensure that any person whose consent to disclosure is required under these provisions has sufficient information to make an informed decision as to whether to give his consent: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 7(3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 7(2). If the subject has died or the agency determines that he is incapable of giving informed consent, the agency may disclose such identifying information about him to the applicant as it considers appropriate, having regard to all the circumstances of the case including the welfare of the applicant, the subject and any other persons who may be identified or otherwise affected by the

application (having particular regard to the welfare of any such person who is under the age of 18), any views of the appropriate adoption agency (obtained under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 12 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 12), and any information (obtained under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 13 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 13) obtained from the Adoption Contact Register; in Wales, the agency must also have regard to any veto recorded under reg 8: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, regs 6(2), (3), 7(2); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, regs 6(2), (3), 7(3). As to the Adoption Contact Register see paras 386-388 ante.

6     Ie by giving written notification to the appropriate adoption agency: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8(1)(b); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8(1)(b). For the meaning of 'appropriate adoption agency' see the Adoption and Children Act 2002 s 65(1); and para 472 note 9 ante (definition applied by the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 2; and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 2). Note also as to the meaning of 'appropriate adoption agency' in England, the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 4A (added by SI 2005/2720).

7     Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8(1)(b); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8(1)(b). Where the appropriate adoption agency is notified of a veto under this provision it must keep a written record of it on the adopted person's case record: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8(2); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8(2).

8     Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8(1)(a), (2); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8(1)(a), (2).

9     Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8(3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8(3).

10    Ie under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 7 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 7 (see the text and notes 1-5 supra).

11    Ie under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 8 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 8 (see the text and notes 6-9 supra).

12    Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 9; Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 9.

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## **482. Counselling.**

An intermediary agency<sup>1</sup> must provide written information<sup>2</sup> about the availability of counselling to any person who makes an application to it for assistance in connection with an adoption<sup>3</sup> or who is the subject<sup>4</sup> of such an application and is considering whether to consent to disclosure of information about himself to the applicant<sup>5</sup>; and if such a person requests that counselling be provided for him, the intermediary agency must secure the provision of counselling for him<sup>6</sup>. The agency may provide the counselling itself or make arrangements with other bodies<sup>7</sup> to secure counselling for the person in question<sup>8</sup>.

1 For the meaning of 'intermediary agency' see para 480 note 7 ante.

2 The information must include details of persons offering counselling and fees that may be charged by such persons: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 10(2); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 10(2).

3 I.e. an application under the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890 or the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701 (see para 480 ante).

4 For the meaning of 'subject' see para 481 note 4 ante.

5 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 10(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 10(1). An intermediary agency may charge such a person such fee as it determines is reasonable in respect of the provision of counselling services for him (or, in England, making arrangements to secure counselling where the counselling is provided by a person outside the United Kingdom): Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 18(1); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 18(1).

6 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 10(3); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 10(3).

7 I.e.: (1) if the person is in England or Wales, another adoption agency or a registered adoption support agency; (2) if the person is in Scotland, a Scottish adoption agency; (3) if the person is in Northern Ireland, an adoption society which is registered under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 4 (or any Health and Social Services Board established under the Health and Personal Social Services (Northern Ireland) Order 1972, SI 1972/1265, art 16 or, where the functions of a Board are exercisable by a Health and Social Services Trust, that Trust); or (4) if the person is outside the United Kingdom, any person or body outside the United Kingdom who appears to the agency to correspond in its functions to a body mentioned above: Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 10(4), (5); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 10(4), (5). An 'adoption agency' is a local authority or a registered adoption society: see paras 394-395 ante. For the meaning of 'registered adoption support agency' see para 480 note 1 ante.

8 Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, SI 2005/890, reg 10(4); Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005, SI 2005/2701, reg 10(4). In Wales, it is provided that where the only counselling services available to a subject are services for which a fee is payable and the subject chooses not to take them up, the



intermediary agency must nevertheless provide support and assistance to the subject in deciding whether to consent to the disclosure of information: reg 10(6).

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## **(8) ADOPTIONS WITH A FOREIGN ELEMENT**

### **(i) Introduction**

#### **483. Implementation of the Hague Convention.**

The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (1993)<sup>1</sup> (the 'Hague Convention') has been implemented in the United Kingdom through the Adoption (Intercountry Aspects) Act 1999 and regulations made thereunder<sup>2</sup> (read with the relevant provisions of the Adoption and Children Act 2002<sup>3</sup>, the Children and Adoption Act 2006<sup>4</sup>, and procedural rules created specifically for adoptions with a foreign element<sup>5</sup>). Her Majesty may by Order in Council provide for giving effect to the Hague Convention in any British overseas territory<sup>6</sup>.

1    I.e. the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691). The Convention entered into force for the United Kingdom on 1 June 2003, and is set out in the Adoption (Intercountry Aspects) Act 1999 s 1(2), Sch 1. The Convention sets out minimum standards for the movement of children for adoption as between contracting parties and seeks: (1) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for the child's fundamental rights as recognised in international law; (2) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected and so prevent the abduction, the sale of, or traffic in children; and (3) to secure the recognition in contracting states of adoptions made in accordance with the Convention: art 1.

2    See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392 (which came into force on 30 December 2005 (reg 1(1))); and para 491 et seq post. The regulations were made under the Adoption (Intercountry Aspects) Act 1999 s 1 (amended by the Adoption and Children (Scotland) Act 2007 s 121(2)), under which it is provided that, subject to the provisions of the Adoption (Intercountry Aspects) Act 1999, regulations made by the Secretary of State (after consultation with the Welsh Ministers: s 16(1)) may: make provision for giving effect to the Hague Convention (Adoption (Intercountry Aspects) Act 1999 s 1(1)); apply, with or without modifications, any provision of the enactments (including Acts of the Scottish Parliament) relating to adoption; provide that any person who contravenes or fails to comply with any provision of the regulations is to be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both; make different provision for different purposes or areas; and make such incidental, supplementary, consequential or transitional provision as appears to the Secretary of State to be expedient (s 1(3), (7) (s 1(7) as so added)). Such regulations are made by statutory instrument and are subject to annulment in pursuance of a resolution of either House of Parliament: s 1(4). Any power to make subordinate legislation under or for the purposes of the enactments relating to adoption includes power to do so with a view to giving effect to the provisions of the Hague Convention (Adoption (Intercountry Aspects) Act 1999 s 1(5)), although this does not apply in relation to any power which is exercisable by the Welsh Ministers (s 1(6)). As to the Secretary of State and the Welsh Ministers see para 155 ante.

3    See the Adoption and Children Act 2002 Pt 1 Ch 6 (ss 83-91A) (as amended); and para 499 et seq post.

4    See the Children and Adoption Act 2006 Pt 2 (ss 9-14); and para 501 post.

5    See the Family Procedure (Adoption) Rules 2005, SI 2005/2795; and para 511 et seq post.

6    Adoption and Children Act 2002 s 137(1). As to British overseas territories see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 44; COMMONWEALTH vol 13 (2009) PARA 702. An Order in Council under s 137(1) in respect of any British overseas territory may, in particular, make any provision corresponding to provision which in relation to any part of Great Britain is made by the Adoption (Intercountry Aspects) Act 1999 or may be made by regulations under s 1 (see note 1 supra); Adoption and Children Act 2002 s 137(2). At the date at which this volume states the law no Order in Council had been made under s 137. See

further the British Nationality Act 1981 s 1 (as amended) (acquisition of British citizenship by birth or adoption), s 15 (as amended) (acquisition of British overseas territories citizenship); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 26-27, 47-48.

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**484. Recognition of foreign adoption orders, and conferment of legal status.**

Foreign adoptions are recognised in different ways, depending on where the adoption took place, and how it can be proved<sup>1</sup>. An adoption order made in Scotland, Northern Ireland, the Isle of Man or the Channel Islands is automatically recognised in England and Wales as an adoption without the need for court proceedings<sup>2</sup>; such an adoption order will confer citizenship<sup>3</sup>. Provision is also made for the court to make a declaration as to the status of a child adopted by way of a Convention adoption or other overseas adoption<sup>4</sup>.

1 See para 485 et seq post.

2 See the Adoption and Children Act 2002 s 66(1)(a), (b); and para 375 ante. As to the court see para 511 post.

3 See *ibid* s 74(2); and para 377 ante.

4 See para 381 ante. For the meaning of 'Convention adoption' see para 375 note 7 ante. For the meaning of 'overseas adoption' for the purposes of the Adoption and Children Act 2002 see para 485 post.

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#### **485. Overseas adoptions and overseas adoption orders.**

For the purposes of the Adoption and Children Act 2002, an 'overseas adoption' is an adoption<sup>1</sup> of a description specified in an order made by the Secretary of State<sup>2</sup>, being a description of adoptions effected under the law of any country or territory outside the British Islands<sup>3</sup>, but does not include a Convention adoption<sup>4</sup>.

As with an adoption order made in Scotland, Northern Ireland, the Isle of Man or the Channel Islands<sup>5</sup>, an overseas adoption order ranks automatically as an adoption order in England and Wales without the need to institute court proceedings<sup>6</sup>. However, an overseas adoption order will not confer United Kingdom citizenship<sup>7</sup>. Overseas adoption orders may be registered in the Adopted Children Register provided that the applicant was (or, in the case of a couple, the applicants were both) habitually resident in England and Wales at the time of the adoption<sup>8</sup>.

1 For this purpose 'adoption' means an adoption of a child or of a person who was a child at the time the adoption was applied for: Adoption and Children Act 2002 s 87(6). For the meaning of 'adoption' generally see para 393 note 2 ante; and for the meaning of 'child' see para 327 note 2 ante.

2 As to the Secretary of State see para 155 ante.

3 Adoption and Children Act 2002 ss 87(1)(a), 147, Sch 6. An order under s 87(1)(a) may contain provision as to the manner in which evidence of any overseas adoption may be given (s 87(5)), and regulations made by the Secretary of State after consultation with the Welsh Ministers may prescribe the requirements that ought to be met by an adoption of any description effected after the commencement of the regulations for it to be an overseas adoption for these purposes (s 87(2)). At the date at which this volume states the law neither orders nor regulations had been made under s 87(1), (2), but by virtue of s 139(2), Sch 4 para 1, the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19 (as amended), has effect as if made thereunder. That order specifies the places in which a lawfully effected adoption may qualify as an overseas adoption for these purposes (art 3, Schedule (art 3 amended by SI 1993/690)), and regulates the arrangements for the adoption and how the adoption may be proved (Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, art 4). It is also provided that at any time when regulations under the Adoption and Children Act 2002 s 87(2) have effect, the Secretary of State must exercise his powers under s 87 so as to secure that subsequently effected adoptions of any description are not overseas adoptions for the purposes of the Adoption and Children Act 2002 if he considers that they are not likely within a reasonable time to meet the prescribed requirements: s 87(3). For the meaning of 'British Islands' see para 103 note 6 ante.

4 Ibid s 87(1)(b). For the meaning of 'Convention adoption' see para 375 note 7 ante.

5 See para 484 ante.

6 See the Adoption and Children Act 2002 s 66(1)(d); and para 375 ante.

7 See ibid s 74(2); and para 377 ante.

8 See the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 3. As to the Adopted Children Register see para 383 ante.

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#### **486. Central authority and accredited bodies.**

The functions of the central authority under the Hague Convention<sup>1</sup> are discharged in relation to England by the Secretary of State and in relation to Wales by the Welsh Ministers<sup>2</sup>. Local authorities<sup>3</sup> and accredited bodies<sup>4</sup> discharge on behalf of the central authority<sup>5</sup> the functions of:

- 901 (1) collecting, preserving and exchanging information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption<sup>6</sup>;
- 902 (2) facilitating, following and expediting proceedings with a view to obtaining the adoption<sup>7</sup>; and
- 903 (3) promoting the development of adoption counselling and post-adoption services<sup>8</sup>.

1 *Ie* the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691). As to the Hague Convention see para 483 ante. As to the designation and functions of Central Authorities and accredited bodies see arts 6-13.

2 Adoption (Intercountry Aspects) Act 1999 s 2(1). As to the Secretary of State and the Welsh Ministers see para 155 ante. A communication may be sent to the central authority in relation to any part of Great Britain by sending it, or forwarding if necessary, to the central authority in relation to England: s 2(2). For the meaning of 'Great Britain' see para 102 note 7 ante.

3 For the meaning of 'local authority' see para 327 note 7 ante; definition applied by *ibid* s 2(5) (substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 96, 98).

4 A registered adoption society is an 'accredited body' for these purposes if, in accordance with the conditions of the registration, the society may provide facilities in respect of Convention adoptions and adoptions effected by Convention adoption orders: Adoption (Intercountry Aspects) Act 1999 s 2(2A) (added by the Care Standards Act 2000 s 116, Sch 4 para 27(a); and amended by the Adoption and Children Act 2002 Sch 3 para 97). For the meaning of 'registered adoption society' see para 395 note 3 ante; definition applied by the Adoption (Intercountry Aspects) Act 1999 s 2(5) (as substituted: see note 3 *supra*). For the meaning of 'Convention adoption' see para 375 note 7 ante; and as to Convention adoption orders see para 490 *et seq* post.

5 *Ibid* s 2(4).

6 *Ie* the functions under the Hague Convention art 9(a).

7 *Ie* the functions under *ibid* art 9(b).

8 *Ie* the functions under *ibid* art 9(c).

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#### **487. Validity and annulment of overseas and Convention adoptions.**

The validity of a Convention adoption<sup>1</sup>, Convention adoption order<sup>2</sup>, overseas adoption<sup>3</sup> or overseas determination<sup>4</sup> cannot in general be called in question in proceedings in any court in England and Wales<sup>5</sup>. However, the High Court may, on an application:

- 904 (1) by order annul a Convention adoption or Convention adoption order on the ground that the adoption is contrary to public policy<sup>6</sup>;
- 905 (2) by order provide for an overseas adoption or an overseas determination to cease to be valid on the ground that the adoption or determination is contrary to public policy or that the authority which purported to authorise the adoption or make the determination was not competent to entertain the case<sup>7</sup>; or
- 906 (3) decide the extent, if any, to which an overseas determination has been affected by a subsequent determination<sup>8</sup>.

Any application for an order or a decision under these provisions must be made in the manner and within any period prescribed by rules<sup>9</sup>. No such application may be made in respect of an adoption unless immediately before the application is made the person adopted, or the adopters or adopter, habitually reside<sup>10</sup> in England and Wales<sup>11</sup>.

1 For the meaning of 'Convention adoption' see para 375 note 7 ante.

2 As to Convention adoption orders see para 490 et seq ante.

3 For the meaning of 'overseas adoption' see para 485 ante.

4 I.e a determination under the Adoption and Children Act 2002 s 91. Section 91 provides that where any authority of a Convention country (other than the United Kingdom) or of the Channel Islands, the Isle of Man or any British overseas territory has power under the law of that country or territory to authorise, or review the authorisation of, an adoption order made in that country or territory (s 91(1)(a)) or to give or review a decision revoking or annulling such an order or a Convention adoption (s 91(1)(b)), any such determination made by the authority in the exercise of that power is to have effect for the purpose of effecting, confirming or terminating the adoption in question or, as the case may be, confirming its termination (s 91(2)). Section 91(2) is subject to s 89 and to any subsequent determination having effect under s 91(2): s 91(3). In deciding in proceedings under s 89 whether such an authority was competent to entertain a particular case, a court is bound by any finding of fact made by the authority and stated by the authority to be so made for the purpose of determining whether the authority was competent to entertain the case: s 90(3). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

5 Ibid s 89(4).

6 Ibid s 89(1). Persons who may apply for such an order, and respondents, are listed in the Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 23.

7 Adoption and Children Act 2002 s 89(2)(a). The High Court may, in any proceedings in that court, decide that an overseas adoption or an overseas determination is to be treated, for the purposes of those proceedings, as invalid on either of the grounds mentioned in s 89(2)(a): s 89(3).

8 Ibid s 89(2)(b).

9 Ibid s 90(1). As to the prescribed manner and the prescribed period see the Family Procedure (Adoption) Rules 2005, SI 2005/2795, Pt 5 (rr 22-33) (amended by SI 2007/2189). The court may not extend the period

within which an order under the Adoption and Children Act 2002 s 89 must be made: Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 12(3).

- 10 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.
- 11 Adoption and Children Act 2002 s 90(2).



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#### **488. Registration of foreign adoptions.**

If the Registrar General is satisfied, on an application<sup>1</sup>, that he has sufficient particulars relating to a child<sup>2</sup> adopted under a registrable foreign adoption<sup>3</sup> to enable an entry to be made in the Adopted Children Register<sup>4</sup> for the child he must make the entry accordingly<sup>5</sup>. If the Registrar General is also satisfied that an entry in the registers of live births<sup>6</sup> or other records relates to the child, he must secure that the entry is marked 'Adopted', followed by the name, in brackets, of the country in which the adoption was effected<sup>7</sup>, or where appropriate, secure that the overseas registers of births<sup>8</sup> are so marked<sup>9</sup>.

If the Registrar General is satisfied that a registrable foreign adoption has ceased to have effect, whether on annulment or otherwise<sup>10</sup>, or that any entry or mark was erroneously made<sup>11</sup> in the Adopted Children Register, the registers of live births, the overseas registers of births or other records<sup>12</sup>, he may secure that such alterations are made in those registers or other records as he considers are required in consequence of the adoption ceasing to have effect or to correct the error<sup>13</sup>.

1    le an application under the Adoption and Children Act 2002 Sch 1 para 3 (see the text and notes 2-9 infra). Such an application must be made in the prescribed manner by a prescribed person, and the applicant must provide the prescribed documents and other information: Sch 1 para 3(3). See the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 4 (persons who may make an application), reg 5 (manner of application and prescribed documents and other information).

2    For the meaning of 'child' see para 327 note 2 ante.

3    'Registrable foreign adoption' means an adoption which satisfies prescribed requirements and is either adoption under a Convention adoption (see para 375 note 7 ante; and para 490 et seq post) or adoption under an overseas adoption (see para 485 ante): Adoption and Children Act 2002 Sch 1 para 3(5). The 'prescribed requirement' is that at the time the Convention adoption or overseas adoption is effected, the adoptive parent or, in the case of a couple, both adoptive parents, are habitually resident in England or Wales: Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 3. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

4    As to the Adopted Children Register see para 383 ante.

5    Adoption and Children Act 2002 Sch 1 para 3(1). The entry must be made in the form prescribed by regulations made by the Registrar General with the approval of the Chancellor of the Exchequer: see Sch 1 para 3(4), (6)(a); and the Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, reg 2(2), Sch 1 (England), Sch 2 (Wales).

6    As to the registration of live births see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 541 et seq.

7    Adoption and Children Act 2002 Sch 1 para 3(2)(a).

8    'Overseas register of births' includes a register made under regulations made by the Secretary of State under the British Nationality Act 1981 s 41(1)(g), (h) or (i) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 6) and a record kept under an Order in Council made under the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 1 (other than a certified copy kept by the Registrar General) (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 585): Adoption and Children Act 2002 Sch 1 para 3(6)(b).

9    Ibid Sch 1 paras 3(2)(b), 4(9).

10   Ibid Sch 1 para 4(9)(a).

11 le in pursuance of *ibid* Sch 1 para 3 (see the text and notes 1-9 *supra*).

12 *Ibid* Sch 1 para 4(9)(b).

13 *Ibid* Sch 1 para 4(9). Where an entry in such a register is so amended any copy or extract of the entry is not to be treated as accurate unless it shows the entry as amended but without indicating that it has been amended: Sch 1 para 4(10). Without prejudice to Sch 1 para 4(9), where an entry in the registers of live births or other records is marked in pursuance of Sch 1 para 3 and the birth in question is subsequently re-registered under s 14 (see para 327 note 7 *ante*), the entry made on re-registration must be marked in the like manner: Sch 1 para 5(2).

## **UPDATE**

### **488 Registration of foreign adoptions**

NOTE 5--Reference to the Chancellor of the Exchequer is now to the Secretary of State: Adoption and Children Act 2002 Sch 1 para 3(6)(a) (amended by SI 2008/678).

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#### **489. Procedural matters in foreign adoptions.**

If adopters have obtained an adoption order in another country, this has to be clearly and distinctly proved, with the courts of England and Wales looking for compatible rules and procedures; if there is no foreign adoption order, then the prospective adopters will have to apply for an adoption order in England and Wales, and the ordinary rules will apply as if the case had no international features<sup>1</sup>. The law of the child's domicile of origin may be relevant when the court is assessing his welfare, as it will be important to know whether the adoption order would be recognised in the child's country of origin<sup>2</sup>. The court will need to be satisfied as to proof of parental agreement<sup>3</sup>.

<sup>1</sup> See *Re B(S) (an infant)* [1968] Ch 204, sub nom *Re B (infant)* [1967] 3 All ER 629; *Re AMR (adoption: procedure)* [1999] 3 FCR 724, [1999] 2 FLR 807.

<sup>2</sup> *Re B(S) (an infant)* [1968] Ch 204, sub nom *Re B (infant)* [1967] 3 All ER 629.

<sup>3</sup> *Re G (foreign adoption: consent)* [1996] 1 FCR 495, [1995] 2 FLR 534; *Re AMR (adoption: procedure)* [1999] 3 FCR 724, [1999] 2 FLR 807.

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**(ii) Convention Adoptions**

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(A) CONVENTION ADOPTION ORDERS

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#### **490. Making of Convention adoption orders.**

A Convention adoption order<sup>1</sup> may be made for the purpose of adopting in the United Kingdom a child habitually resident<sup>2</sup> in a Convention country<sup>3</sup> outside the British Islands<sup>4</sup> or for the purpose of adopting in a Convention country outside the British Islands a child habitually resident in any part of the United Kingdom<sup>5</sup>.

In the former case an adoption order may not be made as a Convention adoption order unless:

- 907 (1) the applicant or applicants has or have been habitually resident in any part of the British Islands for a period of not less than one year ending with the date of the application<sup>6</sup>;
- 908 (2) the child to be adopted was, on the date on which the agreement that the adoption may proceed was made<sup>7</sup>, habitually resident in a Convention country outside the British Islands<sup>8</sup>; and
- 909 (3) in a case where the applicant<sup>9</sup> is not a British citizen<sup>10</sup>, the Home Office has confirmed that the child is authorised to enter and reside permanently in the United Kingdom<sup>11</sup>.

In the latter case an adoption order may not be made as a Convention adoption order unless:

- 910 (a) the applicant or applicants has or have been habitually resident in a Convention country outside the British Islands for a period of not less than one year ending with the date of the application<sup>12</sup>;
- 911 (b) the child to be adopted was, on the date on which the agreement that the adoption may proceed was made<sup>13</sup>, habitually resident in any part of the British Islands<sup>14</sup>; and
- 912 (c) the competent authority has confirmed that the child is authorised to enter and remain permanently in the Convention country in which the applicant is habitually resident<sup>15</sup>.

An application for a Convention adoption order should be made to the High Court or to a county court which is an intercountry adoption centre<sup>16</sup>. Provision is made for the certification of Convention adoption orders after they are made<sup>17</sup> and for the refusal, withdrawal and annulment of Convention adoption orders relating to the adoption in the United Kingdom of a child from outside the British Islands<sup>18</sup>.

The provisions of the Adoption and Children Act 2002 apply, in specified cases with modifications, to adoptions within the scope of the Convention so far as the nature of the provision permits and unless the contrary intention is shown<sup>19</sup>.

1    le an adoption order which, by virtue of regulations under the Adoption (Intercountry Aspects) Act 1999 s 1 (regulations giving effect to the Convention: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392; and para 491 et seq post), is made as a Convention adoption order: Adoption and Children Act 2002 ss 144(1), 147, Sch 6. 'The Convention' means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (as to which see para 483 ante): Adoption and Children Act 2002 s 144(1), Sch 6.

2    As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

3 For the meaning of 'Convention country' see para 375 note 7 ante; definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2.

4 For the meaning of 'British Islands' see para 103 note 6 ante.

5 See para 491 et seq post.

6 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 31(a). In the case of an application by a couple, both members of the couple must have been habitually resident in any part of the British Islands for a period of not less than one year ending with the date of the application; and in the case of an application by one person, the applicant must have been so resident for such a period: reg 31(a)(i), (ii).

7 I.e. the agreement under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) art 17(c) (see para 493 post).

8 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 31(b).

9 I.e. one member of a couple (in the case of an application by a couple) or the applicant (in the case of an application by one person): *ibid* reg 31(c).

10 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 23-43.

11 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 31(c).

12 *Ibid* reg 50(a). In the case of an application by a couple, both members of the couple must have been habitually resident in a Convention country outside the British Islands for a period of not less than one year ending with the date of the application; and in the case of an application by one person, the applicant must have been so resident for such a period: reg 50(a)(i), (aa). In connection with habitual residence for the purposes of reg 50 see *Greenwich London Borough Council v S* [2007] EWHC 820 (Fam), [2007] 2 FCR 141, sub nom *Greenwich London Borough Council v I* [2007] All ER (D) 99 (Apr).

13 See note 7 *supra*.

14 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 50(b).

15 *Ibid* reg 50(c).

16 Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3A (added by SI 2005/2797). As to the court see para 511 post.

17 See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 32, 51, Sch 2.

18 See *ibid* regs 28, 33, 34. Any person who contravenes or fails to comply with reg 33 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: reg 59(d) (added by SI 2005/3482). As to the standard scale see para 132 note 2 ante.

19 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 52.

## UPDATE

### 490 Making of Convention adoption orders

NOTE 16--SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A. Proceedings for a Convention adoption order must now be started in a county court which is an intercountry adoption centre, and may be started in the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason for them to be started in the High Court: arts 6(c), 7, 11(2).

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(B) ADOPTIONS WHERE UNITED KINGDOM IS RECEIVING STATE



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#### **491. Applications and assessments.**

A person who wishes to adopt a child from a Convention country<sup>1</sup> must apply in writing to an adoption agency for a determination of eligibility and an assessment of his suitability to adopt<sup>2</sup>. On receipt of such an application the agency must provide a counselling service for the applicant, and provide written explanatory information<sup>3</sup>. The agency is then required to undertake an assessment of the applicant: this takes a form corresponding to that required in respect of prospective adopters generally<sup>4</sup>, and where the agency is satisfied that the requirements relating to the provision of counselling and information<sup>5</sup>, the carrying out of police checks<sup>6</sup> and the giving of preparatory assistance to prospective adopters<sup>7</sup> have been met<sup>8</sup>, it must prepare a prospective adopter's report<sup>9</sup> and notify the prospective adopter that his application is to be referred to the adoption panel<sup>10</sup>. The agency must then make a decision<sup>11</sup> about whether the prospective adopter is suitable to adopt a child<sup>12</sup>.

<sup>1</sup> I.e. a person or couple, habitually resident in the British Islands, who wishes or wish to adopt a child who is habitually resident in a Convention country outside the British Islands: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 12. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. For the meaning of 'Convention country' see para 375 note 7 ante; definition applied by reg 2.

<sup>2</sup> Ibid reg 13(1)(a). At least one of the applicants must have been habitually resident in England and Wales for not less than one year and at least one of them must have attained the age of 21 years (reg 13(2)). Applicants must also give the agency any information it may require for the purposes of the assessment: reg 13(1)(b).

<sup>3</sup> Ibid reg 14.

<sup>4</sup> I.e. the Adoption Agencies Regulations 2005, SI 2005/389, reg 22 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22 (requirement to consider application for an assessment of suitability: see para 435 ante) apply as if the reference to an application in those provisions was to an application made in accordance with the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 13 (see the text and notes 1-2 supra): reg 15(1).

<sup>5</sup> I.e. the requirements contained in ibid reg 14 (see the text and note 3 supra).

<sup>6</sup> I.e. the requirements contained in the Adoption Agencies Regulations 2005, SI 2005/389, reg 23 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, regs 23, 24 (see paras 435-436, 440 ante).

<sup>7</sup> I.e. the requirements contained in the Adoption Agencies Regulations 2005, SI 2005/389, reg 24 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 25 (see para 437 ante).

<sup>8</sup> Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 15(2).

<sup>9</sup> I.e. the Adoption Agencies Regulations 2005, SI 2005/389, reg 25 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26 (see paras 438-439 ante) apply. For the meaning of 'prospective adopter's report' see the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4); and para 438 ante (definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2). The agency must include in the prospective adopter's report the state of origin from which the prospective adopter wishes to adopt a child, confirmation that the prospective adopter is eligible to adopt a child under the law of that state, any additional information obtained as a consequence of the requirements of that state, and the agency's assessment of the prospective adopter's suitability to adopt a child who is habitually resident in that state: reg 15(4). The agency must place on the prospective adopter's case record any information obtained as a consequence of these provisions: reg 15(3). For the meaning of 'prospective adopter's case record' see the Adoption Agencies Regulations 2005, SI 2005/389, reg 22(1); the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 22(1); and para 448 ante (definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2).

10     le the Adoption Agencies Regulations 2005, SI 2005/389, reg 26 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 27 (see para 439 ante) apply. 'Adoption panel' means a panel established in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 3 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 3 (see para 428 ante): Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2.

11     le in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 27, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 28 and the Suitability of Adopters Regulations 2005, SI 2005/1712 (see para 440 ante).

12     Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 16.

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#### **492. Procedure following decision as to suitability to adopt.**

Where an adoption agency has made a decision that a prospective adopter is suitable to adopt a child<sup>1</sup> it must notify the relevant central authority<sup>2</sup> and if that central authority is satisfied that the agency has complied with the relevant duties and procedures<sup>3</sup>, and that all the relevant information has been supplied by that agency, the central authority must inform the central authority of the child's state of origin about the proceedings<sup>4</sup>. The central authority of the child's state of origin should then consider whether the child is adoptable and send to the relevant central authority in the United Kingdom 'the Article 16 Information'<sup>5</sup>, which the relevant central authority must<sup>6</sup> send on to the adoption agency which must use it, in consultation with the prospective adopter (who must also visit the child in its state of origin), in order to decide whether the adoption should proceed, and must notify the central authority accordingly<sup>7</sup>. The central authority must then notify the central authority of the child's state of origin of the prospective adopter's wishes and that the child is eligible to enter the United Kingdom<sup>8</sup>.

<sup>1</sup> I.e. in accordance with the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 16 (see para 491 ante).

<sup>2</sup> I.e. the agency must send to the relevant central authority (as to which see para 486 ante) written confirmation of the decision and any recommendation the agency may make in relation to the number of children the prospective adopter may be suitable to adopt, their age range, sex, likely needs and background, the enhanced criminal record certificate obtained under the Adoption Agencies Regulations 2005, SI 2005/389, reg 23 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 23 (see para 435 ante), all the documents and information which were passed to the adoption panel in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(9) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(7) (see para 439 ante), the record of the proceedings of the adoption panel, its recommendation and the reasons for its recommendation, and any other information relating to the case as the relevant central authority or the central authority of the state of origin may require: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 18(1). As to enhanced criminal record certificates see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq. As to the meaning of 'adoption panel' see para 491 note 10 ante.

<sup>3</sup> I.e. the duties and procedures imposed by the Adoption Agencies Regulations 2005, SI 2005/389 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313 (see para 435 et seq, 491 ante).

<sup>4</sup> I.e. the central authority must send to the central authority of the child's state of origin the prospective adopter's report prepared in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26 (see paras 438-439, 491 ante), a copy of the adoption agency's decision and the adoption panel's recommendation, any other information that the central authority of the child's state of origin may require, a certificate (in the form set out in the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, Sch 1) confirming that the prospective adopter is eligible to adopt, the prospective adopter has been assessed (see para 491 ante), the prospective adopter has been approved as suitable to adopt a child and the child will be authorised to enter and reside permanently in the United Kingdom if entry clearance, and leave to enter or remain, as may be necessary, is granted and not revoked or curtailed and a Convention adoption order or Convention adoption is made, and (if the prospective adopter applied to the appropriate minister for a review under the Adoption and Children Act 2002 s 12 (see para 440 note 3 ante), the record of the proceedings of the panel, its recommendation and the reasons for its recommendation: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 18(2) (amended by SI 2005/3482). For the meaning of 'Convention adoption' see the Adoption and Children Act 2002 s 66(1)(c); and para 375 note 7 ante (definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2). The relevant central authority must notify the adoption agency and the prospective adopter in writing that the certificate and the documents referred to above have been sent to the central authority of the child's state of origin: reg 18(3).

5 For the purposes of *ibid* regs 19, 20, 'the Article 16 Information' means the report referred to in the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention') art 16(1), including information about the child's identity, adoptability, background, social environment, family history, medical history including that of the child's family and any special needs of the child, proof of confirmation that the consents of the persons, institutions and authorities whose consents are necessary for adoption have been obtained in accordance with art 4, and the reasons for the central authority of the child's state of origin's determination on the placement: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 19(6). As to the Hague Convention see para 483 ante.

6 In providing that the central authority of the child's state of origin considers that the child in question should be placed for adoption with the prospective adopter: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 19(1).

7 *Ibid* reg 19(2), (3). The adoption agency must consider the Article 16 Information, send it to the prospective adopter, meet with him to discuss the information, the proposed placement and the availability of adoption support services and, if appropriate, offer a counselling service and further information as required: reg 19(2). Where this procedure has been followed, the prospective adopter (and where the prospective adopters are a couple, each of them) has visited the child in the state of origin, and after that visit to the child, the prospective adopter has confirmed in writing to the adoption agency that he has visited the child, he has provided the agency with additional reports and information received on or after that visit, and he wishes to proceed to adopt that child, the agency must notify the relevant central authority in writing that these requirements have been satisfied and at the same time it must confirm that it is content for the adoption to proceed: reg 19(3). For the meaning of 'adoption support services' see the Adoption and Children Act 2002 s 2(6)(a), (b); the Adoption Support Services Regulations 2005, SI 2005/691, reg 3(1); the Adoption Support Services (Local Authorities) (Wales) Regulations 2005, SI 2005/1512, reg 3; and para 394 ante (definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2).

8 *Ibid* reg 19(4). Where the relevant central authority has received notification from the adoption agency under reg 19(3) (see the text and note 7 *supra*), the relevant central authority must notify the central authority of the child's state of origin that the prospective adopter wishes to proceed to adopt the child and that it is prepared to agree with the central authority of the child's state of origin that the adoption may proceed, and must confirm to the central authority of the child's state of origin either that the child will be authorised to enter and reside permanently in the United Kingdom (in a case where the requirements specified in the British Nationality Act 1981 s 1(5A) (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 26) are met) or if entry clearance and leave to enter and remain, as may be necessary, is granted and not revoked or curtailed and a Convention adoption order or a Convention adoption is made, the child will be authorised to enter and reside permanently in the United Kingdom (in any other case). For the meaning of 'Convention adoption' see para 375 note 7 ante; definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2. As to Convention adoption orders see para 491 ante.

## **UPDATE**

### **492 Procedure following decision as to suitability to adopt**

TEXT AND NOTES 5-7--SI 2005/392 reg 19(3) substituted: SI 2009/2563.

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**493. Agreement that adoption may proceed.**

Any decision in the state of origin that a child should be entrusted to prospective adoptive parents may only be made if the central authority of that state<sup>1</sup> has ensured that the prospective adoptive parents agree<sup>2</sup>, the central authority of the receiving state has approved such decision, where such approval is required by the law of that state or by the central authority of the state of origin<sup>3</sup>, the Central Authorities of both states have agreed that the adoption may proceed<sup>4</sup>, and it has been determined<sup>5</sup> that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving state<sup>6</sup>.

1 As to the Central Authorities see para 486 ante.

2 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention') art 17(a). As to the Hague Convention see para 483 ante.

3 Ibid art 17(b).

4 Ibid art 17(c).

5 Ie in accordance with ibid art 5.

6 Ibid art 17(d).

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#### **494. Entry of child into United Kingdom.**

Following agreement that adoption is to proceed<sup>1</sup>, the prospective adopter must notify the adoption agency of his expected date of entry into the United Kingdom with the child<sup>2</sup>, confirm to the adoption agency when the child is placed with him by the competent authority in the state of origin<sup>3</sup>, and accompany the child on entering the United Kingdom unless, in the case of a couple, the adoption agency and the central authority of the state of origin have agreed that it is necessary for only one of them to do so<sup>4</sup>. Procedural requirements must be complied with before the child may enter the United Kingdom<sup>5</sup>. Provision is also made for the imposition of a probationary period on Convention adoptions by the child's state of origin<sup>6</sup>.

Different considerations apply whether the adopter brings the child into the United Kingdom in circumstances where there is no adoption order in the state of origin<sup>7</sup>. A prospective adopter must give notice<sup>8</sup> to the relevant local authority of the child's arrival<sup>9</sup> and of his intention either to apply<sup>10</sup> for an adoption order<sup>11</sup> or not to give the child a home<sup>12</sup>, and the local authority functions with respect to the child<sup>13</sup> are modified accordingly<sup>14</sup>. A child may also be withdrawn from a prospective adopter where the relevant local authority is of the opinion that the continued placement of the child is not in his best interests<sup>15</sup>. Contravention of these requirements is an offence<sup>16</sup>.

1    Ie under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention') art 17(c) (see para 493 ante).

2    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 21(a).

3    Ibid reg 21(b).

4    Ibid reg 21(c).

5    Where the adoption agency is informed by the relevant central authority that the agreement under the Hague Convention art 17(c) (see para 493 ante) has been made and the adoption may proceed, before the child enters the United Kingdom that agency must send the prospective adopter's general practitioner written notification of the proposed placement and send with that notification a written report of the child's health history and current state of health, so far as it is known (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 22(a)), send the local authority (if that authority is not the adoption agency) and the primary care trust (see the National Health Service Act 2006 ss 18-24; and HEALTH SERVICES vol 54 (2008) PARA 111 et seq) or local health board (see ss 11-17; and HEALTH SERVICES vol 54 (2008) PARA 74), in whose area the prospective adopter has his home, written notification of the proposed arrival of the child into England or Wales (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 22(b)), and, where the child is of compulsory school age (see the Education Act 1996 s 8 (as amended); and EDUCATION vol 15(1) (2006 Reissue) para 15), send the local education authority in whose area the prospective adopter has his home written notification of the proposed arrival of the child into England or Wales and information about the child's educational history if known and whether he is likely to be assessed for special educational needs under the Education Act 1996 (see EDUCATION vol 15(2) (2006 Reissue) para 340 et seq) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 22(c)). As to the Central Authorities see para 486 ante.

6    See ibid reg 29.

7    Ie where, following the agreement between the relevant central authority and the central authority of the state of origin under the Hague Convention, art 17(c) (see para 493 ante) that the adoption may proceed, no Convention adoption is made, or applied for, in the state of origin (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 23(a)) and the child is placed with the prospective adopter in the state of origin who then returns to England or Wales with that child (reg 23(b)). For the meaning of 'Convention adoption' see para 375 note 7 ante; definition applied by reg 2.

8     le within the period of 14 days beginning with the date on which the child enters the United Kingdom. Provision is made for circumstances where a prospective adopter moves into another local authority area after giving such a notice: see *ibid* reg 24(2).

9     *Ibid* reg 24(1)(a).

10    le in accordance with the Adoption and Children Act 2002 s 44(2) (see para 365 ante).

11    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 24(1)(b)(i).

12    *Ibid* reg 24(1)(b)(ii).

13    le the functions of the local authority under *ibid* reg 5 (see para 500 post).

14    See *ibid* reg 25; and para 500 post. Where the prospective adopter gives notice to the relevant local authority that he does not wish to proceed with the adoption and no longer wishes to give the child a home, he must return the child to that authority not later than the end of the period of seven days beginning with the date on which notice was given: reg 26(1) (reg 26 substituted by SI 2005/3482). Where a relevant local authority has received such a notice it must give notice to the relevant central authority of the decision of the prospective adopter not to proceed with the adoption: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 26(2) (as so substituted). Provision is also made for the placement of the child in these circumstances: see reg 28.

15    *Ibid* reg 27(1). The authority must give notice to the prospective adopter of its opinion and request the return of the child to it (reg 27(1)(a)), and the prospective adopter must, not later than the end of the period of seven days beginning with the date on which notice was given, return the child to that authority (although this is subject to the proviso that where notice is given under reg 27(1) but an application for a Convention adoption order was made prior to the giving of that notice and the application has not been disposed of, the prospective adopter is not required by virtue of reg 27(1) to return the child unless the court so orders) (reg 27(1)(b), (3)). Where the relevant local authority has given notice under reg 27(1) it must at the same time notify the relevant central authority that it has requested the return of the child: reg 27(2). Regulation 27 does not affect the exercise by any local authority or other person of any power conferred by any enactment or the exercise of any power of arrest: reg 27(4). Provision is also made for the placement of the child in these circumstances: see reg 28.

16    Any person who contravenes or fails to comply with *ibid* reg 24, reg 26 or reg 27(1)(b) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: reg 59(a)-(c) (substituted by SI 2005/3482). As to the standard scale see para 132 note 2 ante.

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**495. Procedure where proposed adoption is not to proceed.**

Administrative provision is made for three sets of circumstances under which a proposed Convention adoption<sup>1</sup> might not proceed, as follows:

- 913 (1) if at any stage before the Central Authorities<sup>2</sup> of both states have agreed that an adoption may proceed<sup>3</sup> the central authority of the state of origin notifies the relevant central authority that it has decided the proposed placement should not proceed, the relevant central authority must inform the adoption agency of the decision<sup>4</sup>, the agency must inform the prospective adopter and return the Article 16 Information<sup>5</sup> to the relevant central authority<sup>6</sup>, which must then return those documents to the central authority of the state of origin<sup>7</sup>;
- 914 (2) where at any stage before the adoption agency receives notification of the agreement that an adoption may proceed<sup>8</sup> the approval of the prospective adopter is reviewed<sup>9</sup> and as a consequence the agency determines that the prospective adopter is no longer suitable to adopt a child, the agency must inform the relevant central authority and return the relevant documents<sup>10</sup>, and the relevant central authority must notify the central authority of the state of origin and return those documents<sup>11</sup>; and
- 915 (3) if at any stage before the child is placed with him the prospective adopter notifies the adoption agency that he does not wish to proceed with the adoption, that agency must inform the relevant central authority and return the documents to that central authority<sup>12</sup> and the relevant central authority must notify the central authority of the state of origin of the prospective adopter's decision and return the documents to that central authority<sup>13</sup>.

1 For the meaning of 'Convention adoption' see para 375 note 7 ante; definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2.

2 As to the Central Authorities see para 486 ante.

3 Ie before agreement is reached under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention') art 17(c) (see para 493 ante). As to the Hague Convention see para 483 ante.

4 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 20(1)(a).

5 For the meaning of 'the Article 16 Information' see para 492 note 5 ante.

6 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 20(1)(b).

7 Ibid reg 20(1)(c).

8 See note 3 supra.

9 Ie under the Adoption Agencies Regulations 2005, SI 2005/389, reg 29 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 30 (see para 441 ante).

10 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 20(2)(a). The 'relevant documents' are those referred to in reg 19(1) (see para 492 ante).

11 Ibid reg 20(2)(b).



12 Ibid reg 20(3)(a).

13 Ibid reg 20(3)(b).

## **UPDATE**

### **495 Procedure where proposed adoption is not to proceed**

TEXT AND NOTES 12, 13--SI 2005/392 reg 20(3) amended: SI 2009/2563.

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(C) ADOPTIONS WHERE UNITED KINGDOM IS STATE OF ORIGIN

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#### **496. Procedure for consideration of adoption.**

Where a couple or a person habitually resident<sup>1</sup> in a Convention country<sup>2</sup> outside the British Islands wishes to adopt a child who is habitually resident in the British Islands in accordance with the Hague Convention<sup>3</sup>, the child's permanence report<sup>4</sup> must include a summary of the possibilities for placement of the child within the United Kingdom<sup>5</sup> and an assessment of whether an adoption by a person in a particular receiving state is in the child's best interests<sup>6</sup>. The adoption agency must send to the adoption panel<sup>7</sup>, together with the standard reports and information required to accompany the permanence report<sup>8</sup>, the Article 15 Report<sup>9</sup> (if received) and its observations thereon<sup>10</sup>; and the panel's recommendation as to whether a child should be placed for adoption<sup>11</sup> must consider and take into account the Article 15 Report, if available, and the observations thereon together with the information passed to it as a consequence thereof<sup>12</sup>; and where the adoption agency decides<sup>13</sup> that the child should be placed for an adoption in accordance with the Convention it must notify the relevant central authority accordingly<sup>14</sup>. Provision is also made for the child and his parent or guardian to be given counselling and information in connection with the proposed adoption<sup>15</sup>.

1 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

2 For the meaning of 'Convention country' see para 375 note 7 ante; definition applied by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2.

3 I.e. the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691). As to the Hague Convention see para 483 ante.

4 I.e. the report which the adoption agency is required to prepare in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 17 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17 (see para 433 ante).

5 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 35, 38(1)(a).

6 Ibid reg 38(1)(b).

7 As to the meaning of 'adoption panel' see para 491 note 10 ante.

8 I.e. the reports and information referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 17(2) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(2) (see para 433 ante).

9 The 'Article 15 Report' is a report prepared under the Hague Convention art 15 (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 42(1)(a)), which provides that if the central authority of the receiving state is satisfied that the applicants are eligible and suited to adopt, it must prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care. As to the central authority see para 486 ante. Provision is made in connection with the receipt of the Article 15 Report: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 42.

10 Ibid reg 38(2).

11 I.e. the adoption panel's recommendation in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 18(1) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18(1) (see para 434 ante).

12 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 39.

13     le in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 19 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 19 (see para 434 ante).

14     Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 40 (the agency must notify the relevant central authority of the name, sex and age of the child, the reasons why it considers that the child may be suitable for a Convention adoption, whether a prospective adopter has been identified and, if so, provide any relevant information, and any other information that the central authority may require). The relevant central authority is required to maintain a Convention list of children who are notified to that central authority under reg 40 and must make the contents of that list available for consultation by other Central Authorities within the British Islands: reg 41(1). Where an adoption agency either places for adoption a child whose details have been notified to the relevant central authority under reg 40 or determines that an adoption in accordance with the Convention is no longer in the best interests of the child, it must notify the relevant central authority accordingly and that central authority must remove the details relating to that child from the Convention list: reg 41(2).

15     See *ibid* regs 36, 37.

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#### **497. Procedure for consideration of placement.**

Where, in connection with a proposed Convention adoption of a child who is habitually resident in the British Islands<sup>1</sup>, an adoption agency is considering whether a proposed placement should proceed<sup>2</sup>, it must take into account the Article 15 Report<sup>3</sup>; and where the agency refers the proposal to place the child with the particular prospective adopter to the adoption panel<sup>4</sup>, it must also send the Article 15 Report to the panel<sup>5</sup>, who, in considering whether the child should be placed for adoption with that particular prospective adopter<sup>6</sup>, must take into account the Article 15 Report and any other information passed to it as a consequence of these provisions<sup>7</sup>. The agency must then notify the relevant central authority<sup>8</sup> as soon as possible after it makes its decision<sup>9</sup>.

1    Ie where a couple or a person habitually resident in a Convention country outside the British Islands wishes to adopt a child who is habitually resident in the British Islands in accordance with the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention'): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 35; and para 496 ante. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. For the meaning of 'Convention country' see para 375 note 7 ante; definition applied by reg 2. As to the Hague Convention see para 483 ante.

2    Ie in accordance with the procedure provided for in the Adoption Agencies Regulations 2005, SI 2005/389, reg 31 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32 (see para 442 ante).

3    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 43(1). For the meaning of 'the Article 15 Report' see para 496 note 9 ante.

4    Ie in accordance with the procedure provided for in the Adoption Agencies Regulations 2005, SI 2005/389, reg 31 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32 (see para 442 ante). As to the meaning of 'adoption panel' see para 491 note 10 ante.

5    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 43(2).

6    Ie in considering what recommendation to make in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 32(1) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 33(1) (see para 443 ante).

7    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 44.

8    As to the central authority see para 486 ante.

9    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 45(2). The Adoption Agencies Regulations 2005, SI 2005/389, reg 33 and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 (see para 444 ante) apply as if the Adoption Agencies Regulations 2005, SI 2005/389, reg 33(3) or, as the case may be, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34(3) were omitted: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 45(1). If it is decided that the proposed placement is not to proceed, the adoption agency must return the Article 15 Report and any other documents or information sent to it by the relevant central authority to that central authority; and the relevant central authority must then send the Article 15 Report, any such documents or such information to the central authority of the receiving state: reg 45(3).

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#### **498. Procedure following decision as to suitability to adopt.**

If an adoption agency decides that a proposed placement should proceed<sup>1</sup>, it must prepare a report<sup>2</sup> and send it to the relevant central authority<sup>3</sup> along with details of any placement order or other orders, if any, made by the courts and confirmation that the parent or guardian consents to the proposed adoption<sup>4</sup>. The relevant central authority must then send this material to the central authority of the receiving state<sup>5</sup>, and may notify that central authority that it is prepared to agree to the adoption provided that specified procedural matters have been complied with and that central authority is content for the adoption to proceed<sup>6</sup>. An adoption agency may not, however, place a child for adoption unless a Convention agreement<sup>7</sup> has been made<sup>8</sup>.

1    Ie where a couple or a person habitually resident in a Convention country outside the British Islands wishes to adopt a child who is habitually resident in the British Islands in accordance with the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention'): see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 35; and paras 496-497 ante. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. For the meaning of 'Convention country' see para 375 note 7 ante; definition applied by reg 2. As to the Hague Convention see para 483 ante.

2    Ie for the purposes of the Hague Convention art 16(1) (see para 492 note 5 ante). The report must include the information about the child which is specified in the Adoption Agencies Regulations 2005, SI 2005/389, Sch 1 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Sch 1 (see para 431 ante) and the reasons for the decision: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 46(1).

3    As to the central authority see para 486 ante.

4    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 46(2).

5    Ibid reg 46(3).

6    Ibid reg 47(1). The relevant central authority may notify the central authority of the receiving state that it is prepared to agree that the adoption may proceed provided that central authority has confirmed that the prospective adopter (ie, in the case of a couple, both of them) has agreed to adopt the child and has received such counselling as may be necessary, the prospective adopter has confirmed that he will accompany the child to the receiving state (unless in the case of a couple, the adoption agency and the central authority of the receiving state have agreed that it is only necessary for one of them to do so), it is content for the adoption to proceed, it has explained to the prospective adopter the need to make an application under the Adoption and Children Act 2002 s 84(1) (see para 502 post) (in the case where a Convention adoption is to be effected), and the child is or will be authorised to enter and reside permanently in the Convention country if a Convention adoption is effected or a Convention adoption order is made: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 47(1), (4).

7    Ie an agreement under the Hague Convention art 17(c) (see para 493 ante).

8    Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 47(3). The relevant central authority may not make an agreement under the Hague Convention art 17(c) with the central authority of the receiving state unless confirmation has been received in respect of the matters referred to in the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 47(1) (see note 6 supra) and the adoption agency has confirmed to the relevant central authority that it has met the prospective adopter and explained the requirement to make an application for an order under the Adoption and Children Act 2002 s 84 (see para 502 post) before the child can be removed from the United Kingdom, the prospective adopter has visited the child and the prospective adopter is content for the adoption to proceed: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 47(2). The relevant central authority must advise the agency when that agreement has been made: reg 47(3). See also the Adoption and Children Act 2002 s 84(3); the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 48; and para 502 note 2 post.



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### **(iii) Restrictions on Removing Children to and from the United Kingdom**

#### **499. Assessments in non-Convention cases.**

Provision is made for the assessment of a person's suitability to adopt a child from overseas in circumstances where the Hague Convention<sup>1</sup> does not apply<sup>2</sup>. Where a person who is habitually resident<sup>3</sup> in the British Islands (the 'British resident'):

- 916 (1) intends to bring, or to cause another to bring, a child<sup>4</sup> who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption<sup>5</sup> by the British resident<sup>6</sup>; or
- 917 (2) at any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption<sup>7</sup> effected within a specified period<sup>8</sup> ending with that time<sup>9</sup>,

he must apply in writing to an adoption agency<sup>10</sup> for an assessment of his suitability to adopt a child<sup>11</sup> and give the agency any information it may require for the purpose of the assessment<sup>12</sup>. Failure to comply with these requirements is an offence<sup>13</sup>.

1    Ie the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691). As to the Hague Convention see para 483 ante.

2    See the Adoption and Children Act 2002 s 83; the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 3, 4; the text and notes 11-12 infra; and para 500 post. These provisions do not apply if the child is intended to be adopted under a Convention adoption order: Adoption and Children Act 2002 s 83(2). For the meaning of 'Convention adoption' see para 375 note 7 ante. As to Convention adoption orders see para 490 et seq ante. Regulations made by the Secretary of State after consultation with the Welsh Ministers may provide for s 83 not to apply if the adopters or (as the case may be) prospective adopters are natural parents, natural relatives or guardians of the child in question (or one of them is), or the British resident in question is a partner of a parent of the child, and any prescribed conditions are met: s 86(1), (4). At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 334 note 12 ante. On the occasion of the first exercise of the power to make regulations under s 86 the statutory instrument containing the regulations is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament, and accordingly s 140(2) does not apply to the instrument: s 86(3). As to the Secretary of State and the Welsh Ministers see para 155 ante.

In relation to a child brought into the United Kingdom for adoption in circumstances where these provisions apply, regulations may provide for any of the provisions relating to placement for adoption and adoption orders (ie the Adoption and Children Act 2002 Pt 1 Ch 3 (ss 18-65): see para 331 et seq ante) to apply with modifications or not to apply; and, if notice of intention to adopt has been given, impose functions in respect of the child on the local authority to which the notice was given: s 83(6). See the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 6-9. For the meaning of 'notice of intention to adopt' see the Adoption and Children Act 2002 s 44(2); and para 365 ante. As to the giving of notices under the Adoption and Children Act 2002 see para 333 note 11 ante.

As from a day to be appointed the Secretary of State or the Welsh Ministers may charge a fee to adopters for services provided or to be provided by him or them in relation to adoptions to which the provisions of s 83, or the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, apply: Adoption and Children Act 2002 s 91A(1), (2) (added by the Children and Adoption Act 2006 s 13). At the date at which this volume states the law these provisions were in force only so far as relating to adoptions and prospective adoptions in respect of which the Welsh Ministers may charge a fee (see the Children and Adoption Act 2006 (Commencement No 1) (Wales)



Order 2007, SI 2007/733, appointing 2 April 2007 for this purpose). The Welsh Ministers may charge a fee to adopters for services provided or to be provided by them as the central authority in relation to adoptions to which the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, apply: Adoption and Children Act 2002 s 91A(3) (as so added). The Secretary of State or the Welsh Ministers may determine the level of fee as he or they see fit, and may in particular charge a flat fee or charge different fees in different cases or descriptions of case and, in any case or description of case, waive a fee (s 91A(4) (as so added)); however, the Secretary of State and the Welsh Ministers must secure that, taking one financial year with another, the income from fees under s 91A (as added) does not exceed the total cost to him or, as the case may be, to them of providing the services in relation to which the fees are imposed (s 91A(5) (as so added)). For the purposes of s 91A (as added), references to 'adoptions' and 'adopters' include prospective adoptions and prospective adopters; 'central authority' is to be construed in accordance with the Adoption (Intercountry Aspects) Act 1999 s 2 (see para 486 ante); and 'financial year' means a period of twelve months ending with 31 March: Adoption and Children Act 2002 s 91A(6) (as so added). As to the Secretary of State and the Welsh Ministers see para 155 ante.

3 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.

4 For the meaning of 'child' see para 327 note 2 ante.

5 For these purposes the references to 'adoption', or to a child 'adopted', by the British resident include a reference to adoption, or to a child adopted, by the British resident and another person: Adoption and Children Act 2002 s 83(1). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

6 Ibid s 83(1)(a).

7 An 'external adoption' means an adoption, other than a Convention adoption (see note 2 supra), of a child effected under the law of any country or territory outside the British Islands, whether or not the adoption is an adoption within the meaning of ibid Pt 1 Ch 4 (ss 66-76) (see para 375 et seq ante), or a full adoption: s 83(3). A 'full adoption' is an adoption by virtue of which the child is to be treated in law as not being the child of any person other than the adopters or adopter: s 88(3).

8 The specified period is 12 months (ibid s 83(1)(b) (amended by the Children and Adoption Act 2006 s 14(1))), except in relation to a child adopted under an external adoption effected before 1 October 2007, in which case it is six months (Adoption and Children Act 2002 s 83(1)(b) (as originally enacted); Children and Adoption Act 2006 s 14(2); Children and Adoption Act 2006 (Commencement No 1) Order 2007, SI 2007/2287).

9 Adoption and Children Act 2002 s 83(1)(b) (as amended: see note 8 supra).

10 Ie a local authority or a registered adoption society: see paras 394-395 ante. For this purpose 'adoption agency' includes a Scottish or Northern Irish adoption agency: ibid s 83(4)(a). As to Scottish and Northern Irish adoption agencies see para 352 note 2 ante.

11 Ibid s 83(4)(a); Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 3(a). The regulations are made by the Secretary of State after consultation with the Welsh Ministers: Adoption and Children Act 2002 s 83(9).

12 Ibid s 83(4)(b); Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 3(b).

13 If a person brings, or causes another to bring, a child into the United Kingdom at any time in circumstances where these provisions apply, he is guilty of an offence if he has not complied with any requirement imposed by virtue of the Adoption and Children Act 2002 s 83(4): s 83(7)(a). A person guilty of an such offence is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both; or on conviction on indictment, to imprisonment for a term not exceeding 12 months, or a fine, or both: s 83(8). As to the statutory maximum see para 109 note 23 ante.

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### **500. Conditions of entry in non-Convention cases.**

Provision is made for regulating the entry into the United Kingdom of adoptive children from overseas in circumstances where the Hague Convention<sup>1</sup> does not apply<sup>2</sup>. The prospective adopter must accompany the child on entering the United Kingdom<sup>3</sup> and prior to the child's entry must:

- 918 (1) receive written notification from the Secretary of State or the Welsh Ministers that he has or they have issued to the relevant foreign authority a certificate confirming the prospective adopter's eligibility to be an adoptive parent<sup>4</sup> and that the child will be authorised<sup>5</sup> to enter and reside permanently in the United Kingdom<sup>6</sup>; and
- 919 (2) visit the child in the state of origin<sup>7</sup> and comply with specified requirements relating to that visit<sup>8</sup>.

Except where an overseas adoption<sup>9</sup> is or is to be effected, the prospective adopter must<sup>10</sup> give notice to the relevant local authority<sup>11</sup> of the child's arrival in the United Kingdom<sup>12</sup> and of his intention either to apply for an adoption order<sup>13</sup> or not to give the child a home<sup>14</sup>. Provision is made for the operation of these provisions where the prospective adopter moves his home<sup>15</sup>. Failure to comply with these requirements is an offence<sup>16</sup>.

1 *I*e the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691). As to the Hague Convention see para 483 ante.

2 See para 499 note 2 ante. The Adoption and Children Act 2002 s 83(5) provides that regulations may require prescribed conditions to be met in respect of a child brought into the United Kingdom in circumstances where these provisions apply. These conditions are prescribed by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 4 (see the text and notes 3-15 infra): reg 4(1). For a saving in connection with prospective adoptions notified prior to 30 December 2005 see the Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, arts 7, 8. As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

3 Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 4(3). This requirement will not apply in the case of a couple if the adoption agency (ie a local authority or a registered adoption society: see paras 394-395 ante) and the relevant foreign authority have agreed that it is necessary for only one of them to do so: reg 4(3). 'Relevant foreign authority' means a person outside the British Islands performing functions in the country in which the child is, or in which the prospective adopter is, habitually resident which correspond to the functions of an adoption agency or to the functions of the Secretary of State or the Welsh Ministers in respect of adoptions with a foreign element: reg 2. As to the Secretary of State and the Welsh Ministers see para 155 ante.

4 *I*e that the prospective adopter has been assessed and approved as eligible and suitable to be an adoptive parent in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, Pt 4 (regs 21-30) and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Pt 4 (regs 21-31) (see paras 435 et seq ante): Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 4(2)(a)(i).

5 *I*e provided that entry clearance and leave to enter and remain, as may be necessary, is granted and not revoked or curtailed, and an adoption order is made or an overseas adoption is effected: *ibid* reg 4(2)(a)(i).

6 *Ibid* reg 4(2)(a).

7 *Ibid* reg 4(2)(c). Where the prospective adopters are a couple each of them must visit the child in the state of origin: reg 4(2)(c).

8 Before visiting the child in the state of origin the prospective adopter must notify the adoption agency of the details of the child to be adopted, provide the agency with any information and reports received from the relevant foreign authority, and meet with the agency to discuss the proposed adoption and information received from the relevant foreign authority (ibid reg 4(2)(b)); and after that visit he must confirm in writing to the agency that he has done so and wishes to proceed with the adoption, provide the agency with any additional reports and information received on or after that visit, and notify the agency of his expected date of entry into the United Kingdom with the child (reg 4(2)(d)).

9 For the meaning of 'overseas adoption' for the purposes of the Adoption and Children Act 2002 see para 485 ante.

10 Ie within the period of 14 days beginning with the date on which the child is brought into the United Kingdom: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 4(4).

11 In relation to a prospective adopter 'relevant local authority' means either the local authority within whose area he has his home or, in the case where he no longer has a home in England or Wales, the local authority for the area in which he last had his home: ibid reg 2.

12 Ibid reg 4(4)(a).

13 Ie in accordance with the Adoption and Children Act 2002 s 44(2) (see para 365 ante). A number of duties are imposed on a local authority where a person has given notice of intention to adopt (see para 365 ante) under these provisions: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, regs 5, 25.

14 Ibid reg 4(4)(b).

15 If a prospective adopter has given notice in accordance with ibid reg 4(4) and subsequently moves his home into the area of another local authority, he must within 14 days of that move confirm in writing to that authority the child's entry into the United Kingdom and that notice of his intention to apply for an adoption order in accordance with the Adoption and Children Act 2002 s 44(2) (see para 365 ante) or not to give the child a home, has been given: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 4(5).

16 If a person brings, or causes another to bring, a child into the United Kingdom at any time in circumstances where these provisions apply, he is guilty of an offence if any condition required to be met by virtue of the Adoption and Children Act 2002 s 83(5) (see the text and notes 1-14 supra) is not met: s 83(7)(b). A person guilty of an such offence is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both; or on conviction on indictment, to imprisonment for a term not exceeding 12 months, or a fine, or both: s 83(8). As to the statutory maximum see para 109 note 23 ante.

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### **501. Declaration of special restrictions.**

As from a day to be appointed<sup>1</sup>, the Secretary of State<sup>2</sup> may by order declare<sup>3</sup> that special restrictions on the bringing of children into the United Kingdom are to apply in relation to specified countries<sup>4</sup> because of practices taking place there in connection with the adoption of children<sup>5</sup>. The special restrictions, which may be applied where a British resident<sup>6</sup>:

- 920 (1) wishes to bring, or cause another to bring, a child who is not a British resident into the United Kingdom for the purpose of adoption by the British resident<sup>7</sup>, and, in connection with the proposed adoption, there have been, or would have to be, proceedings in the other country or dealings with authorities or agencies there<sup>8</sup>; or
- 921 (2) wishes to bring, or cause another to bring, into the United Kingdom a child adopted by the British resident under an adoption effected, within the period of 12 months ending with the date of the bringing in, under the law of the other country<sup>9</sup>,

are that the appropriate authority<sup>10</sup> is not to take any step<sup>11</sup> which might otherwise have been taken in connection with furthering the bringing of a child into the United Kingdom in the cases mentioned above<sup>12</sup> (unless the prospective adopters can satisfy the authority that it should take those steps despite the special restrictions<sup>13</sup>). Additional conditions may be imposed in respect of restricted countries by regulations<sup>14</sup>.

1 The Children and Adoption Act 2006 ss 9-12, 16 (see the text and notes 2-14 *infra*) are to be brought into force as from a day to be appointed; ss 11, 12(1), (7) were brought into force on 2 August 2007 for the purpose of making regulations by the Children and Adoption Act 2006 (Commencement No 1) Order 2007, SI 2007/2287, but at the date at which this volume states the law no further commencement day had been appointed.

2 As to the Secretary of State see para 155 *ante*.

3 Before making an order containing such a declaration the Secretary of State must consult the Welsh Ministers and the Department of Health, Social Services and Public Safety in Northern Ireland: Children and Adoption Act 2006 s 9(5). The power to make and revoke an order under these provisions is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 16(2), (3).

4 In any country or territory outside the British Islands from which the Secretary of State has reason to believe it would be contrary to public policy to further the bringing of children into the United Kingdom because of practices taking place there in connection with the adoption of children: *ibid* ss 9(1), 10(4), 12(7). It is immaterial whether the other country is a Convention country or not (ie a Country or territory in which the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (The Hague, 29 May 1993; TS 40 (1994); Cm 2691) (the 'Hague Convention') (see para 483 *ante*) is in force): Children and Adoption Act 2006 s 9(3), (10)(c). The Secretary of State must publish reasons for making the declaration in relation to each country or territory in relation to which such a declaration has effect for the time being (s 9(6), (7)) and must publish and keep up to date a list of those countries (s 9(8)). The restricted list and the reasons are to be published in whatever way the Secretary of State thinks appropriate for bringing them to the attention of adoption agencies and members of the public: s 9(9).

The Secretary of State must keep under review, in relation to each restricted country, whether it should continue to be a restricted country (s 10(1)) and if he determines, in relation to a restricted country, that there is no longer reason to believe what is mentioned in s 9(1) he must by order revoke the order containing the declaration made in relation to it under s 9(4) (see the text and note 5 *infra*) (s 10(2)). Before making a

determination under s 10(2) the Secretary of State must consult the Welsh Ministers and the Department of Health, Social Services and Public Safety in Northern Ireland: s 10(3)).

5 Ibid s 9(1), (4).

6 'British resident' means a person habitually resident in the British Islands: ibid s 9(10)(a).

7 The reference to 'adoption by a British resident' includes adoption by a British resident and another person: ibid s 9(10)(a).

8 Ibid s 9(2)(a).

9 Ibid s 9(2)(b).

10 'The appropriate authority' means, in a Convention case, the central authority in relation to England, Wales or Northern Ireland (as the case may be), and in any other case means the Secretary of State (in relation to England and Wales) or the Secretary of State (for the purposes of steps which he takes) or the Department of Health, Social Services and Public Safety in Northern Ireland (for the purposes of steps which it takes) (in relation to Northern Ireland): ibid regs 11(4), 12(7). 'Convention case' means a case where the child is intended to be adopted under an adoption order which, by virtue of the Adoptions with a Foreign Element Regulations 2005, SI 2005/392 (made under the Adoption (Intercountry Aspects) Act 1999 s 1) (see paras 483, 490 et seq ante), is made as a Convention adoption order or the child is intended to be adopted under an adoption effected under the law of a Convention country outside the British Islands and certified in pursuance of the Hague Convention art 23(1): Children and Adoption Act 2006 s 11(4). 'Central authority' is to be construed in accordance with the Adoption (Intercountry Aspects) Act 1999 s 2 (see para 486 ante) or, in relation to Northern Ireland, the Adoption (Intercountry Aspects) Act (Northern Ireland) 2001 s 2: Children and Adoption Act 2006 s 11(4).

11 Ie whether or not that step is provided for by or by virtue of any enactment: ibid s 11(1).

12 Ibid s 11(1).

13 Ibid s 11(2). The Secretary of State may make regulations providing for the procedure to be followed by the appropriate authority (or, where applicable, the Secretary of State) in determining whether or not he or it is so satisfied and for the matters which the appropriate authority (or the Secretary of State) is to take into account when making such a determination (whether or not he or it also takes other matters into account): s 11(3). At the date at which this volume states the law no such regulations had been made.

Any power to make regulations conferred by the Children and Adoption Act 2006 on the Secretary of State is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 16(1), (3). Regulations may make different provision for different purposes: s 16(4). A power to make regulations (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to those cases subject to specified exceptions or a particular case or class of case: s 16(5).

14 The Secretary of State may make regulations providing for him to specify in the restricted list, in relation to any restricted country, a step which is not otherwise provided for by or by virtue of any enactment but which, by virtue of the arrangements between the United Kingdom and that country, the appropriate authority normally takes in connection with the bringing in of a child where that country is concerned, and that, if such a step has been so specified in relation to a restricted country, one or more conditions specified in the regulations are to be met in respect of a child brought into the United Kingdom in either of the cases mentioned in ibid s 9(2) (see the text and notes 7-9 supra) (reading the reference there to the 'other country' as being to the restricted country in question): s 12(1). Those conditions are in addition to any provided for by virtue of the Adoption and Children Act 2002 s 83 (restriction on bringing children in: see paras 499-500 ante) or the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 58ZA (restriction on bringing children in), or under or by virtue of any other enactment: Children and Adoption Act 2006 s 12(2). A person who brings, or causes another to bring, a child into the United Kingdom is guilty of an offence if any condition so required to be met is not met (s 12(3)), although this does not apply if the step specified in the restricted list in relation to any country had already been taken before the publication of the restricted list (s 12(4)). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding 12 months (in England and Wales, in relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' court's power to impose imprisonment)) or six months (in Northern Ireland, and in England and Wales in relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 154(1)), or a fine not exceeding the statutory maximum, or both; or on conviction on indictment, to imprisonment for a term not exceeding 12 months, or a fine, or both: Children and Adoption Act 2006 s 12(5), (6). As to the statutory maximum see para 109 note 23 ante.

## UPDATE

## **501 Declaration of special restrictions**

TEXT AND NOTE 1--Children and Adoption Act 2006 ss 9(4), 16 in force 7 July 2008; s 10 and, so far as not already in force, ss 9, 11, 12 in force 1 August 2008: SI 2008/1798. As to regulations made under the Children and Adoption Act 2006 s 9(4) see the Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008, SI 2008/1808; the Special Restrictions on Adoptions from Abroad (Guatemala) Order 2008, SI 2008/1809; and the Special Restrictions on Adoptions from Abroad (Nepal) Order 2010, SI 2010/951.

NOTES 13, 14--As to regulations made under the Children and Adoption Act 2006 ss 11(3), 12(1), 16(4), (5) see the Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008, SI 2008/1807.

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## **502. Giving parental responsibility prior to adoption abroad.**

The High Court may, on an application by persons who the court is satisfied intend to adopt a child<sup>1</sup> under the law of a country or territory outside the British Islands, make an order giving parental responsibility for the child to them<sup>2</sup>. The effect of such an order in the context of parental responsibility corresponds to that of an adoption order<sup>3</sup>, although an order under these provisions may not give parental responsibility to persons who the court is satisfied meet those requirements as to domicile, or habitual residence, in England and Wales which have to be met if an adoption order is to be made in favour of those persons<sup>4</sup>.

An application for an order under these provisions may not be made unless at all times during the preceding ten weeks the child's home was with the applicant or, in the case of an application by two people, both of them<sup>5</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 Adoption and Children Act 2002 s 84(1). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). As to the court see para 511 post. Such an order may not be made in the case of a child placed by an adoption agency unless that agency has confirmed to the court that it has complied with the requirements imposed in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, Pt 3 (regs 11-20A) (as amended) (see para 447 ante) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, Pt 3 (regs 11-20) (see para 447 ante) (Adoption and Children Act 2002 s 84(3); Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(i)) and has submitted to the court:

- 261 (1) the reports and information referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 17(2), (3) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(2), (3) (see para 433 ante) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(ii)(aa));
- 262 (2) the recommendations made by the adoption panel in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 18 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 18 (placing child for adoption: see para 434 ante) and the Adoption Agencies Regulations 2005, SI 2005/389, reg 33 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 34 (proposed placement: see para 444 ante) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(ii)(bb));
- 263 (3) the adoption placement report prepared in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d) (see para 442 ante) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(ii)(cc));
- 264 (4) the reports of and information obtained in respect of the visits and reviews referred to in the Adoption Agencies Regulations 2005, SI 2005/389, reg 36 or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37 (see para 446 ante) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(ii)(dd)); and
- 265 (5) the report referred to in the Adoption and Children Act 2002 s 43 as modified by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 11 (see para 366 ante) (Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10(a)(ii)(ee)).

Such an order may not be made in the case of a child placed by an adoption agency unless the relevant foreign authority has:

- 266 (a) confirmed in writing to that agency that the prospective adopter has been counselled and the legal implications of adoption have been explained to him (reg 10(b)(i));
- 267 (b) prepared a report on the suitability of the prospective adopter to be an adoptive parent (reg 10(b)(ii));
- 268 (c) determined and confirmed in writing to that agency that he is eligible and suitable to adopt in the country or territory in which the adoption is to be effected (reg 10(b)(iii)); and
- 269 (d) confirmed in writing to that agency that the child is or will be authorised to enter and reside permanently in that foreign country or territory (reg 10(b)(iv)).

In the case of a child placed by an adoption agency such an order may not be made unless the prospective adopter has confirmed in writing to the adoption agency that he will accompany the child on taking him out of the United Kingdom and entering the country or territory where the adoption is to be effected, or in the case of a couple, the agency and relevant foreign authority have confirmed that it is necessary for only one of them to do so (reg 10(c)).

For the applicable requirements in relation to Convention adoptions where the United Kingdom is the state of origin of the child see reg 48.

3 See the Adoption and Children Act 2002 s 84(5), which provides that the provisions of s 46(2)-(4) (adoption orders: see para 359 ante) have effect in relation to an order under s 84 as they have effect in relation to adoption orders. Specified provisions of the Adoption and Children Act 2002 which refer to adoption orders apply with modifications to orders under s 84: see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 11 (made by the Secretary of State after consultation with the Welsh Ministers under the Adoption and Children Act 2002 s 84(6), (7)).

4 Ibid s 84(2).

5 Ibid s 84(4).

## UPDATE

### 502 Giving parental responsibility prior to adoption abroad

NOTE 2--The relevant foreign authority, under the 2005 Regulations reg 10(b)(iv), is the foreign equivalent of an English adoption agency and is not a government body: see *Re G (an infant) (adoption: placement outside jurisdiction)* [2008] EWCA Civ 105, [2008] 3 WLR 853, [2008] All ER (D) 302 (Feb).

NOTE 5--A 'home' does not have to be in England and Wales: *Re A (a child) (adoption: assessment outside jurisdiction)* [2009] EWCA Civ 41, [2010] Fam 9, [2009] 3 All ER 479.



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### **503. Restriction on taking children out of the United Kingdom.**

A child<sup>1</sup> who is a Commonwealth citizen<sup>2</sup>, or is habitually resident in the United Kingdom<sup>3</sup>, must not be removed from the United Kingdom to a place outside the British Islands for the purpose of adoption unless:

- 922 (1) the prospective adopters have parental responsibility for the child<sup>4</sup>; or
- 923 (2) the child is removed with the appropriate authority<sup>5</sup>.

Removing a child from the United Kingdom includes arranging to do so; and the circumstances in which a person arranges to remove a child from the United Kingdom include those where he:

- 924 (a) enters into an arrangement<sup>6</sup> for the purpose of facilitating such a removal of the child<sup>7</sup>; or
- 925 (b) initiates or takes part in any negotiations of which the purpose is the conclusion of such an arrangement<sup>8</sup>.

A person who removes a child from the United Kingdom in contravention of these provisions is guilty of an offence<sup>9</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 As to Commonwealth citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 11.

3 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. As to the United Kingdom see paras 102 note 7, 341 note 8 ante.

4 Adoption and Children Act 2002 s 85(1), (2)(a). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6). Regulations may provide for s 85(1) to apply with modifications, or not to apply, if the prospective adopters are parents, relatives or guardians of the child in question (or one of them is), or the prospective adopter is a partner of a parent of the child, and any prescribed conditions are met: s 86(2). At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see paras 334 note 12 ante, 499 note 2 ante.

5 Ibid s 85(2)(b). The 'appropriate authority' is an order under s 84 (see para 502 ante), the Adoption (Scotland) Act 1978 s 49 or the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 57: Adoption and Children Act 2002 s 85(2)(b).

6 An arrangement includes an agreement (whether or not enforceable): ibid s 85(3).

7 Ibid s 85(3)(a).

8 Ibid s 85(3)(b).

9 Ibid s 85(4). A person is not guilty of an offence under s 85(4) of causing a person to take any step mentioned in s 85(3)(a), (b) (see the text and notes 6-8 supra) unless it is proved that he knew or had reason to suspect that the step taken would amount to an offence (although this only applies if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned): s 85(5). A person guilty of an offence under s 85 is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both; or on conviction on indictment, to

imprisonment for a term not exceeding 12 months, or a fine, or both: s 85(6). As to the statutory maximum see para 109 note 23 ante.

In any proceedings under s 85 a report by a British consular officer or a deposition made before a British consular officer and authenticated under the signature of that officer is admissible, upon proof that the officer or the deponent cannot be found in the United Kingdom, as evidence of the matters stated in it (s 85(7)(a)), and it is not necessary to prove the signature or official character of the person who appears to have signed any such report or deposition (s 85(7)(b)).

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## **(iv) Recognition of Scottish and Northern Irish Orders**

### **504. Effect of certain Scottish orders and provisions.**

A Scottish adoption order<sup>1</sup>, an interim adoption order<sup>2</sup>, a freeing order<sup>3</sup>, and the revocation or variation of such an order<sup>4</sup>, all have effect in England and Wales as they have in Scotland, but as if references to the 'parental responsibilities' and the 'parental rights' in relation to a child<sup>5</sup> were to parental responsibility<sup>6</sup> for the child<sup>7</sup>.

Any person who contravenes the prohibition on removal of a child where adoption is agreed<sup>8</sup> or who contravenes the prohibition on removal where the applicant provided the child's home<sup>9</sup>, is guilty of an offence<sup>10</sup>. Orders to return or not to remove a child<sup>11</sup> have effect in England and Wales as if they were orders<sup>12</sup> of the High Court<sup>13</sup>.

1 For the meaning of 'Scottish adoption order' see para 331 note 9 ante.

2 Ie an order under the Adoption (Scotland) Act 1978 s 25: Adoption and Children Act 2002 s 105(1).

3 Ie an order under the Adoption (Scotland) Act 1978 s 18: Adoption and Children Act 2002 s 105(2).

4 Ie under the Adoption (Scotland) Act 1978 s 20 or s 21: Adoption and Children Act 2002 s 105(2).

5 For the meaning of 'child' see para 327 note 2 ante.

6 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

7 Ibid s 105(1), (2).

8 See the Adoption (Scotland) Act 1978 s 27(1).

9 See ibid s 28(1) or (2).

10 Adoption and Children Act 2002 s 105(3). Punishment on summary conviction is by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 105(3). As to the standard scale see para 132 note 2 ante.

11 Ie under the Adoption (Scotland) Act 1978 s 29.

12 Ie under the Adoption and Children Act 2002 s 41 (see paras 357-358 ante).

13 Ibid s 105(4).

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### **505. Effect of certain Northern Irish orders and provisions.**

A Northern Irish adoption order<sup>1</sup>, an interim order<sup>2</sup>, a freeing order<sup>3</sup>, and the variation or revocation of such an order<sup>4</sup>, have effect in England and Wales as they have effect in Northern Ireland<sup>5</sup>.

Any person who contravenes the prohibition on removal of a child where adoption is agreed<sup>6</sup> or who contravenes the prohibition on removal where the applicant provided the child's home<sup>7</sup>, is guilty of an offence<sup>8</sup>. Orders to return or not to remove a child<sup>9</sup> are to have effect in England and Wales as if they were orders<sup>10</sup> of the High Court<sup>11</sup>.

1 For the meaning of 'Northern Irish adoption order' see para 331 note 9 ante.

2 Ie an order under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 26: Adoption and Children Act 2002 s 106(1).

3 Ie an order made under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 17 or art 18: Adoption and Children Act 2002 s 106(2).

4 Ie under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 20 or art 21: Adoption and Children Act 2002 s 106(2).

5 Ibid s 106(1), (2).

6 See the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 28(1) or (2).

7 See ibid art 29(1) or (2).

8 Adoption and Children Act 2002 s 106(3). Punishment on summary conviction is by imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 106(3). As to the standard scale see para 132 note 2 ante.

9 Ie under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 30.

11 Ie under the Adoption and Children Act 2002 s 41 (see paras 357-358 ante).

12 Ibid s 106(4).

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**506. Use of adoption records from other parts of the British Islands.**

Any document which is receivable as evidence of any matter in Scotland<sup>1</sup>, in Northern Ireland<sup>2</sup>, or in the Isle of Man or any of the Channel Islands<sup>3</sup>, is also receivable as evidence of that matter in England and Wales<sup>4</sup>.

1    Ie under the Adoption (Scotland) Act 1978 s 45(2).

2    Ie under the Adoption (Northern Ireland) Order 1987, SI 1987/2203, art 63(1).

3    Ie under an enactment corresponding to the Adoption and Children Act 2002 s 77(3) (see para 384 ante).

4    Ibid s 107.

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## (9) ANCILLARY RESTRICTIONS

### 507. Restriction on arranging adoptions.

Subject to certain exceptions concerning prospective adopters who are related to the child<sup>1</sup> in question<sup>2</sup>, a person who is neither an adoption agency<sup>3</sup> nor acting in pursuance of an order of the High Court<sup>4</sup> may not:

- 926 (1) ask a person other than an adoption agency<sup>5</sup> to provide a child for adoption<sup>6</sup>;
- 927 (2) ask a person other than an adoption agency to provide prospective adopters for a child<sup>7</sup>;
- 928 (3) offer to find a child for adoption<sup>8</sup>;
- 929 (4) offer a child for adoption to a person other than an adoption agency<sup>9</sup>;
- 930 (5) hand over a child to any person other than an adoption agency with a view to the child's adoption by that or another person<sup>10</sup>;
- 931 (6) receive a child handed over to him in contravention of the above provision<sup>11</sup>;
- 932 (7) enter into an agreement with any person for the adoption of a child, or for the purpose of facilitating the adoption of a child, where no adoption agency is acting on behalf of the child in the adoption<sup>12</sup>;
- 933 (8) initiate or take part in negotiations of which the purpose is the conclusion of such an agreement<sup>13</sup>; or
- 934 (9) cause another person to take any of the steps mentioned above<sup>14</sup>.

Contravention of these provisions is an offence<sup>15</sup>.

1 For the meaning of 'child' see para 327 note 2 ante.

2 The Adoption and Children Act 2002 s 92(1) (see the text and note 6 infra) does not apply to a person taking any of the steps mentioned in s 92(2)(d), (e), (g), (h), (i) (ie heads (4), (5), (7)-(9) in the text) if the prospective adopters are parents, relatives or guardians of the child (or one of them is) (s 92(3), (4)(a)) or the prospective adopter is the partner of a parent of the child (s 92(4)(b)). As to the meaning of 'guardian' see para 332 note 3 ante. For the meaning of 'relative' see para 329 note 11 ante.

The Secretary of State may, after consultation with the Welsh Ministers, by order make any amendments of s 92(1)-(4) (see the text and notes 3-14 infra), and any consequential amendments of the Adoption and Children Act 2002, which he considers necessary or expedient: s 92(6). At the date at which this volume states the law no such order had been made. As to the Secretary of State and the Welsh Ministers see para 155 ante.

3 Ie a local authority or a registered adoption society: see paras 394-395 ante. In *ibid* ss 92-96 (see the text and notes 2 supra, 4-14 infra; and paras 508-509 post), 'adoption agency' includes a Scottish or Northern Irish adoption agency: s 97(a). As to Scottish and Northern Irish adoption agencies see para 352 note 2 ante.

4 As to the court see para 511 post. It was held under the corresponding provisions of the legislation formerly making provision in this regard (ie the Adoption Act 1976 s 11(1) (repealed), which prohibited a person other than an adoption agency from making arrangements for the adoption of a child, or from placing a child for adoption, unless, *inter alia*, that person was acting in pursuance of an order of the High Court), that an order may be made in respect of a placement which has already taken place: *Re A (adoption placement)* [1988] 1 WLR 229, [1988] 2 FLR 133; *Re adoption application (adoption of non-patrial)* [1992] 1 WLR 596, sub nom *Re an adoption application* [1992] 1 FLR 341; *Re ZHH (adoption application)* [1992] 1 FCR 197, [1993] 1 FLR 83; but cf *Re C (a minor) (adoption application)* [1992] 1 FCR 337, [1993] 1 FLR 87; *Re adoption application (non-patrial: breach of procedures)* [1993] Fam 125, [1993] 1 FLR 947. No court had the power retrospectively to authorise a placement in breach of the provisions of the Adoption Act 1976 s 11 (repealed): *Re G (a minor) (adoption: illegal*

*placement*) [1995] 3 FCR 26, [1995] 1 FLR 403, CA. However, the fact that an offence had been committed under the Adoption Act 1976 s 11(1) (repealed) did not prevent an adoption order being made, as long as the application for an adoption order was made to the High Court: see *Re S (arrangements for adoption)* [1985] FLR 579, [1985] Fam Law 132, CA. Placement for adoption through a local authority was not the only means by which adoption could be effected, as the Adoption Act 1976 s 11(1) (repealed) did not prohibit an individual from making arrangements to place a child with an approved adoption agency: *Re W (a minor) (adoption: mother under disability)* [1995] Fam 120, sub nom *Re W (adoption: placement)* [1995] 1 FCR 714.

5 References to an 'adoption agency' in the Adoption and Children Act 2002 s 92(2) (see the text and notes 6-14 *infra*) include a prescribed person outside the United Kingdom exercising functions corresponding to those of an adoption agency, if the functions are being exercised in circumstances prescribed (ie by regulations made by the Secretary of State after consultation with the Welsh Ministers) in respect of the child in question: s 92(5), (7)(b). As to the United Kingdom see paras 102 note 7, 341 note 8 *ante*. At the date at which this volume states the law no such circumstances had been prescribed. See also note 2 *supra*. See further the following decisions under the Adoption Act 1976 on unlawful placements: *Re A (adoption: placement)* [1988] 1 WLR 229, [1988] 2 FLR 133; *Re adoption application (adoption of non-patril)* [1992] 1 WLR 596, sub nom *Re an adoption application* [1992] 1 FLR 341; *Re AW (adoption application)* [1992] 2 FCR 641, [1993] 1 FLR 62; *Re adoption application (non-patril: breach of procedures)* [1993] Fam 125, [1993] 1 FLR 947.

6 Adoption and Children Act 2002 s 92(1), (2)(a). References to 'adoption' in ss 92-96 are to the adoption of persons, wherever they may be habitually resident, effected under the law of any country or territory, whether within or outside the British Islands: s 97(c). As to habitual residence see para 806 *post*; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 *et seq*.

7 *Ibid* s 92(2)(b).

8 *Ibid* s 92(2)(c).

9 *Ibid* s 92(2)(d).

10 *Ibid* s 92(2)(e).

11 *Ibid* s 92(2)(f).

12 *Ibid* s 92(2)(g).

13 *Ibid* s 92(2)(h).

14 *Ibid* s 92(2)(i).

15 If a person contravenes *ibid* s 92(1), he is guilty of an offence; and, if that person is an adoption society, the person who manages the society is also guilty of the offence: s 93(1). A person is not, however, guilty of the offence of taking the step mentioned in s 92(2)(f) (see head (6) in the text) unless it is proved that he knew or had reason to suspect that the child was handed over to him in contravention of s 92(2)(e) (see head (5) in the text) (s 93(2)), and a person is not guilty of an offence of causing a person to take any of the steps mentioned in s 92(2)(a)-(h) (see heads (1)-(8) in the text) unless it is proved that he knew or had reason to suspect that the step taken would contravene the provision in question (s 93(3)). However, these exclusions only apply if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned: s 93(4). A person guilty of an offence under s 93 is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding £10,000, or both: s 93(5). Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)).

Note that, for the purposes of ss 92, 93, a person who carries on an activity which consists of the provision of an information society service from an establishment in the United Kingdom to a person or persons in one or more EEA states and who would not otherwise be regarded as carrying on that activity in the United Kingdom is regarded as carrying it on in the United Kingdom: see the Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005, SI 2005/3222.

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## **508. Restriction on reports.**

A person who is not a social worker<sup>1</sup> may not:

- 935 (1) prepare a report<sup>2</sup> about whether a child should be placed for adoption<sup>3</sup>;
- 936 (2) prepare a report<sup>4</sup> about the suitability of a prospective adopter to adopt a child<sup>5</sup>;
- 937 (3) prepare a report<sup>6</sup> about whether a child should be placed for adoption with a particular prospective adopter<sup>7</sup>;
- 938 (4) prepare a report<sup>8</sup> of a visit where a child is placed for adoption<sup>9</sup>;
- 939 (5) prepare a report<sup>10</sup> of a visit or review pursuant to local authority functions in an adoption with a foreign element<sup>11</sup>;
- 940 (6) prepare a report of a review of a child's case<sup>12</sup> in an adoption with a foreign element<sup>13</sup>;
- 941 (7) prepare a pre-adoption report<sup>14</sup>;
- 942 (8) prepare a post-adoption report<sup>15</sup>;
- 943 (9) prepare a report in relation to an application for an adoption order relating to a child placed for adoption by an adoption agency<sup>16</sup> or where notice of an intention to adopt has been given<sup>17</sup> in respect of a child not placed with the prospective adopters by an adoption agency<sup>18</sup>; or
- 944 (10) prepare a report in the case of an application for parental responsibility<sup>19</sup> prior to an adoption abroad<sup>20</sup>.

Any person who contravenes any of these provisions<sup>21</sup> or causes a person to prepare a report, or submits to any person a report which has been prepared, in contravention thereof<sup>22</sup> is guilty of an offence<sup>23</sup>; and if that person works for an adoption society the person who manages the society is also so guilty<sup>24</sup>.

1    le a person who is not within a description prescribed by regulations made by the Secretary of State after consultation with the Welsh Ministers: Adoption and Children Act 2002 s 94(1). The Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 3 provides that a person is within a 'prescribed description' for these purposes if:

- 270 (1) he is a social worker who is employed by a local authority or registered adoption society, and satisfies at least one of the 'relevant conditions' set out below (reg 3(1)(a));
- 271 (2) he is a person who is participating in a course approved by a Council under the Care Standards Act 2000 s 63 (see SOCIAL SERVICES AND COMMUNITY CARE) for persons wishing to become social workers, is employed by, or placed with, a local authority or registered adoption society as part of that course, and satisfies the second condition set out below (reg 3(1)(b)); or
- 272 (3) he is acting on behalf of a local authority or a registered adoption society and is a social worker who satisfies both the conditions set out below (reg 3(1)(c)).

The 'relevant conditions' are:

- 273 (a) that the person has at least three years' post-qualifying experience in child care social work, including direct experience of adoption work (reg 3(2)(a)); and
- 274 (b) that the person is supervised by a social worker who is employed by the local authority or registered adoption society in question and has at least three years' post-qualifying experience in child care social work, including direct experience of adoption work (reg 3(2)(b)).



'Social worker' means a person who is registered in the register for social workers maintained in accordance with the Care Standards Act 2000 s 56 (see SOCIAL SERVICES AND COMMUNITY CARE) or in a corresponding register maintained under the law of Scotland or Northern Ireland: Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 2. 'Council' means either the English Council or the Welsh Council; and 'the English Council' and 'the Welsh Council' have the same meaning as in the Care Standards Act 2000 s 54 (see SOCIAL SERVICES AND COMMUNITY CARE): Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 2.

2    Ie in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 17(1) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 17(1) (see para 433 ante).

3    Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(a) (made under the Adoption and Children Act 2002 s 94(1), which provides that a person who is not within the prescribed description (ie is not a social worker: see note 1 supra) may not prepare a report for any person about the suitability of a child for adoption or of a person to adopt a child or about the adoption, or placement for adoption, of a child). For the meaning of 'child' see para 327 note 2 ante. For the meaning of 'adoption' see para 507 note 6 ante.

4    Ie in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 25(5) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 26(4) (see para 438 ante).

5    Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(b).

6    Ie in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 31(2)(d) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 32(3)(d) (see para 442 ante).

7    Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(c).

8    Ie in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 36(4)(b) or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 37(5)(b) (see para 446 ante).

9    Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(d).

10   Ie in accordance with the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 5(1)(h)(ii) (see para 500 ante).

11   Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(e).

12   Ie in accordance with the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 5(3) (see para 500 ante).

13   Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(f).

14   Ibid reg 4(g). 'Pre-adoption report' means a report prepared otherwise than in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, at the request of a relevant foreign authority following the placement for adoption of a child from the country in which that authority performs its functions and prior to that child's adoption and includes a report prepared in accordance with the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 29(2) (see para 494 ante): Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 2. For the meaning of 'relevant foreign authority' see the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2; and para 500 note 3 ante (definition applied by the Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 2).

15   Ibid reg 4(h). 'Post-adoption report' means a report prepared otherwise than in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, or the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, at the request of a relevant foreign authority following the adoption of a child from the country in which that authority performs its functions: Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 2.

16   Ie accordance with the Adoption and Children Act 2002 s 43 (see para 366 ante).

17   As to such reports see *ibid* s 44(5); and para 365 ante.

18   Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(i).

19   Ie an application under the Adoption and Children Act 2002 s 84(1) (see para 502 ante). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

20 Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711, reg 4(j).

21 Adoption and Children Act 2002 s 94(2)(a), (3)(a).

22 Ibid s 94(2)(b), (3)(b). A person is not guilty of an offence under s 94(2)(b) unless it is proved that he knew or had reason to suspect that the report would be, or had been, prepared in contravention of s 94(1), but sufficient evidence must be adduced to raise an issue as to whether the person had the requisite knowledge or reason: s 94(4).

23 A person guilty of an offence under *ibid* s 94 is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both: s 94(5). As to the standard scale see para 132 note 2 *ante*. Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)).

24 Ibid s 94(3). Any home study assessment for a proposed intercountry adoption must be undertaken on behalf of an agency: *Re M (adoption: international adoption trade)* [2003] EWHC 219 (Fam), [2003] 1 FLR 1111, sub nom *A Local Authority v M (by her guardian J)* [2003] 3 FCR 193.

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### **509. Prohibition of certain payments.**

A person is guilty of an offence<sup>1</sup> if he makes<sup>2</sup>, agrees or offers to make<sup>3</sup>, or receives or agrees to receive or attempts to obtain<sup>4</sup>, any payment<sup>5</sup> (other than an excepted payment<sup>6</sup>) which is made for or in consideration of:

- 945 (1) the adoption of a child<sup>7</sup>;
- 946 (2) giving any consent required in connection with the adoption of a child<sup>8</sup>;
- 947 (3) removing from the United Kingdom a child who is a Commonwealth citizen<sup>9</sup>, or is habitually resident<sup>10</sup> in the United Kingdom, to a place outside the British Islands for the purpose of adoption<sup>11</sup>;
- 948 (4) a person who is neither an adoption agency<sup>12</sup> nor acting in pursuance of an order of the High Court taking a restricted step<sup>13</sup>; or
- 949 (5) preparing, causing to be prepared or submitting a report the preparation of which contravenes the restrictions on reports<sup>14</sup>.

1 A person guilty of an offence under these provisions is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding £10,000, or both: Adoption and Children Act 2002 s 95(4). Proceedings for this offence may not be brought more than six years after the commission of the offence (s 138(a)) but, subject to that, may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge (s 138(b)).

2 Ibid s 95(3)(a).

3 Ibid s 95(3)(b).

4 Ibid s 95(3)(c).

5 'Payment' includes reward: ibid s 97(b).

6 A payment is an 'excepted payment' if:

- 275 (1) it is made by virtue of, or in accordance with provision made by or under, the Adoption and Children Act 2002, the Adoption (Scotland) Act 1978 or the Adoption (Northern Ireland) Order 1987, SI 1987/2203 (Adoption and Children Act 2002 s 96(1));
- 276 (2) if it is made to a registered adoption society by a parent or guardian of a child, or a person who adopts or proposes to adopt a child, in respect of expenses reasonably incurred by the society in connection with the adoption or proposed adoption of the child (s 96(2)); or
- 277 (3) if it is made in respect of any legal or medical expenses incurred or to be incurred by any person in connection with an application to a court which he has made or proposes to make for an adoption order (see para 359 ante), a placement order (see para 335 ante), or an order under s 26 (contact: see para 339 ante) or s 84 (parental responsibility prior to adoption abroad: see para 502 ante) (s 96(3)).

A payment made as mentioned in s 95(1)(c) (see the text and note 11 *infra*) is an excepted payment if the condition in s 85(2) (see para 503 ante) is met and the payment is made in respect of the travel and accommodation expenses reasonably incurred in removing the child from the United Kingdom for the purpose of adoption: s 96(4).

For the meaning of 'registered adoption society' see para 395 note 3 ante. As to the meaning of 'guardian' see para 332 note 3 ante. For the meaning of 'child' see para 327 note 2 ante. For the meaning of 'adoption' see para 507 note 6 ante. For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

- 7 Ibid s 95(1)(a).
- 8 Ibid s 95(1)(b).
- 9 As to Commonwealth citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 11.
- 10 As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.
- 11 Adoption and Children Act 2002 s 95(1)(c). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.
- 12 As to the meaning of 'adoption agency' for these purposes see para 507 note 3 ante.
- 13 Adoption and Children Act 2002 s 95(1)(d). As to the restricted steps see s 92(2); and para 507 ante. As to the court see para 511 post.
- 14 Ibid s 95(1)(e). As to the restrictions on reports see s 94; and para 508 ante.

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## **510. Restriction on advertisements.**

No person, other than a person who is an adoption agency or who is acting on behalf of an adoption agency<sup>1</sup>, may publish or distribute<sup>2</sup>, or cause the publication or distribution<sup>3</sup> of:

- 950 (1) an advertisement indicating that the parent or guardian<sup>4</sup> of a child<sup>5</sup> wants the child to be adopted<sup>6</sup>;
- 951 (2) an advertisement indicating that a person wants to adopt a child<sup>7</sup>;
- 952 (3) an advertisement indicating that a person other than an adoption agency is willing to take a restricted step<sup>8</sup>;
- 953 (4) an advertisement indicating that a person other than an adoption agency is willing to receive a child handed over to him with a view to the child's adoption by him or another<sup>9</sup>;
- 954 (5) an advertisement indicating that a person is willing to remove a child from the United Kingdom for the purposes of adoption<sup>10</sup>;
- 955 (6) information about how to do anything which, if done, would constitute an offence under the provisions restricting the removal of children from the United Kingdom<sup>11</sup> or on arranging adoptions<sup>12</sup> (whether or not the information includes a warning that doing the thing in question may constitute an offence)<sup>13</sup>; or
- 956 (7) information about a particular child as a child available for adoption<sup>14</sup>.

Contravention of these provisions is an offence<sup>15</sup>.

1 Adoption and Children Act 2002 s 123(5). As to adoption agencies (ie local authorities and registered adoption societies) see paras 394-395 ante. In s 123 (see the text and notes 2-14 infra), 'adoption agency' includes a Scottish or Northern Irish adoption agency (s 123(9)(a)); and references to an 'adoption agency' include a person prescribed by regulations made by the Secretary of State outside the United Kingdom exercising functions corresponding to those of an adoption agency, if the functions are being exercised in prescribed circumstances: s 123(7). At the date at which this volume states the law no such regulations had been made. Before exercising the power conferred by s 123(7) the Secretary of State must consult the Scottish Ministers, the Department of Health, Social Services and Public Safety and the Welsh Ministers: s 123(8). As to the Secretary of State and the Welsh Ministers see para 155 ante. As to Scottish and Northern Irish adoption agencies see para 352 note 2 ante.

The Secretary of State may by order make any amendments to s 123 which he considers necessary or expedient in consequence of any developments in technology relating to publishing or distributing advertisements or other information by electronic or electro-magnetic means: s 123(6). At the date at which this volume states the law this power had not been exercised. Before exercising this power the Secretary of State must consult the Scottish Ministers, the Department of Health, Social Services and Public Safety and the Welsh Ministers: s 123(8).

2 Ibid s 123(1)(a). 'Publishing' or 'distributing' an advertisement or information means publishing it or distributing it to the public (which includes selected members of the public as well as the public generally or any section of the public) and includes doing so by electronic means (for example, by means of the Internet): s 123(4). For the meaning of 'information' see para 385 note 8 ante.

Note that for the purposes of ss 123, 124, a person who carries on an activity which consists of the provision of an information society service from an establishment in the United Kingdom to a person or persons in one or more EEA states and who would not otherwise be regarded as carrying on that activity in the United Kingdom is regarded as carrying it on in the United Kingdom: see the Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005, SI 2005/3222.

3 Adoption and Children Act 2002 s 123(1)(b).

- 4 As to the meaning of 'guardian' see para 332 note 3 ante.
- 5 For the meaning of 'child' see para 327 note 2 ante.
- 6 Adoption and Children Act 2002 s 123(2)(a). For these purposes, references to 'adoption' are to the adoption of persons, wherever they may be habitually resident, effected under the law of any country or territory, whether within or outside the British Islands: s 123(9)(b). As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.
- 7 Ibid s 123(2)(b).
- 8 Ibid s 123(2)(c). As to the restricted steps see s 92(2)(a)-(e), (g)-(i); and para 507 ante.
- 9 Ibid s 123(2)(d).
- 10 Ibid s 123(2)(e). As to the United Kingdom see paras 102 note 7, 341 note 8 ante.
- 11 Ie ibid s 85 (see para 503 ante) or corresponding Scottish or Northern Irish provision.
- 12 Ie ibid s 93 (see para 507 note 15 ante) or corresponding Scottish or Northern Irish provision.
- 13 Ibid s 123(3)(a).
- 14 Ibid s 123(3)(b).
- 15 Ibid s 124(1). A person is not guilty of the offence unless it is proved that he knew or had reason to suspect that s 123 applied to the advertisement or information (although this only applies if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned): s 124(2). A person guilty of an offence under s 123 is liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both: s 124(3). As to the standard scale see para 132 note 2 ante. In connection with advertisements offering children for adoption see also *Re K (adoption) (permission to advertise)* [2007] EWHC 544 (Fam), [2007] 2 FLR 326, [2007] 1 WLR 2531, [2007] Fam Law 681.

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## **(10) PROCEDURAL PROVISIONS**

### **511. Adoption procedures.**

The allocation of the court in adoption proceedings is determined by the Adoption and Children Act 2002 and the Children (Allocation of Proceedings) Order 1991<sup>1</sup>, which together provide that adoption applications<sup>2</sup> may be issued in the High Court, the county court (an adoption centre<sup>3</sup>) or the magistrates court<sup>4</sup>, and that an application for a Convention adoption order<sup>5</sup>, or an adoption order relating to a child habitually resident outside the United Kingdom<sup>6</sup> must be made to the High Court or county court<sup>7</sup>.

The Family Procedure (Adoption) Rules 2005 contain a comprehensive set of procedural rules for adoption proceedings<sup>8</sup>. At their centre is the overriding objective of enabling the court to deal with cases justly having regard to the welfare issues involved<sup>9</sup>. This includes, so far as is practicable, ensuring that a case is dealt with expeditiously and fairly<sup>10</sup>, dealing with it in ways which are proportionate to the nature and importance and complexity of the issues<sup>11</sup>, ensuring that the parties are on an equal footing<sup>12</sup>, saving expense<sup>13</sup> and allotting to the case an appropriate share of the court's resources<sup>14</sup>.

The child is automatically a party to an application for a placement order<sup>15</sup>, but not necessarily an adoption order<sup>16</sup>. The court will appoint a children's guardian where the child is a party to the proceedings unless it is satisfied that it is not necessary to do so to safeguard the interests of the child<sup>17</sup>.

An appeal lies to the High Court against the making by a magistrates' court of any order under the Children Act 1989 or the Adoption and Children Act 2002, or any refusal by a magistrates' court to make such an order<sup>18</sup>. Where a magistrates' court has power, in relation to any proceedings under the Children Act 1989 or the Adoption and Children Act 2002, to decline jurisdiction because it considers that the case can more conveniently be dealt with by another court, no appeal lies against any exercise by that magistrates' court of that power<sup>19</sup>.

1 See the Children (Allocation of Proceedings) Order 1991, SI 1991/1677 (as amended).

2 Ie under the Adoption and Children Act 2002 s 49 (see para 361 ante).

3 See the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 14(2) (added by SI 2005/2797). As to adoption centres see the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(d), Sch 3 (both added by SI 2005/2797; and the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, Sch 3 amended by SI 2007/1099).

4 See the Adoption and Children Act 2002 ss 144(1), 147, Sch 6 (providing that 'court' means, subject to any provision made by virtue of the Children Act 1989 Sch 11 Pt 1 (see para 208 ante), the High Court, a county court or a magistrates' court); and the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, arts 3, 3A-3C, 4 (amended by SI 1993/624; SI 1994/2164; SI 2001/775; SI 2005/2797).

5 'Convention adoption order' means an adoption order which, by virtue of regulations under the Adoption (Intercountry Aspects) Act 1999 s 1 (regulations giving effect to the Convention: see para 483 ante), is made as a Convention adoption order: Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 1 (amended by SI 2005/2797).

6 Ie an adoption order where the Adoption and Children Act 2002 s 83 (see para 499 ante) applies.

7     le an intercountry adoption centre: see the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(e), Sch 4 (both added by SI 2005/2797; and the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, Sch 4 amended by SI 2007/1099). Regulations made by the Secretary of State after consultation with the Welsh Ministers may provide for a reference in any provision of the Adoption and Children Act 2002 to an order of a court to include an order of a court in the Isle of Man or any of the Channel Islands which appears to the Secretary of State to correspond in its effect to the order in question (s 108(1)(a), (3)), and may modify any provision of the Act, as such provision applies to any order made, or other thing done, under the law of the Isle of Man or any of the Channel Islands (s 108(2)). As to the Secretary of State and the Welsh Ministers see para 155 ante. At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 334 note 12 ante.

8     See the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (as amended).

9     Ibid r 1(1).

10    Ibid r 1(2)(a).

11    Ibid r 1(2)(b).

12    Ibid r 1(2)(c).

13    Ibid r 1(2)(d).

14    Ibid r 1(2)(e).

15    As to placement orders see para 335 ante.

16    See the Family Procedure (Adoption) Rules 2005, SI 2005/2795, r 23. As to adoption orders see para 359 ante.

17    See ibid r 59. See also rr 60, 62, r 63, rr 64-68 (children's guardian to make such investigations as considered necessary). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante.

18    See the Children Act 1989 s 94(1) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 23; and the Adoption and Children Act 2002 s 100).

19    See the Children Act 1989 s 94(2) (amended by the Adoption and Children Act 2002 s 100).

## UPDATE

### 511 Adoption procedures

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 1-7--SI 1991/1677 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 211A. Proceedings for a variation of a placement order under the Adoption and Children Act 2002 s 23 and an adoption order under s 50 or 51 unless a local authority will be a party to the proceedings must, with specified exceptions, be started in a magistrates' court: SI 2008/2836 art 5(1)(d), (e). Where specified proceedings under the 2002 Act are pending, certain related proceedings must be started in the same court as the pending proceedings: SI 2008/2836 art 8. Proceedings for a Convention adoption order or an adoption order where the 2002 Act s 83 applies must now be started in a county court which is an intercountry adoption centre, and may be started in the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason for them to be started in the High Court: SI 2008/2836 arts 6(c), 7, 11(2). Any other proceedings under the 2002 Act which are to be started in a county court must be started in a county court which is an adoption centre: SI 2008/2836 art 11(1).



NOTE 8--See also *Practice Note (adoption: final hearings)* [2009] PTSR 93 sub nom *Practice Direction (family proceedings) (listing final hearings in adoption cases)* [2008] All ER (D) 134 (Oct) (amended by *Practice Direction (family proceedings) (forms A58, A60 and A61)*, (1 August 2009, unreported)).

TEXT AND NOTES 18, 19--References to the High Court are now to a county court: Children Act 1989 s 94 (amended by SI 2009/871).

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## **512. Proceedings in private.**

Proceedings under the Adoption and Children Act 2002 in the High Court or a county court may be heard and determined in private<sup>1</sup>. The statutory provisions relating to the publication of information relating to proceedings before any court sitting in private also apply to these proceedings<sup>2</sup>, as do the provisions safeguarding the privacy of children involved in proceedings<sup>3</sup>.

1 Adoption and Children Act 2002 s 101(1).

2 See the Administration of Justice Act 1960 s 12 (as amended); and CONTEMPT OF COURT vol 9(1) (Reissue) para 431. As to the court see para 511 ante.

3 See the Children Act 1989 s 97 (as amended); and para 227 ante. All documents relating to adoption proceedings must, while they are in the custody of the court, be kept in a place of special security: Adoption Rules 1984, SI 1984/265, r 53(1). Save as required or authorised by a provision of any enactment or of the rules or with the leave of the court, no document or order held by or lodged with the court in adoption proceedings are open to inspection by any person, and no copy of any such document or order, or of an extract from any such document or order, may be taken by or issued to any person: see r 53(4) (amended by SI 1991/1880).

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### **513. Role of CAFCASS.**

Provision is made<sup>1</sup> for the appointment of an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>2</sup> or a Welsh family proceedings officer<sup>3</sup> in connection with:

- 957 (1) an application for the making, varying or revocation of a placement order<sup>4</sup>;
- 958 (2) an application for the making of a contact order<sup>5</sup> or the varying or revocation of such an order<sup>6</sup>;
- 959 (3) an application for the making of an adoption order<sup>7</sup>;
- 960 (4) an application for the making of an order giving parental responsibility<sup>8</sup> to persons who intend to adopt a child from abroad<sup>9</sup>; or
- 961 (5) the signification by any person of any consent to placement or adoption<sup>10</sup>.

Rules must provide for the appointment of such an officer in prescribed cases and may provide for the appointment of such an officer in other circumstances in which it appears to the Lord Chancellor to be necessary or expedient to do so<sup>11</sup>. Certain persons are ineligible for appointment<sup>12</sup>. Where an officer has been appointed he has the right at all reasonable times to examine and take copies of any records of, or held by, an adoption agency<sup>13</sup> which were compiled in connection with the making, or proposed making, by any person of any application<sup>14</sup> in respect of the child concerned<sup>15</sup>.

Where a parent or guardian of a child resides in England and Wales and is prepared to consent to the placement of the child for adoption<sup>16</sup> and, as the case may be, to consent to the making of a future adoption order<sup>17</sup>, the adoption agency must request CAFCASS to appoint an officer of the Service or the Welsh Ministers to appoint a Welsh family proceedings officer for the purposes of the signification by that officer of the consent to placement or to adoption by that parent or guardian<sup>18</sup>.

1    Ie under the Adoption and Children Act 2002 ss 102, 103 (see the text and notes 2-15 infra).

2    As to CAFCASS generally see para 230 ante.

3    For the meaning of 'Welsh family proceedings officer' see the Children Act 2004 s 35; and para 230 note 9 ante (definition applied by the Adoption and Children Act 2002 s 102(8) (added by the Children Act 2004 s 40, Sch 3 paras 15, 16(1), (4))).

4    Adoption and Children Act 2002 ss 102(1)(a), (6)(a). As to applications for the making, varying or revocation of a placement order see paras 335, 338 ante.

5    Ie under *ibid* s 26 (see para 339 ante).

6    *Ibid* s 102(6)(b).

7    *Ibid* s 102(6)(c). As to applications for the making of adoption orders see para 361 ante.

8    Ie under *ibid* s 84 (see para 502 ante). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and para 134 ante (definition applied by the Adoption and Children Act 2002 s 147, Sch 6).

9    *Ibid* s 102(6)(d).

10   *Ibid* s 102(2)(b).

11 Ibid s 102(1), (2) (s 102(1) amended by the Children Act 2004 Sch 3 para 16(2)). The rules may provide for the officer: (1) to act on behalf of the child upon the hearing of any relevant application (ie any of the applications listed in heads (1)-(4) in the text), with the duty of safeguarding the interests of the child in the prescribed manner (Adoption and Children Act 2002 s 102(3)(a)); (2) where the court so requests, to prepare a report on matters relating to the welfare of the child in question (s 102(3)(b)); (3) to witness documents which signify consent to placement or adoption (s 102(3)(c)); and (4) to perform prescribed functions (s 102(3)(d)). A report prepared in pursuance of the rules on matters relating to the welfare of a child must deal with prescribed matters (unless the court orders otherwise) (s 102(4)(a)) and be made in the manner required by the court (s 102(4)(b)). As to the court see para 511 ante. Rules may make provision as to the assistance which the court may require an officer of the Service or a Welsh family proceedings officer to give to it: s 102(7) (amended by the Children Act 2004 Sch 3 para 16(3)). For the applicable rules see the Family Procedure (Adoption) Rules 2005, SI 2005/2795, rr 59-68. For the meaning of 'child' see para 327 note 2 ante.

12 A person is not to be appointed under the Adoption and Children Act 2002 s 102(1) or (2): (1) in the case of an application for the making, varying or revocation of a placement order, if he is employed by the local authority which made the application; (2) in the case of an application for an adoption order in respect of a child who was placed for adoption, if he is employed by the adoption agency which placed him; or (3) if he is within a prescribed description: s 102(5). As to the applicable rules see note 11 supra.

13 Ie a local authority or a registered adoption society: see paras 394-395 ante.

14 Ie any application under the Adoption and Children Act 2002 Pt I (ss 1-110).

15 Ibid s 103(1) (s 103(1), (2) amended by the Children Act 2004 Sch 3 para 17). Where an officer of the Service or a Welsh family proceedings officer takes a copy of any record which he is entitled to examine under the Adoption and Children Act 2002 s 103, that copy or any part of it is admissible as evidence of any matter referred to in any report which he makes to the court in the proceedings in question, or evidence which he gives in those proceedings (s 103(2) (as so amended)), regardless of any enactment or rule of law which would otherwise prevent the record in question being admissible in evidence (s 103(3)).

16 Ie under ibid s 19 (see para 332 ante). See also the Family Procedure (Adoption) Rules 2005, SI 2005/2795, rr 24, 28.

17 Ie under the Adoption and Children Act 2002 s 20 (see para 333 ante).

18 Adoption Agencies Regulations 2005, SI 2005/389, reg 20 (amended by SI 2005/3482); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 20.

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## 6. SURROGACY ARRANGEMENTS

### 514. Meaning of 'surrogacy'.

Surrogacy is the practice whereby one woman carries a child for another with the intention that the child should be handed over at birth<sup>1</sup> to the commissioning couple and raised as their child. Surrogacy may be employed when the commissioning mother is either infertile or unable to carry a child.

Surrogacy can take various forms. 'Total' or 'gestational' surrogacy may occur when the commissioning mother donates an egg which is fertilised by sperm from the commissioning father before being implanted in the carrying mother. The commissioning couple are therefore the genetic parents of the child. 'Partial' surrogacy is achieved by artificial insemination of the carrying mother using the sperm of the commissioning father. In partial surrogacy the carrying mother is the genetic mother of the child. However, in both total and partial surrogacy the carrying mother is the legal mother of the child<sup>2</sup>.

The Surrogacy Arrangements Act 1985<sup>3</sup> regulates certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers<sup>4</sup>.

1 See the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) (1984) ('the Warnock Report') para 8.1. See also Kennedy and Grubb *Medical Law* (3rd Edn, 2000) pp 1349-1350.

2 See the Human Fertilisation and Embryology Act 1990 s 27(1); and para 102 ante.

3 See para 515 et seq post.

4 Surrogacy Arrangements Act 1985 preamble. For the meaning of 'surrogate mother' see para 515 post. The term 'surrogacy', however, is not defined in the Act.

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### **515. Meaning of 'surrogate mother'.**

A surrogate mother is a woman who carries a child in pursuance of an arrangement made before she began to carry the child<sup>1</sup>, and made with a view to any child carried in pursuance of it being handed over to, and the parental responsibility<sup>2</sup> being met, so far as practicable, by another person or other persons<sup>3</sup>.

The surrogate mother is treated as the legal parent of the child regardless of any surrogacy arrangement<sup>4</sup>, although the test to be applied by the court in determining any issue concerning the child's upbringing is that the welfare and best interests of the child are the first and paramount considerations<sup>5</sup>.

1 Surrogacy Arrangements Act 1985 s 1(2)(a). A woman who carries a child is to be treated for this purpose as beginning to carry the child at the time of the insemination, or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be, which results in her carrying the child: s 1(6) (amended by the Human Fertilisation and Embryology Act 1990 s 36(2)). It is the gestational mother not the genetic mother who is treated as the mother of the child. Where an infertile woman receives a donated egg or embryo, which she carries to full term, she will be treated in law as the mother: see para 102 ante.

2 As to parental responsibility see paras 133-143 ante.

3 Surrogacy Arrangements Act 1985 s 1(2)(b) (amended by the Children Act 1989 s 108(5), Sch 13 para 56). An arrangement may be regarded as being made with such a view though subject to conditions relating to the handing over of a child: Surrogacy Arrangements Act 1985 s 1(5). For the meaning of 'surrogacy arrangement' see para 517 post.

4 See the Human Fertilisation and Embryology Act 1990 s 27(1); and para 102 ante.

5 *Re W (Minors) (Surrogacy)* [1991] FCR 419, [1991] 1 FLR 385. As to the welfare principle generally applicable to family proceedings see para 300 ante.

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**516. Effect of being treated as the 'mother' or 'father'.**

A person who, pursuant to the Human Fertilisation and Embryology Act 1990 is to be treated as the mother<sup>1</sup> or father<sup>2</sup> of a child is to be treated in law as the mother or, as the case may be, the father, for all purposes<sup>3</sup>. References to any relationship between two people in any enactment, deed, instrument or other document are to be construed accordingly<sup>4</sup>.

This does not apply to a deceased father who is to be treated as the father pursuant to the Human Fertilisation and Embryology Act 1990 for the purposes of artificial insemination and birth registration<sup>5</sup>.

A man who is to be treated as the father of a child may apply under the Children Act 1989 for parental responsibility for the child<sup>6</sup>.

1 For the meaning of 'mother' see para 102 ante.

2 For the meaning of 'father' see para 103 ante.

3 See the Human Fertilisation and Embryology Act 1990 s 29(1); paras 102-103 ante. This means that a person who has no biological links with a child, but is treated as a father pursuant to that Act, may apply for orders in relation to the child under the Children Act 1989 s 8 9 (see para 247 et seq ante): *Re R (contact: Human Fertilisation and Embryology Act 1990)* [2001] 1 FLR 247. See also para 106 ante.

4 See the Human Fertilisation and Embryology Act 1990 s 29(3); and paras 102-103 ante.

5 See *ibid* s 29(2); and paras 102-103 ante.

6 See the Children Act 1989 s 4 (as amended); and para 139 ante.

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### **517. Meaning of 'surrogacy arrangement'.**

An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother<sup>1</sup>. In determining whether an arrangement is made with a view to the child's being handed over to, or parental responsibility being met by, any other person<sup>2</sup>, regard may be had to the circumstances as a whole, and in particular, where there is a promise or understanding that any payment<sup>3</sup> will or may be made to the woman or for her benefit in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding<sup>4</sup>.

No surrogacy arrangement is enforceable by or against any of the persons making it<sup>5</sup>. The Surrogacy Arrangements Act 1985 expressly applies to arrangements whether or not they are lawful<sup>6</sup>.

1 Surrogacy Arrangements Act 1985 s 1(3). For the meaning of 'surrogate mother' see para 515 ante.

2 See para 515 ante. As to parental responsibility see paras 133-143 ante.

3 'Payment' means payment in money or money's worth: Surrogacy Arrangements Act 1985 s 1(8).

4 Ibid s 1(4).

5 Ibid s 1A (added by the Human Fertilisation and Embryology Act 1990 s 36(1)). However, the commissioning couple may apply for a parental order under the Human Fertilisation and Embryology Act 1990 s 30 (see para 106 ante) once the child has been handed over by the surrogate mother in pursuance of a surrogacy arrangement. The commissioning couple may also apply for an adoption order: see paras 361-362 ante. See, however, the Scottish case of *C and C (Petitioners and Respondents to Adopt X)* [1997] Fam Law 9, Ct of Sess, in which it was held that there is nothing in the Adoption (Scotland) Act 1978 to suggest that a person who had breached the Human Fertilisation and Embryology Act 1990 s 30(7)(c) (see para 106 ante) by paying money other than reasonable expenses was barred from obtaining an adoption order in relation to that child. Alternatively the commissioning couple may seek a residence order but this may be problematic if the issue became the removal of the child from the surrogate mother: *Re W (a minor) (residence order: baby)* [1992] 2 FCR 603, [1992] 2 FLR 332, CA. As to residence orders see para 262 ante. Before the implementation of the Children Act 1989 another mechanism by which the commissioning couple could try and obtain parental rights in relation to the child was by issuing a wardship summons to seek care and control of the child through the inherent jurisdiction of the High Court. However, it is unclear whether such an application would now succeed in wardship. As to wardship see paras 218-222 ante. As to the inherent jurisdiction of the High Court see para 200 ante.

6 Surrogacy Arrangements Act 1985 s 1(9) (amended by the Human Fertilisation and Embryology Act 1990 s 36(2)).



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### **518. Advertisements.**

Where a newspaper or periodical publishes an advertisement in the United Kingdom<sup>1</sup> containing an indication, however expressed:

- 962 (1) that any person is or may be willing to enter into a surrogacy arrangement<sup>2</sup> or to negotiate or facilitate the making of a surrogacy arrangement<sup>3</sup>; or  
 963 (2) that any person is looking for a woman willing to become a surrogate mother<sup>4</sup> or for persons wanting a woman to carry a child as a surrogate mother,

any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence<sup>5</sup>.

Where an advertisement containing such an indication is conveyed by means of an electronic communications network<sup>6</sup> so as to be seen or heard (or both) in the United Kingdom, any person who in the United Kingdom causes it to be so conveyed knowing it to contain such an indication is guilty of an offence<sup>7</sup>. A person who publishes or causes to be published in the United Kingdom an advertisement to which these provisions apply (not being an advertisement contained in a newspaper or periodical or conveyed by means of an electronic communications network) is guilty of an offence<sup>8</sup>.

A person who distributes or causes to be distributed in the United Kingdom an advertisement containing such an indication, not being an advertisement contained in a newspaper or periodical published outside the United Kingdom or an advertisement conveyed by means of an electronic communications network, knowing it to contain such an indication is guilty of an offence<sup>9</sup>.

A person guilty of any of the above offences is liable on summary conviction to a fine<sup>10</sup>.

1 For the meaning of 'United Kingdom' see para 102 note 7 ante.

2 For the meaning of 'surrogacy arrangement' see para 517 ante.

3 Surrogacy Arrangements Act 1985 s 3(1), (2)(a).

4 For the meaning of 'surrogate mother' see para 515 ante.

5 Surrogacy Arrangements Act 1985 s 3(1), (2)(b).

6 For the meaning of 'electronic communications network' see TELECOMMUNICATIONS vol 97 (2010) PARA 60.

7 Surrogacy Arrangements Act 1985 s 3(3) (amended by the Communications Act 2003 s 406(1), Sch 17 para 77).

8 Surrogacy Arrangements Act 1985 s 3(4) (amended by the Communications Act 2003 Sch 17 para 77).

9 Surrogacy Arrangements Act 1985 s 3(5) (amended by the Communications Act 2003 Sch 17 para 77).

10 Surrogacy Arrangements Act 1985 s 4(1)(b). The fine must not exceed level 5 on the standard scale: s 4(1)(b). As to the standard scale see para 132 note 2 ante. For general provisions as to offences see para 527 post.

### **UPDATE**

## **518 Advertisements**

TEXT AND NOTES 1-9--The Surrogacy Arrangements Act 1985 s 3 does not apply to any advertisement placed by, or on behalf of, a non-profit making body if the advertisement relates only to the doing by the body of acts that would not contravene s 2(1) even if done on a commercial basis (within the meaning of s 2): Surrogacy Arrangements Act 1985 s 3(1A) (added by Human Fertilisation and Embryology Act 2008 s 59(7)). See further PARA 519.

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### **519. Negotiation of surrogacy arrangements.**

No person is to do any of the following acts in the United Kingdom<sup>1</sup> on a commercial basis<sup>2</sup>:

- 964 (1) to initiate or take part in any negotiations with a view to the making of a surrogacy arrangement<sup>3</sup>;
- 965 (2) to offer or agree to negotiate the making of a surrogacy arrangement<sup>4</sup>; or
- 966 (3) to compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements<sup>5</sup>,

and no person may in the United Kingdom knowingly cause another to do any of those acts on a commercial basis<sup>6</sup>.

A person who does any of the acts in heads (1) to (3) above is guilty of an offence<sup>7</sup>, but it is not an offence for a woman, with a view to becoming a surrogate mother<sup>8</sup> herself, to do any of the acts mentioned in heads (1) to (3) above or to cause such an act to be done<sup>9</sup>, or for any person, with a view to a surrogate mother carrying a child for him<sup>10</sup>, to do such an act or to cause such an act to be done<sup>11</sup>. Further, where:

- 967 (a) a person acting on behalf of a body of persons takes any part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom<sup>12</sup>; and
- 968 (b) negotiating or facilitating the making of surrogacy arrangements is an activity of the body<sup>13</sup>,

then if the body at any time receives any payment made by or on behalf of:

- 17
- 42. (i) a woman who carries a child in pursuance of the arrangement<sup>14</sup>;
- 43. (ii) the person or persons for whom she carries it<sup>15</sup>; or
- 44. (iii) any person connected with a person mentioned in head (i) or head (ii) above<sup>16</sup>,
- .2

the body is guilty of an offence<sup>17</sup>.

A person who, in the United Kingdom, takes part in the management or control of any body of persons, or of any of the activities of any body of persons, is guilty of an offence if an activity of the body concerned<sup>18</sup> is negotiating or facilitating the making of surrogacy arrangements in the United Kingdom, being:

- 969 (A) arrangements the making of which is negotiated or facilitated on a commercial basis<sup>19</sup>; or
- 970 (B) arrangements in the case of which payments are received, or treated as received<sup>20</sup>, by the body concerned<sup>21</sup>.

A person guilty of any of the above offences<sup>22</sup> is liable on summary conviction to a penalty<sup>23</sup>.

- 1 For the meaning of 'United Kingdom' see para 102 note 7 ante.
- 2 Surrogacy Arrangements Act 1985 s 2(1). As to acts done on a commercial basis see para 520 post.
- 3 Ibid s 2(1)(a). For the meaning of 'surrogacy arrangement' see para 517 ante.
- 4 Ibid s 2(1)(b).
- 5 Ibid s 2(1)(c). In any proceedings for an offence under s 2, proof of things done or of words written, spoken or published, whether or not in the presence of any party to the proceedings, by any person taking part in the management or control of a body of persons or of any of the activities of the body, or by any person doing any of the acts mentioned in heads (1)-(3) in the text on behalf of the body, is admissible as evidence of the activities of the body: s 4(5). 'Body of persons' means a body of persons corporate or unincorporate: s 1(7).
- 6 Ibid s 2(1).
- 7 Ibid s 2(2).
- 8 For the meaning of 'surrogate mother' see para 515 ante.
- 9 Surrogacy Arrangements Act 1985 s 2(2)(a).
- 10 Words importing the masculine gender include the feminine, unless the contrary intention appears: Interpretation Act 1978 s 6(a).
- 11 Surrogacy Arrangements Act 1985 s 2(2)(b).
- 12 Ibid s 2(5)(a). A payment received by a person connected with a body of persons is to be treated as received by the body itself: s 2(5). In proceedings against a body for an offence under s 2(5), it is a defence to prove that the payment concerned was not made in respect of the arrangement mentioned in head (a) in the text: s 2(6). For the meaning of 'payment' see para 517 note 3 ante.
- 13 Ibid s 2(5)(b).
- 14 Ibid s 2(5)(i).
- 15 Ibid s 2(5)(ii).
- 16 Ibid s 2(5)(iii).
- 17 Ibid s 2(5).
- 18 Ibid s 2(7). In proceedings against a person for an offence under s 2(7) it is a defence to prove that he neither knew nor had reasonable cause to suspect that the negotiation or facilitation of surrogacy arrangements on a commercial basis was an activity of the body concerned, and for the purposes of such proceedings any arrangement falling within head (B) in the text is to be disregarded if it is proved that the payment concerned was not made in respect of the arrangement: s 2(9).
- 19 Ibid s 2(8)(a).
- 20 See note 12 supra.
- 21 Surrogacy Arrangements Act 1985 s 2(8)(b).
- 22 For general provisions as to offences see para 527 post.
- 23 Surrogacy Arrangements Act 1985 s 4(1)(a). The penalty is a fine not exceeding level 5 on the standard scale or a term of imprisonment not exceeding three months or both: see s 4(1)(a). As to the standard scale see para 132 note 2 ante. As from a day to be appointed s 4(1)(a) is amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9 so that this offence is no longer punishable with a term of imprisonment. At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **519 Negotiation of surrogacy arrangements**

TEXT AND NOTES 1-21--Surrogacy Arrangements Act 1985 s 2 amended to allow non-profit making bodies to receive payment for providing some surrogacy services: Human Fertilisation and Embryology Act 2008 s 59(3)-(6), Sch 8 Pt 1. 'Non-profit making body' means a body of persons whose activities are not carried on for profit: Surrogacy Arrangements Act 1985 s 1(7A) (added by Human Fertilisation and Embryology Act 2008 s 59(2)).

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## **520. Acts done on a commercial basis.**

The making of surrogacy arrangements<sup>1</sup> on a commercial basis is specifically prohibited<sup>2</sup>. A person does an act on a commercial basis if:

- 971 (1) any payment<sup>3</sup> is at any time received by himself or another in respect of it<sup>4</sup>; or
- 972 (2) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement<sup>5</sup>.

However, a person is not to be treated as doing an act on a commercial basis by reason of a payment received by another in respect of the act, if it is proved that:

- 973 (a) in a case where the payment was received before he did the act, he did not do the act knowing or having reasonable cause to suspect that any payment had been received in respect of it<sup>6</sup>; and
- 974 (b) in any case, he did not do the act with a view to any payment being received in respect of it<sup>7</sup>.

The court must be satisfied that no money or other benefit, other than for expenses reasonably incurred, has been given to or received by the husband or the wife in pursuance of the surrogacy arrangement unless authorised by the court<sup>8</sup>.

Surrogacy arrangements are unenforceable<sup>9</sup>.

1 For the meaning of 'surrogacy arrangement' see para 517 ante.

2 See the Surrogacy Arrangements Act 1985 ss 2, 4 (as amended); and paras 519 ante, 527 post. As to the penalties applicable to offences under s 2 see para 519 ante.

3 For the meaning of 'payment' see para 517 note 3 ante. For the purposes of *ibid* s 2(3), payment does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother: s 2(3). For the meaning of 'surrogate mother' see para 515 ante.

4 *Ibid* s 2(3)(a).

5 *Ibid* s 2(3)(b).

6 *Ibid* s 2(4)(a).

7 *Ibid* s 2(4)(b).

8 See the Human Fertilisation and Embryology Act 1990 s 30(7); and para 106 note 14 ante. 'Expenses reasonably incurred' is not defined by the Human Fertilisation and Embryology Act 1990. The court has a discretion whether or not to authorise any payment which has already been made: see further para 106 note 14 ante.

9 See the Surrogacy Arrangements Act 1985 s 1A (as added); and para 517 ante. It follows that, although the payment of reasonable expenses in connection with bearing a child is permitted, a surrogate mother may not enforce an agreement for payment to her of expenses.

**UPDATE**

**520 Acts done on a commercial basis**

TEXT AND NOTES 1-7--Surrogacy Arrangements Act 1985 s 2 amended to allow non-profit making bodies to receive payment for providing some surrogacy services; see PARA 519.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/6. SURROGACY ARRANGEMENTS/521. Licensing and regulation of surrogacy clinics and disclosure of information.

## **521. Licensing and regulation of surrogacy clinics and disclosure of information.**

A body corporate, the Human Fertilisation and Embryology Authority, was set up under the Human Fertilisation and Embryology Act 1990 for the purpose of licensing and regulating the keeping and use of embryos and gametes and the activities of surrogacy clinics<sup>1</sup>.

The authority may grant licences authorising:

- 975 (1) activities in the course of providing treatment service<sup>2</sup>;
- 976 (2) the storage of gametes and embryos<sup>3</sup>; and
- 977 (3) activities for the purposes of a project or research<sup>4</sup>.

The authority is required to keep a register containing information relating to the provision of services or the keeping or use of gametes or taking of embryos, in relation to identifiable individuals<sup>5</sup>. Information<sup>6</sup> may be made available from the authority to a person who is 18 in relation to whether a person other than a parent of the applicant might have been his parent but for the provisions of the Human Fertilisation and Embryology Act 1990 and as to whether a person the applicant intends to marry might be related to him<sup>7</sup>. A court may also require the authority to disclose information where, in proceedings before the court, the question arises as to whether or not a person is the parent of a child by reason of the Human Embryology and Fertilisation Act 1990<sup>8</sup>.

The authority must communicate to the competent authorities of EEA states other than the United Kingdom or of Gibraltar, and to the European Commission, such information in relation to serious adverse events and serious adverse reactions as is necessary for the purpose of enabling appropriate action to be taken, including where necessary the withdrawal from use of gametes and embryos that are intended for human application but are known or suspected to be unsuitable for such application<sup>9</sup>.

1 See the Human Fertilisation and Embryology Act 1990 s 5, Sch 1 (as amended); and MEDICAL PROFESSIONS vol 30(1) (Reissue) para 280.

2 See *ibid* s 11(1)(a), Sch 2; and MEDICAL PROFESSIONS vol 30(1) (Reissue) para 282.

3 See *ibid* s 11(1)(b), Sch 2; and MEDICAL PROFESSIONS vol 30(1) (Reissue) para 283.

4 See *ibid* s 11(1)(c), Sch 3; and MEDICAL PROFESSIONS vol 30(1) (Reissue) para 284.

5 See *ibid* s 31; and para 107 ante.

6 The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, prescribe the information which the authority will provide in response to a request from a person who has attained the age of 18 and who was, or may have been, born in consequence of treatment services provided under the Human Fertilisation and Embryology Act 1990: see para 108 ante.

7 See *ibid* s 31(3), (4); and para 108 ante. A person under 18 may also request information in relation to a person whom the minor intends to marry: see s 31(6); and para 108 ante.

8 See *ibid* s 34; and para 111 ante.



9 Ibid s 8A (added by the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007, SI 2007/1522, reg 10).

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**522. Registration of birth and legal parenthood in relation to a baby born to a surrogate mother.**

A birth must be registered within six weeks<sup>1</sup>. If the surrogate mother is married but her husband is prepared to state in writing that he did not give permission for the arrangement, the intended father may be named as the father<sup>2</sup>. If the surrogate is unmarried and the intended father is present when the birth is registered, he may be named as the father<sup>3</sup>. An intended father who is present at the registration of the birth and named on the birth certificate acquires parental responsibility for the child<sup>4</sup>.

1 See the Births and Deaths Registration Act 1953 s 2; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 546.

2 See the Human Fertilisation and Embryology Act 1990 ss 28(1), (2), 29; and paras 103-104 ante.

3 See *ibid* ss 28(1), (3), 29; and paras 103-104 ante.

4 See the Children Act 1989 s 4(1A) (as added); and para 139 ante. For the meaning of 'parental responsibility' see para 134 ante.

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### **523. Parental orders.**

In certain circumstances<sup>1</sup> the court may make a parental order<sup>2</sup> so that a child carried by a woman other than the wife is to be treated in law as the child of the parties to a marriage<sup>3</sup>. The application must be made not less than six weeks or more than six months after the birth of the child<sup>4</sup>.

1     Ie if the conditions in the Human Fertilisation and Embryology Act 1990 s 30(2)-(7) are satisfied: see para 106 ante.

2     For the meaning of 'parental order' see para 106 note 17 ante.

3     See the Human Fertilisation and Embryology Act 1990 s 30(1); and para 106 ante.

4     See *ibid* s 30(2); and para 106 ante.

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#### **524. Surrogacy and adoption.**

Where it is not possible to apply for a parental order<sup>1</sup>, such as where the birth mother withholds her agreement<sup>2</sup>, the time limit has passed<sup>3</sup> or neither of the commissioning adults is genetically related to the child<sup>4</sup>, intended parents may apply to adopt the child<sup>5</sup>.

A person who is neither an adoption agency<sup>6</sup> nor acting in pursuance of an order of the High Court must not take any of a number of steps in relation to adopting a child<sup>7</sup>, including receiving a child handed over to him by any person other than an adoption agency<sup>8</sup>. There is, however, an exception in a case where one of the prospective adopters is a parent of the child or where the prospective adopter is a partner of a parent of the child<sup>9</sup>.

Where adoption is not possible, it may be possible to apply for a residence order<sup>10</sup>. A residence order will not, however, extinguish the parental responsibility of the birth mother<sup>11</sup>.

1 For the meaning of 'parental order' see para 106 note 17 ante.

2 As to the requirement to obtain the agreement of the woman who carried the child see the Human Fertilisation and Embryology Act 1990 s 30(5); and para 106 ante.

3 I.e. six months from the date of birth of the child: see *ibid* s 30(2); and para 106 ante.

4 As to the requirement that the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo see *ibid* s 30(1)(b); and para 106 ante.

5 As to adoption generally see para 323 et seq ante.

6 References to an adoption agency include a prescribed person outside the United Kingdom exercising functions corresponding to those of an adoption agency, if the functions are being exercised in prescribed circumstances in respect of the child: Adoption and Children Act 2002 s 92(5).

7 See *ibid* s 92(1), (2); and para 507 et seq ante.

8 See *ibid* s 92(2)(f); and para 507 et seq ante. Breach of s 92 is a criminal offence under s 93: see para 507 ante.

9 See *ibid* s 92(4); and para 507 ante.

10 See the Children Act 1989 s 8; and para 262 ante. For the meaning of 'residence order' see para 262 note 3 ante.

11 See para 262 ante. For the meaning of 'parental responsibility' see para 134 ante.

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**525. Surrogacy and civil partnership.**

The Civil Partnership Act 2004 set up a framework whereby same sex couples might register their partnership and achieve legal recognition of their relationship<sup>1</sup>. The Act does not amend the definition of 'parties to a marriage' in the Human Fertilisation and Embryology Act 1990 to include parties to a registered civil partnership<sup>2</sup>. Civil partners may apply to adopt the child<sup>3</sup>. Failing adoption, civil partners may apply for a residence order<sup>4</sup>.

1 See the Civil Partnership Act 2004; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

2 Parental orders are made in relation to 'parties to a marriage': see para 106 ante. For the meaning of 'parental order' see para 106 note 17 ante.

3 As to adoption see para 323 et seq ante.

4 See para 262 ante.

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## **526. Foreign surrogacy.**

Provided the other conditions are satisfied<sup>1</sup>, the court may make a parental order<sup>2</sup> if a child has been carried by a woman other than the wife as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination otherwise than in the United Kingdom<sup>3</sup>.

If the woman who carried the child withholds her consent to the making of a parental order<sup>4</sup>, the intended parents will be in the position of seeking an adoption order<sup>5</sup>. If the child has been born abroad, the intended parents will then be subject to the restrictions relating to bringing a child into the jurisdiction for the purpose of adoption<sup>6</sup>.

1     Ie if the conditions in the Human Fertilisation and Embryology Act 1990 s 30(2)-(7) are satisfied: see para 106 ante.

2     For the meaning of 'parental order' see para 106 note 17 ante.

3     See the Human Fertilisation and Embryology Act 1990 s 30(11); and para 106 ante.

4     As to the requirement to obtain the agreement of the woman who carried the child see *ibid* s 30(5); and para 106 ante.

5     As to adoption see para 323 et seq ante.

6     See the Adoption and Children Act 2002 s 83; and para 499 ante.

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## **527. General provisions as to offences.**

No proceedings for any offence under the Surrogacy Arrangements Act 1985 may be instituted in England and Wales except by or with the consent of the Director of Public Prosecutions<sup>1</sup>.

The information must be laid within two years of commission of the offence<sup>2</sup>. Where an offence committed by a body corporate under the Surrogacy Arrangements Act 1985 is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>3</sup>.

No person may bring about the creation of an embryo or keep or use an embryo except pursuant to a licence<sup>4</sup>.

It is an offence to place in a woman any human embryo created other than by fertilisation<sup>5</sup>.

1 Surrogacy Arrangements Act 1985 s 4(2)(a). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1079 et seq, 1106. In Northern Ireland no proceedings for any offence under the Surrogacy Arrangements Act 1985 may be instituted except by or with the consent of the Director of Public Prosecutions for Northern Ireland: s 4(2)(b).

2 See *ibid* s 4(6).

3 *Ibid* s 4(3). Where the affairs of a body corporate are managed by its members, s 4(3) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 4(4).

4 See the Human Fertilisation and Embryology Act 1990 s 1; and MEDICAL PROFESSIONS vol 30(2) (Reissue) para 278.

5 See the Human Reproductive Cloning Act 2001 s 1(1); and MEDICAL PROFESSIONS vol 30(2) (Reissue) para 279. Such an offence carries a maximum sentence of 10 years imprisonment: see s 1(2); and MEDICAL PROFESSIONS vol 30(2) (Reissue) para 279.

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## 7. FINANCIAL SUPPORT FOR CHILDREN

### (1) IN GENERAL

#### 528. Introduction.

At common law there is no enforceable<sup>1</sup> legal obligation on a father or mother to maintain a child unless the failure to do so would bring the case within the criminal law<sup>2</sup>. By statute, however, any person who has attained the age of 16 years and has responsibility for any child<sup>3</sup> or young person<sup>4</sup> under that age, and who wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or injury to health<sup>5</sup>, commits an offence<sup>6</sup>. Any person who has parental responsibility for a child within the meaning of the Children Act 1989<sup>7</sup>, or is otherwise legally liable to maintain him, and any person who has care of him, is presumed for this purpose to have responsibility for the child or young person<sup>8</sup> and is deemed to have neglected a child or young person in manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him<sup>9</sup>. Apart from any legal obligation, the moral duty of a parent to maintain children has been recognised in cases involving entitlement to property<sup>10</sup>.

1 Although there is probably a common law duty on a parent to maintain a legitimate child there is no effective common law remedy to enforce that duty: see *C v Surrey County Council* [1994] 2 FCR 165, sub nom *Re C (a minor) (contribution notice)* [1994] 1 FLR 111.

2 *Cooper v Martin* (1803) 4 East 76 at 84; *Bazeley v Forder* (1868) LR 3 QB 559 at 565 per Cockburn CJ; *Coldingham Parish Council v Smith* [1918] 2 KB 90. For the relevant criminal offences see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 143-145.

3 For the meaning of 'child' see para 3 ante.

4 For the meaning of 'young person' see para 3 ante.

5 This includes injury to or loss of sight, hearing, or limb, or organ of the body, and any mental derangement: Children and Young Persons Act 1933 s 1(1).

6 Ibid s 1(1) (amended by the Children Act 1989 s 108(4), (5), Sch 12 para 2, Sch 13 para 2). See further para 611 post. The word 'wilfully' qualifies all five verbs, and makes it clear that any offence under this provision requires mens rea, while the word 'neglect' refers to failure to act, in contrast to the other four verbs ('assaults', 'ill-treats', 'abandons' or 'exposes'), and, accordingly, the judicial explanations of the state of mind denoted by the statutory expression 'wilfully' in relation to the doing of a positive act are not necessarily wholly apt in relation to a failure to act at all: see *R v Sheppard* [1981] AC 394 at 403, [1980] 3 All ER 899 at 903, HL, per Lord Diplock. The proper direction to be given to a jury on a charge of wilful neglect by failing to provide medical aid is that the jury must be satisfied: (1) that the child did in fact need medical aid at the time at which the parent is charged with failing to provide it; and (2) either that the parent was aware at the time that the child's health might be at risk if it were not provided with medical aid, or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not: *R v Sheppard* supra at 408 and 906-907 per Lord Diplock.

7 For the meaning of 'parental responsibility' see para 134 ante.

8 Children and Young Persons Act 1933 s 17(1) (s 17 substituted by the Children Act 1989 Sch 13 para 5). Such a person is not to be taken to have ceased to be responsible for the child by reason only that he does not have care of him: Children and Young Persons Act 1933 s 17(2) (as so substituted).



9 See *ibid* s 1(2)(a) (as amended); and para 611 post.

10 See eg *Fawkner v Watts* (1742) 1 Atk 406; *Butler v Freeman and Butler* (1743) 3 Atk 58; *Hill v Chapman* (1787) 2 Bro CC 231; *Pulsford v Hunter, Jennings v Hunter* (1792) 3 Bro CC 416; *Stone v Carr* (1799) 3 Esp 1; *Rawlyns v Vandyke* (1800) 3 Esp 250; *Re Hinde, ex p Whitbread* (1816) 2 Mer 99; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1; *Re Jones, ex p Haycock* (1828) 5 Russ 154; *Cooper v Phillips* (1831) 4 C & P 581; *Mortimore v Wright* (1840) 6 M & W 482; *Clarke v Wright* (1861) 6 H & N 849, Ex Ch; *Bazeley v Forder* (1868) LR 3 QB 559; *Culbertson v Wood* (1870) IR 5 Eq 23. The position will now usually be covered by statute: see the Trustee Act 1925 ss 31, 32 (both as amended); and paras 54, 63-66, 76-78 ante. For the application of ss 31, 32 (both as amended) in the context of family proceedings see *J v J (C intervening) (minors: financial provision)* [1989] Fam 29, [1989] 1 All ER 1121, CA.

## UPDATE

### 528 Introduction

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **529. Relevance of parental responsibility.**

Parental responsibility, as defined in the Children Act 1989<sup>1</sup>, includes the rights, duties, powers, responsibilities and authority which by law a parent of a child<sup>2</sup> has in relation to the child and his property<sup>3</sup>; but the fact that a person has, or does not have, parental responsibility is not conclusive of whether or not that person is under an enforceable obligation to provide support for the child, since the fact that a person has, or does not have, parental responsibility for a child does not affect any obligation which he may have in relation to the child (such as a statutory duty to maintain the child)<sup>4</sup>. Hence, the father of an illegitimate<sup>5</sup> child is under a statutory obligation to maintain the child, whether or not he has parental responsibility for the child<sup>6</sup>; and step-parents and others may be ordered to make payments in proceedings under the Children Act 1989<sup>7</sup> or otherwise<sup>8</sup>. Moreover, legislation making specific provision for the payment of child support<sup>9</sup> provides that each parent of a qualifying child is responsible for maintaining him, and creates machinery whereby maintenance obligations are to be assessed and enforced<sup>10</sup>.

The fact that a person has parental responsibility does not necessarily involve that person in any personal obligation to provide support for the child. Thus, although a child's guardian<sup>11</sup> has parental responsibility for the child, the legislation contains no provision whereby a guardian can, as such, be made liable to provide support for the child out of the guardian's own resources<sup>12</sup>. Similar provision is made as regards a special guardian of a child<sup>13</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante.

2 For the meaning of 'child' see para 3 ante.

3 See the Children Act 1989 s 3(1); and para 134 ante. The court has power to grant injunctive relief to exclude a third party from property in which he has a proprietary interest where his behaviour interferes with the rights of a person with parental responsibility to exercise that responsibility appropriately: *C v K (ouster order: non-parent)* [1996] 3 FCR 488, sub nom *C v K (inherent powers: exclusion order)* [1996] 2 FLR 506.

4 See the Children Act 1989 s 3(4); and para 136 ante.

5 As to the status of children see para 125 et seq ante.

6 See the Social Security Administration Act 1992 ss 78(6), 105(3) (both as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 236, 397.

7 See the Children Act 1989 s 15, Sch 1 (as amended); and para 539 et seq post. Note that the step-parent must be married or be in a civil partnership (or have been married or in a civil partnership) with the other parent and must have treated the child as a child of the family in order to bring them within the scope of this provision: see Sch 1 para 16(2); and para 539 post. See also *J v J (a minor: property transfer)* [1993] 1 FCR 471, [1993] 2 FLR 56.

8 Eg in matrimonial or civil partnership proceedings in which a child is held to be a child of the family: see the Matrimonial Causes Act 1973 ss 23, 24(1), 25(4), 27 (as substituted and amended); the Domestic Proceedings and Magistrates Court Act 1978 s 3(4) (as substituted); the Civil Partnership Act 2004, s 72(1), Sch 5, paras 2, 7, 22; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

9 Ie, at the date at which this volume states the law, principally the Child Support Act 1991.

10 See para 553 et seq post.

11 As to guardians and guardianship see para 144 et seq ante.

- 12 See the text and note 6 *supra*; and para 149 text and note 8 *ante*.
- 13 As to special guardianship orders see para 151 *et seq ante*.

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**530. Liability to provide support for a child.**

There are a number of provisions under which a person may be required to make financial payments in respect of a child. First, there may be liability under social security legislation in cases in which certain welfare benefits have been paid<sup>1</sup>. Secondly, there may be a liability to make contributions in respect of children who are being looked after by a local authority<sup>2</sup>. Thirdly, orders for financial relief may be made in proceedings under the Children Act 1989<sup>3</sup>. Fourthly, financial provision and property adjustment orders may be made in divorce and certain other matrimonial and civil partnership proceedings<sup>4</sup>. Finally, liability may arise under the legislation relating to the payment of child support<sup>5</sup>.

1 See para 531 et seq post.

2 See para 535 et seq post.

3 See para 539 et seq post.

4 See para 552 post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

5 Ie, at the date at which this volume states the law, principally the Child Support Act 1991: see para 553 et seq post.

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## **(2) LIABILITY UNDER SOCIAL SECURITY LEGISLATION**

### **531. Liable relatives.**

For the purposes of the statutory provisions of the Social Security Administration Act 1992 dealing with income-based benefits and the duty to maintain<sup>1</sup>, a man is liable to maintain his wife or civil partner and any children<sup>2</sup> of whom he is the father and a woman is liable to maintain her husband or civil partner and any children of whom she is the mother<sup>3</sup>. An adopted child is for these purposes treated as the child of the adoptive parents<sup>4</sup>. The liability which arises under these provisions is in terms confined to liability for the purpose of the specified statutory provisions, which are concerned largely with the recovery of social fund payments<sup>5</sup>, income support and income-based jobseeker's allowance (and, as from a day to be appointed, income-related employment and support allowance<sup>6</sup>) paid by reference to the circumstances of the children concerned<sup>7</sup>.

The Secretary of State<sup>8</sup> may recover a social fund award in these circumstances from any person who is liable to maintain the person by or on behalf of whom the application for the award was made or any person in relation to whose needs the award was made<sup>9</sup>. If income support is claimed by or in respect of a person whom another person is liable to maintain by reason of these provisions, the Secretary of State may make a complaint against the liable person to a magistrates' court for an order<sup>10</sup>. On the hearing of the complaint, the court must have regard to all the circumstances, particularly the income of the liable person, and may order him to pay such sum, weekly or otherwise, as it may consider appropriate<sup>11</sup>. Payments so ordered are payable to:

- 978 (1) the Secretary of State, in so far as they are attributable to any income support<sup>12</sup>;
- 979 (2) the person claiming income support or, if different, the dependant<sup>13</sup>; or
- 980 (3) such other person as appears to the court expedient in the interests of the dependant<sup>14</sup>.

The court may regard the terms of a divorce court order, or other court order, as being one of the circumstances which it may take into account in deciding whether to make an order, and in settling the terms of such an order; and it appears that the court may take into consideration the whole of the terms of a consent order<sup>15</sup>. The fact that a consent order has been made on terms which may benefit the children (perhaps the transfer of the family home) would accordingly seem to be one of the circumstances which the court may take into account, but the existence of an agreement or consent order under which the wife's right to periodical payments is extinguished, and only a nominal order is made for the children, is not a bar to the exercise by the court of its statutory power to order reimbursement of sums paid by way of income support<sup>16</sup>.

1 le the Social Security Administration Act 1992 Pt V (ss 105-109) (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 397-399.

2 'Child' includes a person who has attained the age of 16 but not the age of 19 and in respect of whom either parent, or some person acting in the place of either parent, is receiving income support or an income-based jobseeker's allowance: *ibid* s 78(6)(d) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 51);

Social Security Administration Act 1992 s 105(3) (amended by the Jobseekers Act 1995 Sch 2 para 53(1), (3)). As to income support see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 176 et seq. As to income-based jobseeker's allowance see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 258 et seq. References to children of whom the man or woman is the father or mother are to be construed in accordance with the Family Law Reform Act 1987 s 1 (see para 125 ante): Social Security Administration Act 1992 ss 78(7), 105(3) (as so amended).

3 Ibid ss 78(6)(a), (b) (s 78(6)(a), (b) amended by the Civil Partnership Act 2004 s 254(1), Sch 24 para 61(1), (4); Social Security Administration Act 1992 s 105(3) (amended by the Jobseekers Act 1995 Sch 2 para 53(2), (3)); Social Security Administration Act 1992 s 105(4) (added by the Jobseekers Act 1995 Sch 2 para 53(4); amended by the Civil Partnership Act 2004 Sch 24 para 62; and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 10(1), (10)(b)). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007. These provisions have the result that the word 'child' includes legitimate, illegitimate and legitimated children as well as children entitled to be treated as legitimate. As to the status of children see para 125 et seq ante.

It is also provided that a person is liable to maintain another person throughout any period in respect of which he has given an undertaking in accordance with specified provisions of the Immigration Rules within the meaning of the Immigration Act 1971: Social Security Administration Act 1992 s 78(6)(c). As to such undertakings see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 99; and as to the Immigration Rules see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 86.

4 See the Adoption Act 1976 s 39 (as amended); and para 376 ante. As to adoption generally see para 323 et seq ante.

5 As to the recovery of social fund payments see the Social Security Administration Act 1992 s 78 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 236.

6 Employment and support allowance is introduced by the Welfare Reform Act 2007 Pt 1 (ss 1-29) (not yet in force).

7 See the Social Security Administration Act 1992 ss 74(3), 78, 105 (all as amended); the text and notes 1-6 supra; para 534 post; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 236, 397 et seq.

8 As to the Secretary of State for these purposes see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 1.

9 See the Social Security Administration Act 1992 s 78(3)(c); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 236.

10 See *ibid* s 106(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

11 See *ibid* s 106(2); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398. Such an order is enforceable as a magistrates' court maintenance order (within the meaning of the Magistrates' Courts Act 1980 s 150(1) (as amended): see MAGISTRATES vol 29(2) (Reissue) para 823): Social Security Administration Act 1992 s 106(5). However, where the case falls within s 78(6)(c) (see note 3 supra), that sum may not include amounts which are not attributable to income support, whether paid before or after the order is made: s 106(2). In determining whether or not to order payments in respect of income support for any period before the making of the complaint, or the amount of any such payments, the court must disregard any amount by which the liable person's income exceeds his income during that period: s 106(3).

12 See *ibid* s 106(4)(a); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

13 See *ibid* s 106(4)(b); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

14 See *ibid* s 106(4)(c); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

15 *Hulley v Thompson* [1981] 1 All ER 1128, [1981] 1 WLR 159, DC; *National Assistance Board v Parkes* [1955] 2 QB 506 at 524, [1955] 3 All ER 1 at 8-9, CA, per Romer LJ. It is difficult to see how a consent order can avoid a parent's liability to maintain the child: *Hulley v Thompson* supra at 1130 and 162 per Waller LJ.

16 In *Hulley v Thompson* [1981] 1 All ER 1128, [1981] 1 WLR 159, DC, where the husband had transferred his share of the matrimonial home to the wife, the divorce court order was that the husband 'do not pay any maintenance to the petitioner either for herself or any children of the family'.

## UPDATE

### 531 Liable relatives

TEXT AND NOTES 1-3--Social Security Administration Act 1992 s 105(3) substituted, s 105(4) further amended: Child Maintenance and Other Payments Act 2008 s 45.

NOTE 3--Appointed day is 27 October 2008: SI 2008/787

NOTE 6--2007 Act Pt 1 partly in force: see SI 2008/787.

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### **532. Additional amounts.**

In any case where a claim for income support<sup>1</sup> is or was made by a parent of one or more children<sup>2</sup> in respect of both himself and those children<sup>3</sup>, and the other parent is liable to maintain those children but, by virtue of not being the claimant's spouse or civil partner is not liable to maintain the claimant<sup>4</sup>, the sum which the court<sup>5</sup> may order the other parent to pay may include an amount determined in accordance with regulations in respect of any income support paid to or for the claimant by virtue of prescribed provisions<sup>6</sup>. That amount has been prescribed<sup>7</sup> as the whole of the following amounts which are payable to or for the claimant:

- 981 (1) any personal allowance<sup>8</sup> for each of the children whom the other parent is liable to maintain<sup>9</sup>;
- 982 (2) any family premium<sup>10</sup>;
- 983 (3) any lone parent premium<sup>11</sup>;
- 984 (4) any disabled child premium<sup>12</sup> in respect of a child whom the other parent is liable to maintain<sup>13</sup>; and
- 985 (5) any carer premium<sup>14</sup>.

Moreover, if the court is satisfied that in addition to the amounts thus specified the liable parent has the means to pay, the court may order him to pay all or some of the amount of any personal allowance payable to or for the claimant<sup>15</sup>. In effect, therefore, the court may include an element calculated by reference to the personal allowance paid to the claimant; but if this power is exercised, the order must separately identify the amount of the personal allowance element<sup>16</sup>.

1    Ie such a claim as is referred to in the Social Security Administration Act 1992 s 106(1) (see para 531 ante). As to income support see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 176 et seq.

2    In *ibid* s 106 (as amended), 'child' means a person under the age of 16 notwithstanding the definition in s 78(6)(d) (as amended) (see para 531 note 2 ante): s 107(15).

3    *Ibid* s 107(1)(a).

4    *Ibid* s 107(1)(b) (amended by the Civil Partnership Act 2004 s 254(1), Sch 24 para 63(1), (2)).

5    Ie a magistrates' court: Social Security Administration Act 1992 s 107(15) (definition substituted by the Courts Act 2003 s 109(1), Sch 8 para 354(c)).

6    See the Social Security Administration Act 1992 s 107(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

7    Ie under the Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2 (having effect for the purposes of the Social Security Administration Act 1992 s 107(1) by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2)).

8    Ie under the Income Support (General) Regulations 1987, SI 1987/1967, regs 17-18, Sch 2 para 2 (as amended). These provisions have been revoked by SI 2003/455; for transitional arrangements in connection with the introduction of child tax credit see reg 7 (amended by SI 2003/1731).

9    Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2(1)(a).



10 Ibid reg 2(1)(b). The family premium was that payable under the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 3 (as amended). This provision has been revoked by SI 2003/455; for transitional arrangements in connection with the introduction of child tax credit see reg 7 (amended by SI 2003/1731).

11 Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2(1)(c). The lone parent premium was that payable under the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 8 (revoked by SI 1996/1803).

12 le under the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 14 (as amended). This provision has been revoked by SI 2003/455; for transitional arrangements in connection with the introduction of child tax credit see reg 7 (amended by SI 2003/1731).

13 Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2(1)(d).

14 Ibid reg 2(1)(e). The carer premium is that payable under the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 14ZA (as added and amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 184. Carer premiums are payable only if the claimant is in receipt, or is treated as being in receipt, of carer's allowance by reason of the fact that he is caring for a severely disabled child or young person whom the other parent is liable to maintain: Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2(1)(e) (amended by SI 2003/2497).

15 Income Support (Liable Relatives) Regulations 1990, SI 1990/1777, reg 2(2).

16 See the Social Security Administration Act 1992 s 107(2); the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 1 (as substituted); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 184.

## **UPDATE**

### **532 Additional amounts**

TEXT AND NOTES 1-6--Social Security Administration Act 1992 s 107 repealed: Child Maintenance and Other Payments Act 2008 Sch 8.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(2) LIABILITY UNDER SOCIAL SECURITY LEGISLATION/533. Transfer of orders.

### **533. Transfer of orders.**

In any case where:

- 986 (1) there is an order<sup>1</sup> in force against a person ('the liable parent') who is the parent of one or more children<sup>2</sup>, in respect of the other parent or the children<sup>3</sup>;
- 987 (2) the payments under the order fall<sup>4</sup> to be made to the Secretary of State<sup>5</sup>; and
- 988 (3) the other parent ('the dependent parent') ceases to claim income support<sup>6</sup>,

then the Secretary of State may, by giving notice in writing to the court<sup>7</sup> which made the order and to the liable parent and the dependent parent, transfer to the dependent parent the right to receive the payments under the order, exclusive of any personal allowance element, and to exercise the relevant rights<sup>8</sup> in relation to the order, except so far as relating to that element<sup>9</sup>. Moreover, no such notice may be given<sup>10</sup> at a time when there is in force a maintenance order<sup>11</sup> made against the liable parent in favour of the dependent parent or one or more of the children, or in favour of some other person for the benefit of the dependent parent or one or more of the children<sup>12</sup>. There are provisions for retransfer of the right to enforce the order if the dependent parent makes a subsequent claim for income support<sup>13</sup>.

The Secretary of State is empowered to enforce an existing maintenance order made in favour of a lone parent claimant of income support<sup>14</sup>.

1    Ie under the Social Security Administration Act 1992 s 106(2) (see para 531 ante).

2    For the meaning of 'child' see para 532 note 2 ante.

3    Social Security Administration Act 1992 s 107(3)(a).

4    Ie by virtue of *ibid* s 106(4)(a) (see para 531 ante).

5    *Ibid* s 107(3)(b). As to the Secretary of State for these purposes see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 1.

6    *Ibid* s 107(3)(c). As to income support see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 176 et seq.

7    As to the court see para 532 note 5 ante.

8    'The relevant rights', in relation to an order under the Social Security Administration Act 1992 s 106(2), means the right to bring any proceedings, take any steps or do any other thing under or in relation to the order which the Secretary of State could have brought, taken or done apart from any transfer under s 107 (as amended): s 107(15).

9    *Ibid* s 107(3).

10   If such notice is purportedly given it will be of no effect: *ibid* s 107(4).

11   In England and Wales, by virtue of *ibid* s 107(15) (amended by the Civil Partnership Act 2004 s 254(1), Sch 24 para 63(1), (3)), 'maintenance order' means:

278 (1) any order for the making of periodical payments or for the payment of a lump sum which is, or has at any time been, a maintenance order within the meaning of the Attachment of Earnings Act 1971 (see s 2, Sch 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 627-628);

279 (2) any order under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended) (overseas divorce: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq) for the making of periodical payments or for the payment of a lump sum; or

280 (3) any order under the Civil Partnership Act 2004 Sch 7 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq) for the making of periodical payments or for the payment of a lump sum.

12 Social Security Administration Act 1992 s 107(4). If such a maintenance order is made at any time after notice has been given, the order under s 106(2) ceases to have effect: s 107(4).

13 See ibid s 107(8), (12); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398.

14 See ibid s 108 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 399.

## **UPDATE**

### **533 Transfer of orders**

TEXT AND NOTES--Social Security Administration Act 1992 s 107 repealed: Child Maintenance and Other Payments Act 2008 Sch 8.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(2) LIABILITY UNDER SOCIAL SECURITY LEGISLATION/534. Criminal liability for refusal or neglect to maintain.

### **534. Criminal liability for refusal or neglect to maintain.**

If any person persistently refuses or neglects to maintain himself or any person whom he is liable to maintain<sup>1</sup>, and in consequence of his refusal or neglect income support<sup>2</sup> or an income-based jobseeker's allowance (or, as from a day to be appointed, an income-related employment and support allowance) is paid to or in respect of him or such a person<sup>3</sup>, he is guilty of an offence<sup>4</sup>. For this purpose a person must not be taken to refuse or neglect to maintain himself or any other person by reason only of anything done or omitted in furtherance of a trade dispute<sup>5</sup>.

1 Social Security Administration Act 1992 s 105(1)(a). As to when a person is liable to maintain see para 531 ante. For the purposes of s 105 (as amended), in its application to an income-based jobseeker's allowance (or, as from a day to be appointed, an income-related employment and support allowance), a person is liable to maintain another if that other person is his or her spouse or civil partner: s 105(4) (added by the Jobseekers Act 1995 s 41(4), Sch 2 para 53(4); amended by the Civil Partnership Act 2004 s 154(1), Sch 24 para 62; and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 10(1), (10)(b)). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007. As to income-based jobseeker's allowance see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 258 et seq. Employment and support allowance is introduced by the Welfare Reform Act 2007 Pt 1 (ss 1-29) (not yet in force).

2 As to income support see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 176 et seq.

3 Social Security Administration Act 1992 s 105(1)(b) (amended by the Jobseekers Act 1995 Sch 2 para 53(1), (3); and prospectively amended by the Welfare Reform Act 2007 Sch 3 para 10(10)(a)). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007.

4 Social Security Administration Act 1992 s 105(1). Until a day to be appointed this offence is punishable on summary conviction by a fine not exceeding level 4 on the standard scale, imprisonment for a term not exceeding three months, or both (s 105(1)); as from the appointed day the sentence of imprisonment ceases to be available and the offence is punishable only by the specified fine (s 105(1) (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see para 132 note 2 ante.

5 Social Security Administration Act 1992 s 105(2). As to the effect of trade disputes on social security benefits generally see EMPLOYMENT vol 41 (2009) PARAS 1319-1322.

### **UPDATE**

### **534 Criminal liability for refusal or neglect to maintain**

NOTES 1, 3--Appointed day is 27 October 2008: SI 2008/787.

NOTE 1--2007 Act Pt 1 partly in force: see SI 2008/787.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(3) LIABILITY FOR CHILDREN LOOKED AFTER BY LOCAL AUTHORITY/535.  
Introduction.

### **(3) LIABILITY FOR CHILDREN LOOKED AFTER BY LOCAL AUTHORITY**

#### **535. Introduction.**

The Children Act 1989 requires local authorities<sup>1</sup> to provide accommodation for children<sup>2</sup> in need<sup>3</sup>, and also empowers the court<sup>4</sup> to make a care order in respect of a child in favour of a local authority<sup>5</sup>, to make a residence order in respect of a child<sup>6</sup> pursuant to which a local authority may<sup>7</sup> be required to make contributions towards the cost of the child's accommodation and maintenance<sup>8</sup>, and to make a special guardianship order in respect of a child<sup>9</sup> pursuant to which a local authority is required (in the form of special guardianship support services) to provide financial support for the person or persons in whose favour the order has been made<sup>10</sup>: the Act accordingly contains provisions dealing with contributions to the maintenance of any child who is looked after by a local authority<sup>11</sup>. Where a local authority is looking after a child other than in certain limited circumstances<sup>12</sup> it must consider whether it should recover contributions towards the child's maintenance<sup>13</sup> from any person liable to contribute ('a contributor')<sup>14</sup>. However, an authority may recover contributions from a contributor only if it considers it reasonable to do so<sup>15</sup>. The persons liable to contribute are, where the child is under 16, each of his parents, and, where he has reached the age of 16, the child himself<sup>16</sup>. A parent is not liable to contribute during any period when he is in receipt of income support<sup>17</sup>, of any element of child tax credit (other than the family element), of working tax credit, of an income-based jobseeker's allowance<sup>18</sup> or, as from a day to be appointed, income-related employment and support allowance<sup>19</sup>; nor is a person liable to contribute towards the maintenance of a child in the care of a local authority in respect of any period during which the child is allowed by the authority<sup>20</sup> to live with a parent of his<sup>21</sup>. A contributor is not obliged to make any contribution towards the child's maintenance except as agreed or determined in accordance with the relevant provisions<sup>22</sup> of the Children Act 1989<sup>23</sup>.

The Secretary of State and the Welsh Ministers<sup>24</sup> may make regulations as to the considerations which a local authority must take into account in deciding whether it is reasonable to recover contributions and what the arrangements for payment should be<sup>25</sup> and as to the procedures a local authority must follow in reaching agreements with contributors<sup>26</sup> and any other local authority<sup>27</sup>.

1 For the meaning of 'local authority' see para 138 note 13 ante.

2 For the meaning of 'child' see para 3 ante.

3 See the Children Act 1989 s 20(1); and para 863 post.

4 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

5 See *ibid* s 31(1)(a); and para 271 ante.

6 See *ibid* ss 8, 10 (as amended); and paras 247, 262 ante.

7 *Ie* where as the result of the residence order the child lives, or is to live, with a person who is not his parent or the husband, wife or civil partner of his parent: see *ibid* Sch 1 para 15 (as amended); and para 550 post.

8 See *ibid* Sch 1 para 15 (as amended); and para 550 post.

9 See *ibid* ss 14A-14F (as added); and paras 151-154 ante.

10 See *ibid* s 14F(2) (as added); the Special Guardianship Regulations 2005, SI 2005/1109, regs 6-10; the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, regs 4, 7; and para 154 ante.

11 See the Children Act 1989 s 29(6), Sch 2 Pt III (as amended); the text and notes 12-27 *infra*; and para 536 et seq post. For the meaning of 'a child who is looked after by a local authority' see para 867 post.

12 *Ie* otherwise than under:

281 (1) the authority's duty to provide accommodation for children in police protection or detention or on remand under *ibid* s 21 (as amended) (see para 863 post) (Sch 2 para 21(7)(a));

282 (2) an interim care order (see para 288 et seq ante) (Sch 2 para 21(7)(b)); or

283 (3) the Powers of Criminal Courts (Sentencing) Act 2000 s 92 (detention of persons convicted of certain serious offences: see para 1404 post) (Children Act 1989 Sch 2 para 21(7)(c) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 130)).

13 'Maintenance' is seemingly to be distinguished from the cost of providing services to the child, as to which see Children Act 1989 s 29 (as amended); note 14 *infra*; and para 934 post.

14 *Ibid* Sch 2 para 21(1). The local authority must also consider whether to recover the cost to it of providing services to a child in need (other than services by way of advice, guidance or counselling) from the child's parents, the child himself (if over the age of 16) or, in certain circumstances, from a member of the child's family: see s 29(1), (4); and para 934 post.

15 *Ibid* Sch 2 para 21(2).

16 *Ibid* Sch 2 para 21(3).

17 *Ie* under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 173 et seq, 202 et seq).

18 For these purposes, 'income-based jobseeker's allowance' has the same meaning as in the Jobseekers Act 1995 s 1(4) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 271); Children Act 1989 s 105(1) (definition added by the Jobseekers Act 1995 s 41(4), Sch 2 para 19(4)).

19 Children Act 1989 Sch 2 para 21(4) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(c); the Jobseekers Act 1995 Sch 2 para 19(5); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 20(a), (b); and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (6)). Employment and support allowance is introduced by the Welfare Reform Act 2007 Pt 1 (ss 1-29). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007.

20 *Ie* under the Children Act 1989 s 23(5) (see para 869 post).

21 *Ibid* Sch 2 para 21(5).

22 *Ie* *ibid* Sch 2 Pt III (as amended): see para 536 et seq post.

23 *Ibid* Sch 2 para 21(6). As to agreed contributions see para 536 post; and as to contribution orders see para 537 post.

24 As to the Secretary of State and the Welsh Ministers see para 155 ante.

25 Children Act 1989 Sch 2 para 25(a).

26 *Ie* under *ibid* Sch 2 paras 22, 23 (see paras 536-537 post).

27 *Ibid* Sch 2 para 25(b). The agreements referred to in the text are those under Sch 2 para 23 (see para 537 post).

## UPDATE

### 535 Introduction

NOTE 10--SI 2005/1109 reg 9 amended: SI 2008/1879.

NOTE 19--Appointed day is 27 October 2008: SI 2008/787.

TEXT AND NOTES 24-27--Children Act 1989 Sch 2 para 25 amended: Children and Young Persons Act 2008 Sch 3 para 27(5).

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Contribution notices and agreements.

### **536. Contribution notices and agreements.**

If a local authority<sup>1</sup> decides to recover contributions towards a child's<sup>2</sup> maintenance<sup>3</sup> it must serve a contribution notice on the contributor<sup>4</sup> specifying the weekly sum which it considers that he should contribute, and the arrangements for payment<sup>5</sup>. The notice must be in writing and dated<sup>6</sup>. Arrangements for payment must, in particular, include:

- 989 (1) the date on which liability to contribute begins<sup>7</sup>;
- 990 (2) the date on which liability under the notice will end (if the child has not before that date ceased to be looked after by the authority)<sup>8</sup>; and
- 991 (3) the date on which the first payment is to be made<sup>9</sup>.

The authority may specify in the contribution notice a weekly sum which is a standard contribution determined by it for all children looked after by it<sup>10</sup>. However, the authority may not specify in a contribution notice a weekly sum greater than that which it considers it would normally be prepared to pay if it had placed a similar child with local authority foster parents<sup>11</sup> and it is reasonably practicable for the contributor to pay having regard to his means<sup>12</sup>. An authority may at any time withdraw a contribution notice without prejudice to its power to serve another<sup>13</sup>, although an authority may not seek a contribution order in respect of a contribution notice that it has withdrawn<sup>14</sup>.

Where the authority and the contributor agree the sum which the contributor is to contribute and arrangements for payment (whether as specified in the contribution notice or otherwise), and the contributor notifies the authority in writing that he so agrees, the authority may recover summarily as a civil debt any contribution which is overdue and unpaid<sup>15</sup>. By serving a notice in writing on the authority, a contributor may withdraw his agreement in relation to any period of liability falling after the date of service of the notice<sup>16</sup>.

1 For the meaning of 'local authority' see para 138 note 13 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the circumstances in which a local authority can recover contributions see para 535 ante.

4 As to who is the contributor see para 535 ante.

5 Children Act 1989 s 29(6), Sch 2 para 22(1). Any notice or other document required under the Children Act 1989 to be served on any person may be served on him by being delivered personally to him, or being sent by post to him in a registered letter or by the recorded delivery service at his proper address: s 105(8). Any such notice or other document required to be served on a body corporate or a firm is duly served if it is served on the secretary or clerk of that body or a partner of that firm: s 105(9). For the purposes of s 105 (as amended), and of the Interpretation Act 1978 s 7 (see STATUTES vol 44(1) (Reissue) para 1388) in its application to the Children Act 1989 s 105 (as amended), the proper address of a person: (1) in the case of a secretary or clerk of a body corporate, is that of the registered or principal office of that body; (2) in the case of a partner of a firm, is that of the principal office of the firm; and (3) in any other case, is the last known address of the person to be served: s 105(10). As to good service on a person's last known address in the context of civil proceedings generally see *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 441.

6 Children Act 1989 Sch 2 para 22(2).

7 Ibid Sch 2 para 22(3)(a). This date must not be earlier than the date of the notice: Sch 2 para 22(3)(a).



- 8 Ibid para 22(3)(b). For the meaning of 'a child who is looked after by a local authority' see para 867 post.
- 9 Ibid Sch 2 para 22(3)(c).
- 10 Ibid Sch 2 para 22(4).
- 11 Ibid Sch 2 para 22(5)(a). For the meaning of 'local authority foster parent' see para 900 post.
- 12 Ibid Sch 2 para 22(5)(b).
- 13 Ibid Sch 2 para 22(6).
- 14 Ibid Sch 2 para 23(5). See further para 537 post.
- 15 Ibid Sch 2 para 22(7). This power is without prejudice to any other method of recovery: Sch 2 para 22(9).
- 16 Ibid Sch 2 para 22(8).

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### **537. Contribution orders.**

Where a contributor<sup>1</sup> has been served with a contribution notice<sup>2</sup> and has failed to reach an agreement with the local authority<sup>3</sup> within the period of one month beginning with the day on which the contribution notice was served, or the contributor has served a notice<sup>4</sup> withdrawing his agreement, the authority may apply to the court<sup>5</sup> for an order<sup>6</sup>. On such an application the court may make a contribution order requiring the contributor to contribute a weekly sum towards the child's<sup>7</sup> maintenance in accordance with arrangements for payments specified by the court<sup>8</sup>. A contribution order must not specify a weekly sum greater than that specified in the contribution notice, and must be made with due regard to the contributor's means<sup>9</sup>. The order must not take effect before the date specified in the contribution notice, nor must it have effect while the contributor is not liable to contribute<sup>10</sup>, nor must it remain in force after the child has ceased to be looked after by the local authority<sup>11</sup> which obtained the order<sup>12</sup>.

A local authority may not apply to the court for a contribution order in relation to a contribution notice which it has withdrawn<sup>13</sup>. Where a contribution order is in force, the authority serves another contribution notice, and the contributor and the authority reach an agreement<sup>14</sup> in respect of that other contribution notice, the effect of the agreement is to discharge the order from the date on which the agreement is to take effect<sup>15</sup>. Where such an agreement is reached, the authority must notify the court of the agreement and the date on which it is to take effect<sup>16</sup>.

A contribution order may be varied or revoked on the application of the contributor or the local authority<sup>17</sup>. In proceedings for the variation of a contribution order the local authority must specify the weekly sum which it proposes the contributor should contribute under the order as varied and the proposed arrangements for payment<sup>18</sup>. A contribution order as varied may not specify a weekly sum greater than that specified in the contribution notice and must be made with due regard to the contributor's means<sup>19</sup>.

A right of appeal exists from both contribution orders and contribution orders as varied<sup>20</sup>.

1 As to who is a contributor see para 535 ante.

2 As to contribution notices see para 536 ante.

3 I.e. as is mentioned in the Children Act 1989 s 29(6), Sch 2 para 22(7) (see para 536 ante). For the meaning of 'local authority' see para 138 note 13 ante.

4 I.e. under *ibid* Sch 2 para 22(8) (see para 536 ante). As to the service of notices see para 536 note 5 ante.

5 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

6 *Ibid* Sch 2 para 23(1).

7 For the meaning of 'child' see para 3 ante.

8 Children Act 1989 Sch 2 para 23(2).

9 *Ibid* Sch 2 para 23(3). Where a contribution order is sought, the court must have regard only to the contributor's income and reasonable expenditure, and not to any other related factors nor to the general duty to maintain a child: *C v Surrey County Council* [1994] 2 FCR 165, sub nom *Re C (a minor) (contribution notice)* [1994] 1 FLR 111, DC.

- 10 le by virtue of the Children Act 1989 Sch 2 para 21 (as amended) (see para 535 ante).
- 11 For the meaning of a 'child who is looked after by a local authority' see para 867 post.
- 12 Children Act 1989 Sch 2 para 23(4).
- 13 Ibid Sch 2 para 23(5).
- 14 le under ibid Sch 2 para 22(7) (see para 536 ante).
- 15 Ibid Sch 2 para 23(6).
- 16 Ibid Sch 2 para 23(7).
- 17 Ibid Sch 2 para 23(8).
- 18 Ibid Sch 2 para 23(9).
- 19 Ibid Sch 2 para 23(10). As to the contributor's means see note 9 supra.
- 20 See ibid Sch 2 para 23(11).

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### **538. Enforcement.**

A contribution order<sup>1</sup> made by a magistrates' court<sup>2</sup> is enforceable as a magistrates' court maintenance order<sup>3</sup>. Where a contributor<sup>4</sup> has agreed, or has been ordered, to make contributions to a local authority<sup>5</sup>, any other local authority<sup>6</sup> within whose area the contributor is for the time being living may:

- 992 (1) at the request of the local authority who served the contribution notice<sup>7</sup>; and
- 993 (2) subject to agreement as to any sum to be deducted in respect of services rendered<sup>8</sup>,

collect from the contributor any contributions due on behalf of the local authority who served the notice<sup>9</sup>.

The power to collect sums due under a contribution order or contribution agreement includes the power to receive and give a discharge for any contributions due and, if necessary, enforce payment of any contributions even though those contributions may have fallen due at a time when the contributor was living elsewhere<sup>10</sup>. Any contribution collected must be paid, subject to any agreed deduction, to the local authority who served the contribution notice<sup>11</sup>. In any proceedings for enforcement<sup>12</sup> a document which purports to be a copy of a contribution order made by a court<sup>13</sup> and is certified as a true copy by the designated officer for the court is evidence of the order<sup>14</sup>, and a certificate which purports to be signed<sup>15</sup> by the clerk or some other duly authorised officer of the local authority who obtained the contribution order, and states that any sum due to the authority under the order is overdue and unpaid, is evidence that the sum is overdue and unpaid<sup>16</sup>.

1 As to contribution orders see para 537 ante.

2 As to magistrates' courts see generally MAGISTRATES.

3 Children Act 1989 s 29(6), Sch 2 para 24(1). As to magistrates' court maintenance orders (ie within the meaning of the Magistrates' Courts Act 1980 s 150(1) (as amended)) see MAGISTRATES vol 29(2) (Reissue) para 823.

4 As to who is a contributor see para 535 ante.

5 For the meaning of 'local authority' see para 138 note 13 ante.

6 The reference to 'any other local authority' includes a reference to a local authority within the meaning of the Social Work (Scotland) Act 1968 s 1(2) (as amended) and a Health and Social Services Board established under the Health and Personal Social Services (Northern Ireland) Order 1972, SI 1972/1265, art 16: Children Act 1989 Sch 2 para 24(3).

7 Ibid Sch 2 para 24(2)(a).

8 Ibid Sch 2 para 24(2)(b).

9 Ibid Sch 2 para 24(2).

10 Ibid Sch 2 para 24(4).

- 11 Ibid Sch 2 para 24(5).
- 12 Ie proceedings under ibid Sch 2 para 24 (as amended).
- 13 Ie a contribution order under ibid Sch 2 para 23 (see para 537 ante).
- 14 Ibid Sch 2 para 24(6) (amended by the Courts Act 2003 s 109(1), Sch 8 para 340).
- 15 'Signed', in relation to any person, includes the making by that person of his mark: Children Act 1989 s 105(1).
- 16 Ibid Sch 2 para 24(7).

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## **(4) OTHER FINANCIAL PROVISIONS UNDER THE**

### **539. Orders for financial relief.**

The Children Act 1989 contains extensive powers under which the court<sup>1</sup> may make orders for financial relief for the benefit of a child<sup>2</sup>. The court may make an order<sup>3</sup> on an application made by:

- 994 (1) a parent<sup>4</sup> (including a step-parent<sup>5</sup>) of the child<sup>6</sup>;
- 995 (2) a guardian of the child<sup>7</sup>;
- 996 (3) a special guardian of a child<sup>8</sup>; or
- 997 (4) any person in whose favour a residence order<sup>9</sup> is in force with respect to a child<sup>10</sup>.

In addition, the court may exercise any of its powers to make financial orders even though no application has been made to it where the child is a ward of court<sup>11</sup>, or where the court makes, varies or discharges either a residence order or a special guardianship order<sup>12</sup>.

In the case of an application to the High Court or a county court, the court may make one or more of the following orders<sup>13</sup>:

- 998 (a) an order requiring either or both parents of a child to make to the applicant for the benefit of the child, or to make to the child himself, such periodical payments<sup>14</sup>, for such term, as may be specified in the order<sup>15</sup>;
- 999 (b) an order requiring either or both parents of a child to secure to the applicant for the benefit of the child, or to secure to the child himself, such periodical payments, for such term, as may be so specified<sup>16</sup>;
- 1000 (c) an order requiring either, or both parents of a child to pay to the applicant for the benefit of the child, or to pay to the child himself such lump sum as may be so specified<sup>17</sup>;
- 1001 (d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property to which either parent is entitled (either in possession or in reversion) and which is specified in the order<sup>18</sup>;
- 1002 (e) an order requiring either or both parents of a child to transfer to the applicant for the benefit of the child or to transfer to the child himself such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order<sup>19</sup>.

In the case of an application to a magistrates' court, the court's powers are limited to those mentioned in head (a) and head (c) above<sup>20</sup>.

The powers conferred by these provisions may be exercised at any time<sup>21</sup>.

The procedure governing such applications is prescribed<sup>22</sup> but parties are encouraged in appropriate cases to seek alternative directions that financial information be exchanged by the use of the appropriate forms<sup>23</sup>, that any questionnaires be limited to those directed by the

court<sup>24</sup> and that the parties agree to attend a hearing akin to a Financial Dispute Resolution Appointment<sup>25</sup>.

1 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

2 See *ibid* Sch 1 (as amended); the text and notes 3-25 *infra*; and paras 540-551 post. For the meaning of 'child' see para 3 ante. An order under the Children Act 1989 Sch 1 (as amended) has effect as specified in Sch 1 (as amended): s 91(9). 'For the benefit of' means no more than 'for the good of' (*Re B (child: property transfer)* [1999] 3 FCR 266, [1999] 2 FLR 418, CA (concerning the comparable provisions of the Guardianship of Minors Act 1971 s 11B (now repealed))) and those words are to be given a 'wide construction' and can include travel costs to visit a child resident abroad or the costs of legal proceedings abroad concerning the child (see *Re S (child: financial provision)* [2004] EWCA Civ 1685 at [19], [2005] Fam 316 at [19], [2005] 2 FLR 94 at [19] per Thorpe LJ). For an example of where ongoing legal costs were held not to be 'for the benefit of the child' see *W v J (child: variation of financial provision)* [2003] EWHC 2657 (Fam), [2004] 2 FLR 300 (but see the observations thereon in *Re S (child: financial provision)* *supra*).

3 The orders which the court may make are those under the Children Act 1989 Sch 1 para 1(2) (see heads (a)-(e) in the text; and notes 15-19 *infra*). For the circumstances in which a person who has reached the age of 18 may apply for an order for periodical payments against a parent see para 544 post.

4 For these purposes, 'parent' must be construed without regard to the child's legitimacy or illegitimacy: see *ibid* s 2(3); the Family Law Reform Act 1987 s 1; and para 125 note 3 ante.

5 For the purposes of the Children Act 1989 Sch 1 (other than Sch 1 paras 2, 15), 'parent' includes any party to a marriage (whether or not subsisting), and any civil partner in a civil partnership (whether or not subsisting), in relation to whom the child concerned is a child of the family; and any reference to either parent or both parents is to be construed as a reference to any parent of the child and to all of his parents: s 15(1), Sch 1 para 16(2) (s 15(1) amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 10(1); and the Children Act 1989 Sch 1 para 16(2) substituted by the Civil Partnership Act 2004 s 78(1), (4)). For the meaning of 'child of the family' see para 248 note 10 ante. However, there is no power to make orders against a person who has lived with the parent of a child outside of a marriage or civil partnership, whatever the length of his relationship with the child: *J v J (property transfer application)* [1993] 1 FCR 471, sub nom *J v J (a minor: property transfer)* [1993] 2 FLR 56. As to the circumstances in which a father who donates sperm to be artificially inseminated can be said to be receiving treatment services together with the mother (within the meaning of the Human Fertilisation and Embryology Act 1990 s 28: see paras 103-104 ante) such that he may be deemed to be a parent for the purposes of the Children Act 1989 Sch 1 (as amended) see *Re B (minors) (parentage)* [1996] 3 FCR 697, [1996] 2 FLR 15. As to the position of an unmarried man who has embarked on IVF treatment with a woman using donated sperm from another man but where the couple have separated prior to conception see *Re R (IVF: paternity of child)* [2005] UKHL 33, [2005] 2 AC 621, [2005] 2 FLR 843. As to parentage where incorrect sperm is mistakenly used in treatment services see *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QB), [2003] 1 FCR 599, [2003] 1 FLR 1091.

6 Children Act 1989 Sch 1 para 1(1).

7 *Ibid* Sch 1 para 1(1) (Sch 1 para 1(1), (6) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 71(a)). For the meaning of 'guardian of a child' see para 144 note 5 ante.

8 Children Act 1989 Sch 1 para 1(1) (as amended: see note 7 *supra*). For the meaning of 'special guardian', and as to the effect of a 'special guardianship order', see ss 14A-14F (as added); and paras 151-154 ante.

9 As to residence orders see para 262 ante.

10 Children Act 1989 Sch 1 para 1(1).

11 *Ibid* Sch 1 para 1(7) (added by the Courts and Legal Services Act 1990 s 116, Sch 16 para 10(2)). As to wards of court see para 218 et seq ante.

12 Children Act 1989 Sch 1 para 1(6) (as amended: see note 7 *supra*).

13 *Ibid* Sch 1 para 1(1)(a). Any reference in the Children Act 1989 to the powers of the court under Sch 1 para 1(2) (see the text and notes 14-25 *infra*) or to an order made under Sch 1 para 1(2) includes a reference to the powers which the court has by virtue of Sch 1 para 14(1) (financial provision where a child is resident in a country outside England and Wales: see para 540 post) or, as the case may be, to an order made by virtue of Sch 1 para 14(1): Sch 1 para 14(2).

14 Where the High Court or a county court decides to make an order under the Children Act 1989 for the securing of periodical payments or for the transfer or settlement of property, it may direct that the matter be

referred to one of the conveyancing counsel of the court to settle a proper instrument to be executed by all necessary parties: *ibid* Sch 1 para 13. As to the conveyancing counsel of the court see SALE OF LAND vol 42 (Reissue) para 136. The exercise of the court's powers in relation to periodical payment orders is restricted by the Child Support Act 1991 s 8 (as amended) (see paras 556, 560 post).

15 Children Act 1989 Sch 1 para 1(2)(a).

16 *Ibid* Sch 1 para 1(2)(b).

17 *Ibid* Sch 1 para 1(2)(c). The order may provide for the payment of the lump sum by instalments: Sch 1 para 5(5). Without prejudice to the generality of Sch 1 para 1 (as amended), an order for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses incurred in connection with the birth of the child or in maintaining the child, and reasonably incurred before the making of the order, to be met: Sch 1 para 5(1). See *E v G (lump sum order: bankruptcy)* [1997] 1 FCR 261, sub nom *Re G (Children Act 1989, Schedule 1)* [1996] 2 FLR 171 (the court has jurisdiction to make a lump sum order against a parent who has been made the subject of a bankruptcy order). See also *J v C (child: financial provision)* [1998] 3 FCR 79, [1999] 1 FLR 152 (a child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and his present standard of living); *Re P (child: financial provision)* [2003] EWCA Civ 837, [2003] 2 FCR 481, [2003] 2 FLR 865 (the scale of the father's wealth and his lifestyle were important considerations in determining appropriate accommodation for the applicant mother, and the meaning of 'liabilities' and 'expenses' falling within the Children Act 1989 Sch 1 para 5(1) is to be 'broadly construed'). As to the importance of the parties' standard of living see also *F v G (child: financial provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261. The power to make a lump sum order is not to be exercised in such a way as to cure any defects in the assessment of a father to pay child maintenance to a mother made pursuant to the Child Support Act 1991: see *Phillips v Peace* [1996] 2 FCR 237, [1996] 2 FLR 230.

18 Children Act 1989 Sch 1 para 1(2)(d). See note 14 *supra*.

19 *Ibid* Sch 1 para 1(2)(e). See note 14 *supra*. Where an order would not interfere with a right of occupation, the question as to where a child should live is usually suitable for determination on an application for a specific issue order (see para 263 ante): *Re F (minors)* (1994) 26 HLR 354, CA.

20 Children Act 1989 Sch 1 para 1(1)(b). The exercise of the court's powers in relation to periodical payment orders is restricted by the Child Support Act 1991 s 8 (as amended): see paras 556, 560 post. Where a magistrates' court is minded to make an order which has not been applied for, it must give the parties an opportunity to make representations before the order is actually made: *Re C (a minor) (financial provision: lump sum order)* [1994] 2 FCR 1122, [1995] 1 FLR 925. The amount of any lump sum required to be paid by an order made by a magistrates' court may not exceed £1,000 or such larger amount as may from time to time be fixed by order: Children Act 1989 Sch 1 para 5(2) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 203, 209(1), (2); and the Transfer of Functions (Magistrates' Courts and Family Law) Order 1992, SI 1992/709, art 3, Sch 2). The order may provide for the payment of the lump sum by instalments: Children Act 1989 Sch 1 para 5(5). At the date at which this volume states the law no order had been made under these provisions.

21 *Ibid* Sch 1 para 1(3). As to the position regarding applications for further orders for periodical payments, lump sums and settlement or transfer of property orders see para 543 post.

22 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.4 et seq (as amended); and para 581 post.

23 See *ibid* r 2.61B, App 1A (as added); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 925.

24 See *ibid* rr 2.61B(7)(c), 2.61D(2)(a)(i) (as added); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 925, 928.

25 See *Morgan v Hill* [2006] EWCA Civ 1602 at [53], [2006] 3 FCR 620 at [53], [2007] 1 FLR 1480 at [53] per Thorpe LJ. As to a Financial Dispute Resolution Appointment see the Family Proceedings Rules 1991, SI 1991/1247, r 2.61E (as added); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 925-930.

## UPDATE

### 539 Orders for financial relief

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.





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**540. Orders where child resident outside, and respondent resident within, England and Wales.**

Where one parent<sup>1</sup> of a child<sup>2</sup> lives in England and Wales and the child lives outside England and Wales with another parent or a guardian<sup>3</sup> or special guardian<sup>4</sup> or a person in whose favour a residence order<sup>5</sup> is in force with respect to the child, the court<sup>6</sup> has power, on an application made by any of those persons, to make orders for periodical payments (secured or unsecured)<sup>7</sup> against the parent living in England and Wales<sup>8</sup>.

1 For the meaning of 'parent' see para 539 text and notes 4-5 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'guardian of a child' see para 144 note 5 ante.

4 For the meaning of 'special guardian', and as to the effect of a 'special guardianship order', see ss 14A-14F (as added); and paras 151-154 ante.

5 As to residence orders see para 262 ante.

6 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

7 Ie the orders mentioned in *ibid* Sch 1 para 1(2)(a), (b) (see para 539 ante).

8 *Ibid* Sch 1 para 14(1). Any reference in the Children Act 1989 to the powers of the court under Sch 1 para 1(2) (see para 539 ante) or to an order made under Sch 1 para 1(2) includes a reference to the powers which the court has by virtue of Sch 1 para 14(1) or, as the case may be, to an order made by virtue of Sch 1 para 14(1): Sch 1 para 14(2).

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**541. Orders where both child and respondent resident outside England and Wales and applicant is resident within England and Wales.**

Where one parent<sup>1</sup> of a child<sup>2</sup> or a guardian<sup>3</sup> or special guardian<sup>4</sup> of a child or a person in whose favour a residence order<sup>5</sup> is in force with respect to the child lives in England and Wales and the child lives outside England and Wales with another parent, the court<sup>6</sup> may have power in certain limited circumstances on an application made by such a person resident in England and Wales to make orders for periodical payments (secured or unsecured) against the parent living outside England and Wales<sup>7</sup>. There is, however, no statutory definition of the general jurisdiction of the courts of England and Wales to make orders under the applicable provisions of the Children Act 1989<sup>8</sup> in cases concerning children who are neither present nor resident in England and Wales<sup>9</sup>.

1 For the meaning of 'parent' see para 539 text and notes 4-5 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'guardian of a child' see para 144 note 5 ante.

4 For the meaning of 'special guardian', and as to the effect of a 'special guardianship order', see the Children Act 1989 ss 14A-14F (as added); and paras 151-154 ante.

5 As to residence orders see para 262 ante.

6 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

7 See *Re S (child: financial provision)* [2004] EWCA Civ 1685, [2005] Fam 316, [2005] 2 FLR 94, discussing the circumstances in which the courts of England and Wales have jurisdiction to make orders in respect of children who are neither resident nor present in England and Wales. In that case the wrongful removal of the child concerned to Sudan and the declaration in the High Court in England that the child remained habitually resident in England notwithstanding the wrongful removal were significant factors. As to orders for periodical payments see para 539 ante.

8 I.e. the Children Act 1989 Sch 1 (see paras 539-540 ante, 542 et seq post).

9 *Re S (child: financial provision)* [2004] EWCA Civ 1685, [2005] Fam 316, [2005] 2 FLR 94.

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#### **542. Variation and discharge of orders.**

Orders for periodical payments<sup>1</sup> (whether secured or unsecured) by a parent<sup>2</sup> may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order<sup>3</sup>, and the power to vary or discharge an order for the making or securing of periodical payments by a parent includes power to make an order for the payment of a lump sum by that parent<sup>4</sup>. Where the court<sup>5</sup> provides for payment of a lump sum by instalments it may, on an application made either by the person liable to pay or the person entitled to receive that sum, vary the order by varying the number of instalments payable, the amount of any instalment payable and the date on which any instalment becomes payable<sup>6</sup>. In certain prescribed circumstances the child may also apply to revive an order that has expired by effluxion of time and upon its revival any such order may be varied as to its terms<sup>7</sup>; there is, however, no general power to review or vary a property adjustment order<sup>8</sup> or a lump sum order other than a lump sum payable by instalments<sup>9</sup>.

After the death of either parent, a guardian<sup>10</sup> or special guardian<sup>11</sup> of the child<sup>12</sup> concerned may apply for the variation or discharge of the order<sup>13</sup>. Where the parent liable to make payments under a secured periodical payments order<sup>14</sup> has died, the persons who may apply for the variation or discharge of the order include the personal representatives of the deceased parent<sup>15</sup>, but no application for the variation of the order, except with the permission of the court, may be made after the end of the period of six months from the date on which representation in regard to the estate of that parent is first taken out<sup>16</sup>.

In exercising its powers to vary or discharge an order for the making or securing of periodical payments, the court must have regard to all the circumstances in the case, including any change in any of the matters to which the court was required to have regard when making the order<sup>17</sup> and including changed circumstances resulting from the death of a parent<sup>18</sup>. The power of the court to vary an order for the making of periodical payments whether secured or unsecured includes power to suspend any provision of the order temporarily and to revive any provision so suspended<sup>19</sup>. Where the court, on an application for the variation or discharge of an order, varies the payment required to be made, it may provide that the payments as so varied are to be made from such date as it may specify, not being earlier than the date of the making of the application<sup>20</sup>.

Where an order<sup>21</sup> for the making or securing of periodical payments in favour of more than one child is in force requiring payments specified in it to be made to or for the benefit of more than one child without apportioning those payments between them, a maintenance calculation is made<sup>22</sup> with respect to one or more, but not all, of the children with respect to whom those payments are to be made, and an application is made, before the end of the period of six months beginning with the date on which the maintenance calculation was made, for the variation or discharge of the order, the court may<sup>23</sup> direct that the variation or discharge is to take effect from the date on which the maintenance calculation took effect or any later date<sup>24</sup>.

The power of a magistrates' court to vary an order for the making of periodical payments<sup>25</sup> or to vary an order for the payment of a lump sum by instalments<sup>26</sup> includes power, if the court is satisfied that payment has not been made in accordance with the order, to exercise one of its statutory powers<sup>27</sup> to specify the means of payment<sup>28</sup>. In any case where a magistrates' court has made an order for the making of periodical payments or for the payment of a lump sum by

instalments<sup>29</sup>, and payments under the order are required to be made by specified methods of payment<sup>30</sup>, any person entitled to make an application for the variation of the order ('the applicant') may apply to a magistrates court acting in the same local justice area as the court which made the order for the order to be varied<sup>31</sup>. Where such an application is made, a justices' clerk, after giving written notice (by post or otherwise) of the application to any interested party<sup>32</sup> and allowing that party, within the period of 14 days beginning with the date of the giving of that notice, an opportunity to make written representations, may vary the order to provide that payments under the order are to be made to the designated officer for the court<sup>33</sup>. The clerk may proceed with the application notwithstanding that any such interested party has not received written notice of the application<sup>34</sup>. If the clerk considers it inappropriate to exercise his power to vary the order, he may refer the matter to the court, which may vary the order<sup>35</sup>, having regard to any representations made by the parties to the application<sup>36</sup>. None of the powers of the court referred to above, or of a justices' clerk, is exercisable in relation to an order for the making of periodical payments, or for the payment of a lump sum by instalments, which is not a qualifying maintenance order<sup>37</sup>.

1    le orders under the Children Act 1989 Sch 1 paras 1(2)(a), (b) (see para 539 ante).

2    For the meaning of 'parent' see para 539 text and notes 4-5 ante.

3    Children Act 1989 Sch 1 para 1(4).

4    Ibid Sch 1 para 5(3). A lump sum order so made by a magistrates' court must not exceed the maximum amount that may at the time of the making of the order be required to be paid as a lump sum by a magistrates' court (see para 539 note 20 ante); however, a magistrates' court may make an order for the payment of a lump sum not exceeding that maximum amount even though the parent was required to pay a lump sum by a previous order made pursuant to the provisions of Sch 1: Sch 1 para 5(4).

5    As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

6    Ibid Sch 1 para 5(6).

7    For the right of a child to apply for the variation or revival of a periodical payments order see ibid Sch 1 para 6(5)-(7); and para 544 post.

8    le an order under ibid Sch 1 para 1(2)(d), (e) (see para 539 ante).

9    See *Phillips v Peace* [2004] EWHC 3180 (Fam), [2005] 2 All ER 752, [2005] 2 FLR 1212.

10   For the meaning of 'guardian of a child' see para 144 note 5 ante.

11   For the meaning of 'special guardian', and as to the effect of a 'special guardianship order', see the Children Act 1989 ss 14A-14F (as added); and paras 151-154 ante.

12   For the meaning of 'child' see para 3 ante.

13   Children Act 1989 Sch 1 para 6(8) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 71(b)).

14   For these purposes, 'secured periodical payments order' means an order for secured periodical payments under the Children Act 1989 Sch 1 para 1(2)(b) (see para 539 ante): Sch 1 para 7(7).

15   Ibid Sch 1 para 7(1).

16   Ibid Sch 1 para 7(2). The personal representatives of a deceased person against whom a secured periodical payments order was made are not liable for having distributed any part of the estate of the deceased after the end of the period of six months referred to in the text on the ground that they ought to have taken into account the possibility that the court might permit an application for variation to be made after that period by the person entitled to payments under the order (Sch 1 para 7(3)); this does not prejudice any power to recover any part of the estate so distributed arising by virtue of the variation of an order in accordance with Sch 1 para 7 (Sch 1 para 7(4)). In considering the question of when representation was first taken out, a grant limited to settled land or to trust property must be left out of account and a grant limited to real estate or to personal

estate must be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time: Sch 1 para 7(6).

17 Ibid Sch 1 para 6(1). As to the circumstances to which the court must have regard when making an order see para 546 post. As to such orders see paras 539 ante, 544 post.

18 Ibid Sch 1 para 7(5).

19 Ibid Sch 1 para 6(2).

20 Ibid Sch 1 para 6(3) (amended by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, art 2, Sch 1 paras 12, 13).

21 Ie an order under the Children Act 1989 Sch 1 para 1(2)(a) or (b) (see para 539 ante).

22 Ie pursuant to an application made under the Child Support Act 1991 s 4 (as amended) (see para 560 post).

23 Ie in exercise of its powers under the Children Act 1989 Sch 1 para 1 (as amended) (see para 539 ante) to vary or discharge the order.

24 Ibid Sch 1 para 6(9) (amended by the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 10(1), (3)). In the Children Act 1989 Sch 1, 'maintenance calculation' has the same meaning as it has in the Child Support Act 1991 by virtue of s 54 as read with any regulations in force under that provision: Children Act 1989 Sch 1 para 16(3) (added by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, Sch 1 para 15; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 10(4)). For transitional provisions relating to the use of the expression 'maintenance calculation' in place of 'maintenance assessment' see the Child Support, Pensions and Social Security Act 2000 (Commencement No 12) Order 2003, SI 2003/192, arts 3, 8.

25 Ie, for these purposes, under the Children Act 1989 Sch 1 para 1 (as amended) (see para 539 ante).

26 Ie under ibid Sch 1 para 5(6) (see the text and notes 5-6 supra).

27 Ie under the Magistrates' Courts Act 1980 s 59(3)(a)-(d) (as substituted and amended) (which includes the power to order direct payment to the judgment creditor, payment to the court, payment by standing order and the power to make an attachment of earnings order) (see MAGISTRATES vol 29(2) (Reissue) para 820). The court also has power to order that a bank account be opened to facilitate payments: see the Magistrates' Courts Act 1980 s 59(4) (as substituted); and MAGISTRATES vol 29(2) (Reissue) para 820 (provision applied by the Children Act 1989 Sch 1 para 6A(6) (Sch 1 para 6A added by the Maintenance Enforcement Act 1991 s 6)). The powers of a magistrates' court under the Magistrates' Courts Act 1980 s 60 (as substituted and amended) (see MAGISTRATES vol 29(2) (Reissue) para 823) to revoke, revive or vary an order for the periodical payment of money and the power of the clerk of a magistrates' court to vary such an order do not apply in relation to an order made under the Children Act 1989 Sch 1 (as amended): s 15(2) (amended by the Maintenance Enforcement Act 1991 s 11(1), Sch 2 para 10).

28 Children Act 1989 Sch 1 para 6A(1) (as added: see note 27 supra). This is expressed to be subject to Sch 1 para 6A(7), (8) (as added and amended) (see the text and note 36 infra).

29 Ie under ibid Sch 1 (as amended);

30 Ie under the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820).

31 Children Act 1989 Sch 1 para 6A(2) (as added (see note 27 supra); and amended by the Courts Act 2003 s 109(1), Sch 8 para 338).

32 For these purposes, 'interested party', in relation to an application made by the applicant under the Children Act 1989 Sch 1 para 6A(2) (as added and amended) (see the text and notes 29-31 supra), means a person who would be entitled to be a party to an application for the variation of the order made by the applicant under any other provision of Sch 1 (as amended) if such an application were made: Sch 1 para 6A(10) (as added: see note 27 supra).

33 Ibid Sch 1 para 6A(3) (as added (see note 27 supra); and amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 159, 161; and the Courts Act 2003 Sch 8 para 338). The Children Act 1989 Sch 1 para 6A(3) (as added and amended) is expressed to be subject to Sch 1 para 6A(5) (as added) (see the text and note 35 infra).

34 Ibid Sch 1 para 6A(4) (as added: see note 27 supra).

35 Ibid Sch 1 para 6A(5) (as added: see note 27 supra). This power is subject to Sch 1 para 6A(7), (8) (as added and amended) (see the text and note 36 infra). In varying the order the court may exercise powers under the Magistrates' Courts Act 1980 s 59(3)(a)-(d) (as substituted and amended) (see MAGISTRATES vol 29(2) (Reissue) para 820): Children Act 1989 Sch 1 para 6A(5) (as so added).

36 Ibid Sch 1 para 6A(7) (as added: see note 27 supra). If the court does not propose to exercise its power under the Magistrates' Courts Act 1980 s 59(3)(c), (cc) or (d) (as substituted and amended) (see MAGISTRATES vol 29(2) (Reissue) para 820), it must, unless upon representations expressly made in that behalf by the applicant for the order it is satisfied that it is undesirable to do so, exercise its power under s 59(3)(b) (as substituted and amended) (see MAGISTRATES vol 29(2) (Reissue) para 820) to order that payments are to be made to the clerk of the court: Children Act 1989 Sch 1 para 6A(8) (as so added; and amended by the Child Support Act 1991 (Consequential Amendments) Order 1994, SI 1994/731, art 4).

37 Children Act 1989 Sch 1 para 6A(9) (as added: see note 27 supra). As to qualifying maintenance orders see the Magistrates' Courts Act 1980 s 59 (as substituted and amended); and MAGISTRATES vol 29(2) (Reissue) para 820.

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### **543. Further orders.**

Where a court<sup>1</sup> makes a financial relief order under the Children Act 1989<sup>2</sup> it may at any time make a further order for periodical payments (whether secured or unsecured) or for a lump sum<sup>3</sup>, provided the child<sup>4</sup> concerned has not reached the age of 18 years<sup>5</sup>; but it may not make more than one order for a settlement or transfer of property<sup>6</sup> against the same person in respect of the same child<sup>7</sup>. An application for a lump sum<sup>8</sup> for the purpose of housing a child during his minority will not be permitted where there has previously been an order for the settlement<sup>9</sup> or transfer<sup>10</sup> of property in respect of that child<sup>11</sup>.

A final ancillary relief order made in matrimonial proceedings under the Matrimonial Causes Act 1973 does not necessarily limit the court's jurisdiction to make financial relief orders under the Children Act 1989<sup>12</sup>.

1 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

2 Ie an order under *ibid* Sch 1 para 1 (as amended) (see para 539 ante).

3 Ie an order under *ibid* Sch 1 para 1(2)(a), (b) or (c) (see para 539 ante).

4 For the meaning of 'child' see para 3 ante.

5 Children Act 1989 Sch 1 para 1(5)(a).

6 Ie an order under *ibid* Sch 1 para 1(2)(d) or (e) (see para 539 ante).

7 *Ibid* Sch 1 para 1(5)(b). However, where such a settlement or transfer of property is agreed between the parties and incorporated in a deed, but not converted into an order, the court retains jurisdiction to make property settlement or transfer orders: see *Morgan v Hill* [2006] EWCA Civ 1602, [2006] 3 FCR 620, [2007] 1 FLR 1480.

8 Ie pursuant to the Children Act 1989 Sch 1 para 1(2)(c) (see para 539 ante).

9 Ie pursuant to *ibid* Sch 1 para 1(2)(d) (see para 539 ante).

10 Ie pursuant to *ibid* Sch 1 para 1(2)(e) (see para 539 ante).

11 See *Phillips v Peace* [2004] EWHC 3180 (Fam), [2005] 2 All ER 752, [2005] 2 FLR 1212.

12 See *MB v KB* [2007] EWHC 789 (Fam), [2007] Fam Law 801.



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#### **544. Orders for financial relief for persons over 18.**

If, on an application by a person who has reached the age of 18 years, it appears to the court<sup>1</sup> that the applicant is, will be or (if an order were made) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation whether or not while in gainful employment<sup>2</sup>, or that there are special circumstances which justify the making of an order<sup>3</sup>, the court may make one or both of the following orders:

- 1003 (1) an order requiring either or both of the applicant's parents<sup>4</sup> to pay to the applicant such periodical payments, for such term, as may be specified in the order<sup>5</sup>; and
- 1004 (2) an order requiring either or both of the applicant's parents to pay to the applicant such lump sum as may be so specified<sup>6</sup>.

However, an application may not be made by any person if immediately before he reached the age of 16 years a periodical payments order<sup>7</sup> was in force with respect to him<sup>8</sup>; and no order may be made at a time when the parents of the applicant are living with each other in the same household<sup>9</sup>.

An order for periodical payments made under head (1) above may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order<sup>10</sup>.

The power to make an order is exercisable at any time<sup>11</sup>; and where the court makes an order for financial relief for persons over 18 years of age<sup>12</sup>, it may from time to time while that order remains in force make a further such order<sup>13</sup>.

No liability under these provisions may be imposed on anyone other than a parent of the child, and the extended definition of 'parent' (which includes any party to a marriage in relation to whom the child concerned is a child of the family<sup>14</sup>) is disappplied for the purpose of applications by a child over the age of 18 years<sup>15</sup>.

- 1 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.
- 2 Ibid Sch 1 para 2(1)(a).
- 3 Ibid Sch 1 para 2(1)(b).
- 4 For the meaning of 'parent' see para 539 text and notes 4-5 ante.
- 5 Children Act 1989 Sch 1 para 2(2)(a).
- 6 Ibid Sch 1 para 2(2)(b).
- 7 'Periodical payments order' means an order for the making or securing of periodical payments under ibid Sch 1 (as amended), the Matrimonial Causes Act 1973 s 23 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 458 et seq), or s 27 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 542 et seq), the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553 et seq), or the Civil Partnership Act 2004 Sch 5 Pt 1, Sch 5 Pt 9 or Sch 6 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW): Children Act 1989 Sch 1 para 2(6) (amended by the Child Support Act 1991 s 58(14); and the Civil Partnership Act 2004 s 78(1), (2)). However, an application

for the variation of an order made under the Children Act 1989 Sch 1 para 1 (as amended) for the making or securing of periodical payments to or for the benefit of a child may, if the child has reached the age of 16 years, be made by the child himself: Sch 1 para 6(4). For the purpose of an application made under Sch 1 para 2 (as amended) or Sch 1 para 6 (as amended), 'child' includes, in any such case in relation to a person who has reached the age of 18 years, that person: Sch 1 para 16(1).

Where an order for the making or securing of periodical payments made under Sch 1 para 1 (as amended) ceases to have effect on the date on which the child reaches the age of 16 years, or at any time after that date but before or on the date on which he reaches the age of 18 years, the child may apply to the court which made the order for its revival: Sch 1 para 6(5). If on such an application it appears to the court that the child is, will be or (if an order were made) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment, or there are special circumstances which justify the making of an order, the court has the power by order to revive the order from such date as the court may specify, not being earlier than the date of the making of the application: Sch 1 para 6(6). An order which is so revived may be varied or discharged on the application of any person by whom payments are to be made under the revived order: Sch 1 para 6(7).

8 Ibid Sch 1 para 2(3). The provisions of Sch 1 para 6(5), (6) (see note 7 supra) specify circumstances in which a child over the age of 16 may be entitled to apply to extend, vary or revive an order for periodical payments made for his benefit. For the matrimonial jurisdiction for making or extending orders beyond the eighteenth birthday of the child see *Downing v Downing (Downing Intervening)* [1976] Fam 288, [1976] 3 All ER 474; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) para 495.

9 Children Act 1989 Sch 1 para 2(4).

10 Ibid Sch 1 para 2(5).

11 Ibid Sch 1 para 2(7). See, however, as to the provisions governing the making of applications for periodical payments in favour of children who have already reached the age of 18, Sch 1 paras 1(5), 2, 6; and the text and notes 1-10 supra.

12 Ie under ibid Sch 1 para 2 (as amended) (see the text and notes 1-11 supra).

13 Ibid Sch 1 para 2(8).

14 For the meaning of 'child of the family' see para 248 note 10 ante.

15 See the Children Act 1989 Sch 1 para 16(2); and para 539 note 5 ante.

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#### **545. Duration of orders.**

The term to be specified in an order for periodical payments<sup>1</sup> in favour of a child<sup>2</sup> may begin with the date of the making of an application for the order in question or any later date, or in relation to a case where there is a maintenance calculation, the earliest permitted date<sup>3</sup>, but must not in the first instance extend beyond the child's seventeenth birthday unless the court<sup>4</sup> thinks it right in the circumstances of the case to specify a later date<sup>5</sup>, and must not in any event extend beyond the child's eighteenth birthday<sup>6</sup>, unless it appears to the court that the child is or will be or (if an order extending beyond the child's eighteenth birthday were made) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment<sup>7</sup>, or that there are special circumstances which justify the making of an order not limited to the child's eighteenth birthday<sup>8</sup>.

An order for unsecured periodical payments<sup>9</sup>, notwithstanding anything in the order, ceases to have effect on the death of a person liable to make payments under the order<sup>10</sup>. Moreover, periodical payments orders (whether secured or unsecured)<sup>11</sup> cease to have effect if any parent<sup>12</sup> making or securing the payments and any parent to whom the payments are made or secured live together for a period of more than six months<sup>13</sup>.

Where a maintenance calculation ceases to have effect or is cancelled by or under any provision of the Child Support Act 1991<sup>14</sup> and an application is made, before the end of the period of six months beginning with the relevant date<sup>15</sup>, for an order for periodical payments<sup>16</sup> in favour of a child with respect to whom that maintenance calculation was in force immediately before it ceased to have effect or was cancelled<sup>17</sup>, the term to be specified in any such order, or in any interim order<sup>18</sup>, made on that application may begin with the date on which that maintenance calculation ceased to have effect or, as the case may be, the date with effect from which it was cancelled, or any later date<sup>19</sup>.

1    Ie an order made under the Children Act 1989 Sch 1 para 1(2)(a) or Sch 1 para 1(2)(b) (see para 539 ante).

2    For the meaning of 'child' see para 3 ante.

3    See the Children Act 1989 Sch 1 para 3(5), (6) (Sch 1 para 3(5)-(8) added by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, art 2, Sch 1 para 11; and the Children Act 1989 Sch 1 para 3(5)-(7) amended by the Child Support, Pensions and Social Security Act 2000 ss 26, 85, Sch 3 para 10(1), (2), Sch 9 Pt 1), providing that where a maintenance calculation ('the current calculation') is in force with respect to a child and an application is made for an order under the Children Act 1989 Sch 1 para 1(2)(a) or (b) (see para 539 ante) for periodical payments in favour of that child in accordance with the Child Support Act 1991 s 8 (as amended) (see paras 556, 560 post) and before the end of the period of six months beginning with the making of the current calculation, the term to be specified in any such order made on that application may be expressed to begin on, or at any time after, whichever is the later of the date six months before the application is made or the date on which the current calculation took effect or, where successive maintenance calculations have been continuously in force with respect to a child, on which the first of those calculations took effect ('the earliest permitted date'). As to the meaning of 'maintenance calculation' see para 542 note 24 ante. As to the meaning and effect of these provisions see *Re P (child: financial provision)* [2003] EWCA Civ 837, [2003] 2 FCR 481, [2003] 2 FLR 865.

4    As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

5    Ibid Sch 1 para 3(1)(a) (Sch 1 para 3(1) amended by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, Sch 1 para 10).

6 Children Act 1989 Sch 1 para 3(1)(b).

7 Ibid Sch 1 para 3(2)(a).

8 Ibid Sch 1 para 3(2)(b). The 'special circumstances' must relate to the child, and not to one or both of his parents: *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883, DC; *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA.

9 Ie made under the Children Act 1989 Sch 1 para 1(2)(a) or Sch 1 para 2(2)(a) (see paras 539, 544 ante).

10 Ibid Sch 1 para 3(3).

11 Ie made under ibid Sch 1 para 1(2)(a) or Sch 1 para 1(2)(b) (see para 539 ante).

12 For the meaning of 'parent' see para 539 text and notes 4-5 ante.

13 Children Act 1989 Sch 1 para 3(4).

14 Ibid Sch 1 para 3(7)(a) (as added and amended: see note 3 supra).

15 Where the maintenance calculation has ceased to have effect, the relevant date is the date on which it so ceased: ibid Sch 1 para 3(8)(a) (Sch 1 para 3(8) added by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, Sch 1 para 11; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 10(1), (2), Sch 9 Pt 1). Where the maintenance calculation was cancelled, the relevant date is the later of the date on which the person who cancelled it did so and the date from which the cancellation first had effect: Children Act 1989 Sch 1 para 3(8)(b) (as so added and amended).

16 Ie under ibid Sch 1 para 1(2)(a) or Sch 1 para 1(2)(b) (see para 539 ante).

17 Ibid Sch 1 para 3(7)(b) (as added and amended: see note 3 supra).

18 Ie under ibid Sch 1 para 9 (see para 548 et seq post).

19 Ibid Sch 1 para 3(7) (as added and amended: see note 3 supra).

## UPDATE

### 545 Duration of orders

NOTE 8--Evidence must establish special or exceptional circumstances if the court is to be justified in making provision beyond the end of dependency: *Re N (a child) (financial provision: dependency)* [2009] EWHC 11 (Fam), [2009] 1 WLR 1621, [2009] 1 FCR 606.

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#### **546. Matters to which the court must have regard.**

In deciding whether to exercise its powers to make financial relief orders under the Children Act 1989<sup>1</sup>, and, if so, in what manner, the court<sup>2</sup> must have regard to all the circumstances, including<sup>3</sup>:

- 1005 (1) the income, earning capacity, property and other financial resources which each of certain specified persons<sup>4</sup> has or is likely to have in the foreseeable future<sup>5</sup>;
- 1006 (2) the financial needs, obligations and responsibilities which each of those persons has or is likely to have in the foreseeable future<sup>6</sup>;
- 1007 (3) the financial needs of the child<sup>7</sup>;
- 1008 (4) the income, earning capacity (if any), property and other financial resources of the child<sup>8</sup>;
- 1009 (5) any physical or mental disability of the child<sup>9</sup>; and
- 1010 (6) the manner in which the child was being, or was expected to be, educated or trained<sup>10</sup>.

The child's welfare is more than just one of the relevant circumstances of the case and in the generality of cases the child's welfare should be a constant influence on the discretionary outcome<sup>11</sup>. Likewise, although not one of the specific considerations listed in the statutory criteria<sup>12</sup>, the standard of living of the parents and the extent to which the applicant had become accustomed to a particular lifestyle might be an important consideration<sup>13</sup>.

In deciding whether to exercise its powers<sup>14</sup> against a person who is not the mother or father of the child<sup>15</sup>, and, if so, in what manner, the court must have regard, in addition to the other relevant circumstances<sup>16</sup>, to:

- 1011 (a) whether that person has assumed responsibility for the maintenance of the child and, if so, the extent to which and the basis on which he assumed that responsibility, and the length of the period during which he met that responsibility<sup>17</sup>;
- 1012 (b) whether he did so knowing that the child was not his child<sup>18</sup>; and
- 1013 (c) the liability of any other person to maintain the child<sup>19</sup>.

If the court makes an order against a person who is not the father of the child, it must record in the order that the order is made on the basis that the person against whom the order is made is not the child's father<sup>20</sup>.

1     le under the Children Act 1989 Sch 1 para 1 (as amended) or Sch 1 para 2 (as amended) (see paras 539, 544 ante).

2     As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

3     The child's welfare is an important factor (*Re P (child: financial provision)* [2003] EWCA Civ 837, [2003] 2 FCR 481, [2003] 2 FLR 865) but is not paramount (*K v K (minors: property transfer)* [1992] 2 All ER 727, [1992] 1 WLR 530, CA). The approach of a court in determining cases where the financial resources are substantial is to start by deciding on an appropriate home for the child, then decide the cost of equipping and furnishing that home and finally the appropriate budget that the mother reasonably requires: see *Re P (child: financial*

*provision*) supra at [45] per Thorpe LJ. A decision to make a lump sum order must be reasoned and based on findings of fact as to the capital resources of the party against whom the order is made: *Re C (a minor) (financial provision: lump sum order)* [1994] 2 FCR 1122, [1995] 1 FLR 925. See also *K v H (financial provision for child)* [1993] 1 FCR 683, sub nom *K v H (child maintenance)* [1993] 2 FLR 61 (court must have regard to child's financial needs).

4 le: (1) in relation to a decision whether to exercise the court's powers to make orders under the Children Act 1989 Sch 1 para 1 (as amended) (see para 539 ante), any parent of the child (Sch 1 para 4(4)(a)); (2) in relation to a decision whether to exercise the court's powers under Sch 1 para 2 (as amended) (see para 544 ante), the mother and father of the child (Sch 1 para 4(4)(b)); (3) the applicant for the order (Sch 1 para 4(4)(c)); and (4) any other person in whose favour the court proposes to make the order (Sch 1 para 4(4)(d)). For the meaning of 'child' see para 3 ante; and for the meaning of 'parent' see para 539 text and notes 4-5 ante.

5 Ibid Sch 1 para 4(1)(a). The scale of the respondent's wealth will be an important factor in determining the level of housing that the applicant reasonably requires: see *Re P (child: financial provision)* [2003] EWCA Civ 837, [2003] 2 FCR 481, [2003] 2 FLR 865; *Re S (unmarried parents: financial provisions)* [2006] EWCA Civ 479, [2006] 2 FLR 950; *Re C (financial provision)* [2007] 2 FLR 13.

6 Children Act 1989 Sch 1 para 4(1)(b). In assessing the mother's own allowance when determining the appropriate level of a periodical payments order, the court is entitled to take a generous approach: see *Re P (child: financial provision)* [2003] EWCA Civ 837 at [43], [2003] 2 FCR 481 at [43], [2003] 2 FLR 865 at [43] per Thorpe LJ.

7 Children Act 1989 Sch 1 para 4(1)(c). See *J v C (child: financial provision)* [1998] 3 FCR 79, [1999] 1 FLR 152; *Re P (child: financial provision)* [2003] EWCA Civ 837, [2003] 2 FCR 481, [2003] 2 FLR 865; *F v G (child: financial provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261.

8 Children Act 1989 Sch 1 para 4(1)(d).

9 Ibid Sch 1 para 4(1)(e).

10 Ibid Sch 1 para 4(1)(f).

11 See *Re P (child: financial provision)* [2003] EWCA Civ 837 at [44], [2003] 2 FCR 481 at [44], [2003] 2 FLR 865 at [44] per Thorpe LJ.

12 le as set out in Children Act 1989 Sch 1 para 4(1)(a)-(f) (see heads (1)-(6) in the text).

13 See *F v G (child: financial provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261.

14 le under the Children Act 1989 Sch 1 para 1 (as amended) (see para 539 ante).

15 See the definition of 'parent' in para 539 text and notes 4-5 ante.

16 As to the other relevant circumstances see the text and notes 1-10 supra.

17 Ibid Sch 1 para 4(2)(a).

18 Ibid Sch 1 para 4(2)(b).

19 Ibid Sch 1 para 4(2)(c).

20 Ibid Sch 1 para 4(3). There is no comparable provision for a case where an order is made against a female who is not the child's mother. There is no power to make orders against a person who has lived with the mother outside marriage, whatever the length of his relationship with the child: see note 15 supra; and *J v J (property transfer application)* [1993] 1 FCR 471, [1993] 2 FLR 56.

## UPDATE

### 546 Matters to which the court must have regard

TEXT AND NOTES--See also Children Act 1989 Sch 1 para 4(5) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 32(2)) (second female parent).

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#### **547. Variation of orders made under other legislation.**

Where a residence order<sup>1</sup> or special guardianship order<sup>2</sup> is made with respect to a child<sup>3</sup> at a time when there is in force a financial relief order made under any legislation other than the Children Act 1989 requiring a person to contribute to the child's maintenance<sup>4</sup>, any person so required, or any person in whose favour a residence order or special guardianship order with respect to the child is in force<sup>5</sup>, may apply to the court<sup>6</sup> for an order revoking the financial relief order, or varying it by altering the amount of any sum payable under that order or by substituting the applicant for the person to whom any such sum is otherwise payable under that order<sup>7</sup>.

1 As to residence orders see para 262 ante.

2 As to the making and effect of special guardianship orders see para 151 et seq ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 Sch 1 para 8(1) (Sch 1 para 8 amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 71(c)).

5 As to references to a person in whose favour a residence order is in force see para 869 note 11 post.

6 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

7 Ibid Sch 1 para 8(2) (as amended: see note 4 supra).

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#### **548. Interim orders.**

The court<sup>1</sup> has power, at any time before it disposes of an application for a financial relief order under the Children Act 1989<sup>2</sup>, to make an interim order requiring either or both parents<sup>3</sup> to make such periodical payments, at such times and for such term as the court thinks fit, and giving any direction which the court thinks fit<sup>4</sup>. The order may provide for payments to be made from such date as the court may specify, not being earlier (save in certain circumstances<sup>5</sup>) than the date of the making of the application<sup>6</sup>. It ceases to have effect when the application is disposed of or, if earlier, on the date specified in the interim order<sup>7</sup>.

1 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante.

2 Ie under *ibid* Sch 1 para 1 (as amended) or Sch 1 para 2 (as amended) (see paras 539, 544 ante).

3 For the meaning of 'parent' see para 539 text and notes 4-5 ante.

4 Children Act 1989 Sch 1 para 9(1).

5 Ie the circumstances set out in *ibid* Sch 1 para 3(5), (6) (as added and amended) (see para 545 ante).

6 *Ibid* Sch 1 para 9(2) (amended by the Maintenance Orders (Backdating) Order 1993, SI 1993/623, art 2, Sch 1 para 14).

7 Children Act 1989 Sch 1 para 9(3). An interim order in which a date has been specified for this purpose may be varied by substituting a later date: Sch 1 para 9(4).



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#### **549. Alteration of maintenance agreements.**

Where a maintenance agreement<sup>1</sup> is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident<sup>2</sup> in England and Wales, either party may apply to the court<sup>3</sup> for an order altering the agreement by varying or revoking any financial arrangements contained in it as may appear to the court to be just having regard to all the circumstances<sup>4</sup>. The court must be satisfied either:

- 1014 (1) that by reason of a change in circumstances in the light of which any financial arrangements contained in the agreement were made, including a change foreseen by the parties when making the agreement, the agreement should be altered so as to make different financial arrangements<sup>5</sup>; or
- 1015 (2) that the agreement does not contain proper financial arrangements with respect to the child<sup>6</sup>.

If the maintenance agreement is altered by such an order, it has effect thereafter as if the alteration had been made by agreement between the parties and for valuable consideration<sup>7</sup>.

Where a maintenance agreement provides for the continuation of maintenance payments for a child after the death of one of the parties, and that party dies domiciled in England and Wales, the surviving party or the deceased party's personal representatives may apply to the High Court or county court for an order<sup>8</sup> altering the agreement<sup>9</sup>.

1 'Maintenance agreement' means any agreement in writing made with respect to a child, whenever made, which is or was made between the father and mother of the child, and which contains provisions (referred to as 'financial arrangements') with respect to the making or securing of payments, or the disposition or use of any property, for the maintenance or education of the child: Children Act 1989 Sch 1 para 10(1). For the meaning of 'child' see para 3 ante.

2 As to domicile and residence see CONFLICT OF LAWS vol 8(3) (Reissue) para 35 et seq.

3 As to the meaning of 'the court' for the purposes of the Children Act 1989 see para 208 ante. A magistrates' court has no power to entertain such an application unless both parties to the agreement are resident in England and Wales and the court acts in, or is authorised to act for, a local justice area in which at least one of the parties is resident: Sch 1 para 10(6) (amended by the Access to Justice Act 1999 s 106, Sch 15 Pt V Table (1); and the Courts Act 2003 s 109, Sch 8 para 339). The magistrates' court does not have power to make any order on such an application except: (1) in a case where the agreement contains no provision for periodical payments by either party, by an order inserting such provision (Children Act 1989 Sch 1 para 10(6) (a)); or (2) in a case where the agreement includes such provision, an order increasing or reducing the rate of, or terminating, any of the periodical payments (Sch 1 para 10(6)(b)).

4 Ibid Sch 1 para 10(2), (3). This does not affect any power of a court, before which any proceedings between the parties to a maintenance agreement are brought under any other enactment, to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings: Sch 1 para 10(7). The pre-existing agreement may itself be one of the circumstances to which the court must have regard, and all the circumstances of that agreement should be given appropriate weight: see *Morgan v Hill* [2006] EWCA Civ 1602, [2006] 3 FCR 620, [2007] 1 FLR 1480.

5 Children Act 1989 Sch 1 para 10(3)(a).

6 Ibid Sch 1 para 10(3)(b).

7 Ibid Sch 1 para 10(4). Where the court decides to make an order to alter the maintenance agreement, either by: (1) inserting provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of the child; or (2) increasing the rate of periodical payments required to be made or secured by one of the parties for the maintenance of the child, then, in deciding the term for which under the agreement as altered by the order the payments or (as the case may be) the additional payments attributable to the increase are to be made or secured, the court must apply the normal provisions governing the termination of the order as if the order had originally been made under the provisions of Sch 1 para 1(2)(a) or Sch 1 para 1(2)(b) (see para 539 ante): Sch 1 para 10(5). As to the duration and termination of orders generally see para 545 ante.

8 le an order under ibid Sch 1 para 10 (as amended) (see the text and notes 1-7 supra).

9 Ibid Sch 1 para 11(1). If a maintenance agreement is altered under these provisions, the agreement has effect thereafter as if the alteration had been made, immediately before the death, by agreement between the parties and for valuable consideration: Sch 1 para 11(2).

An application, except with leave of the court, may not be made after the end of the period of six months beginning with the day on which representation in regard to the estate of the deceased is first taken out: Sch 1 para 11(3). In considering the question of when representation was first taken out, a grant limited to settled land or to trust property is left out of account and a grant limited to real estate or to personal estate is left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time: Sch 1 para 11(4). A county court may not entertain such an application, or an application for leave to make an application, unless it would have jurisdiction to hear and determine proceedings for an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 691 et seq) in relation to the deceased's estate by virtue of the County Courts Act 1984 s 25 (as amended) (see COURTS vol 10 (Reissue) para 717): Children Act 1989 Sch 1 para 11(5). These provisions do not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiry of the period of six months referred to in Sch 1 para 11(3) on the ground that they ought to have taken into account the possibility that a court might grant leave for an application by virtue of Sch 1 para 11 to be made by the surviving party after that period: Sch 1 para 11(6). However, this does not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order altering the agreement: Sch 1 para 11(7).

## **UPDATE**

### **549 Alteration of maintenance agreements**

TEXT AND NOTES 1-7--See also Children Act 1989 Sch 1 para 10(8) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 32(3)) (second female parent).

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### **550. Power of local authority to contribute to child's maintenance.**

Where a child<sup>1</sup> lives, or is to live, with a person<sup>2</sup> as the result of a residence order<sup>3</sup>, a local authority<sup>4</sup> may make contributions to that person towards the cost of the accommodation and maintenance of the child<sup>5</sup>.

1 For the meaning of 'child' see para 3 ante.

2 These provisions do not apply where the person in question is a parent of the child or the husband, wife or civil partner of a parent of the child: Children Act 1989 Sch 1 para 15(2) (amended by the Civil Partnership Act 2004 s 78(1), (3)). For this purpose, the extended meaning of 'parent' does not apply: see the Children Act 1989 Sch 1 para 16(2); and para 539 note 4 ante.

3 As to residence orders see para 262 ante. As to references to person with whom a child lives, or is to live, as a result of a residence order see para 262 note 3 ante.

4 For the meaning of 'local authority' see para 138 note 13 ante.

5 Children Act 1989 Sch 1 para 15(1).

### **UPDATE**

### **550 Power of local authority to contribute to child's maintenance**

NOTE 5--See *R (on the application of M) v Birmingham City Council* [2008] EWHC 1863 (Admin), [2009] PTSR (CS) 3, [2008] All ER (D) 72 (Oct).

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Enforcement of financial relief orders.

### **551. Enforcement of financial relief orders.**

An order for the payment of money made by a magistrates' court under the Children Act 1989 is enforceable as a magistrates' court maintenance order<sup>1</sup>.

Any person for the time being under an obligation to make payments in pursuance of an order for the payment of money made by a magistrates' court under the Children Act 1989 must give notice of any change of address to such person, if any, as may be specified in the order<sup>2</sup>. Failure to do so is an offence<sup>3</sup>.

1 Children Act 1989 Sch 1 para 12(3). As to magistrates' court maintenance orders (ie within the meaning of the Magistrates' Courts Act 1980 s 150(1) (as amended)) see MAGISTRATES vol 29(2) (Reissue) para 823.

2 Children Act 1989 Sch 1 para 12(1).

3 Any person failing without reasonable excuse to give a notice under ibid Sch 1 para 12(1) (see the text and note 2 supra) is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale: Sch 1 para 12(2). As to the standard scale see para 132 note 2 ante.

Where any offence under the Children Act 1989 is committed by a body corporate, and the offence is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and is liable to be proceeded against and punished accordingly: s 103.

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## **(5) FINANCIAL ORDERS FOR CHILDREN UNDER OTHER STATUTORY PROVISIONS**

### **552. Financial orders for children in matrimonial and other proceedings.**

The court has power to make financial orders relating to children under the Matrimonial Causes Act 1973 on granting a decree of divorce, a decree of nullity of marriage, or a decree of judicial separation, or at any time thereafter<sup>1</sup>, or on an application for an order on the ground that a party to the marriage has failed to provide or to make proper contribution towards reasonable maintenance for any child of the family<sup>2</sup>. The court also has power to make financial orders relating to children under the Civil Partnership Act 2004 on making a dissolution order, a nullity order or a separation order, or at any time thereafter, or on an application for an order on the ground that a civil partner has failed to provide or to make proper contribution towards reasonable maintenance for any child of the family<sup>3</sup>. There is also power: (1) to make financial orders under the Matrimonial and Family Proceedings Act 1984<sup>4</sup> in cases where a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country and that divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales<sup>5</sup>; and (2) to make financial orders after a civil partnership has been dissolved or annulled, or civil partners have been legally separated, in a country outside the British Islands<sup>6</sup>. The court may also make financial orders under the Domestic Proceedings and Magistrates' Courts Act 1978<sup>7</sup>, and a magistrates' court may also make corresponding provision in respect of civil partners<sup>8</sup>.

1 See the Matrimonial Causes Act 1973 s 23(1) (prospectively substituted), s 24(1) (as amended; prospectively substituted); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 458 et seq. As to the jurisdiction of the court to make financial orders under the Children Act 1989 Sch 1 (as amended) (see para 539 et seq ante) in proceedings between parties who have previously entered into a final order for ancillary relief under the Matrimonial Causes Act 1973 see *MB v KB* [2007] EWHC 789 (Fam).

2 See the Matrimonial Causes Act 1973 s 27(1)(b) (as substituted); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 542 et seq.

3 See the Civil Partnership Act 2004 s 72(1), Sch 5; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

4 See the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq.

5 See *ibid* s 12(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530.

6 See the Civil Partnership Act 2004 s 72(4), Sch 7; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq.

7 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 (as amended), s 6 (as substituted and amended), s 7 (as amended; prospectively further amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553 et seq.

8 See the Civil Partnership Act 2004 s 72(3), Sch 6 para 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 553.

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## **(6) CHILD SUPPORT**

### **553. The original scheme.**

The Child Support Act 1991, as originally enacted<sup>1</sup>, made provision for the Secretary of State, acting through the Child Support Agency<sup>2</sup>, to undertake the assessment, collection and enforcement of periodical maintenance payable by certain parents (known as 'absent parents'<sup>3</sup>) with respect to children of theirs who were not in their care<sup>4</sup>. The scheme provided for the Child Support Agency to exercise almost exclusive jurisdiction in respect of child maintenance issues and curtailed the jurisdiction of the courts in respect of such issues<sup>5</sup>. At the heart of the scheme was the 'maintenance assessment', that is, the sum payable by an absent parent to the parent with care of the child in question<sup>6</sup>. The calculation of the maintenance assessment was the responsibility of the Child Support Agency and was arrived at by means of a detailed and complex prescribed formula, which has come to be regarded as unduly complex and cumbersome and is considered to be one of the principal reasons for the need to reform the system<sup>7</sup>.

In addition, the original scheme introduced a system under which parents with the care of children who were in receipt of certain state benefits were automatically treated as having applied for a maintenance assessment, regardless of whether or not they actually chose to pursue such an application and, moreover, under which any payments made to such a parent were generally received by the parent with care only if the amount of those payments exceeded the level of qualifying state benefits received by that parent<sup>8</sup>.

1 The Child Support Act 1991 received Royal Assent on 25 July 1991 and was brought into force in two principal stages: first, certain provisions were brought into force on 17 June 1992 for the purpose of making regulations and other procedural matters (see the Child Support Act 1991 (Commencement No 1) Order 1992, SI 1992/1431); and then the more substantive provisions were brought into force on 5 April 1993 (see the Child Support Act 1991 (Commencement No 3 and Transitional Provisions) Order 1992, SI 1992/2644).

2 The Child Support Agency is not established by statute. As to the Secretary of State see para 155 ante. Note that any function of the Secretary of State relating to child support under or by virtue of the provisions of the Child Support Act 1991 may be exercised by, or by employees of, such person (if any) as may be authorised by the Secretary of State, with the exception of functions under s 15, s 35, s 39A (as added) or s 40B (as added), or any other functions excluded from the Deregulation and Contracting Out Act 1994 s 69 by s 71 (see LOCAL GOVERNMENT VOL 69 (2009) PARA 407): Contracting Out (Functions Relating to Child Support) Order 2006, SI 2006/1692, art 2.

3 In the Child Support Act 1991 (as originally enacted), the parent of any child was an 'absent parent' in relation to that child if he was not living in the same household with the child and the child had his home with a person who was, in relation to him, a person with care: see s 3(2) (as originally enacted). As to shared care for a child see *C v Secretary of State for Work and Pensions* [2002] EWCA Civ 1854, [2003] 2 FCR 325, [2003] 1 FLR 829. For these purposes, 'parent', in relation to any child, means any person who is in law the mother or father of the child: Child Support Act 1991 s 54.

Provision is made to facilitate the operation of the child support scheme where parentage is disputed (see s 26 (amended by the Social Security Act 1998 s 86(1), Sch 7 para 31; the Child Support, Pensions and Social Security Act 2000 ss 1(2)(a), 15, 26, 83(5), 85, Sch 3 para 11(1), (8), Sch 8 paras 11, 12, Sch 9 Pt IX; the Adoption and Children Act 2002 s 139(1), Sch 3 para 81; and the Children (Northern Ireland) Consequential Amendments) Order 1995, SI 1995/756, art 13); and *R v Secretary of State for Social Security, ex p West* [1999] 3 FCR 574, [1999] 1 FLR 1233, CA; *R v Secretary of State for Social Security, ex p W* [1999] 3 FCR 693, [1999] 2 FLR 604, for declarations of parentage (see the Child Support Act 1991 s 27 (substituted by the Child Support, Pensions and Social Security Act 2000 Sch 8 para 13)) and for the funding of scientific tests aimed at

establishing parentage (see the Child Support Act 1991 s 27A (added by the Child Support Act 1995 s 21; and amended by the Child Support, Pensions and Social Security Act 2000 s 1(2), Sch 3 para 11(9), Sch 8 para 14)).

Refusal to take a test may lead to a person's benefit being reduced (see the Child Support Act 1991 s 46 (substituted by the Child Support, Pensions and Social Security Act 2000 s 19; and prospectively amended by the Welfare Reform Act 2007 Sch 3 para 7(4), (5))). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007. As to the reduction of a person's benefit under the Child Support Act 1991 s 46 (as substituted; prospectively amended) see *Roach v Secretary of State for Work and Pensions* [2006] EWCA Civ 1746, [2007] 1 FCR 238, [2007] 1 FLR 2167.

- 4 See the Child Support Act 1991, long title (as originally enacted).
- 5 See para 560 post.
- 6 See para 558 post.
- 7 See para 562 et seq post.
- 8 See the Child Support Act 1991 ss 6, 43 (as originally enacted); and paras 557, 559 post.

## UPDATE

### 553-563 Child Support

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

### 553 The original scheme

NOTE 3--Child Support Act 1991 ss 26, 27A further amended, s 27 amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 paras 18-20, Sch 8. Child Support Act 1991 s 26 further amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 36. Child Support Act 1991 s 46 repealed: Child Maintenance and Other Payments Act 2008 s 15(b), Sch 8.

TEXT AND NOTE 8--Child Support Act 1991 s 6 repealed: Child Maintenance and Other Payments Act 2008 s 15(a), Sch 8.

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#### **554. Amendments to the original scheme.**

Since the enactment of the Child Support Act 1991<sup>1</sup> substantial amendments have been made by, inter alia, the Child Support Act 1995, the Social Security Act 1998, and the Child Support, Pensions and Social Security Act 2000<sup>2</sup>.

The Child Support, Pensions and Social Security Act 2000 made provision for a new scheme, to be applied to all applications for maintenance calculations<sup>3</sup> made on or after 3 March 2003<sup>4</sup>, under which the formula to be applied was much simplified and the jurisdiction of the Child Support Agency was strengthened still further<sup>5</sup>. The Child Support, Pensions and Social Security Act 2000 also altered the language of the Child Support Act 1991 by substituting 'non-resident parents' for the previous reference to 'absent parents'<sup>6</sup> and by describing the payable sum under the new formula as a 'maintenance calculation' rather than a 'maintenance assessment'<sup>7</sup>.

At the date at which this volume states the law the statutory child support scheme is once again in flux and the future of the Child Support Agency is uncertain, precluding a comprehensive statement of the law in this work<sup>8</sup>.

<sup>1</sup> See para 553 note 1 ante.

<sup>2</sup> See paras 555-560 post.

<sup>3</sup> See the text and note 7 infra.

<sup>4</sup> I.e. the 'effective date' for the purposes of the new scheme: see in particular the Child Support, Pensions and Social Security Act 2000 (Commencement No 12) Order 2003, SI 2003/192, arts 1, 3, 8.

<sup>5</sup> See para 557 post. In connection with the transition between the original scheme and the scheme as amended by the Child Support, Pensions and Social Security Act 2000 see s 29; and the Child Support (Transitional Provisions) Regulations 2000, SI 2000/3186 (amended by SI 2002/1204; SI 2003/328; SI 2003/347; SI 2003/2779; SI 2004/2415; SI 2005/785).

<sup>6</sup> See the Child Support Act 1991 s 3(2) (amended by the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 11(1), (2)), providing that the parent of any child is a 'non-resident parent' in relation to that child if he is not living in the same household with the child and the child has his home with a person who is, in relation to him, a person with care. This definition corresponds exactly to the former definition of 'absent parent' (see para 553 note 3 ante) but for the change in terminology. For the meaning of 'parent' see para 553 note 3 ante.

<sup>7</sup> 'Maintenance calculation' means a calculation of maintenance made under the Child Support Act 1991 and, except in prescribed circumstances, includes a default maintenance decision and an interim maintenance decision: s 54 (amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(20)(d)). 'Maintenance assessment' meant an assessment of maintenance made under the Child Support Act 1991 and, except in prescribed circumstances, included an interim maintenance assessment: s 54 (as originally enacted).

As to the mechanism by which maintenance calculations are applied for see ss 4, 5 (amended by the Children (Scotland) Act 1995 s 104(4), (5), Sch 4 para 52(3), Sch 5; the Social Security Act 1998 s 86(1), (2), Sch 7 para 19, Sch 8; and the Child Support, Pensions and Social Security Act 2000 ss 1(2), 2, Sch 3 para 11(2), (3)); the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157 (amended by SI 2002/1204; SI 2003/347; SI 2003/828; SI 2003/2779; SI 2004/2415; SI 2005/785; SI 2006/1520); the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (amended by SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1996/2907; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/161; SI 2002/1204; SI 2003/347; SI 2003/3206; SI 2004/1823; SI 2004/2415; SI 2005/617; SI 2005/2877; SI 2006/362; SI 2006/1520; SI 2007/1979); and (in connection with the former system of maintenance assessments) the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (amended by SI 1993/913; SI 1994/227; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/1345; SI 1996/1945; SI 1996/2538;



SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1998/2799; SI 1999/977; SI 1999/1047; SI 1999/2566; SI 2000/897; SI 2000/1596; SI 2002/1703; SI 2003/328; SI 2003/1050; SI 2003/2779; SI 2004/2415; SI 2005/785; revoked with savings by SI 2001/157). See also *AMS v Child Support Officer* [1998] 2 FCR 622, [1998] 1 FLR 955, CA; *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, [2005] 2 FCR 683.

A fee may be payable: see the Child Support Act 1991 s 47 (amended by the Child Support Act 1995 Sch 3 para 13; the Jobseekers Act 1995 s 41(4), Sch 2 para 20(5); the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(2), (18); and the Tax Credits Act 2002 s 47, Sch 3 para 22; and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 7(1), (6)). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Welfare Reform Act 2007.

See also the Child Support, Pensions and Social Security Act 2000 s 27 (temporary compensation payment scheme); and the Child Support (Temporary Compensation Payment Scheme) Regulations 2000, SI 2000/3174 (amended by SI 2002/1854).

8 The Department of Work and Pensions issued a White Paper, *A New System of Child Maintenance* (December 2006; Cm 6979), envisaging a substantial amendment to the existing scheme; and the Child Maintenance and Other Payments Bill, based upon the proposals in the White Paper, was introduced in the House of Commons on 5 June 2007: see paras 562-563 post.

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

### **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

### **554 Amendments to the original scheme**

NOTE 5--SI 2000/3186 amended: SI 2008/2543, SI 2008/2544.

NOTE 7--Child Support Act 1991 s 4 further amended: Child Maintenance and Other Payments Act 2008 Sch 3 para 3. Child Support Act 1991 s 47 repealed: Child Maintenance and Other Payments Act 2008 Sch 8. SI 1992/1813 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544, SI 2008/2683, SI 2009/396, SI 2009/2909. SI 2000/3174 further amended: SI 2008/2683. SI 2001/157 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544, SI 2009/2909.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(6) CHILD SUPPORT/555. Basic principles of the current scheme.

### 555. Basic principles of the current scheme.

The essence of the current scheme in respect of child maintenance<sup>1</sup> is that each parent<sup>2</sup> of a qualifying child<sup>3</sup> is responsible for maintaining him<sup>4</sup>. A non-resident parent<sup>5</sup> meets this responsibility by making periodical payments determined in accordance with the Child Support Act 1991<sup>6</sup>, and is under a duty to make such payments<sup>7</sup>. Where, in any case which falls to be dealt with under the Child Support Act 1991, the Secretary of State is considering the exercise of any discretionary power conferred by that Act, he must have regard to the welfare of any child likely to be affected by his decision<sup>8</sup>.

1 The scheme in operation under the Child Support Act 1991 (as amended) (see para 554 ante).

2 For the meaning of 'parent' see para 553 note 3 ante.

3 For the purposes of the Child Support Act 1991, a person is a 'child' if:

284 (1) he is under the age of 16 (s 55(1)(a));

285 (2) he is under the age of 19 and receiving full time education (which is not advanced education) either by attendance at a recognised educational establishment or elsewhere, if the education is recognised by the Secretary of State (s 55(1)(b)); and, in determining whether a person falls within this provision, no account may be taken of such interruptions in his education as may be prescribed (s 55(6)); or

286 (3) he does not fall within head (1) or head (2) above but he is under the age of 18 and prescribed conditions are satisfied with respect to him (s 55(1)(c)).

'Advanced education' means education of a prescribed description, and 'recognised educational establishment' means an establishment recognised by the Secretary of State for these purposes as being, or as comparable to, a university, college or school: s 55(3). Where a person has reached the age of 16, the Secretary of State may recognise education provided for him otherwise than at a recognised educational establishment only if he is satisfied that education was being so provided for him immediately before he reached the age of 16: s 55(4). The Secretary of State may also provide that, in prescribed circumstances, education is or is not to be treated for these purposes as being full time (s 55(5)); and he may by regulations provide that a person who ceases to fall within s 55(1) be treated as continuing to fall within that provision for a prescribed period (s 55(7)), although no person may be treated as continuing to fall within s 55(1) by virtue of regulations made under s 55(7) after the end of the week in which he reaches the age of 19 (s 55(8)). For the descriptions of education and periods so prescribed, for the establishments so recognised, for the circumstances in which education is or is not to be treated as being full time and in which interruptions to a person's education may and may not be considered, and for the conditions referred to in head (3) supra, for the purposes of the scheme as it has effect after 3 March 2003 see the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157, reg 1(3), Sch 1; and in connection with the scheme having effect before 3 March 2003 see the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813, reg 1(4), Sch 1 (amended by SI 1993/913; SI 1996/1345; SI 1999/977; SI 1999/1047; revoked with savings by SI 2001/157). See para 554 ante.

A person is not a child for these purposes if he is or has been married or a civil partner; has celebrated a marriage, or been a party to a civil partnership, which is void; or has celebrated a marriage in respect of which a decree of nullity has been granted or has been a party to a civil partnership in respect of which a nullity order has been made: Child Support Act 1991 s 55(2) (amended by the Civil Partnership Act 2004 s 254(1), Sch 24 para 3).

A child is a 'qualifying child' if one of his parents is, in relation to him, a non-resident parent (formerly an 'absent parent': see paras 553 note 3, 554 note 6 ante) or both of his parents are, in relation to him, non-resident parents: Child Support Act 1991 s 3(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 11(1), (2)).

4 Child Support Act 1991 s 1(1). As a corollary of this, nothing in the Child Support Act 1991 prevents any person from entering into an agreement for the making of periodical payments for the benefit of a child (see s 9

(amended by the Child Support Act 1995 s 18(4); and the Child Support, Pensions and Social Security Act 2000 s 1(2)(a), Sch 3 para 11(2), (6))), although such an agreement may be affected by the operation of the legislation (see the Child Support Act 1991 s 10 (amended by the Social Security Act 1998 s 86(1), Sch 7 para 23; and the Child Support, Pensions and Social Security Act 2000 s 1(2)(a), Sch 3 para 11(2), (6)); the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645 (amended by SI 1993/913; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1999/1510; SI 2001/161; SI 2002/2469; SI 2003/192; SI 2003/247; SI 2004/696; SI 2005/617; SI 2005/785; SI 2005/2877); and *AMS v Child Support Officer* [1998] 2 FCR 622, [1998] 1 FLR 955, CA). Provision is made for voluntary payments to be set-off against calculations and assessments made pursuant to the legislation: see the Child Support Act 1991 s 28j (added by the Child Support, Pensions and Social Security Act 2000 s 20(1)); and the Child Support (Voluntary Payments) Regulations 2000, SI 2000/3177.

5 For the meaning of 'non-resident parent' see para 554 note 6 ante.

6 Child Support Act 1991 s 1(2) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(2)). Provision is made for the Child Support Act 1991 to operate in a modified form in relation to cases involving more than one child or carer or where both parents of a child are absent: see s 42 (amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(1), (2)); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (amended by SI 1993/913; SI 1994/227; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/1345; SI 1996/1945; SI 1996/2538; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1998/2799; SI 1999/977; SI 1999/1047; SI 1999/2566; SI 2000/897; SI 2000/1596; SI 2002/1703; SI 2003/328; SI 2003/1050; SI 2003/2779; SI 2004/2415; SI 2005/785; revoked with savings by SI 2001/157); the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 (amended by SI 1993/913; SI 1993/925; SI 1994/227; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/481; SI 1996/1345; SI 1996/1803; SI 1996/1945; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2002/1204; SI 2002/2469; SI 2003/328; SI 2003/762; SI 2003/2779; SI 2004/1748; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2006/217; SI 2007/1979; SI 2007/2538; revoked with savings by SI 2001/155); the Child Support Departure Direction and Consequential Amendments Regulations 1996, SI 1996/2907 (amended by SI 1998/58; SI 1999/1047; SI 2000/897; SI 2000/1596; SI 2002/1204; SI 2002/1703; SI 2003/328; SI 2003/347; SI 2003/2779; SI 2005/2877; revoked with savings by SI 2001/156); and the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, SI 2001/155 (amended by SI 2002/1204; SI 2002/2497; SI 2002/3019; SI 2003/328; SI 2003/347; SI 2003/1195; SI 2003/2779; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2007/1979). See para 554 ante.

7 Child Support Act 1991 s 1(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(2)). Provision is made for the repayment of overpayments: Child Support Act 1991 s 41B (added by the Child Support Act 1995 s 23; and amended by the Child Support, Pensions and Social Security Act 2000 ss 1(2)(a), 20, Sch 3 para 11(2)).

8 Child Support Act 1991 s 2 (amended by the Social Security Act 1998 s 86(1), (2), Sch 7 para 18, Sch 8). See also *R v Secretary of State for Social Security, ex p Biggin* [1995] 1 FLR 851. As to whether the Secretary of State and the Child Support Agency owe a common law duty of care in connection with the discharge of their responsibilities under the Child Support Act 1991 see *Rowley v Secretary of State for the Department of Work and Pensions* [2007] EWCA Civ 598, [2007] All ER (D) 186 (Jun).

## UPDATE

### 553-563 Child Support

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

### 554-561 Amendments to the original scheme ... The child support commissioners

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI

1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

### **555 Basic principles of the current scheme**

TEXT AND NOTES--The Secretary of State may by regulations (1) make provision enabling the Child Maintenance and Enforcement Commission in prescribed circumstances to set off liabilities to pay child support maintenance to which this provision applies; (2) make provision enabling the Commission in prescribed circumstances to set off against a person's liability to pay child support maintenance to which this provision applies a payment made by the person which is of a prescribed description: Child Support Act 1991 s 41C(1) (s 41C added by the Child Maintenance and Other Payments Act 2008 s 31). See the Child Support (Management of Payments and Arrears) Regulations 2009, SI 2009/3151. Liability to pay child support maintenance is treated as satisfied to the extent that it is the subject of setting off under regulations under the Child Support Act 1991 s 41C(1): s 41C(2). In s 41C(1), the references to child support maintenance to which this provision applies are to child support maintenance for the collection of which the Commission is authorised to make arrangements: s 41C(3).

NOTE 3--SI 2001/157 Sch 1 further amended: SI 2009/2909.

NOTE 4--Child Support Act 1991 s 9 further amended: Child Maintenance and Other Payments Act 2008 Sch 8. Child Support Act 1991 s 10 further amended: Child Maintenance and Other Payments Act 2008 Sch 3 para 7. Child Support Act 1991 s 28 further amended: Child Maintenance and Other Payments Act 2008 Sch 3 para 31, Sch 8. SI 2000/3177 amended: SI 2008/2543. SI 1992/2645 further amended: SI 2009/2909.

NOTE 6--SI 1992/1815 further amended: SI 2009/736. SI 1996/2907 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2683, SI 2009/736. SI 1992/1813 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544, SI 2008/2683, SI 2009/396, SI 2009/2909. SI 2001/155 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544.

NOTE 7--Child Support Act 1991 s 41B further amended: Child Maintenance and Other Payments Act 2008 Sch 3 para 45.

TEXT AND NOTE 8--Child Support Act 1991 s 2 further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 para 2.

NOTE 8--See *R (on the application of Humphries) v Secretary of State for Work and Pensions* [2008] EWHC 1585 (Admin), [2009] 3 FCR 320.

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## **556. General jurisdiction.**

The Child Support Act 1991 provides that where, in general, the Secretary of State has jurisdiction to make a maintenance calculation<sup>1</sup> with respect to a qualifying child<sup>2</sup>, no court may exercise any power which it would otherwise have to make, vary or revive any maintenance order<sup>3</sup> in relation to such a child<sup>4</sup>. The effect of this is that there is only a very limited jurisdiction in the courts to make orders for child maintenance and that the general jurisdiction over the operation of the Child Support Act 1991 lies with the Child Support Agency<sup>5</sup>.

1 For the meaning of 'maintenance calculation' see para 554 note 7 ante.

2 For the meanings of 'child' and 'qualifying child' see para 555 note 3 ante.

3 In the Child Support Act 1991, 'maintenance order', in relation to any child, means an order which requires the making or securing of periodical payments to or for the benefit of the child and which is made under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 450 et seq), the Domestic Proceedings and Magistrates' Courts Act 1978 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW), the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 530 et seq), the Family Law (Scotland) Act 1985, the Children Act 1989 Sch 1 (as amended) (see para 539 et seq ante), the Civil Partnership Act 2004 Sch 5, 6 or 7 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW), or any other prescribed enactment; and includes any order varying or reviving such an order: Child Support Act 1991 s 8(11) (amended by the Civil Partnership Act 2004 ss 254(1), 261(4), Sch 24 para 1, Sch 30). See also the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645 (amended by SI 1993/913; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1999/1510; SI 2001/161; SI 2002/2469; SI 2003/192; SI 2003/247; SI 2004/696; SI 2005/617; SI 2005/785; SI 2005/2877). See further *AMS v Child Support Officer* [1998] 2 FCR 622, [1998] 1 FLR 955, CA; *Dorney-Kingdom v Dorney-Kingdom* [2000] 3 FCR 20, [2000] 2 FLR 855, CA.

4 Child Support Act 1991 s 8(1), (3) (s 8(1) amended by the Social Security Act 1998 s 86(1), Sch 7 para 22; and the Child Support Act 1991 s 8(1), (3) amended by the Child Support, Pensions and Social Security Act 2000 ss 1(2), 26, Sch 3 para 11(1), (2), (5)). See *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *V v V (child maintenance)* [2001] 2 FLR 799, [2001] All ER (D) 248 (Jun); *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, [2005] 2 FCR 683. See also the Family Proceedings Rules 1991, SI 1991/1247, rr 10.24, 10.25 (both added by SI 1993/295).

5 See paras 557, 560 post. Persons involved in the administration of the child support scheme have a duty of confidentiality: see the Child Support Act 1991 s 50 (amended by the Social Security Act 1998 s 86(1), Sch 7 para 45; the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 36, Sch 7; and the Adults with Incapacity (Scotland) Act 2000 (Consequential Modifications) (England, Wales and Northern Ireland) Order 2005, SI 2005/1790, art 2); and the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (amended by SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1996/2907; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/161; SI 2002/1204; SI 2003/347; SI 2003/3206; SI 2004/1823; SI 2004/2415; SI 2005/617; SI 2005/2877; SI 2006/362; SI 2006/1520; SI 2007/1979). See also *Re C (a minor) (Child Support Agency: disclosure)* [1995] 1 FCR 202, [1995] 1 FLR 201.

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

## **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

## **556 General jurisdiction**

TEXT AND NOTES 1-4--Child Support Act 1991 s 8(1) further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 para 6, Sch 8.

NOTE 3--SI 1992/2645 further amended: SI 2009/2909.

NOTE 5--Child Support Act 1991 s 50 further amended: Child Maintenance and Other Payments Act 2008 Sch 7 para 1(19)-(21), Sch 8; SI 2008/2833.

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### **557. Jurisdiction of the Child Support Agency.**

The Secretary of State, operating through the Child Support Agency, has jurisdiction in respect of all applications made to him for a maintenance calculation<sup>1</sup> in respect of a qualifying child<sup>2</sup>. In respect of a parent with care<sup>3</sup> of a qualifying child who is also in receipt of certain prescribed state benefits, the Secretary of State has the power to make an application on that parent's behalf without the need for that parent to make an application<sup>4</sup>. In cases where the parent with care is not in receipt of a prescribed state benefit, the Secretary of State has a general duty to deal with any application in accordance with the Child Support Act 1991<sup>5</sup>. The Secretary of State does not have jurisdiction to make a maintenance calculation in respect of a person with care, a non-resident parent<sup>6</sup> or a qualifying child if that person is not habitually resident<sup>7</sup> in the United Kingdom unless in the case of a non-resident parent that person meets certain specific qualifying criteria<sup>8</sup>.

1 For the meaning of 'maintenance calculation' see para 554 note 7 ante.

2 Child Support Act 1991 s 11(1) (ss 11, 12 substituted by the Child Support, Pensions and Social Security Act 2000 ss 1(1), 4)). For savings in respect of amendments made by the Child Support, Pensions and Social Security Act 2000 see the Child Support, Pensions and Social Security Act 2000 (Commencement No 12) Order 2003, SI 2003/192, arts 3, 8. Provision is also made for default and interim maintenance decisions: see the Child Support Act 1991 s 12 (as so substituted); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (amended by SI 1993/913; SI 1994/227; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/1345; SI 1996/1945; SI 1996/2538; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1998/2799; SI 1999/977; SI 1999/1047; SI 1999/2566; SI 2000/897; SI 2000/1596; SI 2002/1703; SI 2003/328; SI 2003/1050; SI 2003/2779; SI 2004/2415; SI 2005/785; revoked with savings by SI 2001/157; and the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157 (amended by SI 2002/1204; SI 2003/347; SI 2003/828; SI 2003/2779; SI 2004/2415; SI 2005/785; SI 2006/1520). See para 554 ante. For the meanings of 'child' and 'qualifying child' see para 555 note 3 ante. In connection with assessments and calculations see also *Huxley v Child Support Officer* [2000] 1 FCR 448; *C v Secretary of State for Work and Pensions* [2002] EWCA Civ 1854, [2003] 2 FCR 325, [2003] 1 FLR 829; *Smith v Smith* [2004] EWCA Civ 1318, [2005] 1 WLR 1319, sub nom *Smith v Secretary of State for Work and Pensions* [2006] 2 FCR 487 (revsd [2006] UKHL 35, [2006] 3 All ER 907, [2006] 1 WLR 2024, [2006] 2 FCR 487); *Pabari v Secretary of State for Work and Pensions* [2004] EWCA Civ 1480, [2005] 1 All ER 287; *M v Secretary of State for Work and Pensions* [2004] EWCA Civ 1343, [2006] QB 380, sub nom *Secretary of State for Work and Pensions v M* [2004] 3 FCR 507.

Provision is also made enabling the Secretary of State, where necessary by the appointment of inspectors, to gather the information and evidence required to enable him to determine applications made under the Child Support Act 1991: see s 14 (amended by the Child Support Act 1995 s 30(5), Sch 3 para 3; the Social Security Act 1998 s 86(1), (2), Sch 7 para 27, Sch 8; and the Child Support, Pensions and Social Security Act 2000 ss 12, 26, Sch 3 para 11(1), (7)); the Child Support Act 1991 s 14A (added by the Child Support, Pensions and Social Security Act 2000 s 13); the Child Support Act 1991 s 15 (amended by the Child Support, Pensions and Social Security Act 2000 ss 14, 85, Sch 9 Pt 1; and the Civil Partnership Act 2004 s 254(1), Sch 24 para 2); the Child Support Act 1991 Sch 2 (amended by the Welfare Reform and Pensions Act 1999 s 80; the Child Support, Pensions and Social Security Act 2000 s 1(2), Sch 3 para 11(2); the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 42; and the Welfare Reform and Pensions (Northern Ireland) Order 1999, SI 1999/3147, art 71); the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (amended by SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1996/2907; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/161; SI 2002/1204; SI 2003/347; SI 2003/3206; SI 2004/1823; SI 2004/2415; SI 2005/617; SI 2005/2877; SI 2006/362; SI 2006/1520; SI 2007/1979); the Child Support Departure Direction and Consequential Amendments Regulations 1996, SI 1996/2907 (amended by SI 1998/58; SI 1999/1047; SI 2000/897; SI 2000/1596; SI 2002/1204; SI 2002/1703; SI 2003/328; SI 2003/347; SI 2003/2779; SI 2005/2877; revoked with savings by SI 2001/156); and the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, SI 2001/155 (amended by SI 2002/1204; SI 2002/2497; SI 2002/3019; SI 2003/328; SI 2003/347; SI 2003/1195; SI 2003/2779; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2007/1979). Provision is also made for the revision of the Secretary of State's decisions regarding maintenance calculations in appropriate cases and for subsequent decisions to supersede

earlier decisions (see the Child Support Act 1991 ss 16, 17 (both substituted by the Social Security Act 1998 s 40; and amended by the Child Support, Pensions and Social Security Act 2000 ss 8, 9, Sch 9 Pt 1); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (as so amended); and the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (amended by SI 1999/1466; SI 1999/1623; SI 1999/1662; SI 1999/1670; SI 1999/2677; SI 2000/119; SI 2000/127; SI 2000/897; SI 2000/1596; SI 2000/1982; SI 2000/3030; SI 2000/3185; SI 2001/158; SI 2001/518; SI 2001/1711; SI 2001/4022; SI 2002/398; SI 2002/428; SI 2002/490; SI 2002/1204; SI 2002/1379; SI 2002/1703; SI 2002/3019; SI 2002/3197; SI 2003/129; SI 2003/328; SI 2003/492; SI 2003/916; SI 2003/1050; SI 2003/1189; SI 2003/1581; SI 2003/1731; SI 2003/1886; SI 2003/2274; SI 2004/647; SI 2004/959; SI 2004/2283; SI 2004/2327; SI 2004/2415; SI 2004/3368; SI 2005/337; SI 2005/2677; SI 2005/2878; SI 2006/2377; SI 2007/917), for an appeal to be made to an appeal tribunal against a decision or decisions made in respect of an application for a maintenance calculation (see the Child Support Act 1991 s 20 (substituted by the Social Security Act 1998 s 42; further substituted and amended by the Child Support, Pensions and Social Security Act 2000 ss 1(2), 10); the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (as so amended); the Family Proceedings Rules 1991, SI 191/1247, r 3.22 (added by SI 1993/295; and amended by SI 2001/821); the Family Proceedings Rules 1991, SI 191/1247, r 10.21A (added by SI 1993/295; and amended by SI 2005/1976; SI 2007/2187)), and for the administration of cases and appeals generally (see the Child Support Act 1991 ss 28ZA-28ZD (all added by the Social Security Act 1998 ss 43, 44; the Child Support Act 1991 ss 28ZA-28ZC amended by the Child Support, Pensions and Social Security Act 2000 s 1(2), Sch 3 para 11(11)-(13); and the Child Support Act 1991 ss 28ZB, 28ZC further amended by the Constitutional Reform Act 2005 ss 40(4), 59(5), Sch 9 para 54, Sch 11 para 1(2)); and the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (as so amended)). Decisions of the Secretary of State and the appeal tribunal are, subject to provision made by regulations, final: see the Child Support Act 1991 ss 46A, 46B (both added by the Social Security Act 1998 s 86(1), Sch 7 para 44; and the Child Support Act 1991 s 46B amended by the Child Support, Pensions and Social Security Act 2000 Sch 9 Pt 1); and the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (as so amended).

3     le a person who is, in relation to a child, both a parent (see para 553 note 3 ante) and a person with care: Child Support Act 1991 s 54 (amended by the Child Support Act 1995 s 30(5), Sch 3 para 16). A person is a 'person with care', in relation to any child, if he is a person with whom the child has his home, who usually provides day to day care for the child (whether exclusively or in conjunction with any other person) and who does not fall within a prescribed category of person: Child Support Act 1991 s 3(3). The Secretary of State may not for this purpose prescribe as a category parents, guardians or persons in whose favour residence orders under the Children Act 1989 s 8 (see para 262 ante) are in force: Child Support Act 1991 s 3(4)(a)-(c). For the prescribed categories of person who cannot be a person with care for these purposes see the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157, reg 21; and in connection with the scheme having effect before 3 March 2003 see the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813, reg 51 (amended by SI 1993/913; revoked with savings by SI 2001/157). See para 554 ante.

4     Child Support Act 1991 s 6(1), (3) (s 6 substituted by the Child Support, Pensions and Social Security Act 2000 s 3; and the Child Support Act 1991 s 6(1) prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 7(1), (3)). See also the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (as amended: see note 2 supra); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (as amended: see note 2 supra). See further *Secretary of State for Social Security v Harmon*, *Secretary of State for Social Security v Carter*, *Secretary of State for Social Security v Cocks* [1999] 1 WLR 163, [1999] 1 FCR 213, [1998] 2 FLR 598, CA; *R v Secretary of State for Social Security, ex p Harris* [1999] 1 FLR 837, [1999] Fam Law 296. The Secretary of State may not act under the Child Support Act 1991 s 6(3) (as substituted) if the parent asks him not to (and such a request need not be in writing) (s 6(5) (as so substituted)), although this may lead to that parent's benefit being reduced (see s 46 (substituted by the Child Support, Pensions and Social Security Act 2000 s 19; and prospectively amended by the Welfare Reform Act 2007 Sch 3 para 7(4), (5)); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (as so amended); and the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157 (as so amended)). As to the reduction of a person's benefit under the Child Support Act 1991 s 46 (as substituted; prospectively amended) see *Roach v Secretary of State for Work and Pensions* [2006] EWCA Civ 1746, [2007] 1 FCR 238, [2007] 1 FLR 2167. A fee may be payable: see the Child Support Act 1991 s 47 (amended by the Child Support Act 1995 Sch 3 para 13; the Jobseekers Act 1995 s 41(4), Sch 2 para 20(5); the Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(2), (18); and the Tax Credits Act 2002 s 47, Sch 3 para 22; and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 7(1), (6)). At the date at which this volume states the law no day had been appointed for the coming into force of the amendments made by the Welfare Reform Act 2007.

5     Child Support Act 1991 s 11(1), (2) (as substituted: see note 2 supra).

6     For the meaning of 'non-resident parent' see para 554 note 6 ante.

7     As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq.



8 Child Support Act 1991 s 44(1), (2A) (s 44(1) amended by the Social Security Act 1998 s 86(1), Sch 7 para 41; and the Child Support Act 1991 s 44(1) further amended, and s 44(2A) added, by the Child Support, Pensions and Social Security Act 2000 ss 1(2)(a), 22(1)-(3), Sch 3 para 11(2)). See also the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645 (amended by SI 1993/913; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1999/1510; SI 2001/161; SI 2002/2469; SI 2003/192; SI 2003/247; SI 2004/696; SI 2005/617; SI 2005/785; SI 2005/2877). The conditions are that the person not habitually resident in the United Kingdom is employed in the civil service of the Crown or is a member of the armed forces, or is employed by a company or other body meeting certain prescribed conditions: see the Child Support Act 1991 s 44(2A) (as so added). For the prescribed conditions see the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645, reg 7A (added by SI 2001/161; and amended by SI 2002/2469; SI 2004/696)).

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

### **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

### **557 Jurisdiction of the Child Support Agency**

TEXT AND NOTES 1, 2 ,5--Child Support Act 1991 s 11(1), (2) amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 para 8.

NOTE 2--Child Support Act 1991 s 12, 14A amended, ss 14-17, 20, 28ZA, 28ZC further amended: Child Maintenance and Other Payments Act 2008 s 36, Sch 3 paras 10-14, 22-24, Sch 8. Child Support Act 1991 ss 16, 17, 20, 28ZA-28ZD, 46A, 46B amended: SI 2008/2833. Child Support Act 1991 Sch 2 repealed: Child Maintenance and Other Payments Act 2008 Sch 8. Child Support Act 1991 ss 16, 17, 20, 28ZA, 28ZB, 28ZC, 28ZD, 46A, 46B amended: Sch 8; SI 2008/2833. SI 1992/1813 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544, SI 2008/2683, SI 2009/396, SI 2009/2909. SI 1996/2907 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2683, SI 2009/736. SI 1999/991 further amended: SI 2007/2470, SI 2007/2582, SI 2008/787, SI 2008/1042, SI 2008/1554, SI 2008/1596, SI 2008/1957, SI 2008/2365, SI 2008/2543, SI 2008/2544, SI 2008/2656, SI 2008/2667, SI 2008/2683, SI 2009/396, SI 2009/659, SI 2009/1490, SI 2009/2715, SI 2009/3151, SI 2010/424. SI 2001/155, SI 2001/157 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544. SI 2001/157 further amended: SI 2009/2909. Child Support Act 1991 s 46A amended, s 46B further amended as a result of the

transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 paras 48, 49.

See *Child Support Agency v Forrest* [2010] EWHC 1264 (Admin), [2010] All ER (D) 126 (May), DC.

TEXT AND NOTES 3, 4--Child Support Act 1991 ss 6, 46 repealed: Child Maintenance and Other Payments Act 2008 s 15, Sch 8.

NOTE 4--Child Support Act 1991 s 47 repealed: Child Maintenance and Other Payments Act 2008 Sch 8.

TEXT AND NOTES 6-8--Child Support Act 1991 s 44(1) further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 para 46.

NOTE 8--Child Support Act 1991 s 44(2A) amended: SI 2009/1941. SI 1992/2645 further amended: SI 2009/2909.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(6) CHILD SUPPORT/558. Making a maintenance calculation.

### 558. Making a maintenance calculation.

Prior to the changes introduced by the Child Support, Pensions and Social Security Act 2000, a complex formula for making maintenance assessments<sup>1</sup> was established by the Child Support Act 1991 and the detailed subordinate legislation made thereunder<sup>2</sup>. An absent parent's<sup>3</sup> maintenance obligation was calculated in accordance with that formula, which took into account many factors including the income of both the parent with care<sup>4</sup> and the absent parent<sup>5</sup>. The formula was much simplified by the amendments made by the Child Support, Pensions and Social Security Act 2000 (which have effect in relation to applications for child maintenance made to the Secretary of State, operating through the Child Support Agency, after 3 March 2003<sup>6</sup>), under which the income of the person with care is no longer taken into account<sup>7</sup>. The current formula has at its core a requirement that the non-resident parent<sup>8</sup> pays a fixed percentage of his net weekly income<sup>9</sup> as child maintenance to the person with care<sup>10</sup>, namely 15 per cent where that non-resident parent is the parent of one qualifying child<sup>11</sup>, 20 per cent where there are two qualifying children, and 25 per cent where there are three or more qualifying children<sup>12</sup>. The scheme provides for adjustments to that formula in accordance with certain factors and in particular in accordance with the number of nights that the child in question spends with the non-resident parent<sup>13</sup> and the presence of any other relevant children<sup>14</sup> that the non-resident parent is permitted to have taken into account<sup>15</sup>. The sums payable under the new formula may be varied if the circumstances of a particular case meet certain detailed conditions<sup>16</sup>.

1 These are now known as 'maintenance calculations': see para 554 note 7 ante.

2 See the Child Support Act 1991 Sch 1 (as originally enacted); and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 (amended by SI 1993/913; SI 1993/925; SI 1994/227; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/481; SI 1996/1345; SI 1996/1803; SI 1996/1945; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2002/1204; SI 2002/2469; SI 2003/328; SI 2003/762; SI 2003/2779; SI 2004/1748; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2006/217; SI 2007/1979; SI 2007/2538; revoked with savings by SI 2001/155). In connection with maintenance calculations under the original formula see also the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (amended by SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1996/2907; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/161; SI 2002/1204; SI 2003/347; SI 2003/3206; SI 2004/1823; SI 2004/2415; SI 2005/617; SI 2005/2877; SI 2006/362; SI 2006/1520; SI 2007/1979); the Child Support (Maintenance Assessment Procedure) Regulations 1992, SI 1992/1813 (amended by SI 1993/913; SI 1994/227; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/1345; SI 1996/1945; SI 1996/2538; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1998/2799; SI 1999/977; SI 1999/1047; SI 1999/2566; SI 2000/897; SI 2000/1596; SI 2002/1703; SI 2003/328; SI 2003/1050; SI 2003/2779; SI 2004/2415; SI 2005/785; revoked with savings by SI 2001/157); the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645 (amended by SI 1993/913; SI 1995/123; SI 1995/1045; SI 1995/3261; SI 1999/1510; SI 2001/161; SI 2002/2469; SI 2003/192; SI 2003/247; SI 2004/696; SI 2005/617; SI 2005/785; SI 2005/2877); and the Child Support Departure Direction and Consequential Amendments Regulations 1996, SI 1996/2907 (amended by SI 1998/58; SI 1999/1047; SI 2000/897; SI 2000/1596; SI 2002/1204; SI 2002/1703; SI 2003/328; SI 2003/347; SI 2003/2779; SI 2005/2877; revoked with savings by SI 2001/156). See para 554 ante. See also *Secretary of State for Social Security v Henderson* [1999] 1 FCR 433, [1999] 1 FLR 496, CA; *Wakefield v Secretary of State for Social Security* [2000] 1 FCR 761, [2000] 1 FLR 510, CA; *Huxley v Child Support Officer* [2000] 1 FCR 448; *C v Secretary of State for Work and Pensions* [2002] EWCA Civ 1854, [2003] 2 FCR 325, [2003] 1 FLR 829; *Smith v Secretary of State for Work and Pensions* [2006] UKHL 65, [2006] 2 All ER 907, [2006] 2 FCR 487; *Pabari v Secretary of State for Work and Pensions* [2004] EWCA Civ 1480, [2005] 1 All ER 287; *M v Secretary of State for Work and Pensions* [2004] EWCA Civ 1343, [2006] QB 380, [2004] 3 FCR 507; *Chandler v Secretary of State for Work and Pensions* [2007] EWCA Civ 1211, [2007] All ER (D) 457 (Nov).

3 For the meanings of 'parent' and 'absent parent' see para 553 note 3 ante.

4 See para 557 note 3 ante.

5 See the Child Support Act 1991 Sch 1 paras 1, 2 (as originally enacted).

6 le the 'effective date' for the purposes of the new scheme: see in particular the Child Support, Pensions and Social Security Act 2000 (Commencement No 12) Order 2003, SI 2003/192, arts 1, 3, 8. See para 554 ante.

7 See the Child Support Act 1991 Sch 1 Pt 1 paras 1-10C (Sch 1 Pt 1 substituted by the Child Support, Pensions and Social Security Act 2000 s 1(2)(b), (3), Sch 1). As to the making of maintenance calculations see the Child Support (Maintenance Calculation Procedure) Regulations 2000, SI 2001/157 (amended by SI 2002/1204; SI 2003/347; SI 2003/828; SI 2003/2779; SI 2004/2415; SI 2005/785; SI 2006/1520); and the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, SI 2001/155 (amended by SI 2002/1204; SI 2002/2497; SI 2002/3019; SI 2003/328; SI 2003/347; SI 2003/1195; SI 2003/2779; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2007/1979). See also the Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812 (as amended: see note 2 supra); and the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, SI 1992/2645 (as amended: see note 2 supra).

8 For the meaning of 'non-resident parent' see para 554 note 6 ante.

9 As to the 'net weekly income' for these purposes see the Child Support Act 1991 Sch 1 paras 10, 10A-10C (as substituted: see note 7 supra); and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815, Pt II (regs 2-18) (as amended: see note 2 supra). The scheme applies to net weekly income up to £2,000 per week and net weekly income in excess of this figure is ignored: Child Support Act 1991 Sch 1 para 10(3) (as so substituted). As to the relevance of capital allowances in establishing the net weekly income of a self-employed non-resident parent see *Smith v Smith* [2004] EWCA Civ 1318, [2005] 1 WLR 1319, sub nom *Smith v Secretary of State for Work and Pensions* [2006] 2 FCR 487; revsd [2006] UKHL 35, [2006] 3 All ER 907, [2006] 1 WLR 2024, [2006] 2 FCR 487.

10 For the meaning of 'person with care' see para 557 note 3 ante.

11 For the meanings of 'child' and 'qualifying child' see para 555 note 3 ante; and as to 'qualifying children' and 'relevant children' see the Child Support Act 1991 Sch 1 para 10C (as substituted: see note 7 supra).

12 Ibid Sch 1 para 2(1) (as substituted: see note 7 supra).

13 As to the effect of shared care see ibid Sch 1 para 7 (as substituted: see note 7 supra).

14 See note 11 supra.

15 See the Child Support Act 1991 Sch 1 para 2(2) (as substituted: see note 7 supra).

16 Formerly known as 'departure directions', the current variation provisions are found in the Child Support Act 1991 ss 28A-28G, Schs 4A, 4B (ss 28A-28G added by the Child Support Act 1995 ss 1-7; the Child Support Act 1991 ss 28A-28C, 28F, 28G substituted, and ss 28D, 28E amended, by the Child Support, Pensions and Social Security Act 2000 ss 5(1)-(5), 7; the Child Support Act 1991 s 28D also amended by the Social Security Act 1998 s 86(1), Sch 7 para 36; and the Child Support Act 1991 Schs 4A, 4B added by the Child Support Act 1995 ss 1(2), 6(2), Schs 1, 2; and substituted by the Child Support, Pensions and Social Security Act 2000 s 6, Sch 2). See also the Child Support Departure Direction and Consequential Amendments Regulations 1996, SI 1996/2907 (as amended: see note 2 supra); the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (amended by SI 1999/1466; SI 1999/1623; SI 1999/1662; SI 1999/1670; SI 1999/2677; SI 2000/119; SI 2000/127; SI 2000/897; SI 2000/1596; SI 2000/1982; SI 2000/3030; SI 2000/3185; SI 2001/158; SI 2001/518; SI 2001/1711; SI 2001/4022; SI 2002/398; SI 2002/428; SI 2002/490; SI 2002/1204; SI 2002/1379; SI 2002/1703; SI 2002/3019; SI 2002/3197; SI 2003/129; SI 2003/328; SI 2003/492; SI 2003/916; SI 2003/1050; SI 2003/1189; SI 2003/1581; SI 2003/1731; SI 2003/1886; SI 2003/2274; SI 2004/647; SI 2004/959; SI 2004/2283; SI 2004/2327; SI 2004/2415; SI 2004/3368; SI 2005/337; SI 2005/2677; SI 2005/2878; SI 2006/2377; SI 2007/917); the Child Support (Variations) (Modification of Statutory Provisions) Regulations 2000, SI 2000/3173 (amended by SI 2002/1204); and the Child Support (Variations) Regulations 2000, SI 2001/156 (amended by SI 2002/1204; SI 2003/328; SI 2003/347; SI 2003/2779; SI 2004/2415; SI 2005/785; SI 2005/2877).

## UPDATE

### 553-563 Child Support

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

#### **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

#### **558 Making a maintenance calculation**

TEXT AND NOTES--Any decision falling to be made under or by virtue of the Child Support Act 1991 by the Child Maintenance and Enforcement Commission (see PARA 563A) may be made, not only by a person authorised to exercise the Commission's decision-making function, but also by a computer for whose operation such a person is responsible: s 50A (added by the Child Maintenance and Other Payments Act 2008 Sch 3 para 51).

Child Support Act 1991 Sch 1 further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission: Child Maintenance and Other Payments Act 2008 Sch 3 para 52, Sch 7 para 1(32), (34).

NOTE 2--SI 1992/1813 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544, SI 2008/2683, SI 2009/396, SI 2009/2909. SI 1992/1815 further amended: SI 2009/736. SI 1996/2907 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2683, SI 2009/736. SI 1992/2645 further amended: SI 2009/2909.

NOTE 7--1991 Act Sch 1 Pt 1 amended: Welfare Reform Act 2007 Sch 3 para 7(8). SI 2001/155, SI 2001/157 further amended: SI 2008/1554, SI 2008/2543, SI 2008/2544. SI 2001/157 further amended: SI 2009/2909.

NOTE 16--Child Support Act 1991 ss 28A-28C, 28F, Sch 4A amended, ss 28D, 28E further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission: Child Maintenance and Other Payments Act 2008 Sch 3 paras 25-30, 53. Child Support Act 1991 ss 28A, 28F, Sch 4A, Sch 4B further amended: Child Maintenance and Other Payments Act 2008 Sch 8. Child Support Act 1991 s 28D, Sch 4A further amended: SI 2008/2833.

SI 1999/991 further amended: see PARA 557 NOTE 2. SI 2001/156 further amended: SI 2008/2543, SI 2009/736.

See *Wincott v Secretary of State for Work and Pensions* [2009] EWCA Civ 113, [2009] Fam Law 385, [2009] All ER (D) 282 (Feb).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/7. FINANCIAL SUPPORT FOR CHILDREN/(6) CHILD SUPPORT/559. Enforcement of a maintenance calculation.

### **559. Enforcement of a maintenance calculation.**

The Secretary of State has the power to enforce a maintenance calculation<sup>1</sup> and it is not open to the person with care<sup>2</sup> to enforce a maintenance calculation in his own right<sup>3</sup>. This restriction against the person with care does not infringe that person's right of access to a court under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup>. The enforcement regime available to the Secretary of State includes the power to impose a deduction from earnings order<sup>5</sup>, to make deductions from state benefits<sup>6</sup> and to seek liability orders in respect of unpaid maintenance<sup>7</sup>. If a liability order remains unsatisfied the Secretary of State may also pursue orders for distress<sup>8</sup> or<sup>9</sup> by way of third party debt orders<sup>10</sup> and charging orders<sup>11</sup>. Where the Secretary of State has sought to enforce an amount of outstanding maintenance by means of distress, third party debt or charging order<sup>12</sup> and the amount in question or any part thereof remains unpaid the Secretary of State can apply for an order committing the liable person to prison for a period not exceeding six weeks<sup>13</sup> or for an order disqualifying the liable person from holding a driving licence<sup>14</sup>. Provision is also made for the cross-border enforcement of liability orders within the United Kingdom<sup>15</sup>. In addition to his powers to recover arrears in payments, the Secretary of State may also require a non-resident parent<sup>16</sup> in arrears of child maintenance to pay penalty payments of up to 25 per cent of the child maintenance payable for that week<sup>17</sup>.

1 For the meaning of 'maintenance calculation' see para 554 note 7 ante.

2 For the meaning of 'person with care' see para 557 note 3 ante.

3 See the Child Support Act 1991 s 29 (amended by the Child Support, Pensions and Social Security Act 2000 s 1(2)); and *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, [2005] 2 FCR 683. For the relevant subordinate legislation see the Child Support (Collection and Enforcement) Regulations 1992, SI 1992/1989 (amended by SI 1993/913; SI 1994/227; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/162; SI 2001/1775; SI 2003/328; SI 2003/347; SI 2005/2877; SI 2006/1520; SI 2007/1979). See also *R v Secretary of State for Social Security, ex p Biggin* [1995] 2 FCR 595, [1995] 1 FLR 851; *Re L (Family Proceedings Court) (appeal: jurisdiction)* [2003] EWHC 1682 (Fam), [2005] 1 FLR 210. Arrangements made for the purpose of collecting child support payments under the Child Support Act 1991 s 29 (as amended) may incorporate arrangements made for the collection of other relevant payments: see s 30 (amended by the Child Support Act 1995 s 30(5), Sch 3 para 9; and the Child Support, Pensions and Social Security Act 2000 ss 1(2), 26, Sch 3 para 11(1), (2)); and the Child Support (Collection and Enforcement of Other Forms of Maintenance) Regulations 1992, SI 1992/2643 (amended by SI 1993/913; SI 2001/162; SI 2001/1775; SI 2003/347; SI 2005/2877).

4 See *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, [2005] 2 FCR 683. As to the right of access to a court see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), art 6(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 134-135.

5 See the Child Support Act 1991 ss 31, 32 (both amended by the Child Support, Pensions and Social Security Act 2000 s 1(2)). See also the regulations referred to in note 3 supra. In connection with the Child Support Act 1991 s 31 (as amended) see *R v Secretary of State for Social Security, ex p Singh* [2000] 2 FLR 664, [2000] Fam Law 698.

6 See the Child Support Act 1991 s 43 (substituted by the Child Support, Pensions and Social Security Act 2000 s 21); and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 (amended by SI 1993/913; SI 1993/925; SI 1994/227; SI 1995/1045; SI 1995/3261; SI 1995/3265; SI 1996/481; SI 1996/1345; SI 1996/1803; SI 1996/1945; SI 1996/2907; SI 1996/3196; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2002/1204; SI 2002/2469; SI 2003/328; SI 2003/762; SI 2003/2779; SI 2004/1748; SI 2004/2415; SI 2004/3168; SI 2005/785; SI 2005/2060; SI 2005/2078; SI 2005/2877; SI 2005/2929; SI 2006/217; SI 2007/1979; SI 2007/2538; revoked with savings by SI 2001/155).

7 See the Child Support Act 1991 ss 33, 34 (s 33 amended by the Child Support Act 1995 s 30(5), Sch 3 para 10; the Child Support, Pensions and Social Security Act 2000 s 1(2), Sch 3 para 11(17); and the Courts Act 2003 (Consequential Amendment) Order 2006, SI 2006/1001, art 2). See also the regulations referred to in note 3 supra. In connection with the Child Support Act 1991 s 33 (as amended) see *R (on the application of Denson) v Child Support Agency* [2002] EWHC 154 (Admin), [2002] 1 FCR 460, [2002] 1 FLR 938; *Farley v Secretary of State for Work and Pensions* [2006] UKHL 31, [2006] 3 All ER 935; *Giltinane v Child Support Agency* [2006] EWHC 423 (Fam), [2006] 2 FLR 857.

8 See the Child Support Act 1991 s 35. See also the regulations referred to in note 3 supra.

9 Ie if a county court so orders: *ibid* s 36(1).

10 As to third party debt orders (formerly 'garnishee orders') see CPR Pt 72; and CIVIL PROCEDURE vol 12 (2009) PARAS 1411-1430.

11 Child Support Act 1991 s 36(1). For the meaning of 'charging order' see the Charging Orders Act 1979 s 1; and CIVIL PROCEDURE vol 12 (2009) PARAS 1467-1485 (definition applied by the Child Support Act 1991 s 36(2)).

12 Ie pursuant to *ibid* s 36 (see the text and notes 9-11 supra): s 39A(1) (s 39A added by the Child Support, Pensions and Social Security Act 2000 s 16(1)).

13 See the Child Support Act 1991 s 39A(2)(a) (as added: see note 12 supra); and s 40 (amended by the Child Support, Pensions and Social Security Act 2000 ss 16(2), 17(1), 85, Sch 9 Pt 1). In connection with the Child Support Act 1991 s 40 (as amended) see the regulations referred to in note 3 supra; and *R v Cardiff Magistrates, ex p Czech* [1999] 1 FCR 721.

14 See the Child Support Act 1991 s 39A(2)(b) (as added: see note 12 supra); and s 40B (added by the Child Support, Pensions and Social Security Act 2000 s 16(3); and prospectively amended by the Road Safety Act 2006 ss 9(6), 10(12), 59, Sch 2 para 33, Sch 3 paras 30, 65, Sch 7).

15 See the Child Support Act 1991 s 39; and the Child Support (Collection and Enforcement) Regulations 1992, SI 1992/1989 (amended by SI 1993/913; SI 1994/227; SI 1995/1045; SI 1995/3261; SI 1996/1945; SI 1998/58; SI 1999/977; SI 1999/1510; SI 2001/162; SI 2001/1775; SI 2003/328; SI 2003/347; SI 2005/2877; SI 2006/1520; SI 2007/1979).

16 For the meanings of 'parent' and 'non-resident parent' see paras 553 note 3, 554 note 6 ante.

17 See the Child Support Act 1991 ss 41, 41A (s 41 amended, and s 41A added, by the Child Support Act 1995 s 22, Sch 3 para 11; and the Child Support Act 1991 ss 41, 41A amended by the Child Support, Pensions and Social Security Act 2000 ss 1(2), 18, 26, 85, Sch 3 para 11(2), Sch 9 Pt 1); and the Child Support (Arrears, Interest and Adjustment of Maintenance Assessments) Regulations 1992, SI 1992/1816 (amended by SI 1993/913; SI 1995/1045; SI 1995/3261; SI 1996/1345; SI 1996/2907; SI 1998/1229; SI 1999/1510; SI 2000/3185; SI 2001/162; SI 2001/1775; SI 2001/3649; SI 2002/3019; SI 2003/347; and by virtue of the Child Support, Pensions and Social Security Act 2000 s 1(2)).

## UPDATE

### 553-563 Child Support

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

### 554-561 Amendments to the original scheme ... The child support commissioners

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI

1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

## **559 Enforcement of a maintenance calculation**

TEXT AND NOTES--The Child Maintenance and Enforcement Commission may make a regular deduction order against a non-resident parent who has failed to pay child maintenance in order to secure the payment in question from an account held with a deposit-taker: see the Child Support Act 1991 s 32A (ss 32A-32D added by the Child Maintenance and Other Payments Act 2008 s 22). Before a regular deduction order is applied to a joint account, the Commission must offer each of the account-holders an opportunity to make representations with regards to the making of the order and the amounts to be deducted: see Child Support Act 1991 s 32B. As to the regulation-making powers of the Secretary of State with regard to the practicalities and procedure relating to regular deduction orders see s 32C. As to offences see s 32D. 'Deposit-taker' means a person who, in the course of a business, may lawfully accept deposits in the United Kingdom: s 54(1) (definition added by the Child Maintenance and Other Payments Act 2008 Sch 7 para 1(25)).

The Commission may also make lump sum deduction orders in order to collect arrears (not ongoing maintenance) from a non-resident parent's account held with a deposit-taker, or from money due or accruing to them from a third party: see ss 32E-32K (added by the Child Maintenance and Other Payments Act 2008 s 23). The Commission may also apply to a court (1) to prevent a non-resident parent who has failed to pay maintenance from disposing of or transferring property, if it is being done to avoid paying child support maintenance; and (2) where a non-resident parent has failed to pay maintenance, for an order to set aside a disposition, if that disposition was undertaken with the intention of avoiding child support maintenance payments: see s 32L (added by the Child Maintenance and Other Payments Act 2008 s 24).

The Secretary of State may by regulations make provision for the recovery from the estate of a deceased person of arrears of child support maintenance for which the deceased person was liable immediately before death: Child Support Act 1991 s 43A(1) (s 43A added by the Child Maintenance and Other Payments Act 2008 s 38). Regulations under the Child Support Act 1991 s 43A(1) may, in particular (1) make provision for arrears of child support maintenance for which a deceased person was so liable to be a debt payable by the deceased's executor or administrator out of the deceased's estate to the Commission; (2) make provision for establishing the amount of any such arrears; (3) make provision about procedure in relation to claims under the regulations: s 43A(2). Regulations under s 43A(1) may include provision for proceedings (whether by appeal or otherwise) to be instituted, continued or withdrawn by the deceased's executor or administrator: s 43A(3).

TEXT AND NOTES 1-3--Child Support Act 1991 s 29 further amended: Child Maintenance and Other Payments Act 2008 s 20, Sch 3 para 32, Sch 8.

NOTES 3, 15--SI 1992/1989 further amended: SI 2008/536, SI 2008/2544, SI 2009/1815.

NOTE 3--Child Support Act 1991 s 30 further amended: Child Maintenance and Other Payments Act 2008 s 20, Sch 3 para 33, Sch 7 para 1(7). See also *Practice Direction (Family Proceedings: deduction order appeals)*, (5 August 2009, unreported).

NOTE 4--See *Treharne v Secretary of State for Work and Pensions* [2008] EWHC 3222 (QB), [2009] Fam Law 190, [2008] All ER (D) 120 (Sep) (failure to enforce and



consequent depreciation in standard of living did not infringe child's right to family life under European Convention on Human Rights art 8).

TEXT AND NOTES 5-8--Child Support Act 1991 ss 31-35 amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 paras 34-38.

TEXT AND NOTE 5--Child Support Act 1991 s 32 further amended: Child Support, Pensions and Social Security Act 2000 Sch 3 para 11(16); Child Maintenance and Other Payments Act 2008 Sch 7 para 1(9).

NOTE 6--SI 1992/1815 further amended: SI 2009/736.

NOTE 7--See also *Boyle v Secretary of State for Work and Pensions* [2008] EWCA Civ 210, [2008] All ER (D) 53 (May).

TEXT AND NOTE 11--Child Support Act 1991 s 36(1) amended, s 36(2) repealed: Child Maintenance and Other Payments Act 2008 Sch 7 para 1(10), Sch 8.

TEXT AND NOTES 12-14--Child Support Act 1991 ss 39A, 40B amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission: Child Maintenance and Other Payments Act 2008 Sch 3 paras 41, 42. See *Child Maintenance and Enforcement Commission v Mitchell* [2010] EWCA Civ 333, [2010] All ER (D) 278 (Mar) (an order under s 39A was not subject to the Limitation Act 1980 s 9 as it would not result in the recovery of sums due).

NOTE 14--Amendments made by Road Safety Act 2006 s 9, Schs 2, 7 now in force: SI 2008/3164.

TEXT AND NOTES 16, 17--Child Support Act 1991 ss 41, 41A further amended as a result of the transfer of functions from the Secretary of State to the Child Maintenance and Enforcement Commission: Child Maintenance and Other Payments Act 2008 Sch 3 paras 43, 44, Sch 7 para 1(34), Sch 8.

NOTE 17--Any outstanding liability in respect of interest under SI 1992/1816 is extinguished: see Child Maintenance and Other Payments Act 2008 s 43(a). SI 1992/1816 further amended: SI 2008/2683, SI 2009/396, SI 2009/3151.

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## **560. Role of the courts.**

As a consequence of the Secretary of State retaining principal jurisdiction in respect of child maintenance<sup>1</sup>, the courts have limited jurisdiction to make orders for child maintenance<sup>1</sup>. The court's power to make orders in respect of child maintenance in those cases where the Secretary of State also has jurisdiction is limited to the following circumstances:

- 1016 (1) revoking a maintenance order<sup>3</sup>;
- 1017 (2) where a written agreement has been made between the parties providing for the making of periodical payments by the non-resident parent to or for the benefit of the child and the maintenance order made by the court is in all material respects in the same terms as that agreement<sup>4</sup>;
- 1018 (3) where a maintenance calculation<sup>5</sup> is in force with respect to a child and the non-resident parent's net weekly income<sup>6</sup> exceeds £2,000 per week and the court is satisfied that it is appropriate for the non-resident parent to pay more than he currently pays under the maintenance calculation<sup>7</sup>;
- 1019 (4) where the child is, will be or would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation and the order is made solely for the purposes of requiring the payer under the order to meet some or all of the expenses incurred in connection with the provision of the instruction or training<sup>8</sup>;
- 1020 (5) where a disability living allowance<sup>9</sup> is paid to or in respect of the child<sup>10</sup> or no such allowance is paid but the child is disabled<sup>11</sup>; and
- 1021 (6) where the order is made against the parent with care<sup>12</sup> of the child in question<sup>13</sup>.

Where the Secretary of State does not have jurisdiction to make and enforce a maintenance calculation the court retains sole jurisdiction<sup>14</sup>. In addition the court has sole jurisdiction in the following limited circumstances:

- 1022 (a) where an agreement for maintenance in respect of a child was made before 5 April 1993<sup>15</sup> and remains in force<sup>16</sup>;
- 1023 (b) where a maintenance order was made before 3 March 2003<sup>17</sup> and that order remains in force<sup>18</sup>; and
- 1024 (c) where a maintenance order was made on or after 3 March 2003 and that order remains in force and has been in force for less than one year<sup>19</sup>.

The courts may also have jurisdiction in respect of certain appeals under the Child Support Act 1991<sup>20</sup>.

1 See paras 556-557 ante.

2 The court has exclusive jurisdiction where the child is not a 'qualifying child' for the purposes of the Child Support Act 1991 (see para 555 note 3 ante) or the person with care, the non-resident parent or the qualifying child is not habitually resident in the United Kingdom (see s 44; and para 557 ante). For the meaning of 'person with care' see para 557 note 3 ante; and for the meanings of 'parent' and 'non-resident parent' see paras 553 note 3, 554 note 6 ante. As to habitual residence see para 806 post; and CONFLICT OF LAWS vol 8(3) (Reissue) para 57 et seq. Provision is made for rights of audience before the court in child support cases (see the Child Support

Act 1991 s 48 (amended by the Child Support Act 1995 s 30(5), Sch 3 para 14)) and for procedure generally (see the Family Proceedings Courts (Child Support Act 1991) Rules 1993, SI 1993/627 (amended by SI 2001/615; SI 2001/778; SI 2005/617; SI 2005/1977; SI 2007/2188), having effect under the Magistrates' Courts Act 1980 s 144).

3 Child Support Act 1991 s 8(4). For the meaning of 'maintenance order' see para 556 note 3 ante.

4 Ibid s 8(5) (amended by the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 11(1), (2)). In connection with the Child Support Act 1991 s 8(5)-(7) (as amended) see the Child Maintenance (Written Agreements) Order 1993, SI 1993/620; and *V v V (child maintenance)* [2001] 2 FLR 799, [2001] All ER (D) 248 (Jun).

5 For the meaning of 'maintenance calculation' see para 554 note 7 ante.

6 As to the calculation of net weekly income see para 558 note 9 ante.

7 See the Child Support Act 1991 s 8(6) (amended by the Child Support, Pensions and Social Security Act 2000 s 1(2), Sch 3 para 11(2), (5)). See note 4 supra.

8 Child Support Act 1991 s 8(7). See note 4 supra.

9 As to disability living allowance see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 102-111.

10 Child Support Act 1991 s 8(8)(a).

11 Ibid s 8(8)(b). For these purposes, a child is 'disabled' if he is blind, deaf or dumb or is substantially and permanently handicapped by illness, injury, mental disorder or congenital deformity or such other disability as may be prescribed: s 8(9). At the date at which this volume states the law no such other disability had been prescribed. See *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA.

12 For the meaning of 'person with care' see para 557 note 3 ante.

13 Child Support Act 1991 s 8(10).

14 See paras 556-557 ante.

15 Ie the date on which the substantive provisions of the Child Support Act 1991 (as originally enacted) were brought into force by the Child Support Act 1991 (Commencement No 3 and Transitional Provisions) Order 1992, SI 1992/2644 (see para 553 note 1 ante).

16 Child Support Act 1991 s 4(10)(a) (s 4(10) added by the Child Support Act 1995 s 18(1)); and para 554 ante. In connection with the Child Support Act 1991 s 4(10) (as added and amended) see *AMS v Child Support Officer* [1998] 2 FCR 622, [1998] 1 FLR 955, CA.

17 Ie the 'prescribed date' for the purposes of the Child Support Act 1991 s 4(10)(a) (as added): see the Child Support (Applications: Prescribed Date) Regulations 2003, SI 2003/194. This date, ie 3 March 2003, is the 'effective date' for the purposes of the current scheme governing the making and calculation of child support payments under the Child Support Act 1991 as amended by the Child Support, Pensions and Social Security Act 2000: see para 554 note 4 ante.

18 Child Support Act 1991 s 4(10)(a) (as added: see note 16 supra).

19 Ibid s 4(10)(aa) (s 4(10) as added (see note 16 supra); and s 4(10)(aa) added by the Child Support, Pensions and Social Security Act 2000 s 2, Sch 3 para 11(2)).

20 See the Child Support Act 1991 s 45 (amended by the Social Security Act 1998 s 86(1), Sch 7 para 42; the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 218, 220; and virtue of the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule); the Child Support Appeals (Jurisdiction of Courts) Order 1993, SI 1993/961 (revoked with savings by SI 2002/1915); and the Child Support Appeals (Jurisdiction of Courts) Order 2002, SI 2002/1915. As to jurisdiction see also *Re L (Family Proceedings Court) (appeal: jurisdiction)* [2003] EWHC 1682 (Fam), [2005] 1 FLR 210.

## UPDATE

### 553-563 Child Support

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

#### **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

#### **560 Role of the courts**

TEXT AND NOTE 1--Secretary of State's functions under Child Support Act 1991 transferred to Child Maintenance and Enforcement Commission (see PARA 563A): see Child Maintenance and Other Payments Act 2008 s 13.

NOTE 2--Child Support Act 1991 s 48 further amended: Child Maintenance and Other Payments Act 2008 Sch 3 para 50. SI 1993/627 further amended: SI 2008/2683, SI 2009/858.

NOTE 20--Child Support Act 1991 s 45 further amended: SI 2008/2833. SI 2002/1915 amended: SI 2008/2683.

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### **561. The child support commissioners.**

Provision is made for the appointment and tenure of a chief child support commissioner and an appropriate number of child support commissioners<sup>1</sup>. Any person who is aggrieved by a decision of an appeal tribunal or the Secretary of State may appeal to a commissioner on a question of law<sup>2</sup>, and an appeal on a question of law from a decision of the commissioner lies to the Court of Appeal<sup>3</sup>. The commissioners' procedure is governed by regulations<sup>4</sup>.

1 See the Child Support Act 1991 s 22(1), (2), Sch 4 (as amended); and COURTS vol 10 (Reissue) para 818.

2 See *ibid* s 24 (amended by the Child Support Act 1995 s 30(5), Sch 3 para 7(3); and the Social Security Act 1998 s 86(1), (2), Sch 7 para 30, Sch 8). In connection with the determination of appeals from a decision of an appeal tribunal see the Child Support Act 1991 s 23A (added by the Child Support, Pensions and Social Security Act 2000 s 11).

3 Child Support Act 1991 s 25 (amended by the Child Support Act 1995 Sch 3 para 8). As to procedure see the Family Proceedings Rules 1991, SI 1991/1247, r 3.23 (added by SI 1993/295).

4 See the Child Support Act 1991 ss 22(3), 24(6), (7), 25(3), (5) (s 22(3) amended by virtue of the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule; and the Child Support Act 1991 s 24(6) amended by the Social Security Act 1998 Sch 7 para 30(6)); and the Child Support Commissioners (Procedure) Regulations 1999, SI 1999/1305 (amended the Constitutional Reform Act 2005 s 59; and by SI 2005/207).

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see [PARA 563A](#); and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and [PARA 563A.8](#).

### **554-561 Amendments to the original scheme ... The child support commissioners**

Child Support (Information, Evidence and Disclosure) Regulations 1992, SI 1992/1812, replaced by Child Support Information Regulations 2008, SI 2008/2551 (amended by SI 2008/2683, SI 2009/396). Functions of Secretary of State under SI 1992/1813, SI 1992/1815, SI 1992/1816, SI 1992/1989, SI 1992/2643, SI 1992/2645, SI 1993/627, SI 1994/227, SI 1995/1045, SI 1996/2907, SI 1999/991, SI 1999/1305, SI 1999/1510, SI 2000/3173, SI 2000/3177, SI 2000/3186, SI 2001/155, SI 2001/156, SI 2001/157, and SI 2008/2551, except so far as relating to reduced benefit decisions under the Child Support Act 1991 s 46, transferred to Child Maintenance and Enforcement Commission (see [PARA 563A](#)): see Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

### **561 The child support commissioners**

TEXT AND NOTES--Functions of appeal tribunals transferred to First-tier Tribunal appeal from which lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A): see First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684.

Child Support Act 1991 ss 23A, 24 amended in consequence of transfer of functions from Secretary of State to Child Maintenance and Enforcement Commission (see PARA 563A): Child Maintenance and Other Payments Act 2008 Sch 3 paras 15-17 (amended by SI 2008/2833).

NOTE 3--SI 1991/1247 r 3.23 amended: SI 2008/2446.

NOTE 4--SI 1999/1305 revoked: SI 2008/2683.

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## **562. The future of the Child Support Agency.**

The Department of Work and Pensions has published a consultation White Paper<sup>1</sup> setting out proposals for further change in the area of child support. Those proposals include the establishment of a new body to replace the Child Support Agency, to be known as the Child Maintenance and Enforcement Commission ('C-MEC'), which will be non-departmental and will be run by an independent board<sup>2</sup>. Under the proposals the jurisdiction of the courts to make maintenance calculations will remain limited, and the present requirement that all parents with care of a qualifying child and who are in receipt of certain prescribed state benefits are to be treated as having applied for a maintenance calculation will be abolished<sup>3</sup>. Parents with the care of relevant children and in receipt of what were previously qualifying state benefits will be able to make their own arrangements with the other parent<sup>4</sup>.

The new scheme also envisages the parent with care being entitled to a 'maintenance disregard' under which state benefits will not be affected by the receipt of maintenance<sup>5</sup>.

The scheme set out in the White Paper is intended to simplify the assessment process by the use of more up to date financial information and the use of gross rather than net incomes from which calculations will be made<sup>6</sup>. The scheme also envisages stronger enforcement measures including measures to require defaulting parents to surrender their passports, and raises the possibility of taking monies direct from sources such as bank accounts; the scheme aims to simplify the enforcement process by restricting the involvement of the courts in the enforcement regime<sup>7</sup>.

1 *A New System of Child Maintenance* (December 2006; Cm 6979).

2 See *ibid* paras 3.8, 3.13. C-MEC's responsibilities will include the management of existing cases and outstanding debt, the detailed development and implementation of the new scheme, managing the transition of cases into private arrangements or between schemes, and the decommissioning of the existing child maintenance schemes and the Child Support Agency itself: see para 3.9. C-MEC will also provide direct policy advice to ministers on all aspects of the system that it is charged with delivering: see para 3.10.

3 See *ibid* paras 2.3-2.7.

4 See *ibid* paras 2.3-2.7, 2.10.

5 *Ibid* para 2.17. At the date at which this volume states the law the precise level at which this 'disregard' would cease to apply has not been made clear.

6 See *ibid* Ch 4 (paras 4.1-4.31).

7 See *ibid* Ch 5 (paras 5.1-4.50).

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A;

and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.



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### **563. The introduction of the new scheme.**

At the date at which this volume states the law a government Bill to establish the Child Maintenance and Enforcement Commission ('C-MEC')<sup>1</sup> and to amend the law relating to child support, known as the Child Maintenance and Other Payments Bill, was before Parliament, having been introduced in the House of Commons on 5 June 2007<sup>2</sup>. The Bill introduces the new scheme for the calculation and payment of child support envisaged in the consultation White Paper published by the Department of Work and Pensions in 2006<sup>3</sup>. Specifically, it would establish and make provision for the constitution and operation of C-MEC<sup>4</sup> and make new provision for the calculation of maintenance and for the collection and enforcement of payments (including removing the requirement that parents who claim benefits are to be automatically treated as applying for maintenance, and applying the new enforcement measures to cases proceeding under the current scheme)<sup>5</sup>. It is envisaged that the legislation will be passed, and C-MEC established, by 2008; that C-MEC will take responsibility for existing child support operations, that new systems for enforcement and collection will be put in place, and that the requirement that parents who claim benefits are to be automatically treated as applying for maintenance will be removed, during 2008-2009; that the system enabling parents to make their own maintenance arrangements will come into operation during 2009-2010; that applications will begin to be accepted under the new system, the improved maintenance disregard<sup>6</sup> will be introduced, and existing cases will begin to be transferred to C-MEC, during 2010-2011; and that by 2012-2013 all clients will be on a single set of rules managed solely by C-MEC<sup>7</sup>.

1 See para 562 ante.

2 The description of the proposed legislation given in the text is based on Bill 118 as introduced in the House of Commons on 5 June 2007.

3 See *A New System of Child Maintenance* (December 2006; Cm 6979); and para 562 ante.

4 See the Child Maintenance and Other Payments Bill (Bill 118) Pts 1, 2.

5 See *ibid* Pt 3.

6 As to the maintenance disregard see para 562 ante.

7 See *A New System of Child Maintenance* (December 2006; Cm 6979).

## **UPDATE**

### **553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

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## **563A. The Child Maintenance and Enforcement Commission.**

### **1. Establishment of the Child Maintenance and Enforcement Commission**

A body corporate to be known as the Child Maintenance and Enforcement Commission ('the Commission') is established: Child Maintenance and Other Payments Act 2008 s 1(1). Provision is made as to the constitution and procedures of the Commission: see s 1(2), Sch 1.

The Commission's main objective is to maximise the number of those children who live apart from one or both of their parents for whom effective maintenance arrangements are in place: s 2(1). The Commission's main objective is supported by the following subsidiary objectives: (1) to encourage and support the making and keeping by parents of appropriate voluntary maintenance arrangements for their children; and (2) to support the making of applications for child support maintenance under the Child Support Act 1991 and to secure compliance when appropriate with parental obligations under that Act: Child Maintenance and Other Payments Act 2008 s 2(2). The Commission must aim to pursue, and to have regard to, its objectives when exercising a function that is relevant to them: s 2(3). For the purposes of Pt 1 (ss 1-12) 'child' has the same meaning as in the Child Support Act 1991 (see PARA 555 NOTE 3): Child Maintenance and Other Payments Act 2008 s 12(1). The Secretary of State may by regulations make provision about when a child is, or is not, to be regarded for the purposes of Pt 1 as living apart from a parent: s 12(2).

The Commission's records are public records: Public Records Act 1958 Sch 1 para 3 table Pt 2 (amended for these purposes by the Child Maintenance and Other Payments Act 2008 Sch 1 para 24). Its members are disqualified from membership of the House of Commons: House of Commons Disqualification Act 1975 Sch 1 Pt II (amended for these purposes by the Child Maintenance and Other Payments Act 2008 Sch 1 para 27).

### **2. Functions of the Child Maintenance and Enforcement Commission**

The Child Maintenance and Enforcement Commission ('the Commission') has the functions relating to child support transferred to it from the Secretary of State by virtue of the Child Maintenance and Other Payments Act 2008, and such other functions as are conferred by, or by virtue of, this or any other enactment: s 3(1). The Secretary of State may by regulations provide for the Commission to have an additional function if it appears to the Secretary of State that it is necessary or expedient for the Commission to have the function in relation to any of its objectives: s 3(2). The Commission must exercise its functions effectively and efficiently: s 3(3).

The Commission must take such steps as it thinks appropriate for the purpose of raising awareness among parents of the importance of taking responsibility for the maintenance of their children, and making appropriate arrangements for the maintenance of children of theirs who live apart from them: s 4. For the purposes of Pt 1 (ss 1-12) 'child' has the same meaning as in the Child Support Act 1991 (see PARA 555 NOTE 3): Child Maintenance and Other Payments Act 2008 s 12(1). The Secretary of State may by regulations make provision about when a child is, or is not, to be regarded for the purposes of Pt 1 as living apart from a parent: s 12(2).

The Commission must provide to parents such information and guidance as it thinks appropriate for the purpose of helping to secure the existence of effective maintenance

arrangements for children who live apart from one or both of their parents, and may provide information for other purposes in the course of exercising that function: s 5.

As to information sharing between the Commission and the Department for Work and Pensions and Her Majesty's Revenue and Customs for the purpose of functions relating to child support, see s 44, Sch 6.

### **3. Fees**

The Secretary of State may by regulations make provision about the charging of fees by the Child Maintenance and Enforcement Commission ('the Commission') in connection with the exercise of its functions: Child Maintenance and Other Payments Act 2008 s 6(1). As to the Commission's functions, see PARA 563A.2. Such regulations may, in particular, make provision: (1) about when a fee may be charged; (2) about the amount which may be charged; (3) for the supply of information needed for the purpose of determining the amount which may be charged; (4) about who is liable to pay any fee charged; (5) about when any fee charged is payable; (6) about the recovery of fees charged; and (7) about waiver, reduction or repayment of fees: s 6(2). The power conferred by s 6(1) includes power to make provision for the charging of fees which are not related to costs: s 6(3). The Secretary of State may by regulations provide that the provisions of the Child Support Act 1991 with respect to (a) the collection of child support maintenance; (b) the enforcement of any obligation to pay child support maintenance, apply equally (with any necessary modifications) to fees payable by virtue of regulations under the Child Maintenance and Other Payments Act 2008 s 6(1): s 6(4). The Secretary of State may by regulations make provision for a person affected by a decision of the Commission under regulations under s 6(1) to have a right of appeal against the decision to the First-tier Tribunal: s 6(5) (amended by SI 2008/2833). The Child Support Act 1991 s 20(3)-(5), (7) and (8) (see PARA 557) applies to appeals under regulations under the Child Maintenance and Other Payments Act 2008 s 6(5) as it applies to appeals under the Child Support Act 1991 s 20: Child Maintenance and Other Payments Act 2008 s 6(6) (amended by SI 2008/2833). The Commission must pay into the Consolidated Fund any amount which it receives in respect of fees charged by it under regulations under this provision: Child Maintenance and Other Payments Act 2008 s 6(7).

### **4. Agency arrangements and contracting out**

Arrangements may be made between the Child Maintenance and Enforcement Commission ('the Commission') and any relevant authority for (1) any functions (see PARA 563A.2) of one of them to be exercised on their behalf by, or by members of staff of, the other; (2) the provision of administrative, professional or technical services by one of them for the other: Child Maintenance and Other Payments Act 2008 s 7(1). The reference in head (1) to functions does not include functions of making, confirming or approving subordinate legislation: s 7(2). The Commission may make arrangements under this provision on such terms and conditions as it thinks fit: s 7(3). For these purposes 'relevant authority' means (a) any minister of the Crown or department of the Government of the United Kingdom; (b) a public body specified in regulations made by the Secretary of State for these purposes: s 7(4).

Any function of the Commission may be exercised by, or by employees of, such person, if any, as the Commission may authorise for the purpose: s 8(1). An authorisation given by virtue of s 8(1) may authorise the exercise of the function concerned (i) either wholly or to such extent as may be specified in the authorisation; (ii) either generally or in such cases or areas as may be so specified; and (iii) either unconditionally or subject to the fulfilment of such conditions as may be so specified: s 8(2). An authorisation given by virtue of s 8(1) may specify its duration, may be revoked at any time by the Commission, and does not prevent the Commission or any other person from exercising the function to which the authorisation relates: s 8(3). Where a

person is authorised to exercise any function by virtue of s 8(1), anything done or omitted to be done by or in relation to that person (or an employee of that person) in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done by or in relation to the Commission: s 8(4). However, this does not apply for the purposes of so much of any contract made between the authorised person and the Commission as relates to the exercise of the function, or for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done by the authorised person (or an employee of that person): s 8(5). Where a person is authorised to exercise any function by virtue of s 8(1), and the authorisation is revoked at a time when a relevant contract is subsisting, the authorised person is entitled to treat the relevant contract as repudiated by the Commission (and not as frustrated by reason of the revocation): s 8(6). For these purposes the reference to a relevant contract is to so much of any contract made between the authorised person and the Commission as relates to the exercise of the function: s 8(7).

## **5. Annual report to the Secretary of State**

The Child Maintenance and Enforcement Commission must prepare a report for each financial year: Child Maintenance and Other Payments Act 2008 s 9(1). Each such report must (1) deal with the activities of the Commission in the financial year for which it is prepared, including the matters mentioned in s 9(3) below; (2) include the report prepared under Sch 1 para 20(5) by the committee established under Sch 1 para 20 (non-executive functions committee): s 9(2). The matters referred to in head (1) are (a) the strategic direction of the Commission and the manner in which it has been kept under review; (b) the Commission's objectives and targets, the steps taken to meet them and the extent to which they have been met; (c) the steps taken to monitor the performance of the Commission in ensuring that its functions are exercised effectively and efficiently; (d) the extent to which the Commission has relied on ss 7(1) and 8(1) (see PARA 563A.4): s 9(3). The Commission must send each report to the Secretary of State as soon as practicable after the end of the financial year for which it is prepared, and publish the report in such manner as the Commission considers appropriate: s 9(4). The Secretary of State must lay before Parliament a copy of every report received: s 9(5). For these purposes 'financial year' means the period beginning with the date on which the Commission is established and ending with the next following 31 March, and each successive period of 12 months: s 9(6). The Commission was established on 24 July 2008: see SI 2008/2033.

## **6. Directions and guidance**

The Secretary of State may give the Child Maintenance and Enforcement Commission (1) guidance as to the exercise of its functions (see PARA 563A.2); (2) general or specific directions as to the exercise of its functions: Child Maintenance and Other Payments Act 2008 s 10(1). In exercising its functions, the Commission must have regard to any guidance under head (1) and comply with any directions under head (2): s 10(2). The guidance or directions must be in writing, and the power to give guidance or directions includes power to vary or revoke guidance or directions given in previous exercise of the power: s 10(3), (4). The Secretary of State must lay before Parliament a copy of any direction given under head (2). He may exclude from what is laid before Parliament any information which he considers to be against the commercial interests of any person, and any information which relates to an individual who can be identified from that information: s 10(5).

## **7. Review of the status of the Child Maintenance and Enforcement Commission**

The Secretary of State must review the status of the Commission as a Crown body as soon as reasonably practicable after the end of the initial period: Child Maintenance and Other Payments Act 2008 s 11(1), (2). For these purposes 'Crown body' means a body whose

functions are to be exercised on behalf of the Crown; and 'initial period' means the period of 3 years beginning with the day on which s 13 comes into force (ie 1 November 2008: see SI 2008/2675): Child Maintenance and Other Payments Act 2008 s 11(8). The Secretary of State may review the status of the Commission as a Crown body at any other time after the end of the initial period, if the Secretary of State considers it appropriate to do so: s 11(3). The Secretary of State must prepare a report of any review under s 11(1) or (3) and must lay a copy of the report before Parliament: s 11(4), (5). If, on a review under this provision, it appears to the Secretary of State appropriate to do so, the Secretary of State may by order made by statutory instrument provide that the Commission is to cease to be a Crown body: s 11(6). Such an order may (a) make any amendment to Sch 1 that appears to the Secretary of State to be necessary or expedient in consequence of the Commission ceasing to be a Crown body; (b) provide for the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, to apply, subject to such modifications and exceptions as may be prescribed, as if, on the Commission ceasing to be a Crown body, there were a transfer of an undertaking or business which is a relevant transfer: Child Maintenance and Other Payments Act 2008 s 11(7).

## **8. Transfer of child support functions**

Any function under the Child Support Act 1991 which is a function of the Secretary of State, and is not an excepted function, is by virtue of this provision transferred to the Commission: Child Maintenance and Other Payments Act 2008 s 13(1). The following functions of the Secretary of State under the Child Support Act 1991 are excepted functions for these purposes: (1) functions under ss 23A, 24 or 25 (appeals); (2) functions under s 46 (reduced benefit decisions) or any other provision of the 1991 Act, so far as relating to such decisions; (3) the function under s 50(7)(c) (authorisation of a person as a 'responsible person' for the purposes of s 50); (4) functions under s 58 (commencement power and power to make consequential amendments); (5) the function under Sch 4 para 2A (payment of expenses); and (6) power to make regulations under any other provision of the Act: Child Maintenance and Other Payments Act 2008 s 13(2). Provision is also made for the transfer to the Commission of functions of the Secretary of State under specified subordinate legislation: see the Child Maintenance and Other Payments Act 2008 s 13(3), Sch 2.

## **9. Transfer of property, rights and liabilities**

The Secretary of State may make one or more schemes for the transfer to the Commission of any of the following: (1) property, rights and liabilities which the Secretary of State is entitled or subject to in connection with the transferred functions (see PARA 563A.8); (2) property, rights and liabilities which the Secretary of State is entitled or subject to and which the Secretary of State considers it appropriate to transfer to the Commission in consequence of any function conferred on it by or under the Child Maintenance and Other Payments Act 2008 Pt 1 (ss 1-12): s 14(1). A scheme under s 14(1) ('a transfer scheme') (a) may provide for the transfer of property, rights and liabilities whether or not they would otherwise be capable of being transferred or assigned; (b) may create for the Secretary of State interests in or rights over property transferred by virtue of the scheme; (c) may create for the Commission interests in or rights over property retained by the Secretary of State; (d) may create rights or liabilities between the Secretary of State and the Commission; (e) may make such supplementary, incidental, consequential or transitional provision or savings as the Secretary of State considers appropriate: s 14(2). A transfer scheme comes into force in accordance with its terms: s 14(3). A certificate given by the Secretary of State that any property, rights or liabilities have been transferred by virtue of a transfer scheme is conclusive evidence of the transfer: s 14(4). For these purposes 'transferred functions' means functions transferred to the Commission by virtue of s 13 (see PARA 563A.8): s 14(5).

**UPDATE**

**553-563 Child Support**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission and amends the law relating to child support. As to the establishment and constitution of the Commission see PARA 563A; and as to the transfer of the Secretary of State's functions to the Commission, see s 13, Schs 2, 3; and PARA 563A.8.

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## **(7) CHILD TRUST FUNDS**

### **564. Eligibility.**

A child<sup>1</sup> is eligible for purposes relating to child trust funds<sup>2</sup> if he was born after 31 August 2002<sup>3</sup> and either:

- 1025 (1) a person is entitled to child benefit<sup>4</sup> in respect of the child<sup>5</sup>; or
- 1026 (2) entitlement to child benefit in respect of the child is excluded<sup>6</sup> because he is in local authority care<sup>7</sup>.

A child is not eligible if he:

- 1027 (a) does not have the right of abode in the United Kingdom<sup>8</sup>;
- 1028 (b) is not a qualified person<sup>9</sup> or a family member of a qualified person<sup>10</sup>; and
- 1029 (c) is not settled in the United Kingdom<sup>11</sup>.

1    le a person under the age of 18: Child Trust Funds Act 2004 s 29.

2    le is an 'eligible child' for the purposes of the Child Trust Funds Act 2004: s 2(1). A 'child trust fund' is an account which is held by a child who is or has been an eligible child (s 1(1), (2)(a)), satisfies the requirements imposed by and by virtue of the Child Trust Funds Act 2004 (see s 3; and para 565 post) (s 1(2)(b)) and has been opened in accordance with the relevant statutory requirements (see ss 5, 6; and para 569 post) (s 1(2)(c)). The matters dealt with by and under the Child Trust Funds Act 2004 are to be under the care and management of Her Majesty's Commissioners for Revenue and Customs: s 1(3). As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933.

3    Regulations may amend *ibid* s 2(1) by substituting for the reference to 31 August 2002 a reference to an earlier date: s 2(7). At the date at which this volume states the law no such regulations had been made.

Any power to make regulations or an order under the Child Trust Funds Act 2004 is exercisable by the Treasury (s 28(1)) and includes power to make any incidental, supplementary, consequential or transitional provision which appears appropriate for the purposes of, or in connection with, the regulations or order (s 28(2)). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 512 *et seq*. Any power to make regulations may be exercised:

- 287 (1) in relation to all cases to which it extends, to all those cases with exceptions prescribed by the regulations or to cases or classes of case so prescribed (s 28(3)(a));
- 288 (2) so as to make as respects the cases in relation to which it is exercised the full provision to which it extends or any less provision (whether by way of exception or otherwise) (s 28(3)(b));
- 289 (3) so as to make the same provision for all cases in relation to which it is exercised or different provision for different cases or classes of case or different provision as respects the same case or class of case for different purposes (s 28(3)(c));
- 290 (4) so as to make provision unconditionally or subject to any condition prescribed by the regulations (s 28(3)(d)); and
- 291 (5) so as to provide for a person to exercise a discretion in dealing with any matter (s 28(3)(e)).

Any power to make such regulations or such an order is exercisable by statutory instrument (s 28(4)), and no regulations under s 2(7), s 10(1) or s 10(2), or regulations which prescribe an amount under s 8(1) or s 9(2), other than the first regulations which do so, may be made unless a draft of the instrument containing them has

been laid before, and approved by a resolution of, each House of Parliament (s 28(5), (6)). A statutory instrument containing only regulations under s 13 is subject to annulment in pursuance of a resolution of the House of Commons (s 28(7)); any other statutory instrument containing regulations under the Child Trust Funds Act 2004 is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament (s 28(8)).

4 As to child benefit see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 237-257.

5 Child Trust Funds Act 2004 s 2(1)(a). Where entitlement to child benefit in respect of a child is excluded because of a directly applicable Community provision or an international agreement, s 2(1) applies as if that exclusion did not apply (s 2(3)), and where a person is entitled to child benefit in respect of a child only because of a directly applicable Community provision or an international agreement, s 2(1) applies as if the person were not so entitled (s 2(4)). A person is not to be regarded as entitled to child benefit in respect of a child (otherwise than by virtue of s 2(3)) unless it has been decided in accordance with the Social Security Act 1998 Pt 1 Ch 2 (ss 8-39) (as amended) (see SOCIAL SECURITY AND PENSIONS) that the person is so entitled, and that decision has not been overturned: Child Trust Funds Act 2004 s 2(6)(a).

6 Ie by the Social Security Contributions and Benefits Act 1992 Sch 9 para 1(c) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 244): Child Trust Funds Act 2004 s 2(2)(a).

7 Ibid s 2(1)(b).

8 Ibid s 2(5)(a). For these purposes, a child does not have the right of abode in the United Kingdom if he does not have the right of abode in the United Kingdom within the meaning given by the Immigration Act 1971 s 2 (as substituted and amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 14): Child Trust Funds Act 2004 s 2(5)(a). For the meaning of 'United Kingdom' see para 102 note 7 ante.

9 Ie within the meaning of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (see reg 6; and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 227).

10 Child Trust Funds Act 2004 s 2(5)(b).

11 Ibid s 2(5)(c). For these purposes, a child is not settled in the United Kingdom if he is not settled in the United Kingdom within the meaning given by the Immigration Act 1971 s 33(2A) (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 134): Child Trust Funds Act 2004 s 2(5)(c).

## UPDATE

### 564 Eligibility

TEXT AND NOTES 9, 10--A child is not eligible if he is not entitled to enter or remain in the United Kingdom by virtue of an enforceable Community right or any provision made under of the European Communities Act 1972 s 2(2): Child Trust Funds Act 2004 s 2(5) (b) (substituted by SI 2009/1117).



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### **565. Structure of child trust funds.**

The terms of a child trust fund<sup>1</sup> must:

- 1030 (1) secure that it is held in the name of a child<sup>2</sup>;
- 1031 (2) secure that the child is beneficially entitled to the investments under it<sup>3</sup>;
- 1032 (3) secure that all income and gains arising on investments under it constitute investments under it<sup>4</sup>;
- 1033 (4) prevent withdrawals from it except as permitted by regulations<sup>5</sup>; and
- 1034 (5) provide that instructions may be given to the account provider<sup>6</sup> with respect to its management only by the person who has the authority to manage it<sup>7</sup>.

The other requirements which must be satisfied in relation to child trust funds are imposed by regulations<sup>8</sup>.

An account is not a child trust fund unless it is either a 'stakeholder account' (that is, an account which meets specified characteristics and conditions) or a 'non-stakeholder account' (that is, an account where any of those characteristics and conditions is not met)<sup>9</sup>.

A penalty may be imposed on an account provider in respect of the provision by him, as a child trust fund, of an account in relation to which any of the above provisions are not complied with or satisfied<sup>10</sup>.

1 For the meaning of 'child trust fund' see para 564 note 2 ante.

2 Child Trust Funds Act 2004 s 3(4)(a). For the meaning of 'child' see para 564 note 1 ante.

3 Ibid s 3(4)(b).

4 Ibid s 3(4)(c).

5 Ibid s 3(4)(d). As to permitted withdrawals see the Child Trust Funds Regulations 2004, SI 2004/1450, regs 18, 18A (reg 18 amended, and reg 18A added, by SI 2004/2676). As to the making of regulations generally see para 564 note 3 ante.

A penalty of £300 may be imposed on any person who fraudulently makes a withdrawal from a child trust fund otherwise than as permitted by regulations under the Child Trust Funds Act 2004 s 3(4)(d): s 20(1)(b). As to the imposition and administration of penalties see para 575 post.

6 As to the account provider see ibid s 3(1); and para 566 post.

7 Ibid s 3(4)(e).

8 Ibid s 3(5). See generally the Child Trust Funds Regulations 2004, SI 2004/1450 (amended by SI 2004/2676; SI 2004/3382; SI 2005/383; SI 2005/909; SI 2005/2919; SI 2005/3349; SI 2006/199; SI 2006/2684; SI 2006/3195).

9 Child Trust Funds Act 2004 s 3(2); Child Trust Funds Regulations 2004, SI 2004/1450, reg 4. For the specified characteristics and conditions see the Schedule (amended by SI 2004/2676; SI 2004/3382; SI 2006/2684).

10 Child Trust Funds Act 2004 s 20(7)(a). Thus a penalty may be imposed on an account provider in respect of the provision by him, as a child trust fund, of an account which is not one of the descriptions prescribed by regulations under the Child Trust Funds Act 2004 s 3(2) (see the text and note 9 supra) (s 20(8)(a)), an account

in relation to which s 3(4) (see the text and notes 1-7 supra) is not complied with (s 20(8)(b)), or an account in relation to which the requirements imposed by regulations under s 3(5) (see the text and note 8 supra) are not satisfied (s 20(8)(c)). The penalty which may be so imposed is a penalty not exceeding £300, or £1 in respect of each account affected by the matter, or any of the matters, in respect of which the penalty is imposed, whichever is greater: s 20(9).

## **UPDATE**

### **565 Structure of child trust funds**

NOTE 8--SI 2004/1450 further amended: SI 2007/1898, SI 2009/475, SI 2009/694, SI 2010/836.

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## **566. Provision and management of funds.**

A child trust fund<sup>1</sup> may be held only with a person (an 'account provider') who has been approved by the Commissioners of Revenue and Customs<sup>2</sup> in accordance with regulations<sup>3</sup>. A child who is aged 16 or over has the authority to manage the child trust fund held by him<sup>4</sup>; where a child is under 16, the person who is a responsible person in relation to him has the authority to manage the fund<sup>5</sup>. Regulations may provide that, in circumstances prescribed by the regulations, the person who has the authority to manage a child trust fund held by a child under 16 is to be the Official Solicitor<sup>6</sup>. Where a contract is entered into by or on behalf of a child who is 16 or over in connection with a child trust fund held by the child, or held by another child in relation to whom the child has parental responsibility, the contract has effect as if the child had been 18 or over when it was entered into<sup>7</sup>.

1 For the meaning of 'child trust fund' see para 564 note 2 ante.

2 As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933.

3 Child Trust Funds Act 2004 s 3(1). The provision which may be made by regulations under s 3(1) includes making approval of an account provider dependent on the person undertaking to provide accounts of such of the descriptions for which provision is made by regulations under s 3(2) (see para 565 ante) as is prescribed by the regulations: s 3(3). As to the approval and withdrawal of approval of account providers, and for qualifications for approval, see the Child Trust Funds Regulations 2004, SI 2004/1450, regs 14-17, 20 (reg 14 amended by SI 2004/2676; SI 2005/909; SI 2005/3349). As to the making of regulations generally see para 564 note 3 ante. A person may appeal against a decision by the Commissioners not to approve, or to withdraw the approval of, a person as an account provider: Child Trust Funds Act 2004 s 22(1)(a), (b). As to the exercise of rights of appeal see para 576 post.

4 Ibid s 3(6)(a).

5 Ibid s 3(6)(b), (7). A person is a 'responsible person' in relation to a child under 16 if he has parental responsibility in relation to the child and is not a local authority or a person under 16: s 3(8). 'Parental responsibility' means parental responsibility within the meaning of the Children Act 1989 (see para 134 ante): Child Trust Funds Act 2004 s 3(9). If there is more than one person who is a responsible person in relation to a child, which of them has that authority is to be determined in accordance with regulations: s 3(7).

6 Ibid s 3(10). See the Child Trust Funds Regulations 2004, SI 2004/1450, reg 33A (added by SI 2004/3382; and amended by SI 2006/2684). A person who has the authority to manage a child trust fund by virtue of the Child Trust Funds Act 2004 s 3(10) is entitled to give any instructions to the account provider with respect to its management which appear to the person who has that authority to be for the benefit of the child: s 3(11).

7 Ibid s 3(12).

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### **567. Limits on subscriptions.**

No subscription may be made to a child trust fund<sup>1</sup> otherwise than by way of a monetary payment<sup>2</sup>, and the maximum amount that may be subscribed to a child trust fund in each year<sup>3</sup> (otherwise than by way of credits made under or by virtue of the Child Trust Funds Act 2004 or income or gains arising on investments under the fund) is limited by regulations<sup>4</sup>. A penalty may be imposed on an account provider<sup>5</sup> in respect of a breach of these requirements<sup>6</sup> in relation to a child trust fund held with that provider<sup>7</sup>.

1 For the meaning of 'child trust fund' see para 564 note 2 ante.

2 Child Trust Funds Act 2004 s 12(1).

3 'Year', in relation to a child trust fund held by a child, means the period beginning with the day on which the child trust fund is opened (see para 569 post) and ending immediately before the child's next birthday, and each succeeding period of 12 months: s 12(3).

4 Ibid s 12(2). The maximum amount that may be subscribed during any subscription year is £1,200: see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 9.

5 As to the account provider see the Child Trust Funds Act 2004 s 3(1); and para 566 ante.

6 Ie ibid s 12(1) or regulations under s 12(2) (see the text and notes 1-4 supra).

7 Ibid s 20(7)(c). The penalty which may be so imposed is a penalty not exceeding £300, or £1 in respect of each account affected by the matter, or any of the matters, in respect of which the penalty is imposed, whichever is greater: s 20(9). As to the imposition and administration of penalties see para 575 post.

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### **568. Inalienability of investments.**

Any assignment<sup>1</sup> of, or agreement to assign, investments under a child trust fund<sup>2</sup>, and any charge on or agreement to charge<sup>3</sup> any such investments, is void<sup>4</sup>. On the bankruptcy<sup>5</sup> of a child by whom a child trust fund is held, the entitlement to investments under it does not pass to any trustee or other person acting on behalf of the child's creditors<sup>6</sup>.

1 'Assignment' includes assignation; and 'assign' is to be construed accordingly: Child Trust Funds Act 2004 s 4(3).

2 For the meaning of 'child trust fund' see para 564 note 2 ante.

3 'Charge on or agreement to charge' includes a right in security over or an agreement to create a right in security over: Child Trust Funds Act 2004 s 4(4).

4 Ibid s 4(1).

5 'Bankruptcy', in relation to a child, includes the sequestration of the child's estate: ibid s 4(5).

6 Ibid s 4(2).

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### **569. Opening a child trust fund.**

The Commissioners of Revenue and Customs<sup>1</sup> must issue a voucher<sup>2</sup> in the case of each child<sup>3</sup> who is first an eligible child<sup>4</sup> to the person who is entitled to child benefit in respect of that child<sup>5</sup>. A child who is aged 16 or over may make an application to an account provider<sup>6</sup> to open a child trust fund of any description<sup>7</sup> provided by that provider<sup>8</sup>; in any other case, application must be made by the responsible person<sup>9</sup>. When the application has been made, the account provider must open a child trust fund of that description for the child and inform the Commissioners<sup>10</sup>.

Where a voucher is issued<sup>11</sup> in respect of a child who is first an eligible child<sup>12</sup> but either the period within which a child trust fund may be opened for him<sup>13</sup> expires or the child is under 16 and it appears to the Commissioners that there is no-one who is a responsible person in relation to him<sup>14</sup>, the Commissioners must apply<sup>15</sup> to open a child trust fund for the child with an account provider<sup>16</sup> and the account provider must open a fund for the child and inform the Commissioners<sup>17</sup>.

A penalty may be imposed on any person who fraudulently applies to open a child trust fund or secures the opening of a child trust fund by the Commissioners<sup>18</sup>.

<sup>1</sup> As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933.

<sup>2</sup> The voucher must be issued in the form and manner prescribed in the Child Trust Funds Regulations 2004, SI 2004/1450, reg 3 (amended by SI 2006/199): Child Trust Funds Act 2004 s 5(1).

<sup>3</sup> For the meaning of 'child' see para 564 note 1 ante.

<sup>4</sup> Ie by virtue of the Child Trust Funds Act 2004 s 2(1)(a) (see para 564 ante).

<sup>5</sup> Ibid s 5(1), (2). In the case of a child who is such an eligible child because of s 2(3) (see para 564 ante), the voucher must be issued to a responsible person: s 5(2). For the meaning of 'responsible person' see para 566 note 5 ante. Any person who is entitled to child benefit in respect of a child, has applied to open a child trust fund for a child or has at any time given instructions with respect to the management of the child trust fund held by a child may appeal against a decision by the Commissioners not to issue a voucher under s 5 in relation to that child or not to open a child trust fund for him under s 6: s 22(2)(a), (b), (3). As to the exercise of rights of appeal see para 576 post. For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante.

<sup>6</sup> As to the account provider see ibid s 3(1); and para 566 ante.

<sup>7</sup> Ibid s 5(3)(a). An application to open a child trust fund is to be made within such period beginning with the day on which the voucher is issued as is prescribed by regulations, and in accordance with regulations: s 5(4). As to the conditions for application by a responsible person or the child to open an account, or to make alterations to an account, see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 13 (amended by SI 2004/2676; SI 2004/3382).

<sup>8</sup> Child Trust Funds Act 2004 s 5(3)(b). See note 8 supra.

<sup>9</sup> Ibid s 5(5). The child trust fund must be opened and the Commissioners must be informed in accordance with regulations: s 5(5). As to the opening of an account by a responsible person or a child see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 5 (amended by SI 2006/199). A penalty may be imposed on an account provider in respect of a failure by him to comply with a requirement imposed on him by regulations under the Child Trust Funds Act 2004 s 5(5) or s 6(3) (see the text and note 16 infra): s 20(7)(b). The penalty which may be so imposed is a penalty not exceeding £300, or £1 in respect of each account affected by the

matter, or any of the matters, in respect of which the penalty is imposed, whichever is greater: s 20(9). As to the imposition and administration of penalties see para 575 post.

10    Ie under ibid s 5(1) (see the text and notes 1-5 supra).

11    See note 4 supra.

12    Ie under the Child Trust Funds Act 2004 s 5(4) (see note 7 supra).

13    Ibid s 6(4), (5).

14    Ie in accordance with regulations: ibid s 6(2).

15    Ibid s 6(1), (2). Both the account provider and the description of child trust fund are to be selected in accordance with regulations: s 6(1). As to the opening of an account by the Commissioners see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 6 (amended by SI 2004/2676; SI 2005/3349). Accounts opened by the Commissioners must be stakeholder accounts: Child Trust Funds Regulations 2004, SI 2004/1450, reg 4(2).

16    Child Trust Funds Act 2004 s 6(3). The fund must be of the description selected by the Commissioners; and the fund must be opened, and the must be Commissioners informed, in accordance with regulations: s 6(3); and see note 15 supra. No liability is to arise in respect of the selection of an account provider, or a description of child trust fund, in accordance with regulations under s 6: s 6(6). A penalty may be imposed on an account provider in respect of a failure by him to comply with a requirement imposed on him by regulations under s 6(3): see note 9 supra.

17    Ibid s 20(1)(a), (c). The penalty must not exceed £300: s 20(1). There is a right of appeal against a failure to open a fund in these circumstances: see note 5 supra.

## **UPDATE**

### **569 Opening a child trust fund**

NOTE 9--SI 2004/1450 reg 5 further amended: SI 2009/694.

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## **570. Transferring a child trust fund.**

Regulations may make provision about the circumstances in which:

- 1035 (1) a child trust fund which is an account of one of the descriptions prescribed by regulations may become an account of another of those descriptions<sup>1</sup>; and
- 1036 (2) a child trust fund held with one account provider<sup>2</sup> may be transferred to another<sup>3</sup>.

A penalty may be imposed on an account provider in respect of a failure by him to comply with a requirement imposed on him by any such regulations<sup>4</sup>.

1 Child Trust Funds Act 2004 s 7(a). For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante.

2 As to the account provider see *ibid* s 3(1); and para 566 ante.

3 *Ibid* s 7(b). As to the transfer of accounts see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 21 (amended by SI 2004/2676).

4 Child Trust Funds Act 2004 s 20(7)(b). The penalty which may be so imposed is a penalty not exceeding £300, or £1 in respect of each account affected by the matter, or any of the matters, in respect of which the penalty is imposed, whichever is greater: s 20(9). As to the imposition and administration of penalties see para 575 post.



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## **571. Commissioners' contributions.**

If an account provider<sup>1</sup> has informed the Commissioners of Revenue and Customs<sup>2</sup> that a child trust fund<sup>3</sup> has been opened<sup>4</sup> and has made a claim to them<sup>5</sup>, the Commissioners must pay to that provider a prescribed amount<sup>6</sup>; a prescribed amount is also payable<sup>7</sup> if there is an entitlement to child tax credit<sup>8</sup> in respect of an eligible child<sup>9</sup> who holds a child trust fund<sup>10</sup> and the provider makes a claim<sup>11</sup> to the Commissioners<sup>12</sup>. In either case, on receipt of such payment the provider must credit the fund with the amount of the payment<sup>13</sup>.

Provision is also made for the Commissioners to make additional payments to account providers of child trust funds held by certain children in respect of whom entitlement to child benefit is excluded<sup>14</sup>, or any description of such children<sup>15</sup>, either on such children attaining such age as may be prescribed by regulations<sup>16</sup> or in such other circumstances as may be so prescribed<sup>17</sup>.

1 As to the account provider see the Child Trust Funds Act 2004 s 3(1); and para 566 ante.

2 In accordance with *ibid* s 5(5) or s 6(3) (see para 569 ante). As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933. Regulations may make provision requiring that, in prescribed circumstances, a person of a prescribed description is to account to the Commissioners for amounts credited to a child trust fund in respect of Commissioners' contributions (ie payments made by the Commissioners which were required to be made under or by virtue of ss 8-10 (see the text and note 3-17 *infra*) or which the Commissioners considered were required to be so made, together with any income and gains arising in consequence of the crediting of those amounts: s 11. See the Child Trust Funds Regulations 2004, SI 2004/1450, reg 22 (amended by SI 2005/383). Any person who is required by the Commissioners to account for an amount under regulations under the Child Trust Funds Act 2004 s 11 may appeal against the decision to impose the requirement: s 22(4). As to the exercise of rights of appeal see para 576 post.

3 For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante.

4 Child Trust Funds Act 2004 s 8(1)(a). As to the opening of funds see para 569 ante.

5 *Ibid* s 8(1)(b). Claims must be made in accordance with regulations: s 8(1)(b). A penalty not exceeding £3,000 may be imposed on an account provider who fraudulently or negligently makes an incorrect statement or declaration in connection with a claim under s 8, s 9 or regulations under s 10: s 20(2)(a). Penalties may also be imposed on an account provider who fails to make a claim under s 8, s 9 or regulations under s 10 within the required time limits (s 20(3)(a)), although for this purpose a person is to be taken not to have failed to make a claim within the required time if he made it within such further time (if any) as the Commissioners may have allowed (s 20(6)(a)), if he had a reasonable excuse for not making it by that time (s 20(6)(b)) or if, after having had such an excuse, he made it without unreasonable delay (s 20(6)(c)). Such penalties may not exceed £300 (s 20(4)(a)), although, if the failure continues after such a penalty is imposed, a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under s 20(3)(a) was imposed (but excluding any day for which such a further penalty has already been imposed) may be imposed (s 20(4)(b)). No penalty under s 20(3) may be imposed on a person in respect of a failure after the failure has been remedied: s 20(5). As to the imposition and administration of penalties see para 575 post.

6 *Ibid* s 8(1). As to the amounts to be paid see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 7(1)-(4) (reg 7(4) amended by SI 2004/2676). Any person who is entitled to child benefit in respect of a child, has applied to open a child trust fund for a child or has at any time given instructions with respect to the management of the child trust fund held by a child may appeal against a decision by the Commissioners not to make a payment under s 8, s 9 or regulations under s 10 (see the text and notes 14-17 *infra*) in respect of the child: s 22(2)(c), (d), (3).

7 As to the amounts to be paid see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 7(5)-(9) (reg 7(9) added by SI 2004/2676). There is a right of appeal against failure to make payment: see note 6 supra.

8 Ie if it has been determined in accordance with the provision made by and by virtue of the Tax Credits Act 2002 ss 18-21 (see SOCIAL SECURITY AND PENSIONS) that a person was, or persons were, entitled to child tax credit in respect of the child for the child benefit commencement date and either the relevant income of the person or persons for the tax year in which that date fell does not exceed the income threshold or the person, or either of the persons, was entitled to a relevant social security benefit for that date, and that determination has not been overturned: Child Trust Funds Act 2004 s 9(4)(c), (5).

'Child benefit commencement date', in relation to a child, means: (1) the first day for which child benefit was paid in respect of the child, otherwise than because of a directly applicable Community provision or an international agreement; or (2) in the case of a child to whom s 2(3) applies or s 2(5) has applied (see para 564 ante), such day as is prescribed by regulations: s 9(10). At the date at which this volume states the law no such regulations had been made. If the child benefit commencement date is earlier than 6 April 2005, the condition which must be satisfied is specified in s 9(8), and if the child benefit commencement date is earlier than 6 April 2003, the condition in s 9(5) is modified: see s 9(7)-(9).

'The relevant income', in relation to a person or persons and a tax year, has the meaning given by the Tax Credits Act 2002 Act s 7(3) (see SOCIAL SECURITY AND PENSIONS) in relation to a claim by the person or persons for a tax credit for the tax year; 'tax year' means a period beginning with 6 April in one year and ending with 5 April in the next; 'the income threshold' has the meaning given by s 7(1)(a) (see SOCIAL SECURITY AND PENSIONS); and 'relevant social security benefit' means any social security benefit prescribed for the purposes of s 7(2) (see SOCIAL SECURITY AND PENSIONS): Child Trust Funds Act 2004 s 9(6).

9 Ie a child who was first an eligible child by virtue of *ibid* s 2(1)(a) (see para 564 ante): s 9(4)(b). For the meaning of 'child' see para 564 note 1 ante.

10 *Ibid* s 9(4)(a).

11 Ie in accordance with regulations: *ibid* s 9(2). Fraudulent, negligent or late claims may attract penalties: see note 5 supra.

12 *Ibid* s 9(2). The Commissioners must inform the account provider with whom the fund is held that these provisions (ie the provisions of s 9: see the text and notes 1-11 supra) apply to the child: s 9(1).

13 *Ibid* ss 8(2), 9(3). A penalty may be imposed on an account provider in respect of a failure by him to comply with s 8(2) or s 9(3) or with a requirement imposed on him by any regulations under s 10(3) (see note 16 infra): s 20(7)(b). The penalty which may be so imposed is a penalty not exceeding £300, or £1 in respect of each account affected by the matter, or any of the matters, in respect of which the penalty is imposed, whichever is greater: s 20(9).

14 Ie children in respect of whom entitlement to child benefit is excluded by the Social Security Contributions and Benefits Act 1992 Sch 9 para 1(a) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 244): Child Trust Funds Act 2004 s 10(1)(a), (4)(a).

15 *Ibid* s 10(1)(b).

16 The regulations must include provision for making account providers aware that such amounts are payable, about the claiming of such payments by account providers, and about the crediting of child trust funds by account providers with the amount of such payments: *ibid* s 10(3). Fraudulent, negligent or late claims or any failure to comply with a requirement imposed by regulations may attract penalties: see notes 5, 13 supra.

17 *Ibid* s 10(2). The amounts of the payments are the amounts prescribed by, or determined in accordance with, regulations: s 10(1). Provision has been made for the payment of such a further contribution by the Child Trust Funds Regulations 2004, SI 2004/1450, reg 7(10), (11) (added by SI 2005/383). There is a right of appeal against failure to make payment: see note 6 supra.

## UPDATE

### 571 Commissioners' contributions

NOTES 6, 7--SI 2004/1450 reg 7A added, reg 22(2)(c) amended: SI 2009/475. SI 2004/1450 reg 7B added: SI 2010/836.

NOTE 17--SI 2004/1450 reg 7(10A) added: SI 2009/475.



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## 572. Taxation.

Investments under child trust funds<sup>1</sup> attract relief from income tax and capital gains tax, and provision is accordingly made<sup>2</sup> for exempting account income and gains from tax<sup>3</sup>, requiring account providers<sup>4</sup> to administer tax liabilities and reliefs on behalf of fund-holders<sup>5</sup>, for the timing of tax repayments to the account provider<sup>6</sup>, for the making and administration of claims<sup>7</sup>, for assessments<sup>8</sup>, for the sending of returns<sup>9</sup>, and for ensuring that child trust funds do not form part of a child's estate for capital gains tax purposes<sup>10</sup>. Provision is also made for protecting the child trust fund business<sup>11</sup> of insurance companies and friendly societies from tax liability<sup>12</sup>.

1 For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante.

2 Ie by regulations under the Child Trust Funds Act 2004 s 13: s 13(1). Provision made by virtue of s 13 may disapply, or modify the effect of, any enactment relating to income tax or capital gains tax: s 13(5). In particular, regulations may include provision for securing that losses are disregarded for the purposes of capital gains tax where they accrue on the disposal of investments under child trust funds (s 13(2)(a)) and provision dealing with anything which, apart from the regulations, would have been regarded for those purposes as an indistinguishable part of the same asset (s 13(2)(b)). The regulations may specify how tax relief is to be claimed by persons entitled to it or by account providers on their behalf: s 13(3). Further, the regulations may include provision requiring that, in circumstances prescribed by the regulations, the person prescribed by the regulations is to account to the Commissioners of Revenue and Customs for tax from which relief has been given under the regulations (s 13(4)(a)) and income or gains arising in consequence of the giving of relief under the regulations (s 13(4)(b)) or for an amount determined in accordance with the regulations in respect of such tax (s 13(4)). As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933. A penalty not exceeding £3,000 may be imposed on an account provider who fraudulently or negligently makes an incorrect statement or declaration in connection with a claim under regulations under s 13: s 20(2)(a). As to the imposition and administration of penalties see para 575 post. Any person who is required by the Commissioners to account for an amount under regulations under s 13 may appeal against the decision to impose the requirement: s 22(4). As to the exercise of rights of appeal see para 576 post.

3 See the Child Trust Funds Regulations 2004, SI 2004/1450, reg 24 (amended by SI 2005/3349; SI 2006/3195).

4 As to the account provider see the Child Trust Funds Act 2004 s 3(1); and para 566 ante.

5 See the Child Trust Funds Regulations 2004, SI 2004/1450, regs 25, 37, 38.

6 See *ibid* regs 26, 27.

7 See *ibid* reg 28.

8 See *ibid* reg 29.

9 See *ibid* reg 30.

10 See *ibid* reg 36.

11 'Child trust fund business', in relation to an insurance company or friendly society, means business of the insurance company or friendly society that is attributable to child trust funds: Child Trust Funds Act 2004 s 14(2).

12 See *ibid* s 14(1) (amended by the Income Tax (Trading and Other Income) Act 2005 s 882(1), Sch 1 para 628), which provides that the provisions of the Income and Corporation Taxes Act 1988 s 333B(1), (5)-(9) (as added and amended) (involvement of insurance companies and friendly societies with ISAs: see INCOME TAXATION

vol 23(2) (Reissue) para 1213) have effect in relation to insurance companies and friendly societies as if child trust fund business were 'plan business' within the meaning of s 333B (as added and amended) (see s 333B(9) (as added and amended); and INCOME TAXATION vol 23(2) (Reissue) para 1213). See also the Child Trust Funds (Insurance Companies) Regulations 2004, SI 2004/2680.

## **UPDATE**

### **572 Taxation**

NOTE 9--SI 2004/1450 reg 30 amended: SI 2009/475.

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### **573. Provision and use of information.**

Regulations may require, or authorise officers of Revenue and Customs<sup>1</sup>:

- 1037 (1) to require any relevant person<sup>2</sup> to make documents available for inspection on behalf of the Commissioners of Revenue and Customs<sup>3</sup>, or to provide to the Commissioners any information<sup>4</sup>, relating to, or to investments which are or have been held under, a child trust fund<sup>5</sup>; and
- 1038 (2) to require an authority to make documents available for inspection on behalf of the Commissioners<sup>6</sup>, or to provide to them any information<sup>7</sup> which is information relating to children in respect of whom entitlement to child benefit is excluded because they are in local authority care<sup>8</sup> and which they may require for the discharge of any function relating to child trust funds<sup>9</sup>.

Information held for any purpose by the Commissioners or by a person providing services to the Commissioners (in connection with the provision of those services) may be used or supplied to any person providing services to the Commissioners for the purpose of the exercise of any of the Commissioners' functions (including those relating to child trust funds)<sup>10</sup>; but if that information is held for the purposes of any function other than those relating to child trust funds, it may be so used or supplied only for the purposes of, or for any purposes connected with, the exercise of any function of the Commissioners relating to child trust funds<sup>11</sup>. Information held by the Secretary of State, or any person providing services to the Secretary of State, may be supplied to the Commissioners, or a person providing services to the Commissioners, in connection with the provision of those services, for use for the purposes of, or for any purposes connected with, the exercise of any function of the Commissioners relating to child trust funds<sup>12</sup>.

1 As to the Commissioners and officers of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933.

2 The following are relevant persons:

- 292 (1) anyone who is or has been the account provider in relation to a child trust fund (Child Trust Funds Act 2004 s 15(2)(a));
- 293 (2) the person by whom the child trust fund is or was held (s 15(2)(v));
- 294 (3) the person, if any, to whom a voucher was issued under s 5(1) (see para 569 ante) in respect of the child by whom the child trust fund is or was held (s 15(2)(c));
- 295 (4) the person who applied to open the child trust fund, unless it was opened by the Commissioners (s 15(2)(d));
- 296 (5) anyone who has given instructions with respect to the management of the child trust fund (s 15(2)(e)); and
- 297 (6) anyone entitled to child benefit in respect of the child (s 15(2)(f)).

For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante. As to the account provider see s 3(1); and para 566 ante. For the meaning of 'child' see para 564 note 1 ante.

3 Ibid s 15(1)(a).

4 Ibid s 15(1)(b).

5 Ibid s 15(1). The regulations may include provision requiring documents to be made available or information to be provided in the manner and form, and by the time and at the place, prescribed by or under the regulations: s 15(3). As to the information which account providers and former account providers must provide see the Child Trust Funds Regulations 2004, SI 2004/1450, regs 32, 34, 35 (reg 32 amended by SI 2005/909). A penalty not exceeding £3,000 may be imposed on any person who fraudulently or negligently provides incorrect information in response to a requirement imposed by or under regulations under the Child Trust Funds Act 2004 s 15: s 20(2)(b). Penalties may also be imposed on any person who fails to make a document available, or provide information, in accordance with such regulations (s 20(3)(b)), although for this purpose a person is to be taken not to have failed to make available a document or provide information which must be made, made available or provided by a particular time if he made it available or provided it within such further time (if any) as the Commissioners may have allowed (s 20(6)(a)), if he had a reasonable excuse for not making it available or providing it by that time (s 20(6)(b)) or if, after having had such an excuse, he made it available or provided it without unreasonable delay (s 20(6)(c)). Such penalties may not exceed £300 (s 20(4)(a)), although, if the failure continues after such a penalty is imposed, a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under s 20(3)(a) was imposed (but excluding any day for which such a further penalty has already been imposed) may be imposed (s 20(4)(b)). No penalty under s 20(3) may be imposed on a person in respect of a failure after the failure has been remedied: s 20(5). As to the imposition and administration of penalties see para 575 post.

6 Ibid s 16(1)(a).

7 Ibid s 16(1)(b).

8 I.e. children in respect of whom entitlement to child benefit is excluded by reason of their being, or having been, in the care of the authority in circumstances prescribed by regulations under the Social Security Contributions and Benefits Act 1992 Sch 9 para 1(c) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 244): Child Trust Funds Act 2004 s 16(2)(a).

9 Ibid s 16(1). The regulations may include provision requiring documents to be made available or information to be provided in the manner and form, and by the time and at the place, prescribed by or under the regulations: s 16(3). As to the information which authorities must provide see the Child Trust Funds Regulations 2004, SI 2004/1450, reg 33 (amended by SI 2004/2676; SI 2004/3382; SI 2006/2684).

10 Child Trust Funds Act 2004 s 17(1), (2). As to the disclosure of information see also the Finance Act 1989 s 182 (as amended); and INCOME TAXATION vol 23(2) (Reissue) para 1834.

11 Child Trust Funds Act 2004 s 17(3).

12 Ibid s 17(4).

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#### **574. Payments after death of child.**

Where a child<sup>1</sup> who is, has been or would have been<sup>2</sup> an eligible child<sup>3</sup> dies, the Commissioners of Revenue and Customs<sup>4</sup> may make to the child's personal representatives a payment equal to the amount of the payment or payments which had not been made or credited<sup>5</sup>. Such payments may be made if:

- 1039 (1) either no payment had been made<sup>6</sup> by the Commissioners or, if one had, the amount of the payment had not been credited to the child trust fund<sup>7</sup> held by the child<sup>8</sup>;
- 1040 (2) provision concerning the payment of a supplementary contribution by the Commissioners applied to the child<sup>9</sup>, but either no such payment had been made under that provision or, if one had, the amount of the payment had not been credited to the child trust fund held by the child<sup>10</sup>; or
- 1041 (3) the Commissioners were required by regulations<sup>11</sup> to make a payment in respect of the child but either the payment had not been made or, if it had, the amount of the payment had not been credited to the child trust fund held by the child<sup>12</sup>.

1 For the meaning of 'child' see para 564 note 1 ante.

2 Ie if the Child Trust Funds Act 2004 had come into force on 31 August 2002 (see para 564 ante).

3 Ie by virtue of *ibid* s 2(1)(a) (see para 564 ante).

4 As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933.

5 Child Trust Funds Act 2004 s 19(1), (2), (4). The personal representatives of a child who has died may appeal against a decision by the Commissioners not to make a payment to them under s 19: s 22(5). As to the exercise of rights of appeal see para 576 post.

6 Ie under *ibid* s 8 (see para 571 ante).

7 For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante.

8 Child Trust Funds Act 2004 s 19(3)(a).

9 Ie *ibid* s 9 (see para 571 ante) applied to the child, or would have had the Child Trust Funds Act 2004 come into force on 31 August 2002 (see para 564 ante): s 19(3)(b).

10 *Ibid* s 19(3)(b).

11 Ie regulations made under *ibid* s 10 (see para 571 ante).

12 *Ibid* s 19(3)(c).



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## **575. Imposition and administration of penalties.**

Penalties<sup>1</sup> are imposed by the Commissioners of Revenue and Customs<sup>2</sup>, and if the Commissioners decide to impose a penalty the decision must (subject to the permitted maximum) set it at such amount as, in their opinion, is appropriate<sup>3</sup>. The Commissioners may also, in their discretion, mitigate any such penalty<sup>4</sup>. The Commissioners must give notice of a decision to impose a penalty to the person on whom the penalty is imposed<sup>5</sup>, and after the notice has been given, the decision must not be altered except on appeal<sup>6</sup>. A penalty is treated for the purposes of the collection and recovery of taxes<sup>7</sup> as if it were tax charged in an assessment and due and payable<sup>8</sup>.

A penalty under these provisions becomes payable at the end of the period of 30 days beginning with the date on which notice of the decision is given<sup>9</sup>. A decision to impose a penalty may not be made after the end of the period of six years beginning with the date on which the penalty was incurred or began to be incurred<sup>10</sup>.

<sup>1</sup> The penalties under the Child Trust Funds Act 2004 s 20: s 21(1). Section 20 provides that penalties of varying sums may be imposed on:

- 298 (1) any person who fraudulently applies to open a child trust fund (see s 20(1)(a); and para 569 ante);
- 299 (2) any person who fraudulently makes a withdrawal from a child trust fund otherwise than as permitted by regulations under s 3(4)(d) (see s 20(1)(b); and para 565 ante);
- 300 (3) any person who fraudulently secures the opening of a child trust fund by the Commissioners of Revenue and Customs (see s 20(1)(c); and para 569 ante);
- 301 (4) an account provider who fraudulently or negligently makes an incorrect statement or declaration in connection with a claim under s 8 or s 9 or regulations under s 10 or s 13 (see s 20(2)(a); and paras 571-572 ante);
- 302 (5) any person who fraudulently or negligently provides incorrect information in response to a requirement imposed by or under regulations under s 15 (see s 20(2)(b); and para 573 note 5 ante);
- 303 (6) an account provider who fails to make a claim under s 8 or s 9 or regulations under s 10 by the required time (see s 20(3)(a), (4)-(6); and para 571 note 5 ante);
- 304 (7) any person who fails to make a document available, or provide information, in accordance with regulations under s 15 (see s 20(3)(b), (4)-(6); and para 573 note 5 ante);
- 305 (8) an account provider in respect of the provision by him, as a child trust fund, of an account which is not of one of the descriptions prescribed by regulations under s 3(2) or in relation to which s 3(4) is not complied with or the requirements imposed by regulations under s 3(5) are not satisfied (see s 20(7)(a), (8), (9); and para 565 ante);
- 306 (9) an account provider in respect of a failure by him to comply with s 8(2) or s 9(3) or with a requirement imposed on him by regulations under s 5(5), s 6(3), s 7 or s 10(3) (see s 20(7)(b), (9); and paras 569-571 ante); and
- 307 (10) an account provider in respect of a breach of s 12(1), or regulations under s 12(2), in relation to a child trust fund held with him (see s 20(7)(c), (9); and para 567 ante).

For the meaning of 'child trust fund' see para 564 note 2 ante; and as to the descriptions of child trust funds see para 565 ante. As to the Commissioners and Officers of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933. As to the account provider see s 3(1); and para 566 ante.

2 Ibid s 21(1).

3 Ibid s 21(2).

4 Ibid s 21(7).

5 Ibid s 21(4). The notice must state the date on which it is given and give details of the right to appeal against the decision under s 22 (see para 576 post): s 21(5).

6 Ibid s 21(6). A person on whom a penalty under s 20 is imposed may appeal against the decision to impose the penalty or its amount: s 22(6). As to appeals see para 576 post.

7 Ie for the purposes of the Taxes Management Act 1970 Pt 6 (ss 60-70A) (as amended) (see INCOME TAXATION vol 23(2) (Reissue) paras 1814-1823).

8 Child Trust Funds Act 2004 s 21(11).

9 Ibid s 21(8).

10 Ibid s 21(3).

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## 576. Appeals.

Notice of an appeal against a decision of the Commissioners of Revenue and Customs relating to child trust funds<sup>1</sup> must be given to the Commissioners in the manner prescribed by regulations within the period of 30 days after the date on which notice of the decision was given<sup>2</sup>, and notice of such an appeal must specify the grounds of appeal<sup>3</sup>.

Until a day to be appointed<sup>4</sup>, an appeal<sup>5</sup> is made to an appeal tribunal<sup>6</sup>; as from the appointed day, an appeal is to be made to the General Commissioners<sup>7</sup> but the appellant may elect<sup>8</sup> to bring the appeal before the Special Commissioners<sup>9</sup> instead<sup>10</sup>. On the hearing of an appeal the tribunal or the Commissioners may allow the appellant to put forward grounds not specified in the notice, and take them into consideration if satisfied that the omission was not wilful or unreasonable<sup>11</sup>.

Special provision is made in connection with appeals against a decision to impose a penalty<sup>12</sup>; and detailed provision is made as to the procedure for appeals generally<sup>13</sup>.

<sup>1</sup> As to the Commissioners of Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) paras 900-933. The following appeals may be brought:

- 308 (1) a person may appeal against a decision by the Commissioners not to approve, or to withdraw the approval of, a person as an account provider (see the Child Trust Funds Act 2004 s 22(1)(a), (b); and para 566 note 3 ante);
- 309 (2) any person who is entitled to child benefit in respect of a child, has applied to open a child trust fund for a child or has at any time given instructions with respect to the management of the child trust fund held by a child may appeal against a decision by the Commissioners:
  - 1 (a) not to issue a voucher under s 5 in relation to that child (see s 22(2)(a), (3); and para 569 note 5 ante);
  - 2 (b) not to open a child trust fund for him under s 6 (see s 22(2)(b); and para 569 note 5 ante); or
  - 3 (c) not to make a payment under s 8, s 9 or regulations under s 10 in respect of the child (see s 22(2)(c), (d); and para 571 note 6 ante);
- 310 (3) a person who is required by the Commissioners to account for an amount under regulations under s 11 or s 13 may appeal against the decision to impose the requirement (see s 22(4); and paras 571 note 2, 572 note 2 ante);
- 311 (4) the personal representatives of a child who has died may appeal against a decision by the Commissioners not to make a payment to them under s 19 (see s 22(5); and para 574 note 5 ante); and
- 312 (5) a person on whom a penalty under s 20 is imposed may appeal against the decision to impose the penalty or its amount (see s 22(6); and para 575 note 6 ante).

<sup>2</sup> Ibid s 23(1). As to the prescribed manner of giving notice of appeal to the Commissioners see the Child Trust Funds (Non-tax Appeals) Regulations 2005, SI 2005/191, reg 3. See also, in connection with appeals against the refusal to approve a person as an account provider, or the withdrawal of such approval, the Child Trust Funds Regulations 2004, SI 2004/1450, reg 17.

<sup>3</sup> Child Trust Funds Act 2004 s 23(2).

4    le a day appointed by order under *ibid* s 24(1). At the date at which this volume states the law no such day had been appointed.

5    le an appeal under *ibid* s 22 (see note 1 *supra*).

6    *Ibid* s 24(1)(b), (3). For this purpose, an 'appeal tribunal' is an appeal tribunal constituted under the Social Security Act 1998 Pt 1 Ch 1 (ss 1-7) (as amended) (see *SOCIAL SECURITY AND PENSIONS*): Child Trust Funds Act 2004 s 24(6)(a). Until a day to be appointed (see note 4 *supra*), the provisions of s 23(3), (4), (6), (7) (see the text and notes 8-13 *infra*) do not apply: s 24(3)(a).

Regulations may apply any provision contained in the Social Security Act 1998 (social security appeals) and the Taxes Management Act 1970 s 54 (settling of appeals by agreement: see *INCOME TAXATION* vol 23(2) (Reissue) para 1767) in relation to appeals which by virtue of the Child Trust Funds Act 2004 s 24 are to an appeal tribunal, or lie to a Social Security Commissioner, but subject to such modifications as are prescribed by the regulations: see s 24(5); and the Child Trust Funds (Non-tax Appeals) Regulations 2005, SI 2005/191, regs 4-15. 'Social Security Commissioner' means the Chief Social Security Commissioner or any other Social Security Commissioner appointed under the Social Security Act 1998 or a tribunal of three or more Commissioners constituted under s 16(7) (see *SOCIAL SECURITY AND PENSIONS*): Child Trust Funds Act 2004 s 24(7)(a).

7    le the 'Commissioners for the general purposes of the income tax' appointed under the Taxes Management Act 1970 s 2 (as amended) (see *INCOME TAXATION* vol 23(1) (Reissue) paras 35-37): Child Trust Funds Act 2004 s 28.

8    Any such election must be in accordance with the Taxes Management Act 1970 s 46(1) (see *INCOME TAXATION* vol 23(2) (Reissue) para 1200): Child Trust Funds Act 2004 s 23(3). The provisions of the Taxes Management Act 1970 s 31D(2)-(7) (as added) (see *INCOME TAXATION* vol 23(2) (Reissue) paras 1751, 1760) have effect in relation to an election under the Child Trust Funds Act 2004 s 23(3) as in relation to an election under the Taxes Management Act 1970 s 31D(1) (as added): Child Trust Funds Act 2004 s 23(4). Note that the provisions of the Child Trust Funds Act 2004 s 23(3), (4) do not apply where appeal lies to an appeal tribunal and not to the General (or Special) Commissioners: see s 24(3)(a); and note 6 *supra*.

9    le the 'Commissioners for the special purposes of the Income Tax Acts' appointed under the Taxes Management Act 1970 s 4 (as amended) (see *INCOME TAXATION* vol 23(1) (Reissue) paras 39-41): Child Trust Funds Act 2004 s 28. As to the Income Tax Acts see *INCOME TAXATION* vol 23(1) (Reissue) para 21.

10   Child Trust Funds Act 2004 s 23(3). Note that s 23(3) does not apply where appeal lies to an appeal tribunal and not to the General (or Special) Commissioners: see s 24(3)(a); and note 6 *supra*.

11   *Ibid* ss 23(5), 24(3)(b).

12   le a decision under *ibid* s 20 (see para 575 *ante*). On an appeal under s 22 against a decision under s 20, the appeal tribunal or the General or Special Commissioners (as the case may be) may:

313   (1)   if it appears that no penalty has been incurred, set the decision aside (ss 21(9)(a), 24(1)(a), (2)(a));

314   (2)   if the amount set appears to be appropriate, confirm the decision (s 21(9)(b));

315   (3)   if the amount set appears to be excessive, reduce it to such other amount (including nil) as it considers or they consider appropriate (s 21(9)(c)); or

316   (4)   if the amount set appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers or they consider appropriate (s 21(9)(d)).

Where such an appeal is to the appeal tribunal, an appeal from a decision of the tribunal under s 21(9) lies, at the instance of the person on whom the penalty was imposed, to a Social Security Commissioner, and on such an appeal that Commissioner has a similar jurisdiction to that conferred on the General or Special Commissioners by s 21(9); and where such an appeal is to the General or Special Commissioners, an appeal from the Commissioners' decision under s 21(9) lies, at the instance of the person on whom the penalty was imposed, to the High Court, and on such an appeal the court has a similar jurisdiction to that conferred on the Commissioners by s 21(9): ss 21(10), 24(2)(b).

13   See the Child Trust Funds (Appeals) Regulations 2005, SI 2005/990; and as to the procedure of the Social Security Commissioners in determining appeals and applications arising from decisions of appeal tribunals see the Social Security Commissioners (Procedure) (Child Trust Funds) Regulations 2005, SI 2005/1031. The Taxes Management Act 1970 Pt 5 (ss 44-58) (as amended) (appeals to Commissioners: see *INCOME TAXATION* vol 23(2) (Reissue) para 1750 *et seq*) applies in relation to appeals under the Child Trust Funds Act 2004 s 22 as in relation to appeals under the Taxes Acts, but subject to such modifications as are prescribed by regulations:

Child Trust Funds Act 2004 s 23(6). At the date at which this volume states the law no such regulations had been made. Any regulations under the Taxes Management Act 1970 s 56B (as added) (see INCOME TAXATION vol 23(2) (Reissue) para 1762) which were in force immediately before 6 April 2005 (ie the date on which the Child Trust Funds Act 2004 s 23(6) was brought into force by the Child Trust Funds Act 2004 (Commencement No 2) Order 2004, SI 2004/3369) apply, subject to any necessary modifications, for the purposes of appeals under the Child Trust Funds Act 2004 s 22 (until amended or revoked): s 23(7). Note that the provisions of s 23(6), (7) do not apply where appeal lies to an appeal tribunal and not to the General (or Special) Commissioners: see s 24(3)(a); and note 6 supra. As to the meaning of 'the Taxes Acts' see the Taxes Management Act 1970 s 118; and INCOME TAXATION vol 23(1) (Reissue) para para 21.

## **UPDATE**

### **576 Appeals**

TEXT AND NOTES--Child Trust Funds Act 2004 s 24 amended: SI 2008/2833. SI 2005/191, SI 2005/990 amended, SI 2005/1031 revoked: SI 2008/2683. Functions of appeal tribunals are transferred to First-tier Tribunal (see First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684), appeal from which lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

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## **8. PROTECTION OF CHILDREN**

### **(1) PROTECTION UNDER THE**

#### **(i) In general**

##### **577. Introduction.**

Part V of the Children Act 1989<sup>1</sup> makes provision for the protection of children at risk. It imposes specific duties on local authorities to investigate where they have reasonable cause to suspect that a child is suffering or is likely to suffer significant harm<sup>2</sup>, and in certain other circumstances<sup>3</sup>. If attempts to have a child examined or assessed voluntarily have failed, application may be made to the court for a child assessment order which will require the child to be produced and made available for assessment in accordance with directions given by the court<sup>4</sup>. The court may, in certain circumstances, make an emergency protection order authorising the removal of the child, or the prevention of the child's removal, along with the power to include an exclusion requirement and certain other ancillary powers, for a limited period<sup>5</sup>. The police are given power to take a child into protection<sup>6</sup>, and the Children Act 1989 confers powers of entry and search<sup>7</sup> and provides that the court may, in certain circumstances, make a recovery order in respect of a child<sup>8</sup>. In support of these provisions the Children Act 1989 creates criminal offences relating to the wrongful removal of children<sup>9</sup>.

Proceedings under Part V of the Children Act 1989 are not 'family proceedings' for the purposes of that Act, with the result that the court has no power to make residence, contact, specific issue or prohibited steps orders of its own motion in such proceedings<sup>10</sup>, except in the family proceedings court where all proceedings under the Children Act 1989 are treated as 'family proceedings'<sup>11</sup>. Rules of court may be made with respect to the procedure to be followed in connection with proceedings under Part V of the Children Act 1989<sup>12</sup>.

In determining any application under Part V of the Children Act 1989 the court must have regard to the welfare principle<sup>13</sup>, to the presumption against making an order<sup>14</sup> and to the general principle that delay is likely to prejudice the welfare of the child<sup>15</sup>.

1 See the Children Act 1989 Pt V (ss 43-52) (as amended). Comparable provisions relating to service families are to be found in the Armed Forces Act 1991 Pt III (ss 17-23) (as amended): see ARMED FORCES vol 2(2) (Reissue) para 68 et seq.

2 As to the meaning of 'significant harm' see para 274 ante.

3 See the Children Act 1989 s 47 (as amended); and paras 599, 601-603 post. As to guidelines for social workers conducting investigations see *Re E (care proceedings: social work practice)* [2000] 2 FCR 297, [2000] All ER (D) 670.

4 See the Children Act 1989 s 43; and paras 578-582 post.

5 See *ibid* s 44, s 44A (as added), s 44B (as added), s 45 (as amended); and paras 583-591 post.

6 See *ibid* s 46; and paras 594-598 post.

7 See *ibid* s 48; and paras 586, 588 post.

8 See *ibid* s 50 (as amended); and paras 606-607 post.

9 See *ibid* s 49; and para 605 post.

10 See *ibid* s 8(3), (4) (as amended), s 10 (as amended); and paras 199, 247-249 ante. As to contact orders see para 251 ante; as to prohibited steps orders see para 261 ante; as to residence orders see para 262 ante; and as to specific issue orders see para 263 ante. See *R v Oxfordshire County Council (secure accommodation order)* [1992] Fam 150, [1992] 3 All ER 660.

11 See the Children Act 1989 s 92(2); and para 204 ante.

12 *Ibid* s 52(1). This is expressed to be without prejudice to s 93 (as amended) (see para 207 ante) (power to make rules of court) or any other power to make such rules. The rules may, in particular make provision: (1) as to the form in which any application is to be made or direction is to be given; (2) prescribing the persons who are to be notified of the making, or extension, of an emergency protection order or the making of an application under s 45(4) or (8) (see para 590 post) or s 46(7) (see para 595 post); and (3) as to the content of any such notification and the manner in which, and person by whom, it is to be given: s 52(2). As to the rules of court in family proceedings see paras 206-207 ante.

13 As to the welfare principle see *ibid* s 1(1); and para 300 ante. The court is not, however, obliged to have regard to the particular matters set out in s 1(3) (see para 303 ante): see s 1(4).

14 See *ibid* s 1(5); and para 302 ante.

15 See *ibid* s 1(2); and para 301 ante.

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## **(ii) Child Assessment Orders**

### **578. Child assessment orders.**

A child assessment order is an order for the assessment of the state of a child's<sup>1</sup> health or development, or of the way in which he has been treated<sup>2</sup>. It deals with the single issue of enabling an assessment of the child to be made where significant harm<sup>3</sup> is suspected but the child is not thought to be at immediate risk such as would require his removal, or keeping him in hospital. The purpose of the order is to allow the local authority or authorised person to ascertain enough about the state of the child's health or development or the way in which he has been treated to decide what further action, if any, is required<sup>4</sup>. A child assessment order is not for use in cases of emergency, for which an emergency protection order would be more appropriate<sup>5</sup>.

On the application of a local authority<sup>6</sup> or authorised person<sup>7</sup> for a child assessment order to be made with respect to a child, the court may make the order, but only if it is satisfied that:

- 1042 (1) the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm<sup>8</sup>;
- 1043 (2) an assessment of the state of the child's health or development, or of the way in which he has been treated, is required to enable the applicant to determine whether or not the child is suffering, or is likely to suffer, significant harm<sup>9</sup>; and
- 1044 (3) it is unlikely that such an assessment will be made, or be satisfactory, in the absence of a child assessment order<sup>10</sup>.

No court may make a child assessment order if it is satisfied that there are grounds for making an emergency protection order with respect to the child, and that it ought to make such an order rather than a child assessment order<sup>11</sup>. The court may treat an application for a child assessment order as an application for an emergency protection order<sup>12</sup>.

An application by a local authority for a child assessment order should always be preceded by some kind of local authority investigation<sup>13</sup>. Action under the statutory provision imposing a duty on the local authority to investigate<sup>14</sup> should be seen as the usual first step when a question of child protection arises<sup>15</sup>.

1 For the meaning of 'child' see para 3 ante.

2 See the Children Act 1989 ss 43(1)(b), (2), 105(1). Comparable provisions as to service family child assessment orders are made by the Armed Forces Act 1991: see ss 17, 18 (both as amended); and ARMED FORCES vol 2(2) (Reissue) paras 68-69.

3 As to the meaning of 'significant harm' see para 274 ante.

4 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.6. As to the guidance and regulations generally see para 163 ante.

5 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.4. The child assessment order is envisaged as a 'heavily court-controlled order dealing with the narrow issue of examination or assessment of the child in specific circumstances of non



co-operation by the parents and lack of evidence of the need for a different type of order or other action': Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.4. As to emergency protection orders see para 583 et seq post.

6 For the meaning of 'local authority' see para 138 note 13 ante.

7 For the meaning of 'authorised person' see para 271 ante; definition applied by the Children Act 1989 s 43(13). Cf the definition of 'authorised person' in the case of applications for emergency protection orders: see s 44(1); and para 583 post. As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

8 Ibid s 43(1)(a).

9 Ibid s 43(1)(b).

10 Ibid s 43(1)(c). The Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.8 states that these conditions are very specific: the order is for cases where there are suspicions, but no firm evidence, of actual or likely significant harm in circumstances which do not constitute an emergency; and the applicant considers that a decisive step to obtain an assessment is needed to show whether the concern is well founded or further action is not required, and that informal arrangements to have such an assessment carried out have failed. Examples are given of situations in which an application may be appropriate: eg the parents or other persons looking after the child have resisted attempts to arrange an examination or assessment by agreement or failed to bring the child to see a doctor when arrangements have been made, and have not made suitable alternative arrangements: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.8. A child assessment order will usually be most appropriate where the harm to the child is long-term and cumulative rather than sudden and severe: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.9. The circumstances may be nagging concern about a child who appears to be failing to thrive; or the parents are ignorant of or unwilling to face up to possible harm to their child because of the state of his health or development; or it appears that the child may be subject to wilful neglect or abuse but not to such an extent as to place him at serious immediate risk: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.9. Sexual abuse, which covers a wide range of behaviour, can fall in this category: the harm to the child can be long-term rather than immediate and it does not necessarily require emergency action: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.9.

11 Children Act 1989 s 43(4).

12 Ibid s 43(3).

13 'The applicant is not likely to be able to satisfy the court of either set of grounds without being able to point to findings of an investigation, however limited this might be in some circumstances and especially in sudden emergencies': Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.78. See *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam), [2007] 1 FCR 512, [2005] 1 FLR 341.

14 Ie under the Children Act 1989 s 47 (as amended): see paras 599, 601-603 post.

15 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.78. The structure for helping to gather and then analyse the information obtained is found in the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006) Appendix 2: Framework for the Assessment of Children in Need.

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### **579. Commencement, duration and effect of child assessment order.**

A child assessment order must specify the date by which the assessment is to begin<sup>1</sup>, and has effect for such period, not exceeding seven days, beginning with that date, as may be specified in the order<sup>2</sup>.

Where a child assessment order is in force with respect to a child<sup>3</sup>, it is the duty of any person who is in a position to produce the child to produce him to such person as may be named in the order and to comply with such directions<sup>4</sup> relating to the assessment of the child as the court thinks fit to specify in the order<sup>5</sup>. Failure to comply with a child assessment order may be dealt with under the provisions of the Magistrates' Courts Act 1980<sup>6</sup>. In practice, deliberate refusal to comply would probably be sufficient to satisfy the conditions for an emergency protection order<sup>7</sup>.

A child assessment order authorises any person carrying out the assessment, or any part of the assessment, to do so in accordance with the terms of the order<sup>8</sup>.

1 Children Act 1989 s 43(5)(a).

2 Ibid s 43(5)(b). The applicant should make the necessary arrangements in advance of the application, so that it would usually be possible to complete within such period an initial multi-disciplinary assessment of the child's medical, intellectual, emotional, social and behavioural needs; this should be sufficient to establish whether the child is suffering, or likely to suffer, significant harm and, if so, what further action is required: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.12. The applicant should be able to give details of the proposed arrangements to the court so that it may consider these when giving directions: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.12. As to the guidance and regulations generally see para 163 ante.

3 For the meaning of 'child' see para 3 ante.

4 The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.14 states that the court should take advice from those presenting the case, and if necessary other professionals involved in the case (including the children's guardian) about what the assessment should cover, and may make directions accordingly. This may include eg whether the assessment should be limited to a medical examination or cover other aspects of a child's health and development, and by whom and where it should be conducted: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.14. It may require that the child's usual doctor or another medical professional may participate and eg for the child's parents' medical representative to be present: Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 1 Court Orders* (HMSO, 1991) para 4.14. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante.

5 Children Act 1989 s 43(6).

6 Ie the Magistrates' Courts Act 1980 s 63(3) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 6.

7 If the developing circumstances make the case so urgent that there is no time to apply for an emergency protection order, the police should be asked to use their powers under the Children Act 1989 s 46 (see paras 594-598 post) to take the child into police protection; there are no powers of search attached to s 46, but, in emergencies and for the purposes of saving life and limb, the police have reserve powers under the Police and Criminal Evidence Act 1984 to enter and search premises without a warrant (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 924-925): see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.19.

8 Children Act 1989 s 43(7).

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### **580. Particular matters which may be contained in a child assessment order.**

The court may direct a medical or psychiatric examination as part of the terms of a child assessment order, but it is specifically provided that if a child<sup>1</sup> is of sufficient understanding<sup>2</sup> to make an informed decision he may refuse to submit to a medical or psychiatric examination or other assessment<sup>3</sup>, regardless of the fact that the effect of a child assessment order is to confer authority for the carrying out of the assessment or any part of the assessment<sup>4</sup>.

A child may only be kept away from home, in accordance with directions specified in the order, if it is necessary for the purposes of the assessment and for such period or periods as may be specified in the order<sup>5</sup>. Where the child is to be kept away from home, the order must contain such directions as the court thinks fit with regard to the contact that he must be allowed to have with other persons while away from home<sup>6</sup>.

1 For the meaning of 'child' see para 3 ante.

2 The Children Act 1989 makes no provision as to the level of understanding which is required. The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.13 states that the children's guardian may well be able to advise the court as to whether the child is of sufficient understanding to make such a decision. In performing this duty the children's guardian may need to seek the assistance of professionals in other disciplines, and particularly where a child suffers from a handicap which impairs his ability to communicate: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.13. The children's guardian will wish to explore with the child his reluctance to undertake an assessment, and advise the court accordingly: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.13. Providing the child with further advice may result in the child withdrawing his opposition, but all professionals should take particular care to avoid coercing the child into agreement even where there is a belief that the refusal to comply is itself the product of coercion by a parent, relative or friend: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.13. As to the guidance and regulations generally see para 163 ante. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante.

3 Children Act 1989 s 43(8). Cf *Re R (a minor) (wardship: medical treatment)* [1992] Fam 11, [1991] 4 All ER 177, CA (suggesting that the court exercising the wardship jurisdiction has power to override the refusal of a mature minor to undergo medical treatment); *Re W (aa minor) (medical treatment: court's jurisdiction)* [1993] Fam 64, [1992] 4 All ER 627, CA.

4 See the Children Act 1989 s 43(7); and para 579 ante.

5 Ibid s 43(9). This power is intended to be a reserve provision, and if used the number of overnight stays should be kept as low as possible; the assessment should be conducted with as little trauma for the child and parents as possible: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.15, which also gives examples of when the need for an overnight stay might arise.

6 Children Act 1989 s 43(10). A temporary overnight stay cannot be equated with being placed in care, but the court may well be guided on contact by the presumption of reasonable contact between the child in care and his parents: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.16. For further matters which the court should consider see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.16.

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### **581. Procedure for making application.**

An application for a child assessment order must be made on notice<sup>1</sup>. Any person making an application for an order must take such steps as are reasonably practicable to ensure that notice of the application is given, before the hearing of the application, to: (1) the child's parents<sup>2</sup>; (2) any person who is not a parent but who has parental responsibility<sup>3</sup>; (3) any other person caring for the child<sup>4</sup>; (4) any person in whose favour a contact order is in force with respect to the child<sup>5</sup> or who is allowed to have contact with the child by virtue of a care contact order<sup>6</sup>; and (5) the child<sup>7</sup>. The application must be made on the prescribed form<sup>8</sup> and, save in exceptional cases, must be made in the magistrates' court<sup>9</sup>. A copy of the application must be served on the respondents to the application at least seven days prior to the hearing<sup>10</sup>. Notice of the proceedings must be given to specified persons<sup>11</sup>.

1 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1)(b) (amended by SI 1994/3156; SI 2004/3376; SI 2005/617); Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1)(b) (amended by SI 1994/3155; SI 2004/3375). Applications for child assessment orders are not among the applications which may be made ex parte: see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(4) (amended by SI 1992/2068; SI 1994/3156; SI 2005/617); Family Proceedings Rules 1991, SI 1991/1247, r 4.4(4) (amended by SI 1991/2113; SI 1992/2067; SI 1994/3155).

2 Children Act 1989 s 43(11)(a). As to the meaning of 'parent' see para 539 note 4 ante.

3 Ibid s 43(11)(b). For the meaning of 'parental responsibility' see para 134 ante.

4 Ibid s 43(11)(c).

5 Ibid s 43(11)(d). As to contact orders see para 251 ante.

6 Ibid s 43(11)(e). As to care contact orders see para 279 ante.

7 Ibid s 43(11)(f). As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

8 Ie form C16: see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 1 (form C16 substituted by SI 1994/3156); and the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 (form C16 substituted by SI 1994/3155).

9 See the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 3(1) (as amended); and para 209 ante. For the exceptional cases see art 3(2), (3) (as amended); and para 209 ante.

10 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1)(b), Sch 2 (r 4.1(b) as amended (see note 1 ante); Sch 2 amended by SI 1992/2068; SI 2003/2840; SI 2005/2930); Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1)(b), Appendix 3 (r 4.4(1)(b) as amended (see note 1 supra); Appendix 3 substituted by SI 1992/2067; and amended by SI 1994/2165; SI 2003/2839; SI 2005/2922).

11 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(3) (substituted by SI 1994/3155); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 2 (as amended: see note 10 supra); Family Proceedings Rules 1991, SI 1991/1247, r. 4.4(3), Appendix 3 (as substituted and amended: see note 10 supra). As to the specified persons to whom notice of the proceedings is to be given see para 224 ante.

### **UPDATE**

## **581 Procedure for making application**

NOTE 1--SI 1991/1247 r 4.4 further amended: SI 2009/636. SI 1991/1395 r 4(4) further amended: SI 2009/637.

NOTE 8--SI 1991/1395 Sch 1 further amended: SI 2009/2025.

TEXT AND NOTE 9--SI 1991/1677 art 3(1) replaced: Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, art 5(2)(h). For the exceptional cases see art 5(3); and PARA 209.

NOTE 10--SI 1991/1395 Sch 2 modified: SI 2008/2859. SI 1991/1395 Sch 2 further amended: SI 2009/637, SI 2009/2025.

NOTE 11--See also SI 1991/1247 rr 4.4(3A), 4.4A, 4.13B (added by SI 2008/2861). See also SI 1991/1395 r 4(3A) (added, for specified purposes, by SI 2008/2859).

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## **582. Discharge or variation of child assessment order.**

Any person on whose application a child assessment order was made, or any person to whom notice of such an application had to be given<sup>1</sup>, may apply to the court in any circumstances for the discharge or variation of the child assessment order<sup>2</sup>. A copy of the application must be served on the respondents to the application at least two days prior to the hearing<sup>3</sup>.

<sup>1</sup> See under the Children Act 1989 s 43(11); see para 581 ante.

<sup>2</sup> See *ibid* s 43(12); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(3); and the Family Proceedings Rules 1991, SI 1991/1247, r 4.2(3). As to appeals see paras 304-306 ante.

<sup>3</sup> Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1)(b) (amended by SI 1994/3156; SI 2004/3376; SI 2005/617); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 2 (amended by SI 1992/2068; SI 2003/2840; SI 2005/2930); Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1)(b) (amended by SI 1994/3155; SI 2004/3375); Family Proceedings Rules 1991, SI 1991/1247, Appendix 3 (substituted by SI 1992/2067; and amended by SI 1994/2165; SI 2003/2839; SI 2005/2922).

## **UPDATE**

### **582 Discharge or variation of child assessment order**

NOTE 3--SI 1991/1395 Sch 2 modified: SI 2008/2859. SI 1991/1395 Sch 2 further amended: SI 2009/637, SI 2009/2025. See also SI 1991/1247 r 4.4A (added by SI 2008/2861).

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### **(iii) Emergency Protection Orders**

#### **583. Grounds for an emergency protection order.**

Where any person ('the applicant') applies to the court for an emergency protection order<sup>1</sup> to be made with respect to a child<sup>2</sup> the court may make an order if, but only if, it is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm<sup>3</sup> if he is not removed to accommodation provided by or on behalf of the applicant, or if he does not remain in the place in which he is then being accommodated<sup>4</sup>.

Where the application is made by a local authority<sup>5</sup>, the court may make an order if, but only if, it is satisfied that there is reasonable cause to believe that: (1) inquiries are being made with respect to the child<sup>6</sup>; and (2) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access<sup>7</sup> and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency<sup>8</sup>.

Where the application is made by an authorised person<sup>9</sup>, the court may also make an emergency protection order if, but only if, it is satisfied that: (a) the applicant has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm<sup>10</sup>; (b) the applicant is making inquiries with respect to the child's welfare<sup>11</sup>; and (c) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access<sup>12</sup> and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency<sup>13</sup>.

In exercising its discretion as to whether or not to make an emergency protection order, and what the terms of that order should be<sup>14</sup>, the court must apply the welfare principle<sup>15</sup> and the presumption against making an order<sup>16</sup>. The applicants and the court should approach any such application with anxious awareness of the extreme nature of the order sought, and with a scrupulous regard for the human rights of both the child and the parents<sup>16</sup>.

An application by a local authority for an emergency protection order should always be preceded by some kind of local authority investigation<sup>17</sup>. Action under the statutory provision imposing a duty on the local authority to investigate<sup>18</sup> should be seen as the usual first step when a question of child protection arises<sup>19</sup>.

1 'Emergency protection order' means an order under the Children Act 1989 s 44: s 105(1). The purpose of an emergency protection order is to 'enable the child in a genuine emergency to be removed from where he is, or be kept where he is, if and only if this is what is necessary to provide immediate short-term protection': Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.28. Although the provisions governing emergency protection orders have been limited to what is necessary to protect the child, an application for such an order remains an extremely serious step, which must not be seen as a routine response to allegations of child abuse or as a routine first step to initiating care proceedings: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.30. As to the guidance and regulations generally see para 163 ante. Comparable provisions for orders for the emergency protection of children of service families are made by the Armed Forces Act 1991 ss 19, 20, 20A, 21, 22 (s 20A as added; all as amended); and ARMED FORCES vol 2(2) (Reissue) paras 70 et seq.

2 For the meaning of 'child' see para 3 ante. An emergency protection order must, wherever it is reasonably practicable to do so, name the child, and where it does not do so it must describe him as clearly as possible: see the Children Act 1989 s 44(14).



3 As to the meaning of 'significant harm' see para 274 ante.

4 Children Act 1989 s 44(1)(a). A local authority or authorised person may make an application in the same way as any other person under this 'general purpose provision for emergencies': Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.41. As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

Rules of court may be made with respect to the procedure to be followed in connection with proceedings under Pt V (ss 43-52) (as amended), and such rules may in particular make provision prescribing the persons who are to be notified of the making, or extension of, an emergency protection order: s 52(1), (2)(b)(i). As to the rules of court in family proceedings see paras 206-207 ante.

5 For the meaning of 'local authority' see para 138 note 13 ante. In certain circumstances a local authority is required to apply for an emergency protection order or an alternative order: see *ibid* s 47(6); and para 602 post.

6 *Ibid* s 44(1)(b)(i). The reference in the text to inquiries being made in respect of the child is to those made by the local authority under s 47(1)(b): see para 601 post.

7 A 'person authorised to seek access' means, in the case of an application by a local authority, an officer of the local authority or a person authorised by the authority to act on its behalf in connection with the inquiries: *ibid* s 44(2)(b)(i).

8 *Ibid* s 44(1)(b)(ii). See further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.39.

9 For the meaning of 'authorised person' see para 271 ante; definition applied by the Children Act 1989 s 44(2)(a).

10 *Ibid* s 44(1)(c)(i).

11 *Ibid* s 44(1)(c)(ii).

12 A 'person authorised to seek access' means, in the case of an application by an authorised person, that person: *ibid* s 44(2)(b)(ii). Any person seeking access to a child in connection with inquiries of a kind mentioned in s 44(1) and purporting to be authorised to do so must, on being asked to do so, produce some duly authenticated document as evidence that he is such a person: s 44(3).

13 *Ibid* s 44(1)(c)(iii). See further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.39.

14 The Children Act 1989 s 44(1) (see the text and notes 1-13 supra) empowers, but does not oblige, the court to make an emergency order if the grounds are made out. The court will wish to know what it is that necessitates urgent action, whether, if removal of the child is necessary, it can be achieved with the co-operation of the parents and the provision of accommodation and whether a decision can wait until the parents have had an opportunity properly to prepare their case at an interim hearing; and the applicant will be expected to give as much of this information as possible either orally or in the application form for this order: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.43. In many cases the initial application will be made in the absence of the parents, and in those circumstances the court will want to examine very carefully the information it is given, especially where the basis of the application is the likelihood of future harm or inability to see the child; even if the court does decide that an emergency protection order would be appropriate, these considerations may point to an initial order being made for a very short time, so that notice may be given to parents and others concerned: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.44.

15 As to the welfare principle see the Children Act 1989 s 1(1); and para 300 ante.

16 *Ibid* s 1(5); and para 302 ante. The court must bear in mind that such an order is 'draconian' requiring 'exceptional justification' and 'extraordinarily compelling reasons': *X Council v B (emergency protection orders)* [2004] EWHC 2015 (Fam) at [34], [2007] 1 FCR 512 at [34], [2005] 1 FLR 341 at [34] per Munby J. As to the making of emergency protection orders see further *Re C and B (care order: future harm)* [2000] 2 FCR 614, [2001] 1 FLR 611, CA; *Haringey London Borough Council v C (E intervening)* [2004] EWHC 2580 (Fam), [2005] 2 FLR 47, [2005] Fam Law 351.

17 The applicant is not likely to be able to satisfy the court of either set of grounds without being able to point to findings of an investigation, however limited this might be in some circumstances and especially in

sudden emergencies: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.78. See *X Council v B (emergency protection orders)* [2004] EWHC 2015 (Fam), [2007] 1 FCR 512, [2005] 1 FLR 341.

18 le under the Children Act 1989 s 47 (as amended): see paras 599, 601-603 post.

19 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.78. The structure for helping to gather and then analyse the information obtained is found in the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006) Appendix 2: Framework for the Assessment of Children in Need.

## UPDATE

### 583 Grounds for an emergency protection order

NOTE 5--See *R (on the application of G) v Nottingham City Council* [2008] EWHC 152 (Admin), [2008] All ER (D) 45 (Mar) (removal of child from parent unlawful in absence of court order).

NOTE 10--Extraordinarily compelling reasons must be shown to justify the removal of a child immediately after its birth: *Re D (unborn baby) (emergency protection order: future harm)* [2009] EWHC 446 (Fam), [2009] 2 FLR 313, [2009] All ER (D) 266 (Mar).

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#### **584. Effect of an emergency protection order.**

While an emergency protection order<sup>1</sup> is in force it operates as a direction to any person who is in a position to do so to comply with any request to produce the child to the applicant<sup>2</sup>, and it authorises: (1) the removal of the child at any time to accommodation provided by or on behalf of the applicant and his being kept there; or (2) the prevention of the child's removal from any hospital or other place in which he was being accommodated immediately before the making of the order<sup>3</sup>. The order also gives the applicant parental responsibility<sup>4</sup> for the child<sup>5</sup>.

Subject to any directions made by the court<sup>6</sup>, the applicant must allow the child reasonable contact with: (a) his parents<sup>7</sup>; (b) any person who is not a parent of his, but who has parental responsibility for him<sup>8</sup>; (c) any person with whom he was living immediately before the making of the order<sup>9</sup>; (d) any person in whose favour a contact order is in force with respect to him<sup>10</sup>; (e) any person who is allowed to have contact with a child<sup>11</sup> who is the subject of a care order<sup>12</sup>; and (f) any person acting on behalf of any of those persons<sup>13</sup>.

When a local authority obtains, or is informed of, an emergency protection order, it must make inquiries as to any action it should take to safeguard or promote the child's welfare<sup>14</sup>.

1 For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 Children Act 1989 s 44(4)(a). For the meaning of 'child' see para 3 ante.

3 Ibid s 44(4)(b). A person is guilty of an offence if he intentionally obstructs any person exercising this power to remove, or prevent the removal of, a child: s 44(15). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 44(16). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

4 For the meaning of 'parental responsibility' see para 134 ante.

5 Children Act 1989 s 44(4)(c). In certain circumstances parental responsibility may pass from the original applicant to a local authority: see para 592 post.

6 Ie under the Children Act 1989 s 44(6): see para 586 post.

7 Ibid s 44(13)(a).

8 Ibid s 44(13)(b).

9 Ibid s 44(13)(c).

10 Ibid s 44(13)(d).

11 Ie under ibid s 34: see paras 274, 278-279 ante.

12 Ibid s 44(13)(e). As to care orders see para 276 ante.

13 Ibid s 44(13)(f).

14 See ibid s 47(1) (as amended), (2); and paras 599, 601 post.

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### **585. Restrictions on exercise of powers under an emergency protection order.**

Where an emergency protection order<sup>1</sup> is in force the applicant may only exercise the power to remove the child<sup>2</sup> or prevent his removal<sup>3</sup> in order to safeguard the welfare of the child<sup>4</sup>. Moreover, the applicant must take, and may only take, such action in meeting his parental responsibility<sup>5</sup> for the child as is reasonably required to safeguard or promote the welfare of the child, having regard in particular to the duration of the order<sup>6</sup>. The applicant must also comply with the requirements of any regulations which may be made for the purpose by the Secretary of State<sup>7</sup>.

1 For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 Ie the power conferred by the Children Act 1989 s 44(4)(b): see para 584 ante.

4 Ibid s 44(5)(a).

5 As to parental responsibility under an emergency protection order see para 584 ante. For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 s 44(5)(b). As to the duration of an emergency protection order see para 590 post.

7 See ibid s 44(5)(c). At the date at which this volume states the law no such regulations had been made. As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

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### **586. Power of court to give directions.**

Where the court makes an emergency protection order<sup>1</sup> it may give such directions (if any) as it considers appropriate with respect to the contact which is or is not to be allowed between the child<sup>2</sup> and any named person<sup>3</sup>, and with respect to the medical or psychiatric examination or other assessment of the child<sup>4</sup>. However, where any direction for medical or psychiatric examination is given, the child may, if he is of sufficient understanding to make an informed decision, refuse to submit to the examination or other assessment<sup>5</sup>. A direction relating to medical or psychiatric examination may be to the effect that there is to be no such examination or assessment, or no such examination or assessment unless the court directs otherwise<sup>6</sup>.

An emergency protection order may also authorise the applicant to enter premises specified by the order and search for the child with respect to whom the order is made<sup>7</sup> and the court may, subject to certain conditions, make an order authorising the applicant to search for another child who is reasonably believed to be on the premises<sup>8</sup>.

1 For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 44(6)(a). Such a direction may impose conditions: s 44(8). Subject to any such direction the child must be allowed reasonable contact with specified persons: see s 44(13); and para 584 ante. Directions may be given when the emergency protection order is made or at any time while it is in force, and may be varied at any time on the application of any person falling within any class of person prescribed by rules of court for these purposes: s 44(9). The following persons are prescribed by rules of court: (1) the parties to the application for the order in respect of which it is sought to vary the directions; (2) the children's guardian; (3) the local authority in whose area the child concerned is ordinarily resident; and (4) any person named in the directions: Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 2(4) (amended by SI 2001/818); Family Proceedings Rules 1991, SI 1991/1247, r. 4.2(4) (amended by SI 2001/821). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante. For the meaning of 'local authority' see para 138 note 13 ante.

4 Children Act 1989 s 44(6)(b). As to the power to give directions etc see *Essex County Council v L (minors)* [1993] Fam Law 458, (1992) Times, 18 December.

5 Children Act 1989 s 44(7).

6 Ibid s 44(8). See the *Report of the Inquiry into Child Abuse in Cleveland* (Cm 412) (1987).

7 Children Act 1989 s 48(3). A person is guilty of an offence if he intentionally obstructs any person exercising such a power of entry and search: s 48(7). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 48(8). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

8 See ibid s 48(4). The court must be satisfied that there is reasonable cause to believe that there may be on the premises in question another child with respect to whom an emergency protection order ought to be made: see s 48(4). Wherever it is reasonably practicable to do so, this order must name the child, and where it does not do so it must describe him as clearly as possible: s 48(13). Where an order has been made under s 48(4), the child concerned has been found on the premises and the applicant is satisfied that the grounds for making an emergency protection order exist with respect to him, the order has effect as if it were an emergency protection order: s 48(5). Where such an order has been made, the applicant must notify the court of its effect: s 48(6). A person is guilty of an offence if he intentionally obstructs any person in the exercise of the power of entry and search under s 48(4): s 48(7). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 48(8).



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### **587. Exclusion requirements and undertakings.**

Where, on being satisfied that an emergency protection order should be made, the court makes such an order in respect of a child<sup>1</sup> it may include an exclusion requirement in the order<sup>2</sup> if it is satisfied that: (1) there is reasonable cause to believe that, if a person ('the relevant person') is excluded from a dwelling house in which the child lives then, in the case of an application by an applicant for an emergency protection order<sup>3</sup>, the child will not be likely to suffer significant harm<sup>4</sup> even though the child is not removed<sup>5</sup> or does not remain in the place in which he is then being accommodated<sup>6</sup>, or, in the case of an application by the local authority<sup>7</sup> or an authorised person<sup>8</sup> the inquiries being made with respect to the child will cease to be frustrated<sup>9</sup>; and (2) another person living in the dwelling house (whether a parent of the child or some other person) is able and willing to give to the child the care which it would be reasonable to expect a parent to give to him, and that person consents to the inclusion of the exclusion requirement<sup>10</sup>. An exclusion requirement may require the relevant person to leave the dwelling house in which he is living with the child, prohibit him from entering the dwelling house in which the child lives, and exclude him from a defined area in which the dwelling house in which the child lives is situated<sup>11</sup>. Where the court makes an emergency protection order containing an exclusion requirement, it may attach a power of arrest to the exclusion requirement<sup>12</sup>, enabling a constable to arrest without warrant any person whom he has reasonable cause to believe may be in breach of the requirement<sup>13</sup>.

The court may provide that the exclusion requirement is to have effect for a shorter period than the other provisions of the order<sup>14</sup>. Equally, where the court attaches a power of arrest to an exclusion requirement, it may provide that the power of arrest is to have effect for a shorter period than the exclusion requirement<sup>15</sup>, although the court may extend either of these specified periods on one or more occasions on an application to vary or discharge the emergency protection order<sup>16</sup>. In any event, if while an emergency protection order containing an exclusion requirement is in force, the applicant has removed the child from the dwelling house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours, the order ceases to have effect in so far as it imposes the exclusion requirement<sup>17</sup>.

In any case where the court has power to include an exclusion requirement in an emergency protection order, the court may accept an undertaking from the relevant person<sup>18</sup>, although no power of arrest may be attached to any such undertaking<sup>19</sup>. An undertaking is enforceable as if it were an order of the court, and ceases to have effect if, while it is in force, the applicant has removed the child from the dwelling house for a continuous period of more than 24 hours<sup>20</sup>.

1 Children Act 1989 s 44A(1)(a) (s 44A added by Family Law Act 1996 s 52, Sch 6 para 3). For the meaning of 'emergency protection order' see para 583 note 1 ante. For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 44A(1) (as added: see note 1 supra). As to the procedure to be followed where the court includes an exclusion requirement see the Family Proceedings Rules 1991, SI 1991/1247, r 4.24A (added by SI 1997/1893); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25A (added by SI 1997/1895).

3 ie under the Children Act 1989 s 44(1)(a): see para 583 ante.

4 As to the meaning of 'significant harm' see para 274 ante.

5 le as mentioned in the Children Act 1989 s 44(1)(a)(i): see para 583 ante.

6 See *ibid* s 44A(1)(b), (2)(a)(i) (as added: see note 1 *supra*).

7 le under *ibid* s 44(1)(b): see para 583 ante. For the meaning of 'local authority' see para 138 note 13 ante.

8 le under *ibid* s 44(1)(c): see para 583 ante.

9 See *ibid* s 44A(1)(b), (2)(a)(ii) (as added: see note 1 *supra*).

10 *Ibid* s 44A(1)(b), (2)(b) (as added: see note 1 *supra*). Consent for the purposes of s 44A(2)(b)(ii) (as added) must be given either orally in court or in writing to the designated officer for the court or to the court and signed by the person giving his consent: Family Proceedings Rules 1991, SI 1991/1247, r 4.24(1)(b) (amended by SI 1992/456; SI 1997/1893); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25(1)(b) (amended by SI 1992/2068; SI 1997/1895; SI 2005/617). Any such written consent must include a statement that the person giving consent is able and willing to give to the child the care which it would be reasonable to expect a parent to give him, and understands that the giving of consent could lead to the exclusion of the relevant person from the dwelling house in which the child lives: Family Proceedings Rules 1991, SI 1991/1247, r 4.24(2) (added by SI 1997/1893); Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 25(2) (added by SI 1997/1895).

11 Children Act 1989 s 44A(3) (as added: see note 1 *supra*). Any one or more of these requirements may form part of the exclusion requirement: s 44A(3) (as so added).

12 See *ibid* s 44A(5) (as added: see note 1 *supra*). Where the court includes a power of arrest in an order, and the relevant person was not given notice of and did not attend the hearing, the order should be announced in open court: *Practice Direction (interim care order: exclusion requirement: arrest)* [1998] 2 All ER 928, sub nom *Practice Direction (Children Act 1989: exclusion requirement)* [1998] 1 FCR 338.

13 See the Children Act 1989 s 44A(8) (as added: see note 1 *supra*). The provisions of the Family Law Act 1996 ss 47(7), (11), (12), 48, Sch 5 (arrest and remand for breach of occupation order or non-molestation order) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 988 et seq) have effect in relation a to person arrested under the Children Act 1989 s 44A(8) (as added) as they have effect in relation to a person arrested under the Family Law Act 1996 s 47(6) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 990): Children Act 1989 s 44A(9) (as so added).

14 *Ibid* s 44A(4) (as added: see note 1 *supra*).

15 See *ibid* s 44A(6) (as added: see note 1 *supra*).

16 See *ibid* s 44A(7) (as added: see note 1 *supra*).

17 *Ibid* s 44A(10) (as added: see note 1 *supra*).

18 *Ibid* s 44B(1) (s 44B added by the Family Law Act 1996 Sch 6 para 3). The provisions of the Children Act 1989 s 44B (as added) have effect without prejudice to the powers of the High Court and county court apart from s 44B (as added): s 44B(4) (as so added).

19 *Ibid* s 44B(2) (as added: see note 18 *supra*).

20 *Ibid* s 44B(3) (as added: see note 18 *supra*).



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### **588. Ancillary powers of the court.**

Where it appears to the court making an emergency protection order<sup>1</sup> that adequate information as to the whereabouts of the child<sup>2</sup> is not available to the applicant for the order but is available to another person, it may include in the order a provision requiring that other person to disclose, if asked to do so by the applicant, any information that he may have as to the child's whereabouts<sup>3</sup>.

Powers of entry and search for a child may be granted by the court<sup>4</sup>. Where on an application made by any person for a warrant, it appears to the court: (1) that a person attempting to exercise powers under an emergency protection order has been prevented from doing so by being refused entry to the premises concerned or access to the child concerned; or (2) that any such person is likely to be so prevented from exercising any such powers, it may issue a warrant<sup>5</sup> authorising a constable to assist the person mentioned in head (1) or head (2) above in the exercise of his powers, using reasonable force if necessary<sup>6</sup>.

1 For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 48(1). No person is excused from complying with such a requirement on the ground that complying might incriminate him or his spouse or civil partner of an offence, but a statement or admission made in complying is not admissible in evidence against either of them in proceedings for any offence other than perjury: s 48(2) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 130).

4 See the Children Act 1989 s 48(3); and para 588 ante.

5 The application for a warrant must be made in the manner and form prescribed by rules of court: *ibid* s 48(12). See the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(4) (amended by SI 1992/2068; SI 1994/3156; SI 2005/617); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 1 (amended by SI 2003/2840; SI 2004/3376; SI 2005/413; SI 2005/2930); the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(4) (amended by SI 1991/2113; SI 1992/2067; SI 1994/3155); and the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 (amended by SI 2004/3375). Wherever it is reasonably practicable to do so, an application for a warrant and any such warrant must name the child, and where it does not do so it must describe him as clearly as possible: Children Act 1989 s 48(13).

6 *Ibid* s 48(9). Every warrant issued under s 48 must be addressed to, and executed by, a constable, who must be accompanied by the person applying for the warrant if that person so desires, and the court by whom the warrant is issued does not direct otherwise: s 48(10). The court granting an application for a warrant may direct that the constable concerned may, in executing the warrant, be accompanied by a registered medical practitioner, registered nurse or registered midwife if he so chooses: s 48(11) (amended by the Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 10(b)). The reference to a registered midwife is to such a midwife who is also registered in the Specialist Community Public Health Nurses' Part of the register maintained under the Nursing and Midwifery Order 2001, SI 2002/253, art 5 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 717): Children Act 1989 s 48(11A) (added by the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1771, art 3, Schedule Pt 1 para 4(b)).

## **UPDATE**

### **588 Ancillary powers of the court**

NOTE 5--SI 1991/1395 r 4(4) further amended: SI 2009/637. SI 1991/1395 Sch 1 further amended: SI 2008/2858, SI 2009/637, SI 2009/2025.

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### **589. Duty of the applicant to return the child.**

Where an emergency protection order is in force with respect to a child<sup>1</sup> and the child has been removed<sup>2</sup>, but it appears to the applicant to be safe for the child to be returned, or the child has been prevented from being removed<sup>3</sup> but it appears that it is safe for him to be allowed to be removed from the place in question, the applicant must return the child or, as the case may be, allow him to be removed<sup>4</sup>. Where the applicant is so required to return the child he must return the child to the care of the person from whose care he was removed<sup>5</sup>, or, if that is not reasonably practicable, to the care of: (1) a parent of his<sup>6</sup>; (2) any person who is not a parent of his but who has parental responsibility<sup>7</sup> for him<sup>8</sup>; or (3) such other person as the applicant, with the agreement of the court, considers appropriate<sup>9</sup>. Where the applicant has been required<sup>10</sup> to return the child or allow him to be removed, he may again exercise his powers with respect to the child at any time while the emergency protection order remains in force if it appears to him that a change in the circumstances of the case makes it necessary for him to do so<sup>11</sup>.

1 For the meaning of 'emergency protection order' see para 583 note 1 ante. For the meaning of 'child' see para 3 ante.

2 *Ie* under the Children Act 1989 s 44(4)(b)(i): see para 584 ante.

3 *Ie* under *ibid* s 44(4)(b)(ii): see para 584 ante.

4 *Ibid* s 44(10).

5 *Ibid* s 44(11)(a).

6 *Ibid* s 44(11)(b)(i).

7 For the meaning of 'parental responsibility' see para 134 ante.

8 Children Act 1989 s 44(11)(b)(ii).

9 *Ibid* s 44(11)(b)(iii).

10 *Ie* by *ibid* s 44(10): see the text to notes 1-4 *supra*.

11 *Ibid* s 44(12).

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### **590. Duration and discharge of orders.**

An emergency protection order has effect for such period, not exceeding eight days, as may be specified in the order<sup>1</sup>. The court may on application<sup>2</sup> extend the period during which the order is to have effect by such period, not exceeding seven days, as it thinks fit, but it may do so only if it has reasonable cause to believe that the child concerned is likely to suffer significant harm if the order is not extended<sup>3</sup>. An emergency protection order may be extended only once<sup>4</sup>.

An application may be made for the discharge of an emergency protection order by the child, a parent of his, any person who is not a parent but who has parental responsibility<sup>5</sup> for him, or any person with whom the child was living immediately before the making of the order<sup>6</sup>. On the application of a person who is not entitled to apply for the order to be discharged, but who is a person to whom an exclusion requirement<sup>7</sup> contained in the order applies, an emergency protection order may be varied or discharged by the court in so far as it imposes the exclusion requirement<sup>8</sup>. Where the person who would otherwise be entitled to apply for the emergency protection order to be discharged was given notice, in accordance with rules of court<sup>9</sup>, of the hearing at which the order was made and was present at the hearing that person may not apply for the emergency protection order to be discharged<sup>10</sup>; nor is there any right to apply for the discharge of an order the effective period of which has been extended<sup>11</sup>. No application for the discharge of an emergency protection order may be heard before the expiry of the period of 72 hours beginning with the making of the order<sup>12</sup>.

1 Children Act 1989 s 45(1). For the meaning of 'emergency protection order' see para 583 note 1 ante. Where the court making an emergency protection order would specify a period of eight days as the period for which the order is to have effect but the last of those eight days is a public holiday (ie Christmas Day, Good Friday, a bank holiday or a Sunday) the court may specify a period which ends at noon on the first later day which is not such a holiday: s 45(2). 'Bank holiday' means a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321); Children Act 1989 s 105(1). As to the calculation of time see generally TIME.

2 Any person who has parental responsibility for a child as a result of an emergency protection order and is entitled to apply for a care order with respect to the child may apply to the court for the period during which the emergency protection order is to have effect to be extended: *ibid* s 45(4). As to parental responsibility under an emergency protection order see para 584 ante.

Rules of court may be made with respect to the procedure to be followed in connection with proceedings under Pt V (ss 43-52) (as amended), and such rules may in particular make provision prescribing the persons who are to be notified of the making of an application under s 45(4) or (8): s 52(1), (2)(b)(ii). As to the rules of court in family proceedings see paras 206-207 ante.

3 *Ibid* s 45(5). As to the meaning of 'significant harm' see para 274 ante.

4 *Ibid* s 45(6).

5 For the meaning of 'parental responsibility' see para 134 ante.

6 See the Children Act 1989 s 45(8). See also note 2 *supra*.

7 As to exclusion requirements see para 587 ante.

8 Children Act 1989 s 45(8A) (added by the Family Law Act 1996 s 52, Sch 6 para 4). Where a power of arrest has been attached to an exclusion requirement the court may, on the application of any person entitled to apply for the discharge of the order so far as it imposes the exclusion requirement, vary or discharge the

order in so far as it confers a power of arrest, whether or not any application has been made to vary or discharge any other provision of the order: Children Act 1989 s 45(8B) (added by the Family Law Act 1996 Sch 6 para 4).

9 See para 591 post.

10 See the Children Act 1989 s 45(11)(a).

11 See *ibid* s 45(11)(b).

12 *Ibid* s 45(9).

## **UPDATE**

### **590 Duration and discharge of orders**

TEXT AND NOTE 12--Children Act 1989 s 45(9) repealed: Children and Young Persons Act 2008 s 30, Sch 4.

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### **591. Procedural matters and appeals.**

An application for an emergency protection order is normally made in the family proceedings court<sup>1</sup> and must be made in the prescribed form<sup>2</sup>. However, an application may also be made in the county court or the High Court<sup>3</sup>. An application may be made *ex parte*<sup>4</sup>. However, where the court refuses to make an order on an *ex parte* application it may direct that the application be made *inter partes*<sup>5</sup>. Where the application is made on notice, rules specify who is to be a respondent and who must be given notice of the proceedings<sup>6</sup>.

Regardless of any enactment or rule of law<sup>7</sup> which would otherwise prevent it from doing so, a court hearing an application for or with respect to an emergency protection order may take account of any statement contained in any report made to the court in the course of, or in connection with, the hearing, or of any evidence given during the hearing, which in the opinion of the court is relevant to the application<sup>8</sup>. A court making an emergency protection order may direct that the applicant, in exercising any power which he has by virtue of the order, may be accompanied by a registered medical practitioner, nurse or midwife if he so chooses<sup>9</sup>.

There is no appeal against: (1) the making of, or refusal to make, an emergency protection order<sup>10</sup>; (2) the extension of, or refusal to extend, the period during which the order is to have effect<sup>11</sup>; (3) the discharge of, or refusal to discharge, such an order<sup>12</sup>; (4) the giving of, or refusal to give, any direction in connection with such an order<sup>13</sup>.

1 As to the family proceedings court see para 208 note 10 ante. In such circumstances as the Lord Chancellor, after consulting the Lord Chief Justice, may by order specify, the jurisdiction of a magistrates' court to make an emergency protection order may be exercised by a single justice: Children Act 1989 s 92, Sch 11 para 3(1)(a) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 5 Pt 1 paras 203, 210(1), (4)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477-497. For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 *le Forms C1, C11*: see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1) (amended by SI 1994/3156; SI 2004/3376; SI 2005/617; the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(1A) (added by SI 1994/3156; and amended by SI 2004/3376); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 1 (amended by SI 1997/1875; SI 2004/3376; SI 2005/413; SI 2005/2930). As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

3 As to when an application for an emergency protection order is to be made in a county court or the High Court see para 209 ante. In those circumstances the prescribed forms are Forms C1, C11: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1) (amended by SI 1994/3155; SI 2004/3175); the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(1A) (added by SI 1994/3155; and amended by SI 2004/3375); and the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 (amended by SI 1997/1893; SI 2004/3375; SI 2005/412; SI 2005/2922).

4 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(4)(b). An application in the county court or High Court may be made by telephone: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(4)(b). In the family proceedings court the applicant must file the application at the time of making it or as directed by the designated officer of the court; and he must serve a copy of the order on each respondent within 48 hours of the making of the order: see the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(4)(b), (i), (ii) (r 4(4)(i) amended by SI 1994/3156; SI 2005/617). In the county court and High Court the applicant must file the application at the time when the application is made, or where the application is made by telephone, within 24 hours after the making of the application; and he must serve a copy of the order on each respondent within 48 hours of the making of the order: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.4(4)(b), (i), (ii) (r 4.4(4)(i) amended by SI 1994/3155).

Except in 'wholly exceptional cases' these applications must be on notice. An ex parte application would normally be appropriate only in cases of genuine emergency or other great urgency, and even then some informal notice to the parents should be possible unless there are compelling reasons to believe that the child's welfare would be compromised by such advance notice. Particular care is required in the giving, recording and then passing on of a record of the evidence given in applications heard in the absence of and without the knowledge of the parents: *X Council v B (emergency protection orders)* [2004] EWHC 2015 (Fam), [2007] 1 FCR 512, [2005] 1 FLR 341; *Haringey London Borough Council v C (E intervening)* [2004] EWHC 2580 (Fam), [2005] 2 FLR 47, [2005] Fam Law 351.

5 Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(5); Family Proceedings Rules 1991, SI 1991/1247, r. 4.4(5).

6 See the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 4(3) (substituted by SI 1994/3156); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, Sch 2 (amended by SI 1992/2068; SI 2003/2840; 2005/2930); the Family Proceedings Rules 1991, SI 1991/1247, r. 4.4(3) (substituted by SI 1994/3155); and the Family Proceedings Rules 1991, SI 1991/1247, Appendix 3 (substituted by SI 1992/2067; and amended by SI 2003/2839; SI 2005/2922).

It is not appropriate, except in wholly exceptional circumstances, to bring judicial review proceedings where the purpose of the proceedings is to prevent a local authority from commencing emergency protection proceedings: *Re M (care proceedings: judicial review)* [2003] EWHC 850 (Admin), [2004] 1 FCR 302, [2003] 2 FLR 171.

7 As to the admissibility of hearsay evidence in family law proceedings see para 317 note 15 ante.

8 Children Act 1989 s 45(7).

9 Ibid s 45(12) (amended by the Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 10(a)). The reference to a registered midwife is to such a midwife who is also registered in the Specialist Community Public Health Nurses' Part of the register maintained under Nursing and Midwifery Order 2001, SI 2002/253, art 5 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 717); Children Act 1989 s 45(13) (added by the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1772, art 3, Schedule Pt 1 para 4(a)).

The court must comply with the requirements of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21 (as amended) as to the giving and recording of reasons: see *Essex County Council v F* [1993] 2 FCR 289, [1993] 1 FLR 847, [1993] Fam Law 337.

10 Children Act 1989 s 45(10)(a) (s 45(10) substituted by the Courts and Legal Services Act 1990 s 116, Sch 16 para 19).

11 Children Act 1989 s 45(10)(b) (as substituted: see note 10 supra).

12 Ibid s 45(10)(c) (as substituted: see note 10 supra).

13 Ibid s 45(10)(d) (as substituted: see note 10 supra). See also *Essex County Council v F* [1993] 2 FCR 289, [1993] 1 FLR 847, [1993] Fam Law 337; *Re P (emergency protection order)* [1996] 3 FCR 637, [1996] 1 FLR 482.

## UPDATE

### 591 Procedural matters and appeals

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--SI 1991/1395 Sch 1 further amended: SI 2008/2858, SI 2009/637, SI 2009/2025. SI 1991/1395 r 4(1), (1A), Sch 1 modified: SI 2008/2859. SI 1991/1395 r 4(1A) further amended: SI 2009/2025.

NOTES 3, 6--SI 1991/1247 r 4.4(1) further amended, r 4.4A added: SI 2008/2861.

NOTE 3--SI 1991/1247 r 4.4(1A) further amended: SI 2009/2027.

NOTE 6--SI 1991/1395 Sch 2 modified: SI 2008/2859. SI 1991/1395 Sch 2 further amended: SI 2009/637, SI 2009/2025. SI 1991/1247 Appendix 3 further amended: SI 2008/2861, SI 2009/636.





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**592. Power to make regulations transferring the applicant's responsibilities to the local authority.**

The Secretary of State<sup>1</sup> may by regulations provide that, where: (1) an emergency protection order has been made with respect to a child<sup>2</sup>; (2) the applicant for the order was not the local authority<sup>3</sup> within whose area the child is ordinarily resident; and (3) that local authority is of the opinion that it would be in the child's best interests for the applicant's responsibilities under the order to be transferred to it, that authority must (subject to its having complied with any requirements imposed by the regulations) be treated, for the purposes of the Children Act 1989, as though it and not the original applicant had applied for, and been granted, the order<sup>4</sup>. Such regulations may, in particular, make provision as to: (a) the considerations to which the local authority must have regard in forming an opinion as mentioned in head (3) above; and (b) the time at which responsibility under any emergency protection order is to be treated as having been transferred to a local authority<sup>5</sup>.

1 As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 For the meaning of 'emergency protection order' see para 583 note 1 ante. For the meaning of 'child' see para 3 ante.

3 For the meaning of 'local authority' see para 138 note 13 ante.

4 Children Act 1989 s 52(3). As to the regulations made see the Emergency Protection Orders (Transfer of Responsibilities) Regulations 1991, SI 1991/1414; and para 593 post.

5 Children Act 1989 s 52(4). See para 593 post.

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### **593. Transfer of responsibilities.**

Where an emergency protection order has been made with respect to a child, and the applicant for the order was not the local authority within whose area the child is ordinarily resident, and that authority is of the opinion that it would be in the child's best interests for the responsibilities of the applicant to be transferred to it, the authority is treated as though it had applied for and been granted the order<sup>1</sup>. In forming that opinion the authority must consult the applicant<sup>2</sup> and have regard to the following considerations:

- 1045 (1) the ascertainable wishes and feelings of the child, having regard to his age and understanding<sup>3</sup>;
- 1046 (2) the child's physical, emotional and educational needs for the duration of the order<sup>4</sup>;
- 1047 (3) the likely effect on the child of any change in circumstances which may be caused by the transfer of responsibilities under the order<sup>5</sup>;
- 1048 (4) the child's age, sex and family background<sup>6</sup>;
- 1049 (5) the circumstances which gave rise to the application for the emergency protection order<sup>7</sup>;
- 1050 (6) any directions of the court and other orders made in respect of the child<sup>8</sup>;
- 1051 (7) the relationship (if any) of the applicant for the emergency protection order to the child<sup>9</sup>; and
- 1052 (8) any plans which the applicant may have in respect of the child<sup>10</sup>.

When an authority has formed the opinion that a transfer of responsibilities would be in the best interests of the child, it must give notice of the date and time<sup>11</sup> of the transfer to the court which made the order, the applicant for the order, and those, other than the local authority, to whom the applicant for the order gave notice of it<sup>12</sup>.

1 Emergency Protection Orders (Transfer of Responsibilities) Regulations 1991, SI 1991/1414, reg 2. The regulations do not apply where the child to whom the emergency protection order applies is in a refuge in respect of which there is in force a Secretary of State's certificate issued under the Children Act 1989 s 51 (as amended) (see para 609 post) and the person carrying on the home or the foster parent providing the refuge, having taken account of the wishes and feelings of the child, has decided that the child should continue to be provided with refuge for the duration of the order: Emergency Protection Orders (Transfer of Responsibilities) Regulations 1991, SI 1991/1414, reg 5. For the meaning of 'emergency protection order' see para 583 note 1 ante.

2 Ibid reg 3(1).

3 Ibid reg 3(1)(a).

4 Ibid reg 3(1)(b).

5 Ibid reg 3(1)(c).

6 Ibid reg 3(1)(d).

7 Ibid reg 3(1)(e).

8 Ibid reg 3(1)(f).

9 Ibid reg 3(1)(g).

10 Ibid reg 3(1)(h).

11 The time at which responsibility under any emergency protection order is to be treated as having been transferred to a local authority is the time stated as the time of transfer in this notice by the local authority to the applicant for the emergency protection order, or the time at which notice is given to him, whichever is the later: see *ibid* reg 4.

12 Ibid reg 3(2). The notice must be given in writing, and may be sent by post: reg 3(3).

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#### **(iv) Police Powers and Duties**

##### **594. Taking a child into police protection.**

Where a constable has reasonable cause to believe that a child<sup>1</sup> would otherwise be likely to suffer significant harm<sup>2</sup> he may remove the child to suitable accommodation and keep him there or take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented<sup>3</sup>. A child with respect to whom a constable has exercised these powers is referred to as having been taken into police protection<sup>4</sup>.

The powers of the police cannot in practice be exercised unless and until a child is found, and a constable has no right to enter and search premises to remove a child without a warrant<sup>5</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'significant harm' see para 274 ante. The power may be used where a police officer attends a domestic dispute and finds a child living in unhygienic conditions: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.71. The power may also be used where the child's parents have been arrested, or when children are found in unsuitable places, or when they are considered to be at risk in case of abuse investigations. As to the guidance and regulations generally see para 163 ante.

3 Children Act 1989 s 46(1). The powers are significant in the context of child protection not least because it is only a constable who has power to take compulsory measures relating to a child without first obtaining a court order. They may be exercised notwithstanding the fact that an emergency protection order under s 44 (see para 583 et seq ante) is in force in relation to the child. However, where a police officer knows there is such an order in force, he should not exercise the s 46 power of removal unless there are compelling reasons to do so, otherwise he will be acting unlawfully: *Langley v Liverpool City Council* [2005] EWCA Civ 1173, [2006] 2 All ER 202, [2006] 1 WLR 375, [2006] 1 FLR 342.

4 Children Act 1989 s 46(2).

5 As to the court's power to authorise entry and search of premises see para 586 ante. However, in certain circumstances the police might exercise the general power to enter and search premises without a warrant, ie to arrest a person for an indictable offence, to arrest a person for a breach of the peace, to recapture a person unlawfully at large, to save life and limb, or prevent serious damage to property: see the Police and Criminal Evidence Act 1984 s 17 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 884.

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### **595. Duties and responsibilities of police; the designated officer.**

As soon as is reasonably practicable after taking a child<sup>1</sup> into police protection, the constable concerned must secure that the case is inquired into by the designated officer (that is, the officer designated by the chief officer of the police area concerned)<sup>2</sup>. On completing that inquiry, the designated officer must release the child from police protection unless he considers that there is still reasonable cause for believing that the child would be likely to suffer significant harm<sup>3</sup> if released<sup>4</sup>. While a child is being kept in police protection, the designated officer may apply on behalf of the appropriate authority<sup>5</sup> for an emergency protection order to be made<sup>6</sup> in respect of the child<sup>7</sup>, but such an application may be made whether or not the authority knows of it or agrees to its being made<sup>8</sup>.

1 For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 46(3)(e). As to chief officers of police see POLICE vol 36(1) (2007 Reissue) para 178 et seq; and as to police areas see POLICE vol 36(1) (2007 Reissue) paras 136-138.

3 As to the meaning of 'significant harm' see para 274 ante.

4 Children Act 1989 s 46(5). The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.74, makes it clear that it is envisaged that the designated officer will have an important liaison role in situations in which the police become involved with a child who is at risk of suffering significant harm. As to the guidance and regulations generally see para 163 ante.

5 I.e. the local authority in whose area the child is ordinarily resident: see the Children Act 1989 s 46(3)(b); and para 596 post.

6 I.e. under *ibid* s 44: see para 583 et seq ante.

7 *Ibid* s 46(7). Rules of court may be made with respect to the procedure to be followed in connection with proceedings under Pt V (ss 43-52) (as amended), and such rules may, in particular make provision prescribing the persons who are to be notified of the making of an application under s 46(7): s 52(1), (2)(b)(ii). As to the rules of court in family proceedings see paras 206-207 ante.

8 *Ibid* s 46(8). Good and effective channels of communications should mean that the police never make such an application without the local authority's knowledge and agreement. If they do so without local authority agreement protection can only extend for the duration of the order. The police cannot seek an extension to an emergency protection order, nor can they commence care proceedings: Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.74.

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#### **596. Further duties of constable who has exercised powers.**

In addition to his duty to secure an investigation by a designated officer<sup>1</sup>, a constable who has taken a child<sup>2</sup> into police protection is required, as soon as is reasonably practicable after doing so:

- 1053 (1) to inform the local authority<sup>3</sup> within whose area the child was found of the steps that have been, and are proposed to be, taken with respect to the child<sup>4</sup> and the reasons for taking them<sup>5</sup>;
- 1054 (2) to give details to the authority within whose area the child is ordinarily resident ('the appropriate authority') of the place at which the child is being accommodated<sup>6</sup>;
- 1055 (3) to inform the child (if he appears capable of understanding) of the steps that have been taken with respect to him, the reasons for taking them and the further steps that may be taken with respect to him<sup>7</sup>;
- 1056 (4) to take such steps as are reasonably practicable to discover the wishes and feelings of the child<sup>8</sup>; and
- 1057 (5) where the child was taken into police protection by being removed to accommodation not provided by or on behalf of a local authority, or as a refuge<sup>9</sup>, to secure that the child is moved to accommodation which is so provided<sup>10</sup>.

The constable concerned must, as soon as is reasonably practicable after taking a child into police protection, take such steps as are reasonably practicable to inform: (a) the child's parents; (b) every person who is not a parent of his but who has parental responsibility<sup>11</sup> for him; and (c) any other person with whom the child was living immediately before being taken into police protection, of the steps that he has taken with respect to the child<sup>12</sup>, the reasons for taking them and the further steps that may be taken with respect to him<sup>13</sup>.

1 See the Children Act 1989 s 46(3)(e); and para 595 ante. For the meaning of 'designated officer' see para 595 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'local authority' see para 138 note 13 ante.

4 Ie under the Children Act 1989 s 46.

5 Ibid s 46(3)(a).

6 Ibid s 46(3)(b).

7 Ibid s 46(3)(c).

8 Ibid s 46(3)(d).

9 Ie under ibid s 51 (as amended); see para 609 post.

10 Ibid s 46(3)(f).

11 For the meaning of 'parental responsibility' see para 134 ante.

12 le under the Children Act 1989 s 46.

13 Ibid s 46(4).

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**597. Effect of police protection on parental responsibility.**

While a child<sup>1</sup> is being kept in police protection neither the constable concerned nor the designated officer has parental responsibility<sup>2</sup> for him<sup>3</sup>. However, the designated officer<sup>4</sup> must do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare, having regard in particular to the length of the period during which the child will be so protected<sup>5</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'parental responsibility' see para 134 ante.

3 Children Act 1989 s 46(9)(a).

4 For the meaning of 'designated officer' see para 595 ante.

5 Children Act 1989 s 46(9)(b).



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### **598. Contact with a child in police protection.**

Where a child<sup>1</sup> has been taken into police protection, the designated officer<sup>2</sup> must allow the following persons to have such contact (if any) with the child as, in the opinion of the designated officer, is both reasonable and in the child's best interests<sup>3</sup>: (1) the child's parents<sup>4</sup>; (2) any person who is not a parent of the child but who has parental responsibility<sup>5</sup> for him<sup>6</sup>; (3) any person with whom the child was living immediately before he was taken into police protection<sup>7</sup>; (4) any person in whose favour a contact order is in force with respect to the child<sup>8</sup>; (5) any person who is allowed to have contact with the child by virtue of a care contact order<sup>9</sup>; and (6) any person acting on behalf of any of those persons<sup>10</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'designated officer' see para 595 ante. Where the child is in accommodation provided by, or on behalf of, the local authority in whose area the child is ordinarily resident, this duty rests on that authority and not on the designated officer: see the Children Act 1989 s 46(11).

3 Ibid s 46(10). As with all provisions of the Children Act 1989 relating to contact, the wishes and feelings of the child should be fully considered: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.76. As to the guidance and regulations generally see para 163 ante.

4 Children Act 1989 s 46(10)(a).

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 s 46(10)(b).

7 Ibid s 46(10)(c).

8 Ibid s 46(10)(d). As to contact orders see para 251 ante.

9 Ibid s 46(10)(e). As to care contact orders see para 279 ante.

10 Ibid s 46(10)(f).

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### **599. Duties of the local authority.**

Where a local authority<sup>1</sup> is informed<sup>2</sup> that a child<sup>3</sup> who lives, or is found, in its area is in police protection it must make or cause to be made such inquiries as it considers necessary to enable it to decide whether it should take any action to safeguard or promote the child's welfare<sup>4</sup>. The inquiries must in particular be directed towards establishing whether, in the case of a child who has been taken into police protection, it would be in the child's best interests for the authority to ask for an application to be made for an emergency protection order<sup>5</sup>.

1 For the meaning of 'local authority' see para 138 note 13 ante.

2 As to the duty of the constable who brings a child into police protection to give information to both the local authority within whose area the child was found and the authority within whose area the child is ordinarily resident see para 596 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 47(1).

5 Ibid s 47(3)(c). See also s 47(3)(a), (b); and para 601 post. The reference in the text to an application for an emergency protection order is to one under s 46(7): see para 595 ante. As to emergency protection orders see para 583 et seq ante. The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 4.77 states that local authorities will find it necessary to monitor and review at regular intervals their channels of communication with the police so that effective inter-agency working is achieved. As to the guidance and regulations generally see para 163 ante.

## **UPDATE**

### **599 Duties of the local authority**

NOTE 4--See also Application 2010/06 *Kehoe v United Kingdom* [2008] 2 FCR 461, ECtHR.

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#### **600. Duration of police protection.**

No child<sup>1</sup> may be kept in police protection for more than 72 hours<sup>2</sup> and where an emergency protection order is made on an application by a designated officer<sup>3</sup> on behalf of the appropriate authority<sup>4</sup> the eight day maximum period for which the emergency protection order may have effect<sup>5</sup> begins with the first day on which the child was taken into police protection<sup>6</sup>.

1 For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 46(6).

3 As to the designated officer and his power to apply for an emergency protection order see para 595 ante. As to emergency protection orders see para 583 et seq ante.

4 Ie an application under the Children Act 1989 s 46(7): see para 595 ante.

5 See para 590 ante.

6 See the Children Act 1989 s 45(3). The reference in the text to the first day on which the child was taken into police protection is to the first day he was taken into police protection under s 46: see paras 594-598 ante.

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## **(v) Local Authority Investigations**

### **601. Duty of local authority to conduct inquiries.**

Where a local authority<sup>1</sup> is informed that a child<sup>2</sup> who lives, or is found, in its area is either the subject of an emergency protection order<sup>3</sup> or is in police protection<sup>4</sup>, or has contravened a ban imposed by a curfew notice<sup>5</sup>, the authority must make or cause to be made such inquiries as it considers necessary to enable it to decide whether it should take any action to safeguard or promote the child's welfare<sup>6</sup>. The same duty arises where a local authority has reasonable cause to suspect that a child who lives or is found in its area is suffering or is likely to suffer significant harm<sup>7</sup>.

Where a local authority has obtained an emergency protection order with respect to a child, the authority must make or cause to be made such inquiries as it considers necessary to enable it to decide what action it should take to safeguard or promote the child's welfare<sup>8</sup>.

Inquiries must in particular be directed towards establishing: (1) whether the authority should make any application to the court, or exercise any of its other powers under the Children Act 1989 or the Crime and Disorder Act 1998<sup>9</sup>, with respect to the child<sup>10</sup>; (2) whether, in the case of a child with respect to whom an emergency protection order has been made and who is not in accommodation provided by or on behalf of the local authority, it would be in the child's best interests while an emergency protection order remains in force for him to be in such accommodation<sup>11</sup>; and (3) whether, in the case of a child who has been taken into police protection, it would be in the child's best interests for the authority to ask that the designated officer<sup>12</sup> make an application on behalf of the authority for an emergency protection order<sup>13</sup>.

1 For the meaning of 'local authority' see para 138 note 13 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 47(1)(a)(i). As to emergency protection orders see para 583 seq ante.

4 Ibid s 47(1)(a)(ii). As to the duty of a constable to inform the local authority that a child has been taken into police protection see para 596 ante. As to the meaning of 'police protection' see para 594 ante.

5 Ibid s 47(1)(a)(iii) (added by the Crime and Disorder Act 1998 ss 15(4), 119, Sch 8 para 69). The reference in the text to a ban imposed by a curfew notice is to one within the meaning of the Crime and Disorder Act 1998 s 14 (as amended): see para 624 post. In such a case the inquiries must be commenced as soon as practicable and, in any event, within 48 hours of the authority receiving the information: Children Act 1989 s 47(1) (added by the Crime and Disorder Act 1998 s 15(4), Sch 8 para 69).

6 Children Act 1989 s 47(1). For the power of the local authority to refer certain individuals to the Secretary of State see para 649 post. As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

7 Ibid s 47(1)(b). As to the meaning of 'significant harm' see para 274 ante. As to the duty of a local authority to investigate in other circumstances see para 604 post; and see also *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, [1993] 2 FLR 134, CA.

8 Children Act 1989 s 47(2).

9 I.e. the Crime and Disorder Act 1998 s 11 (as amended): see para 625 post.

10 Children Act 1989 s 47(3)(a) (amended by the Crime and Disorder Act 1998 s 15(4), Sch 8 para 69). As to the manner in which this duty must be discharged see *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, [1993] 2 FLR 134, CA.

11 Children Act 1989 s 47(3)(b).

12 For the meaning of 'designated officer' see para 595 ante.

13 Children Act 1989 s 47(3)(c). The reference in the text to the designated officer making an application on behalf of the authority for an emergency protection order is to an application under s 46(7): see para 595 ante.

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## **602. Conduct of the inquiries.**

Where the local authority<sup>1</sup> is required to make or cause to be made, such inquiries as it considers necessary to enable it to decide what action it should take to safeguard or promote a child's<sup>2</sup> welfare<sup>3</sup> it must (with a view to enabling it to determine what action, if any, to take with respect to him) take such steps as are reasonably practicable to obtain access to the child or to ensure that access to him is obtained on the authority's behalf by a person authorised by it for the purpose, unless it is satisfied that it already has sufficient information with respect to the child<sup>4</sup>. Where, in the course of such inquiries, any officer of the local authority concerned or the person authorised by the authority to act on its behalf in connection with those inquiries is refused access to the child concerned or is denied information as to his whereabouts, the authority must apply for an emergency protection order<sup>5</sup>, a child assessment order<sup>6</sup>, a care order<sup>7</sup> or a supervision order<sup>8</sup> with respect to the child unless it is satisfied that the child's welfare can be satisfactorily safeguarded without its doing so<sup>9</sup>.

Where a local authority is conducting inquiries<sup>10</sup>, it is the duty of any local authority, any local education authority<sup>11</sup>, any local housing authority<sup>12</sup>, any local health board<sup>13</sup>, special health authority<sup>14</sup>, primary care trust<sup>15</sup>, national health service trust<sup>16</sup> or NHS foundation trust<sup>17</sup> and any person authorised by the Secretary of State<sup>18</sup> for the purpose, to assist a local authority with those inquiries, in particular by providing relevant information and advice, if called upon by the authority to do so<sup>19</sup>. However, there is no obligation on any person to assist a local authority where doing so would be unreasonable in all the circumstances of the case<sup>20</sup>. Where a local authority is making inquiries with respect to a child who appears to be ordinarily resident within the area of another authority, the first-mentioned authority must consult the other authority, which may undertake the necessary inquiries in its place<sup>21</sup>.

1 For the meaning of 'local authority' see para 138 note 13 ante.

2 For the meaning of 'child' see para 3 ante.

3 *Ie* under the Children Act 1989 s 47(1): see para 599 ante.

4 *Ibid* s 47(4).

5 As to emergency protection orders see para 583 et seq ante.

6 As to child assessment orders see para 578 ante.

7 As to care orders see para 276 et seq ante.

8 As to supervision orders see para 281 et seq ante.

9 Children Act 1989 s 47(6).

10 *Ie* under *ibid* s 47: see paras 599, 601 ante, 603 post.

11 As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

12 For the meaning of 'local housing authority' see para 932 note 9 post.

13 As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74.

- 14 As to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq.
- 15 As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq.
- 16 As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.
- 17 As to NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARA 174 et seq.
- 18 As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.
- 19 See the Children Act 1989 s 47(9), (11) (s 47(11) amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 20; the Health Authorities Act 1995 s 2, Sch 1 para 118(1); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 24(1), (7); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 para 79; and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(f)).
- 20 Children Act 1989 s 47(10).
- 21 See *ibid* s 47(12).

## **UPDATE**

### **602 Conduct of the inquiries**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **603. Matters arising from inquiries; reviews.**

If on the conclusion of any inquiries<sup>1</sup> a local authority<sup>2</sup> decides not to apply for an emergency protection order<sup>3</sup>, a child assessment order<sup>4</sup>, a care order<sup>5</sup> or a supervision order<sup>6</sup> with respect to the child, the authority must consider whether it would be appropriate to review the case at a later date, and if it decides that it would be it must determine the date on which that review is to begin<sup>7</sup>. The same requirement applies on the conclusion of any such review, if the authority decides not to apply for one of the orders mentioned above<sup>8</sup>.

Where, as a result of complying with its duty to conduct inquiries, a local authority concludes that it should take action to safeguard or promote the child's welfare, it must take that action (so far as it is both within its power and reasonably practicable for it to do so)<sup>9</sup>.

For the purposes of making a determination as to the action to be taken with respect to a child, a local authority must, so far as is reasonably practicable, and consistent with the child's welfare, ascertain the child's wishes and feelings regarding the action to be taken with respect to him, and give due consideration (having regard to his age and understanding) to those wishes and feelings<sup>10</sup>.

Where it appears to the authority from its inquiries that there are matters connected with the child's education which should be investigated, the authority must consult the relevant local education authority<sup>11</sup>.

1 le inquiries made under the Children Act 1989 s 47(1) (as amended): see paras 599, 601 ante.

2 For the meaning of 'local authority' see para 138 note 13 ante.

3 As to emergency protection orders see para 583 et seq ante.

4 As to child assessment orders see para 578 ante.

5 As to care orders see para 276 et seq ante.

6 As to supervision orders see para 281 et seq ante.

7 See the Children Act 1989 s 47(7).

8 See *ibid* s 47(7).

9 *Ibid* s 47(8). The action which is taken to safeguard or promote the child's welfare is not limited by the Children Act 1989 to instituting legal proceedings. For example, a local authority might find as a result of the inquiries which it has made that a child is 'in need' in which case it would be under certain duties in relation to him, and would consider whether to exercise its powers in respect of such children: see Pt III (ss 17-30) (as amended); and para 851 et seq post.

10 *Ibid* s 47(5A) (added by the Children Act 2004 s 53(3)).

11 Children Act 1989 s 47(5).



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#### **604. Other duties of local authority to conduct investigations.**

A further duty<sup>1</sup> to make inquiries into the circumstances of a child<sup>2</sup> arises where: (1) a question arises in family proceedings<sup>3</sup> with respect to the welfare of any child and it appears to the court that it may be appropriate for a care order or supervision order to be made with respect to him, and the court directs an investigation<sup>4</sup>; (2) the court discharges an education supervision order and directs the local authority to carry out an investigation<sup>5</sup>; and (3) a local education authority notifies the local authority that a child who is subject to an education supervision order is persistently failing to comply with any direction given under the order<sup>6</sup>.

1    le a separate duty from that described in paras 601-603 ante.

2    For the meaning of 'child' see para 3 ante.

3    For the meaning of 'family proceedings' see para 199 ante.

4    See the Children Act 1989 s 37(1); and para 272 ante. As to care orders and supervision orders see para 270 et seq ante. The court will look at alternative, less intrusive, routes before deciding that a direction under this provision is necessary: *C v C (children) (investigation of circumstances)* sub nom *Re F (family proceedings: section 37 investigation)* [2005] EWHC 2935 (Fam), [2006] 1 FLR 1122.

5    See the Children Act 1989 s 36, Sch 3 para 17(2); and para 296 ante.

6    See *ibid* Sch 3 para 19(2); and para 298 ante.

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## **(vi) Abduction and Recovery of Children in Care or at Risk**

### **605. Abduction of children in care, etc.**

A person is guilty of an offence<sup>1</sup> if, knowingly and without lawful authority or reasonable excuse he: (1) takes a child<sup>2</sup> away from the responsible person<sup>3</sup>; (2) keeps such a child away from the responsible person<sup>4</sup>; or (3) induces, assists or incites such a child to run away or stay away from the responsible person<sup>5</sup>. However, these provisions do not apply in relation to any person providing a refuge for any child in a home in respect of which a certificate is in force<sup>6</sup>, nor in relation to a foster parent in respect of whom a certificate is in force, who provides a refuge for any child in accordance with arrangements made by a local authority<sup>7</sup> or voluntary organisation<sup>8</sup>.

The wrongful removal or detention of a child may also give rise to a number of other offences, for example under the Child Abduction Act 1984<sup>9</sup>.

1 The offence is punishable on summary conviction by imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both: Children Act 1989 s 49(3). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

2 The offence is restricted to a child who is: (1) in care; (2) the subject of an emergency protection order; or (3) in police protection: *ibid* s 49(2). For the meaning of 'child' see para 3 ante. As to care orders see paras 276 ante. As to emergency protection orders see para 583 et seq ante. As to the provisions of the Children Act 1989 dealing with police protection see paras 594-600 ante.

3 *Ibid* s 49(1)(a). The 'responsible person' means any person who for the time being has care of the child by virtue of the care order, the emergency protection order, or s 46 (see paras 594-598 ante): s 49(2).

4 *Ibid* s 49(1)(b).

5 *Ibid* s 49(1)(c).

6 See *ibid* s 51(5), (7)(a). As to refuges for children at risk see paras 609-610 post.

7 For the meaning of 'local authority' see para 138 note 13 ante.

8 See the Children Act 1989 s 51(6), (7)(a). For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to placements with local authority foster parents see para 900 et seq post.

9 See the Child Abduction Act 1984 s 2; and para 785 post. Note also the offences of removing or preventing a child's removal during the continuance of an emergency protection order (see para 584 ante), and obstructing the power of entry and search conferred by order of the court (see para 586 ante).

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#### **606. Power to make orders for the recovery of abducted children.**

Where it appears to the court that there is reason to believe that a child<sup>1</sup> has been unlawfully taken away or is being unlawfully kept away from a responsible person<sup>2</sup>, or has run away or is staying away from the responsible person, or is missing, the court may make a recovery order<sup>3</sup>. The court may make such an order only on the application of a person who has parental responsibility<sup>4</sup> for the child by virtue of a care order or emergency protection order, or, where the child is in police protection, the designated officer<sup>5</sup>. The order must name the child and also any person who has parental responsibility for the child by virtue of a care order or emergency protection order, or, where the child is in police protection, the designated officer<sup>6</sup>.

1     Is a child to whom the Children Act 1989 s 50 applies. Section 50 only applies to a child who is: (1) in care; (2) the subject of an emergency protection order; or (3) in police protection: see ss 49(2), 50(2); and para 605 ante. As to care orders see para 276 ante. As to emergency protection orders see para 583 et seq ante. As to the provisions of the Children Act 1989 dealing with police protection see paras 594-600 ante. For the meaning of 'child' see para 3 ante.

2     For the meaning of 'responsible person' see para 605 note 3 ante; definition applied by *ibid* s 50(2). See also *Re R (a minor) (recovery order)* [1998] 3 FCR 321, [1998] 2 FLR 401.

3     Children Act 1989 s 50(1). As to the court's power on disposing of an application for an order under the Children Act 1989 to order that no application of a specified kind may be made by any person named in the order without the leave of the court see para 223 note 13 ante.

4     For the meaning of 'parental responsibility' see para 134 ante. As to parental responsibility under a care order see para 276 ante; and as to parental responsibility under an emergency protection order see para 584 ante.

5     Children Act 1989 s 50(4).

6     *Ibid* s 50(5). For the meaning of 'designated officer' see para 595 ante; definition applied by s 50(7).

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### **607. Effect of recovery order.**

A recovery order<sup>1</sup> (1) operates as a direction to any person who is in a position to do so to produce the child<sup>2</sup> on request to any authorised person<sup>3</sup>; (2) authorises the removal of the child by any authorised person<sup>4</sup>; (3) requires any person who has information as to the child's whereabouts to disclose that information, if asked to do so, to a constable or an officer of the court<sup>5</sup>; and (4) authorises a constable to enter any premises specified in the order and search for the child, using reasonable force if necessary<sup>6</sup>.

Where a child is made the subject of a recovery order whilst being looked after by a local authority<sup>7</sup>, any reasonable expenses incurred by an authorised person in giving effect to the order are recoverable from the authority<sup>8</sup>.

Other provisions relating to recovery of children are to be found in the Family Law Act 1986<sup>9</sup>. The High Court has power to make orders in the exercise of its inherent jurisdiction<sup>10</sup>.

1    Ie an order under the Children Act 1989 s 50 for the recovery of a child abducted from care: see para 606 ante.

2    For the meaning of 'child' see para 3 ante.

3    Children Act 1989 s 50(3)(a). An 'authorised person' is: (1) any person specified by the court; (2) any constable; and (3) any person authorised, after the recovery order is made and by a person who has parental responsibility for the child by virtue of a care order or an emergency protection order, to exercise any power under a recovery order: s 50(7). Where the authorisation is under head (3) supra, it must identify the recovery order, and any person claiming to be authorised must, if asked to do so, produce some duly authenticated document showing that he is authorised: see s 50(8). For the meaning of 'parental responsibility' see para 134 ante. As to parental responsibility under a care order see para 276 ante; and as to parental responsibility under an emergency protection order see para 584 ante.

4    Ibid s 50(3)(b). A person is guilty of an offence if he intentionally obstructs an authorised person exercising the power to remove a child: s 50(9). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 50(10). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

5    Ibid s 50(3)(c). A person is not excused from complying with a request for information about a child's whereabouts on the ground that complying with it might incriminate the person or his spouse or civil partner of an offence, but a statement or admission made in complying is not admissible in evidence against either of them in proceedings for an offence other than perjury: s 50(11) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 131).

6    Children Act 1989 s 50(3)(d). Premises may be specified for this purpose only if it appears to the court that there are reasonable grounds for believing the child to be on them: s 50(6).

7    For the meaning of 'local authority' see para 138 note 13 ante.

8    Children Act 1989 s 50(12).

9    See the Family Law Act 1986 ss 33, 34 (both as amended); and paras 840-841 post. See also *S v S (Chief Constable of West Yorkshire Police intervening)* [1999] 1 All ER 281, [1998] 1 WLR 1716, CA.

10   See para 218 et seq ante.

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#### **608. Recovery of child absconding from place of safety.**

If a child<sup>1</sup> or young person<sup>2</sup> is absent, without the consent of the responsible person<sup>3</sup>:

- 1058 (1) from a place of safety<sup>4</sup> to which he has been taken<sup>5</sup>; or
- 1059 (2) from local authority accommodation<sup>6</sup>: (a) in which he is required to live<sup>7</sup>; or (b) to which he has been remanded<sup>8</sup>; or (c) to which he has been remanded or committed<sup>9</sup>,

he may be arrested by a constable<sup>10</sup> anywhere in the United Kingdom<sup>11</sup> or Channel Islands without a warrant<sup>12</sup>.

A person so arrested must be conducted to: (i) the place of safety<sup>13</sup>; (ii) the local authority accommodation<sup>14</sup>; or (iii) such other place as the responsible person may direct<sup>15</sup>, at the responsible person's expense<sup>16</sup>.

If a magistrates' court is satisfied by information on oath that there are reasonable grounds for believing that a person specified in the information can produce a person who is absent as mentioned in head (1) or head (2) above, the court may issue a summons directed to the person so specified and requiring him to attend and produce the absent person before the court, and a person who without reasonable excuse fails to comply with any such requirement is, without prejudice to any liability<sup>17</sup>, guilty of an offence<sup>18</sup>.

Without prejudice to its powers<sup>19</sup>, a magistrates' court may, if it is satisfied by information on oath that there are reasonable grounds for believing that a person who is absent as mentioned in head (1), (2)(a) or (2)(b) above is in premises specified in the information, issue a search warrant authorising a constable to search the premises for that person<sup>20</sup>.

A court must not issue a summons or search warrant<sup>21</sup> in any case where the person who is absent is a person to whom head (1) or head (2) above applies, unless the information required when issuing a summons or search warrant<sup>22</sup> is given by the responsible person<sup>23</sup>.

A person who knowingly compels, persuades, incites or assists another person to become or continue to be absent as mentioned in head (1) or head (2) above is guilty of an offence<sup>24</sup>.

A child<sup>25</sup> who absconds<sup>26</sup>:

- 1060 (A) from a place of safety in which he is being kept<sup>27</sup>;
- 1061 (B) from a place which, though not a place of safety such as is mentioned in head (A) above, is a residential establishment in which he is required to reside<sup>28</sup> or a hospital or other institution in which he is temporarily residing while subject to such a requirement (a 'relevant place')<sup>29</sup>; or
- 1062 (C) from a person who, in connection with a supervision requirement<sup>30</sup>, has control over him while he is being taken to, is awaiting being taken to, or (whether or not by reason of being on leave) is temporarily away from, such place of safety or relevant place<sup>31</sup>,

may be arrested without warrant in any part of the United Kingdom and taken to the place of safety or as the case may be the relevant place; and a court which is satisfied that there are

reasonable grounds for believing that the child is within any premises may, where there is such power of arrest, grant a warrant authorising a constable to enter those premises and search for the child, using reasonable force if necessary<sup>32</sup>.

A person who:

- 1063 (aa) knowingly assists or induces a child to abscond in circumstances which render the child liable to arrest under the provisions described above<sup>33</sup>;
- 1064 (bb) knowingly and persistently attempts to induce a child so to abscond<sup>34</sup>;
- 1065 (cc) knowingly harbours or conceals a child who has so absconded<sup>35</sup>; or
- 1066 (dd) knowingly prevents a child from returning to the place or person to whom he should return<sup>36</sup>,

is guilty of an offence<sup>37</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'young person' see para 3 ante.

3 For these purposes, 'the responsible person' means the person who made the arrangements under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 7(4) (see para 1357 post) or, as the case may be, the authority designated under s 63, Sch 6 para 5 (see para 1347 post), Sch 7 para 7(8) (see para 1357 post) or the Children and Young Persons Act 1969 s 23 (see para 1247 et seq post): s 32(1C) (added by the Children Act 1989 s 108(4), Sch 12 para 27(1); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 ss 165(1), 167(1), Sch 9 para 41(1), (3)).

4 'Place of safety' means a community home provided by a local authority or a controlled community home, any police station, or any hospital, surgery, or any other suitable place, the occupier of which is willing temporarily to receive a child or young person: Children and Young Persons Act 1933 s 107(1) (amended by the Children and Young Persons Act 1969 s 72(3), Sch 5 para 12); definition applied by the Children and Young Persons Act 1969 s 70(1). As to community homes see para 967 et seq post.

5 Ibid s 32(1A)(a) (s 32(1A) added by the Children Act 1975 s 68; substituted by the Children Act 1989 Sch 12 para 27(1); and amended by the Prisoners (Return to Custody) Act 1995 s 2(2)(a); and the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 41(1), (2)). As to when a child or young person is taken to a place of safety under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 7(4) see para 1357 post.

6 For the meaning of 'local authority accommodation' see para 1247 note 3 post.

7 Children and Young Persons Act 1969 s 32(1A)(b)(i) (as added, substituted and amended: see note 5 supra). As to when a child or young person is required to live in local authority accommodation under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 see para 1346 post.

8 Children and Young Persons Act 1969 s 32(1A)(b)(ii) (as added, substituted and amended: see note 5 supra). As to when a child or young person is remanded to local authority accommodation under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 7(5) see para 1357 post.

9 Children and Young Persons Act 1969 s 32(1A)(b)(iii) (as added, substituted and amended: see note 5 supra). As to when a child or young person is remanded or committed to local authority accommodation under s 23(1) (as substituted) see para 1247 post.

10 The reference to a constable in ibid s 32(1A) (as added, substituted and amended) (see the text and notes 1-9 supra) and s 32(2A) (as added and amended) (see the text and notes 19-20 infra) includes a reference to a person who is a constable under the law of any part of the United Kingdom, to a member of the police in Jersey and to an officer of police within the meaning of the Larceny (Guernsey) Law 1958 s 43 or any corresponding law for the time being in force: Children and Young Persons Act 1969 s 32(4) (amended by the Children Act 1975 s 68(1), (7)).

11 For the meaning of 'United Kingdom' see para 102 note 7 ante.

12 Children and Young Persons Act 1969 s 32(1A)(b) (as added, substituted and amended: see note 5 supra).

13 Ibid s 32(1B)(a) (s 32(1B) added by the Children Act 1989 Sch 12 para 27(1)).

- 14 Children and Young Persons Act 1969 s 32(1B)(b) (as added: see note 13 supra).
  - 15 Ibid s 32(1B)(c) (as added: see note 13 supra).
  - 16 Ibid s 32(1B) (as added: see note 13 supra).
  - 17 Ie apart from ibid s 32(2) (as amended): see the text and note 18 infra.
  - 18 Ibid s 32(2) (amended by the Children Act 1975 s 68(1), (4)). A person guilty of such an offence is liable on summary conviction to a fine of an amount not exceeding level 3 on the standard scale: Children and Young Persons Act 1969 s 32(2) (as so amended; and further amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see para 132 note 2 ante.
  - 19 Ie under the Children and Young Persons Act 1969 s 32(2) (as amended): see the text and note 18 supra.
  - 20 Ibid s 32(2A) (added by the Children Act 1975 s 68(1), (5); and amended by the Prisoners (Return to Custody) Act 1995 s 2(2)(b)).
  - 21 Ie under the Children and Young Persons Act 1969 s 32(2) (as amended) (see the text and note 18 supra) or s 32(2A) (as added and amended) (see the text and notes 19-20 supra).
  - 22 Ie the information referred to in ibid s 32(2) (as amended) (see the text and note 18 supra) or s 32(2A) (as added and amended) (see the text and note 20 supra).
  - 23 Ibid s 32(2B) (added by the Children Act 1975 s 68(1), (5); and amended by the Children Act 1989 Sch 12 para 27).
  - 24 Children and Young Persons Act 1969 s 32(3) (amended by the Health and Social Services and Social Security Adjudications Act 1983 s 9, Sch 2 para 16). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine of an amount not exceeding level 5 on the standard scale or both: Children and Young Persons Act 1969 s 32(3) (as so amended; and further amended by the Criminal Justice Act 1982 ss 37, 38, 46).
  - 25 'Child' means: (1) a child who has not attained the age of 16; (2) a child over the age of 16 who has not attained the age of 18 and in respect of whom a supervision requirement is in force; or (3) a child whose case has been referred to a children's hearing by virtue of an order made in a part of the United Kingdom other than Scotland: see the Children (Scotland) Act 1995 s 93(2)(b). As to referrals to children's hearings from elsewhere in the United Kingdom see s 33. As to supervision requirements see s 70; and para 281 note 11 ante. The provisions of ss 82, 83 apply to England and Wales: s 105(8).
  - 26 Without prejudice to the generality of ibid s 82(1), a child who at the end of a period of leave from a place of safety or relevant place fails to return there is taken to have absconded for the purposes of s 82: s 82(2).
  - 27 Ibid s 82(1)(a). A child may be kept in a place of safety by virtue of Pt II (ss 16-93) (as amended).
  - 28 Ie by virtue of ibid s 70(3)(a): see para 281 note 11 ante.
  - 29 Ibid s 82(1)(b).
  - 30 Ie by virtue of a supervision requirement or of ibid s 74.
  - 31 Ibid s 82(1)(c).
  - 32 Ibid s 82(1). A child who absconds from a person who, not being a person mentioned in head (c) in the text, is a person who has control over him by virtue of a supervision requirement may, subject to the same provisions as those to which an arrest under s 82(1) is subject, be arrested as is mentioned in s 82(1) and returned to that person; and the provision for a warrant to be granted applies accordingly: see s 82(3).
- As to the position where the occupier of the place of safety or relevant place is unwilling or unable to receive the child see s 82(4), (5).
- 33 Ibid s 83(a).
  - 34 Ibid s 83(b).
  - 35 Ibid s 83(c).
  - 36 See ibid s 83(d).

37 Ibid s 83. This is subject to the Children Act 1989 s 51(5), (6) (see para 605 post), and to corresponding Scottish and Northern Ireland provisions: Children (Scotland) Act 1995 s 83. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment: s 83.

## **UPDATE**

### **608 Recovery of child absconding from place of safety**

TEXT AND NOTES 1-24--Children and Young Persons Act 1969 s 32 further amended: Criminal Justice and Immigration Act 2008 Sch 4 paras 17, 101.

NOTES 3, 5, 20, 24--Prisoners (Return to Custody) Act 1995 s 2(2), Health and Social Services and Social Security Adjudications Act 1983 Sch 2 para 16 and Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 41 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.



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## **(vii) Refuges for Children at Risk**

### **609. Certification of refuges for children at risk.**

Where it is proposed to use a voluntary home<sup>1</sup> or private children's home<sup>2</sup> to provide a refuge for children<sup>3</sup> who appear to be at risk of harm, the Secretary of State<sup>4</sup> may issue a certificate with respect to that home<sup>5</sup>. Where a local authority<sup>6</sup> or voluntary organisation<sup>7</sup> arranges for a foster parent<sup>8</sup> to provide such a refuge, the Secretary of State may issue a certificate with respect to that foster parent<sup>9</sup>. Where a certificate is in force with respect to a home, the persons providing a refuge for children in that home are not liable to prosecution for certain offences<sup>10</sup>. Similarly, if a certificate is in force with respect to a foster parent, that foster parent is not liable to prosecution for those offences in relation to the provision by him of a refuge for any child in accordance with arrangements made by the local authority or voluntary organisation<sup>11</sup>.

The Secretary of State may by regulations make provision as to the manner in which certificates may be issued, impose requirements which must be complied with while any certificate is in force, and provide for the withdrawal of certificates in prescribed circumstances<sup>12</sup>. In exercise of this power, regulations have been made which provide that the Secretary of State may withdraw a certificate at any time where: (1) a person providing a refuge fails to comply with the requirements<sup>13</sup> regarding the admittance of a child to a refuge<sup>14</sup>; (2) a person providing a refuge in a home fails to comply with requirements relating to the conduct of children's homes<sup>15</sup>; (3) a foster parent providing a refuge fails to comply with certain requirements contained in the agreement relating to him<sup>16</sup>; (4) the person providing the refuge or any person assisting him in that respect has had proceedings instituted against him in relation to, or has been convicted of, any criminal offence<sup>17</sup>. Where a certificate is withdrawn the person carrying on the voluntary home or registered children's home in respect of which, or the foster parent in respect of whom, it was issued must return it immediately to the Secretary of State<sup>18</sup>.

1 As to voluntary homes see para 975 et seq post.

2 For the meaning of 'private children's home' see para 980 note 2 post.

3 For the meaning of 'child' see para 3 ante.

4 As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

5 Children Act 1989 s 51(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (7)).

6 For the meaning of 'local authority' see para 138 note 13 ante.

7 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

8 'Foster parent' means a person who is, or who from time to time is, a local authority foster parent or a foster parent with whom children are placed by a voluntary organisation: Children Act 1989 s 51(3).

9 Ibid s 51(2).

10 See *ibid* s 51(5). The relevant offences are: (1) abduction of a child in care (see s 49; and para 605 ante); (2) recovery and harbouring of certain fugitive children contrary to the provisions of the Children (Scotland) Act 1995 ss 82, 83 (see para 608 ante), so far as they apply in relation to anything done in England and Wales; (3) inciting or assisting a person to be absent from detention contrary to the Children and Young Persons Act 1969 s 32(3) (as amended) (see para 608 post) so far as it applies to anything done in England and Wales; and (4) abduction of a child contrary to the Child Abduction Act 1984 s 2 (as amended) (see para 785 post): see the Children Act 1989 s 51(5), (7) (s 51(7) amended by the Children (Scotland) Act 1995 s 105(4), Sch 4 para 48(3)).

11 See the Children Act 1989 s 51(6), (7) (s 51(7) as amended: see note 10 *supra*).

12 *Ibid* s 51(4). The Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507 (as amended) (see the text and notes 13-18 *infra*), the Children Act (Miscellaneous Amendments) (England) Regulations 2002, SI 2002/546, and Children Act 1989 and the Care Standards Act 2000 (Miscellaneous Regulations) (Amendment) (Wales) (No 2) Regulations 2002, SI 2002/2935, have been made under this provision.

13 See the requirements of the Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 3: see para 610 post.

14 See *ibid* reg 4(1)(a).

15 See *ibid* reg 4(1)(b) (amended by SI 2002/546; SI 2002/2935). The reference in the text to requirements relating to the conduct of children's homes is to the requirements of the Children's Homes Regulations 2001, SI 2001/3967, Pts III-V (regs 11-36), in relation to England, or the Children's Homes (Wales) Regulations 2002, SI 2002/327, Pts III-V (regs 11-35), in relation to Wales: see para 998 *et seq post*.

16 Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 4(1)(c) (substituted in relation to England by SI 2002/546). The reference in the text, in relation to England, is to an agreement concerning the matters to which the Fostering Services Regulations 2002, SI 2002/57, Sch 5 paras 7-15 or Sch 6 paras 4-8 apply, or an agreement concerning the duties set out in reg 38(3) in respect of an emergency placement; and, in relation to Wales, is to an agreement concerning the matters to which the equivalent provisions of the Fostering Services (Wales) Regulations 2003, SI 2003/237, apply (note that the latter regulations replace, in relation to Wales, the Foster Placement (Children) Regulations 1991, SI 1991/910): see para 900 *et seq post*.

17 Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 4(1)(d).

18 *Ibid* reg 4(2) (amended by SI 2002/546; SI 2002/395).

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## **610. Conduct of refuges.**

While a certificate is in force with respect to a home or foster parent<sup>1</sup>, a child<sup>2</sup> may not be provided with a refuge unless it appears that the child is at risk of harm<sup>3</sup> unless the child is or continues to be provided with a refuge<sup>4</sup>. As soon as is reasonably practicable after admitting a child to a home for the purpose of providing a refuge or after a foster parent provides a refuge for a child, and in any event within 24 hours of such provision, the person providing the refuge for the child must notify the designated officer<sup>5</sup> that a child has been admitted to the home or provided with refuge by a foster parent, together with the telephone number by which the person providing the refuge for the child may be contacted<sup>6</sup>. He must also notify the designated officer of the child's name and last permanent address, if he knows those details<sup>7</sup>. As soon as is reasonably practicable after providing the refuge for the child, and in any event within 24 hours of becoming aware of the identity of the responsible person<sup>8</sup> for the child, the person providing the refuge must give to the designated officer the name and address of the responsible person<sup>9</sup>.

Where the designated officer has been notified or is otherwise aware that the child is being provided with refuge, and has been notified or is otherwise aware of the name and address of a responsible person, the designated officer must inform the responsible person that the child is being provided with refuge and by whom it is being provided, and notify the responsible person of the telephone number by which the person providing the refuge may be contacted<sup>10</sup>. He must not, however, disclose to any person the address of the place at which the refuge is being provided<sup>11</sup>.

No child may be provided with a refuge in any one place for a continuous period of more than 14 days or for more than 21 days in any period of three months<sup>12</sup>.

Where a child ceases to be provided with a refuge, the person who provided him with the refuge must notify the designated officer<sup>13</sup>.

1 See the Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 3(1). 'Home' means a private children's home or voluntary home: reg 2(1) (amended by SI 2002/546; SI 2002/2935). As to the certification of homes and foster parents see para 609 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'harm' see para 274 ante.

4 Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 3(2).

5 'Designated officer' means a police officer for the time being designated by the chief officer of police for the area within which: (1) a home which is provided as a refuge in pursuance of the Children Act 1989 s 51(1) (prospectively amended) (see para 609 ante) is situated; or (2) a foster parent who provides a refuge in pursuance of s 51(2) (see para 934 ante) lives: Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 2(1).

6 Ibid reg 3(3)(a).

7 See ibid reg 3(3)(b), (c). Where subsequently the person providing the refuge discovers the child's name or last permanent address he must immediately notify the designated officer accordingly: reg 3(1), (4).

8 The 'responsible person' in relation to a child means: (1) except where a person has care of a child as mentioned in head (2) *infra*: (a) a parent of his; (b) a person (not being a parent) who has parental responsibility for him; and (c) any person who for the time being has care of him (not being a person providing a refuge); or (2) any person who has care of him by virtue of a care order, an emergency protection order or the provisions of the Children Act 1989 relating to police protection: see *ibid* reg 2(1). For the meaning of 'parental responsibility' see para 134 *ante*. As to care orders see para 276 *et seq ante*. As to emergency protection orders see para 583 *et seq ante*. As to the provisions of the Children Act 1989 dealing with police protection see s 46; and para 594 *et seq ante*.

9 Refuges (Children's Homes and Foster Placements) Regulations 1991, SI 1991/1507, reg 3(5).

10 *Ibid* reg 3(6), (7)(a), (b).

11 *Ibid* reg 3(7)(c).

12 *Ibid* reg 3(9).

13 *Ibid* reg 3(8).

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## **(2) PROTECTION FROM CRUELTY AND DANGER**

### **(i) Protection from Cruelty**

#### **611. Cruelty.**

If any person who has attained the age of 16 years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight or hearing, or limb or organ of the body, and any mental derangement), that person is guilty of an offence<sup>1</sup>.

A parent or other person legally liable to maintain a child or young person or the legal guardian of a child or young person is deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that regard<sup>2</sup>.

Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of 16 years, that other person must, if he was when he went to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health<sup>3</sup>.

In relation to the offences of wounding and causing grievous bodily harm<sup>4</sup>, assault occasioning actual bodily harm<sup>5</sup> or cruelty to a person under 16<sup>6</sup>, battery of a child<sup>7</sup> cannot be justified on the ground that it constituted reasonable punishment<sup>8</sup>. In any civil proceedings battery of a child causing actual bodily harm cannot be justified on the ground that it constituted reasonable punishment<sup>9</sup>.

<sup>1</sup> See the Children and Young Persons Act 1933 s 1(1) (amended by the Children Act 1989 s 108(4), (5), Sch 12 para 2, Sch 13 para 2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 143. A person may be convicted of an offence notwithstanding: (1) that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person; or (2) the death of the child or young person in question: Children and Young Persons Act 1933 s 1(3). A person guilty of an offence under s 1(1) (as amended) is liable: (a) on conviction on indictment, to a fine or imprisonment for a term not exceeding 10 years, or both; and (b) on summary conviction, to a fine not exceeding the prescribed sum, or imprisonment for a term not exceeding six months, or both: see s 1(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 1, Sch 5; the Children Act 1975 s 108(1), Sch 4 Pt III; the Criminal Justice Act 1988 ss 45, 170(2), Sch 16; and by virtue of the Magistrates' Courts Act 1980 s 32(2)); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 143. As to the prescribed sum see para 109 note 23 ante. For further discussion on the construction of the Children and Young Persons Act 1933 s 1(1) (as amended) see *R v Sheppard* [1981] AC 394, [1980] 3 All ER 899, HL, cited at para 528 note 6 ante.

Proceedings for any offence under the Children and Young Persons Act 1933 Pt I (ss 1-17) (as amended) may be instituted by a local education authority: s 98 (substituted by the Children Act 1948 s 60(2), Sch 3). Without prejudice to that, such proceedings may be instituted by the council of a county or county borough (or in Wales, a Welsh county or county borough), whether or not the council is the local education authority, and may, where

the council is the local education authority, be instituted by it otherwise than in that capacity: Children and Young Persons Act 1963 s 56(1), (1A) (s 56(1A) added by the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 4). So much of the Local Government Act 1933 s 85(2) as restricts the matters that may be referred to or dealt with by committees established under that provision does not apply in relation to any functions exercisable by a council under the Children and Young Persons Act 1963 s 56 (as amended): s 56(2) (amended by the Local Authority Social Services Act 1970 s 14, Sch 2 para 10; and the Children Act 2004 s 64, Sch 5 Pt 5).

2 See the Children and Young Persons Act 1933 s 1(2)(a) (amended by the Children Act 1989 Sch 12 para 2, Sch 13 para 2; and the National Assistance (Adaptation of Enactments) Regulations 1950, SI 1950/174, reg 2, Schedule); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 143.

3 See the Children and Young Persons Act 1933 s 1(2)(b); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 143.

4 Is an offence the Offences against the Person Act 1861 s 18 (as amended) or s 20 (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) paras 118, 120): Children Act 2004 s 58(2).

5 Is an offence under the Offences against the Person Act 1861 s 47 (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 149): Children Act 2004 s 58(2).

6 Is an offence under the Children and Young Persons Act 1933 s 1 (as amended) (see the text and notes 1-3 supra): Children Act 2004 s 58(2).

7 For the meaning of 'child' see para 164 note 2 ante.

8 Children Act 2004 s 58(1), (2).

9 Ibid s 58(3). 'Actual bodily harm' has the same meaning as it has for the purposes of the Offences against the Person Act 1861 s 47 (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 149): Children Act 2004 s 58(4).

## UPDATE

### 611 Cruelty

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## **(ii) Protection from Danger**

### **A. DANGERS ON LAND OR PREMISES**

#### **612. Occupier's liability.**

At common law, an occupier of land who allows children<sup>1</sup> on his land, whether as invitees, licensees<sup>2</sup> or trespassers<sup>3</sup>, and who has on the land something which is to his knowledge an allurement to children and a danger to them, must take reasonable care to protect them from the danger<sup>4</sup>.

The duty owed by an occupier of premises to his visitors<sup>5</sup> is the common duty of care<sup>6</sup>. This duty, except in so far as it is extended, restricted, modified or excluded by agreement or otherwise, is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there<sup>7</sup>. These circumstances include the degree of care, or want of care, which would ordinarily be looked for in such a visitor, so that in proper cases the occupier must be prepared for children to be less careful than adults<sup>8</sup>.

A duty is owed by an occupier of premises to another (not being his visitor)<sup>9</sup> if he is aware of a danger due to the state of his premises or to things done or omitted to be done on them, or has reason to believe that it exists, or if he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger, in either case whether the other has lawful authority for being in the vicinity or not, and the risk is one from which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection<sup>10</sup>. The duty is to take such care as is reasonable to see that the other does not suffer injury on the premises by reason of the danger concerned<sup>11</sup>.

The duty which thus falls upon the owner or occupier of property does not, however, absolve parents or other persons in charge of children<sup>12</sup> from their primary responsibility of looking after the children and exercising all reasonable supervision in the circumstances<sup>13</sup>.

1 See *Phipps v Rochester Corpn* [1955] 1 QB 450, [1955] 1 All ER 129.

2 See *Gough v National Coal Board* [1954] 1 QB 191, [1953] 2 All ER 1283, CA.

3 See *Herrington v British Railways Board* [1971] 2 QB 107, [1971] 1 All ER 897, CA; affd *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL.

4 *Gough v National Coal Board* [1954] 1 QB 191, [1953] 2 All ER 1283, CA.

5 As to his invitees and licensees: see the Occupiers' Liability Act 1957 s 1(2); and **NEGLIGENCE** vol 78 (2010) PARA 31.

6 See *ibid* s 2(1); and **NEGLIGENCE** vol 78 (2010) PARAS 32-33.

7 See *ibid* s 2(1), (2); and **NEGLIGENCE** vol 78 (2010) PARAS 32, 38.

8 See *ibid* s 2(3)(a); and **NEGLIGENCE** vol 78 (2010) PARA 32.

9 'Visitor' means any person to whom is owed the common duty of care under *ibid* s 2: Occupiers' Liability Act 1984 s 1(2)(b).

10 See *ibid* s 1(3); and **NEGLIGENCE** vol 78 (2010) PARA 40. See also *White v St Albans City and District Council* (1990) Times, 12 March, CA.

11 See the Occupiers' Liability Act 1957 s 1(4); and **NEGLIGENCE** vol 78 (2010) PARA 40.

12 See eg *Clark v Monmouthshire County Council* (1954) 118 JP 244, CA. Such other persons must act as any careful parent would in the circumstances: *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL; *Barnes (an infant) v Hampshire County Council* [1969] 3 All ER 746, [1969] 1 WLR 1563, HL (and see a note of the Court of Appeal decision in that case at [1971] 2 All ER 1299).

13 See eg *Bates v Stone Parish Council* [1954] 3 All ER 38, [1954] 1 WLR 1249, CA; *Phipps v Rochester Corp'n* [1955] 1 QB 450, [1955] 1 All ER 129; *Dyer v Ilfracombe UDC* [1956] 1 All ER 581, [1956] 1 WLR 218, CA; *Simkiss v Rhondda Borough Council* (1982) 81 LGR 460, CA.



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### **613. Protection from fire.**

If any person who has attained the age of 16 years, having responsibility for any child<sup>1</sup> under the age of 12 years, allows the child to be in any room containing an open fire grate, or any heating appliance liable to cause injury to a person by contact with it, not sufficiently protected to guard against the risk of the child's being burnt or scalded, without taking reasonable precautions against that risk, and by reason thereof the child is killed or suffers serious injury, that person is liable on summary conviction to a fine<sup>2</sup>. Neither this provision, however, nor any proceedings taken under it affect the liability of any such person to be proceeded against by indictment for any indictable offence<sup>3</sup>.

1 For the purposes of the Children and Young Persons Act 1933, 'child' generally means a person under the age of 14 years (although s 11 (as amended) applies to a child under the age of 12): s 107(1).

2 See *ibid* s 11 (amended by the Children and Young Persons (Amendment) Act 1952 ss 8, 9, Schedule para 1; the Criminal Law Act 1977 s 31(5)(a), (6)(a); the Children Act 1989 s 108(5), Sch 13 paras 2, 3(c); and by virtue of the Criminal Justice Act 1982 s 46). The fine must not exceed level 1 on the standard scale: see the Children and Young Persons Act 1933 s 11 (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 936 note 1 post. See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 144.

As to the sale or hire of unguarded gas or oil heating appliances see the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693 (amended by SI 1992/711). In relation to the disapplication of these regulations to all appliances except 'second-hand' appliances see the Gas Appliances (Safety) Regulations 1995, SI 1995/1629. See also **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 614.

3 Children and Young Persons Act 1933 s 11 proviso. A person might be guilty, for example, of manslaughter.

## **UPDATE**

### **613 Protection from fire**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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## ***B. DANGEROUS OBJECTS***

### **614. Articles with a blade or point.**

Any person who sells to a person under the age of 18 years: (1) any knife, knife blade or razor blade<sup>1</sup>; (2) any axe<sup>2</sup>; and (3) any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person<sup>3</sup>, is guilty of an offence<sup>4</sup>.

It is a defence for a person charged with this offence to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence<sup>5</sup>.

1 See the Criminal Justice Act 1988 s 141A(1), (2)(a) (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706. Note that for offences committed before 1 October 2007 the relevant age was 16.

2 See *ibid* s 141A(1), (2)(b) (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706.

3 See *ibid* s 141A(1), (2)(c) (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706.

4 See *ibid* s 141A(1) (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both: see s 141A(1) (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706. As to the standard scale see para 132 note 2 ante.

However, s 141A (as added and amended) does not apply to any article described in: (1) the Restriction of Offensive Weapons Act 1959 s 1 (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 705); (2) an order made under the Criminal Justice Act 1988 s 141(2) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 702); or (3) an order made by the Secretary of State under s 141A (as added): see s 141A(3) (as added); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706.

The power to make an order under s 141A (as added and amended) is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: see s 141A(5) (as added); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706.

5 See *ibid* s 141A(4) (as added); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 706.

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## **615. Crossbows.**

A person who sells or lets on hire a crossbow or a part of a crossbow to a person under the age of 18 is guilty of an offence, unless he believes him to be of that age or older and has reasonable grounds for the belief<sup>1</sup>. A person under that age who buys or hires a crossbow or a part of a crossbow is guilty of an offence<sup>2</sup>. A person under that age who has with him a crossbow which is capable of discharging a missile, or parts of a crossbow which together (and without any other parts) can be assembled to form a crossbow capable of discharging a missile, is guilty of an offence, unless he is under the supervision of a person who is at least 21 years of age<sup>3</sup>. The above provisions do not apply to crossbows with a draw weight of less than 1.4 kilograms<sup>4</sup>.

1 See the Crossbows Act 1987 s 1 (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 710. Note that for offences committed before 1 October 2007 the relevant age was 17.

A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding level 5 on the standard scale, or to both: s 6(1). As to the standard scale see para 132 note 2 ante. The court by which a person is convicted of such an offence may make such order as it thinks fit as to the forfeiture or disposal of any crossbow or part of a crossbow in respect of which the offence was committed: 6(3). As to powers of search and seizure see s 4; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 708.

2 See *ibid* s 2 (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 709. Note that for offences committed before 1 October 2007 the relevant age was 17.

A person guilty of an offence under the Crossbow Act 1987 s 2 (as amended) is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 6(2).

3 See *ibid* s 3 (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 708. Note that for offences committed before 1 October 2007 the relevant age was 17.

A person guilty of an offence under the Crossbow Act 1987 s 3 (as amended) is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 6(2).

4 See *ibid* s 5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 708.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/B. DANGEROUS OBJECTS/616. Firearms.

## 616. Firearms.

It is generally an offence:

- 1067 (1) for a person under 18 to purchase or hire an air weapon or ammunition for an air weapon, or for a person under 17 to purchase or hire a firearm or ammunition of any other description<sup>1</sup>;
- 1068 (2) to sell or let on hire an air weapon or ammunition for an air weapon to a person under the age of 18, or to sell or let on hire a firearm or ammunition of any other description to a person under the age of 17<sup>2</sup>;
- 1069 (3) for a person under 15 to have with him an assembled shotgun<sup>3</sup>;
- 1070 (4) to give a shotgun or ammunition to a person under 15<sup>4</sup>;
- 1071 (5) for a person under 14 to have a firearm or ammunition in his possession without holding a firearms certificate<sup>5</sup>;
- 1072 (6) to give or lend firearms or ammunition to a person under 14, or to give an air weapon or ammunition for it to a person under 18<sup>6</sup>;
- 1073 (7) to part with possession of firearms or ammunition to a person under 14 who does not hold a firearms certificate<sup>7</sup>;
- 1074 (8) to part with possession of an air weapon or ammunition to a person under 18<sup>8</sup>;
- 1075 (9) for a person under 18 to have with him an air weapon or ammunition<sup>9</sup>;
- 1076 (10) for a person under 18 to purchase an imitation firearm and for any person to sell such an item to a person under 18<sup>10</sup>.

1 See the Firearms Act 1968 s 22(1) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 668. Note that for offences committed before 1 October 2007 the relevant age was 17.

2 See the Firearms Act 1968 s 24(1) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 668. Note that for offences committed before 1 October 2007 the relevant age was 17.

3 See the Firearms Act 1968 s 22(3); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 669.

4 See *ibid* s 24(3); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 669.

5 See *ibid* s 22(2) (amended by the Firearms (Amendment) Act 1988 s 23(4)); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 668.

6 See the Firearms Act 1968 s 24(2)(a), (4)(a) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) paras 668, 670. Note that for offences committed before 1 October 2007 the relevant age was 17.

7 See *ibid* s 24(2)(b) (amended by the Firearms (Amendment) Act 1988 s 23(4)); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 668.

8 See the Firearms Act 1968 s 24(4)(b) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 670. Note that for offences committed before 1 October 2007 the relevant age was 17.

9 See *ibid* s 22(4) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 670. Note that for offences committed before 1 October 2007 the relevant age was 17.

10 See the Firearms Act 1968 s 24A (as added); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

**UPDATE**

**615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/B. DANGEROUS OBJECTS/617. Safety of goods and restrictions on sale.

### **617. Safety of goods and restrictions on sale.**

The Secretary of State may make regulations for the safety of goods, and such regulations may contain requirements relating to the construction and design of the goods, or restricting or prohibiting their supply<sup>1</sup>. Contravention of requirements of safety regulations may constitute an offence<sup>2</sup>. A number of safety regulations have been made or take effect under the Consumer Protection Act 1987 which are aimed wholly or partly at protecting children and young persons in particular<sup>3</sup>. It is, in addition, an offence to sell aerosol paints to children under the age of 16<sup>4</sup>.

1 See the Consumer Protection Act 1987 s 11 (as amended); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 539.

2 See *ibid* s 12; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 540.

3 See eg the Children's Clothing (Hood Cords) Regulations 1976, SI 1976/2; the Nightwear (Safety) Regulations 1985, SI 1985/2043 (amended by SI 1987/286); the Bunk Bed (Entrapment Hazards) (Safety) Regulations 1987, SI 1987/1337; the Food Imitations (Safety) Regulations 1989, SI 1989/1291; the Imitation Dummies (Safety) Regulations 1993, SI 1993/2923; the Toys (Safety) Regulations 1995, SI 1995/204 (amended by SI 2005/1802); the Fireworks (Safety) Regulations 1997, SI 1997/2294; and the Wheeled Child Conveyances (Safety) Regulations 1997, SI 1997/2866.

For general provisions with regard to product safety see the General Product Safety Regulations 2005, SI 2005/1803 (as amended) which implement European Parliament and EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4) on general product safety; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 565 et seq.

4 See the Anti-social Behaviour Act 2003 s 54; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 345.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

### **617 Safety of goods and restrictions on sale**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/C. DUTY OF EMPLOYERS/618. Care required by employer.

### **C. DUTY OF EMPLOYERS**

#### **618. Care required by employer.**

The duty of an employer to take care to protect his employees from injury is greater towards a young person<sup>1</sup> than it is towards an adult<sup>2</sup>.

1 For the purposes of the Factories Act 1961 a young person is a person who has ceased to be a child (ie a person under compulsory school age) and is under 18: Factories Act 1961 s 176(1) (amended by the Education Act 1996 s 582(1), Sch 37 para 135). As to compulsory school age see **EDUCATION** vol 15(1) (2006 Reissue) para 15.

2 *Crocker v Banks* (1888) 4 TLR 324, CA; *Grizzle v Frost* (1863) 3 F & F 622; *Robinson v WH Smith & Son* (1901) 17 TLR 423, CA; *Cribb v Kynoch Ltd* [1907] 2 KB 548, DC; *Young v Hoffman Manufacturing Co Ltd* [1907] 2 KB 646, CA.

### **UPDATE**

#### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/D. EXPLOITATION/619. Prevention of begging.

## **D. EXPLOITATION**

### **619. Prevention of begging.**

Any person who causes or procures any child<sup>1</sup> or young person<sup>2</sup> under the age 16 years or who, having responsibility for such a child or young person, allows him to be in any street<sup>3</sup>, premises or place for the purpose of begging or receiving alms<sup>4</sup>, or of inducing the giving of alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, is liable on summary conviction to a penalty<sup>5</sup>. If any person, while singing, playing, performing or offering anything for sale in a street or public place<sup>6</sup>, has with him a child who has been lent or hired out to him, the child is deemed to be in that street or place for the purpose of inducing the giving of alms<sup>7</sup>. If a person having responsibility for a child or young person is charged with an offence under these provisions, and it is proved that the child or young person was in any street, premises or place for the purpose of begging or receiving alms or of inducing the giving of alms, and that the person charged allowed him to be in the street, premises or place, that person is presumed to have allowed him to be there for that purpose unless the contrary is proved<sup>8</sup>.

1 For the meaning of 'child' for these purposes see para 613 note 1 ante.

2 'Young person' means a person who has attained the age of 14 years and is under the age of 18 years: Children and Young Persons Act 1933 ss 31(2), 107(1) (definition substituted by the Criminal Justice Act 1991 s 68, Sch 8 para 1(3)).

3 'Street' includes any highway and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not: Children and Young Persons Act 1933 s 107(1).

4 In *Pointon v Hill* (1884) 12 QBD 306, DC, it was held that if a person, not as a regular mode of living but for some object not in itself unlawful, went from house to house and solicited subscriptions, that was not begging or gathering alms within the meaning of the former Vagrancy Act 1824.

5 See the Children and Young Persons Act 1933 s 4(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 4, Sch 5; the Criminal Law Act 1977 s 31(5)(a), (6)(b); the Children Act 1989 s 108(5), Sch 13 para 3(b); and by virtue of the Criminal Justice Act 1982 s 46). The penalty is a fine not exceeding level 2 on the standard scale or imprisonment for a term not exceeding three months or both: see the Children and Young Persons Act 1933 s 4(1) (as so amended). As to the standard scale see para 132 note 2 ante. As from a day to be appointed s 4(1) is further amended so as to remove the punishment of imprisonment: s 4(1) (as so amended; and prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante.

6 'Public place' includes any public park, garden, sea beach or railway station and any ground to which the public has or is permitted to have access, whether on payment or otherwise: Children and Young Persons Act 1933 s 107(1).

7 Ibid s 4(3).

8 Ibid s 4(2) (amended by the Children Act 1989 Sch 13 para 3(b)).

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**



Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/D. EXPLOITATION/620. Sexual offences.

## 620. Sexual offences.

Special provision is made in the Sexual Offences Act 2003 with regard to sexual offences against children<sup>1</sup>. It is an offence for a person to rape a child under 13<sup>2</sup>; to assault a child under 13 by penetration<sup>3</sup>; to touch a child under 13 sexually<sup>4</sup>; or to cause or incite a child under 13 to engage in sexual activity<sup>5</sup>.

More generally, a person aged 18 or over commits an offence if he engages in sexual activity with a child<sup>6</sup>; causes or incites a child to engage in sexual activity<sup>7</sup>; engages in sexual activity in the presence of a child<sup>8</sup>; or causes a child to watch a sexual act<sup>9</sup>. A person under 18 commits an offence if he does anything which would be an offence under these provisions<sup>10</sup> if he were aged 18<sup>11</sup>.

It is also an offence for a person to arrange or facilitate the commission of a child sex offence<sup>12</sup> or to meet a child following sexual grooming<sup>13</sup>.

1 The relevant provisions of the Sexual Offences Act 2003 apply to offences committed after 1 May 2004: see s 141(1); and the Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874. With regard to offences committed before that date, the old legislation continues to apply: see eg the Sexual Offences Act 1956; the Indecency with Children Act 1960; and the Criminal Law Act 1977 s 54(1). As to the continuity of sexual offences law see the Violent Crime Reduction Act 2006 s 55; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to cross-border provisions relating to sexual offences see s 56; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

The Sexual Offences Act 2003 also creates offences by young persons see ss 64, 65 (sex with adult relative); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) paras 188-190.

2 See *ibid* s 5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 166.

3 See *ibid* s 6; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 168.

4 See *ibid* s 7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 170.

5 See *ibid* s 8; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 172.

6 See *ibid* s 9; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 173. A person commits this offence if the child is under 13 or if the child is 13 or over but under 16 and the person does not reasonably believe that the child is 16 or over: see s 9(1)(c)(i), (ii); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 173.

7 See *ibid* s 10; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 174. A person commits this offence if the child is under 13 or if the child is 13 or over but under 16 and the person does not reasonably believe that the child is 16 or over: see s 10(1)(c)(i), (ii); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 174.

8 See *ibid* s 11; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 175. A person commits this offence if the child is under 13 or if the child is 13 or over but under 16 and the person does not reasonably believe that the child is 16 or over: see s 11(1)(d)(i), (ii); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 175.

9 See *ibid* s 12; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 175. A person commits this offence if the child is under 13 or if the child is 13 or over but under 16 and the person does not reasonably believe that the child is 16 or over: see s 12(1)(c)(i), (ii); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 175.

10 *Ie* under *ibid* ss 9-12: see the text and notes 6-9 *supra*.

- 11 See *ibid* s 13; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 177.
- 12 See *ibid* s 14; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 178.
- 13 See *ibid* s 15; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 179.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/D. EXPLOITATION/621. Abuse of position of trust and familial offences.

## **621. Abuse of position of trust and familial offences.**

Provision is made with regard to sexual offences against children involving the abuse of a position of trust<sup>1</sup>.

It is an offence for a person aged 18 or over who is in a position of trust<sup>2</sup> in relation to a child<sup>3</sup> to engage in sexual activity with that child; or for such a person to cause or incite the child to engage in sexual activity<sup>4</sup>; or for such a person to engage in sexual activity in the presence of the child<sup>5</sup>; or for such a person to cause the child to watch a sexual act<sup>6</sup>.

It is an offence for a person aged 18 or over to engage in sexual activity with a family member who is under 18, or to incite the child family member to engage in sexual activity<sup>7</sup>.

1 The relevant provisions of the Sexual Offences Act 2003 apply to offences committed after 1 May 2004: see s 141(1); and the Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874. With regard to offences committed before that date, the old legislation continues to apply: see eg the Sexual Offences Amendment Act 2000 ss 3, 4 (both repealed). As to the continuity of sexual offences law see the Violent Crime Reduction Act 2006 s 55; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to cross-border provisions relating to sexual offences see s 56; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

2 As to when a person is in a 'position of trust' in relation to a child see the Sexual Offences Act 2003 ss 21, 22; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 184.

3 See *ibid* s 16; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 180.

4 See *ibid* s 17; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 181.

5 See *ibid* s 18; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 182.

6 See *ibid* s 19; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 183.

7 See *ibid* ss 25, 26; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 191.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/D. EXPLOITATION/622. Pornography and prostitution.

## **622. Pornography and prostitution.**

It is an indictable offence for a person to take or permit to be taken, or to make, distribute, show or have in his possession with a view to distribution or showing an indecent photograph or pseudo-photograph of a child, or to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs<sup>1</sup>. It is a summary offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession<sup>2</sup>.

It is an offence for any person having responsibility for a child<sup>3</sup> or young person<sup>4</sup> who has attained the age of 4 and is under 16 to allow that child or young person to reside in or frequent a brothel<sup>5</sup>.

It is an indictable offence for a person to pay for the sexual services of a child where the child is under 13 or where the child is 13 or over but under 18 unless the person reasonably believes that the child is 18 or over<sup>6</sup>. It is an indictable offence for a person intentionally to cause or incite a child to become a prostitute or to be involved in pornography anywhere in the world<sup>7</sup> or intentionally to control any of the activities of a child relating to the child's prostitution or involvement in pornography anywhere in the world<sup>8</sup> or intentionally to arrange or facilitate a child's prostitution or involvement in pornography anywhere in the world<sup>9</sup>.

<sup>1</sup> See the Protection of Children Act 1978 s 1(1)(a)-(d) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 757. If the defendant to a charge under s 1(1)(a), (b) or (c) (as amended) proves that the photograph was of a child aged 16 or over and, at the time of the offence, he and the child were married or civil partners of each other or were living together as partners in an enduring family relationship, and either that the child did or may have consented or that he reasonably believed that the child consented then he will be not guilty of the offence: see s 1A (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 757. Further, a defendant will have a defence to a charge under s 1(1)(a) (as amended) if the making of the photograph was necessary for the purposes of preventing, detecting or investigating a crime: see s 1B (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 757.

<sup>2</sup> See the Criminal Justice Act 1988 s 160 (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 758.

<sup>3</sup> For the meaning of 'child' for these purposes see para 613 note 1 ante. If the defendant proves that the photograph was of a child aged 16 or over and, at the time of the offence, he and the child were married or civil partners of each other or were living together in an enduring family relationship then, if the child consented or may have consented to the photograph being in the defendant's possession or if the defendant reasonably believed that the child consented, the defendant will be not guilty of the offence: see the Criminal Justice Act 1988 s 160A (as added and amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 758.

<sup>4</sup> For the meaning of 'young person' for these purposes see para 619 note 2 ante.

<sup>5</sup> See the Children and Young Persons Act 1933 s 3(1) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 222. As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante.

<sup>6</sup> See the Sexual Offences Act s 47; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 215.

<sup>7</sup> See *ibid* s 48; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 216.

8 See ibid s 49; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 216.

9 See ibid s 50; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 216.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/E. CORRUPTION/623. Harmful publications.

## ***E. CORRUPTION***

### **623. Harmful publications.**

It is an offence for a person to print, publish, sell or let on hire<sup>1</sup>, or have in his possession for the purpose of selling or letting on hire, any book, magazine or other like work of a kind likely to fall into the hands of children<sup>2</sup> or young persons<sup>3</sup>, consisting wholly or mainly of stories told in pictures, with or without the addition of written matter, portraying the commission of crimes, or acts of violence or cruelty or incidents of a repulsive or horrible nature in such a way that the work as a whole would tend to corrupt a child or young person<sup>4</sup>. The importation of any such work, or any plate or photographic film prepared for the purpose of printing copies of such a work, is also prohibited<sup>5</sup>.

1 In respect of selling or buying or possessing for that purpose, it is a defence to prove that the defendant did not examine the contents of the work and had no reason to suspect that it was a prohibited work: see the Children and Young Persons (Harmful Publications) Act 1955 s 2(1) proviso.

2 For the meaning of 'child' see para 613 note 1 ante; definition applied by *ibid* s 5(2).

3 For the meaning of 'young person' see para 619 note 2 ante; definition applied by *ibid* s 5(2).

4 See *ibid* ss 1, 2. A person convicted of such an offence is liable on summary conviction to imprisonment for a term not exceeding four months or to a fine not exceeding level 3 on the standard scale or to both: s 2(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see para 132 note 2 ante. As from a day to be appointed, the maximum term of imprisonment to which a person is liable on summary conviction is 51 weeks: Children and Young Persons (Harmful Publications) Act 1955 s 2(1) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3) Sch 26, para 15). At the date at which this volume states the law no such day had been appointed. A prosecution for an offence under the Children and Young Persons (Harmful Publications) Act 1955 s 2 (as amended) may not be instituted except by, or with the consent of, the Attorney General: s 2(2).

5 *Ibid* s 4. See further **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) para 422.

## **UPDATE**

### **615-624 Crossbows ... Child curfew schemes**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/F. CONTROL OF CHILDREN/624. Child curfew schemes.

## ***F. CONTROL OF CHILDREN***

### **624. Child curfew schemes.**

A local authority<sup>1</sup> or chief officer of police<sup>2</sup> may make a scheme (a 'local child curfew scheme') for enabling the authority or (as the case may be) the officer to give a notice imposing for a specified period (not exceeding 90 days) a ban on children of specified ages (under 16) being in a public place<sup>3</sup> within a specified area during specified hours (between 9 pm and 6 am) and otherwise than under the effective control of a parent or a responsible person aged 18 or over<sup>4</sup>. A notice imposing such a ban is subject to and must be in accordance with the provisions of the scheme, and may only be made if, after such consultation as is required by the scheme, the authority or the officer considers it necessary to do so for the purpose of maintaining order<sup>5</sup>. Before making such a scheme, the local authority must consult every chief officer of police any part of whose police area<sup>6</sup> lies within its area, and such other persons or bodies as it considers appropriate<sup>7</sup>, and the officer must consult every local authority any part of whose area lies within the area to be specified, and such other persons or bodies as he considers appropriate<sup>8</sup>.

A local child curfew scheme must, if made by a local authority, be made under the common seal of the local authority<sup>9</sup> and a local child curfew scheme does not have effect until it is confirmed by the Secretary of State<sup>10</sup>, who may confirm or refuse to confirm it, and may fix a date on which such a scheme is to come into operation<sup>11</sup>. If no date is fixed, the scheme comes into operation at the end of the period of one month beginning with the date of its confirmation<sup>12</sup>.

A curfew notice must be given by posting the notice in some conspicuous place or places within the specified area, and in such other manner, if any, as appears to the local authority or (as the case may be) the chief officer of police to be desirable for giving publicity to the notice<sup>13</sup>. Where a constable has reasonable cause to believe that a child is in contravention of a ban imposed by a curfew notice, he must, as soon as practicable, inform the local authority for the area that the child has contravened the ban<sup>14</sup>. The constable may remove the child to the child's place of residence unless he has reasonable cause to believe that the child would, if removed to that place, be likely to suffer significant harm<sup>15</sup>. Where a local authority is informed that a child who lives or is found in its area has contravened such a ban it must make or cause to be made, as soon as practicable and, in any event, within 48 hours of receiving the information, such inquiries as it considers necessary to enable it to decide whether it should take any action to safeguard or promote the child's welfare<sup>16</sup>.

Where the police have reasonable grounds for believing that any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places, and that anti-social behaviour is a significant and persistent problem in the relevant locality they have the power to disperse groups and return unsupervised young people under 16 years to their place of residence<sup>17</sup>.

<sup>1</sup> For these purposes, 'local authority' means in relation to England the council of a district or London borough, the Common Council of the City of London, the Council of the Isle of Wight and the Council of the Isles of Scilly, and in relation to Wales the council of a county or county borough: Crime and Disorder Act 1998 s 14(8). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras



30, 35-39, 59 et seq; as to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

2 'Chief officer of police' has the meaning given in the Police Act 1996 s 101(1) (see **POLICE** vol 36(1) (2007 Reissue) para 105); Crime and Disorder Act 1998 s 18(1).

3 'Public place' has the same meaning as in the Public Order Act 1986 Pt II (ss 11-16) (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 578); Crime and Disorder Act 1998 s 14(8).

4 Ibid s 14(1), (2) (amended by the Criminal Justice and Police Act 2001 ss 48, 49(1), (2)).

5 Crime and Disorder Act 1998 s 14(1) (amended by the Criminal Justice and Police Act 2001 ss 48, 49(1), (2)). A notice given under a local child curfew scheme may specify different hours in relation to children of different ages: Crime and Disorder Act 1998 s 14(6).

6 'Police area' has the meaning given in the Police Act 1996 s 1(2) (see **POLICE** vol 36(1) (2007 Reissue) para 136); Crime and Disorder Act 1998 s 18(1).

7 Ibid s 14(3).

8 Ibid s 14(3A) (added by the Criminal Justice and Police Act 2001 s 49(1), (3)).

9 Crime and Disorder Act 1998 s 14(4) (substituted by the Criminal Justice and Police Act 2001 s 49(1), (4)).

10 Crime and Disorder Act 1998 s 14(4A) (added by the Criminal Justice and Police Act 2001 s 49(1), (4)). As to the Secretary of State see para 155 ante.

11 Crime and Disorder Act 1998 s 14(5).

12 Ibid s 14(5).

13 Ibid s 14(7) (amended by the Criminal Justice and Police Act 2001 s 49(1), (5)).

14 Crime and Disorder Act 1998 s 15(1), (2).

15 Ibid s 15(3).

16 Children Act 1989 s 47(1)(a)(iii), (b) (s 47(1) amended by the Crime and Disorder Act 1998 ss 15(4), 119, Sch 8 para 69).

17 See the Anti-social Behaviour Act 2003 Pt 4 (ss 30-36) (as amended); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 503-505.

## UPDATE

### 615-624 Crossbows ... Child curfew schemes

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/F. CONTROL OF CHILDREN/625. Child safety orders.

## **625. Child safety orders.**

A magistrates court may make a child safety order with respect to a child under the age of 10, on the application of a local authority<sup>1</sup>, if it is satisfied that one or more of the following conditions are met: (1) the child has committed an act which, if he had been aged 10 or over, would have constituted an offence<sup>2</sup>; (2) a child safety order is necessary for the purpose of preventing the commission by the child of such an act<sup>3</sup>; (3) the child has contravened a ban imposed by a curfew notice<sup>4</sup>; and (4) the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself<sup>5</sup>. However, a court may not make a child safety order unless it has been notified by the Secretary of State<sup>6</sup> that arrangements for implementing such orders are available in the area in which it appears that the child resides or will reside and the notice has not been withdrawn<sup>7</sup>.

A child safety order places the child for a specified period (not exceeding the permitted maximum)<sup>8</sup> under the supervision of a responsible officer<sup>9</sup> and requires the child to comply with such requirements as are specified<sup>10</sup>. The requirements that may be specified are those which the court considers desirable in the interests of: (a) securing that the child receives appropriate care, protection and support and is subject to proper control<sup>11</sup>; or (b) preventing any repetition of the kind of behaviour which led to the child safety order being made<sup>12</sup>. Where a child safety order is in force and it is proved to the satisfaction of the court<sup>13</sup> on the application of the responsible officer that the child has failed to comply with any requirement included in the order the court may make an order varying the order by cancelling any provision included in it or by inserting in it (either in addition to or in substitution for any of its provisions) any provision that could have been included in the order if the court had then had power to make it and were exercising the power<sup>14</sup>.

If while a child safety order is in force in respect of a child it appears to the court which made it, on the application of the responsible officer or a parent or guardian of the child, that it is appropriate to make an order varying or discharging the order, the court may make an order discharging the child safety order or varying it by cancelling any provision included in it or by inserting in it (either in addition to or in substitution for any of its provisions) any provision that could have been included in the order if the court had then had power to make it and were exercising the power<sup>15</sup>.

An appeal lies to the High Court against the making by a magistrates' court of a child safety order<sup>16</sup>.

1 See the Crime and Disorder Act 1998 s 11(1). For the meaning of 'local authority' see para 138 note 13 ante; definition applied by s 11(7). Proceedings in respect of a child safety order are family proceedings for the purposes of the Children Act 1989 (see para 199 ante) or the Magistrates' Courts Act 1980 s 65 (as amended) (see **MAGISTRATES** vol 29(2) (Reissue) para 739), and the standard of proof applicable to such proceedings is the civil standard: Crime and Disorder Act 1998 s 11(6). As to the civil standard of proof see **CIVIL PROCEDURE** vol 11 (2009) PARA 775.

2 Ibid s 11(3)(a).

3 Ibid s 11(3)(b).

4 Ibid s 11(3)(c). 'Curfew notice' means a notice given under a local child curfew scheme (see para 949 ante): ss 14(6), 18(1).

5 Ibid s 11(3)(d). Before making a child safety order, a magistrates' court must obtain and consider information about the child's family circumstances and the likely effect of the order on those circumstances: s 12(1). Before making a child safety order, the court must explain to the parent or guardian of the child in ordinary language the effect of the order and of the requirements proposed to be included in it, the consequences if the child fails to comply with any such requirement, and that the court has power to review the order on the application either of the parent or guardian or the responsible officer: see s 12(2). For these purposes, 'responsible officer' means a social worker of a local authority or a member of a youth offending team: ss 11(8), 18(4) (both amended by the Children Act 2004 s 64, Sch 5 Pt 4). The social worker or team member must be a social worker of, or member of a youth offending team established by, the local authority within whose area it appears to the court that the child resides or will reside: Crime and Disorder Act 1998 s 18(4) (amended by the Criminal Justice Act 2003 s 323(1), (4)(b)).

6 As to the Secretary of State see para 155 ante.

7 Crime and Disorder Act 1998 s 11(2).

8 The maximum permitted period is 12 months: ibid s 11(4) (amended by the Children Act 2004 s 60(3)).

9 Crime and Disorder Act 1998 s 11(1)(a).

10 Ibid s 11(1)(b).

11 Ibid s 11(5)(a).

12 Ibid s 11(5)(b). Requirements must, as far as practicable, be such as to avoid any conflict with the parents' religious beliefs and any interference with the times, if any, at which the child normally attends school: s 12(3).

13 The court must be the court which made the order or another magistrates' court acting in the same local justice area: ibid s 12(6) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2 paras 56-57).

14 Crime and Disorder Act 1998 s 12(6)(b).

15 Ibid s 12(4). Where an application to discharge a child safety order is dismissed, no further application for its discharge may be made by any person except with the consent of the court which made the order: s 12(5).

16 Ibid s 13(1). On such an appeal the High Court may make such orders as may be necessary to give effect to its determination of the appeal, and may also make such incidental or consequential orders as appear to it to be just: s 13(1). Any order of the High Court made on an appeal under s 13 (other than one directing that an application be re-heard by a magistrates' court) must, for the purposes of s 12(4)-(6) (s 12(6) as amended) (see the text and notes 13-15 supra), be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court: s 13(2).

For the purposes of s 13(1), the Lord Chancellor may, with the concurrence of the Lord Chief Justice, by order make provision as to the circumstances in which appeals to the High Court may be made against decisions taken by courts on questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of any order under the Children Act 1989 s 92, Sch 11 para 2 (see para 208 ante): Crime and Disorder Act 1998 s 10(6) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 276, 277(1), (2)); Crime and Disorder Act 1998 s 13(3). At the date at which this volume states the law no such orders had been made. Except to the extent provided for in any order made under s 10(6) (as amended), no appeal may be made against any decision of a kind mentioned in s 10(6) (as amended): ss 10(7), s 13(3).

## UPDATE

### 625 Child safety orders

TEXT AND NOTE 16--Reference to the High Court is now to a county court: Crime and Disorder Act 1998 s 13 (amended by SI 2009/871).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/F. CONTROL OF CHILDREN/626. School attendance orders and cleanliness of pupils.

## **626. School attendance orders and cleanliness of pupils.**

Where a child of compulsory school age<sup>1</sup> is not receiving suitable education, either by regular attendance at school or otherwise, the local education authority has powers to serve on the parent of the child an order (a 'school attendance order') requiring him to cause the child to become a registered pupil at a school named in the order<sup>2</sup>.

A local education authority may by directions in writing authorise one of its medical officers to have the persons and clothing of pupils in attendance at relevant schools examined whenever in his opinion such examinations are necessary in the interests of cleanliness<sup>3</sup>. If on such examination, the person or clothing of a pupil is found to be infested with vermin or in a foul condition, any officer of the local education authority may serve a notice on the pupil's parent requiring him to cause the pupil's person and clothing to be cleansed<sup>4</sup>. If, after a specified period, a medical officer of the authority is not satisfied that the pupil's person and clothing have been properly cleansed, he may by order direct that they be cleansed under arrangements made by the authority<sup>5</sup>.

1 As to compulsory school age see **EDUCATION** vol 15(1) (2006 Reissue) para 15.

2 See the Education Act 1996 s 437 (as amended); and **EDUCATION** vol 15(1) (2006 Reissue) para 514.

3 See *ibid* s 521(1); and **EDUCATION** vol 15(1) (2006 Reissue) para 548.

4 See *ibid* s 522(1); and **EDUCATION** vol 15(1) (2006 Reissue) para 549.

5 See *ibid* ss 522(4), 523; and **EDUCATION** vol 15(1) (2006 Reissue) paras 549-550. If after the person or clothing of a pupil has been cleansed under s 522 his person or clothing is again infested with vermin, or in a foul condition, at any time while he is in attendance at a relevant school, and the condition of his person or clothing is due to neglect on the part of his parent, the parent is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale: see s 525 (as amended); and **EDUCATION** vol 15(1) (2006 Reissue) para 552. As to the standard scale see para 132 note 2 ante.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/F. CONTROL OF CHILDREN/627. Removal of truants and excluded pupils to designated premises.

## **627. Removal of truants and excluded pupils to designated premises.**

A local authority may designate premises in a police area<sup>1</sup> ('designated premises') as premises to which children and young persons of compulsory school age<sup>2</sup> may be removed, and notify the chief officer of police<sup>3</sup> for that area of the designation<sup>4</sup>. If a constable has reasonable cause to believe that a child<sup>5</sup> or young person<sup>6</sup> found by him in a public place<sup>7</sup> in a specified area during a specified period is of compulsory school age and is absent from school<sup>8</sup> without lawful authority the constable may remove the child or young person to such designated premises, or to the school from which he is so absent<sup>9</sup>.

If a constable has reasonable cause to believe that a child or young person found by him in a public place in a specified area during a specified period and during school hours<sup>10</sup> is of compulsory school age, has been and remains excluded on disciplinary grounds from a relevant school for a fixed period or permanently, has not subsequently been admitted as a pupil to any other school, and has no reasonable justification for being in the public place, the constable may remove the child or young person to designated premises<sup>11</sup>.

A police officer of or above the rank of superintendent may direct that those powers conferred on a constable to remove a child or young person<sup>12</sup> are to be exercisable as respects any area falling within the police area and specified in the direction and are to be so exercisable during a period so specified<sup>13</sup>.

1 For the meaning of 'police area' see para 624 note 6 ante.

2 As to compulsory school age see **EDUCATION** vol 15(1) (2006 Reissue) para 15.

3 For the meaning of 'chief officer of police' see para 624 note 2 ante.

4 See the Crime and Disorder Act 1998 s 16(1). For these purposes, 'local authority' means, in relation to England, a county council, a district council whose district does not form part of an area that has a county council, a London borough council or the Common Council of the City of London; and, in relation to Wales, a county council or a county borough council: s 16(5). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

5 For these purposes, 'child' means a person under the age of 14: *ibid* s 117(1).

6 For these purposes, 'young person' means a person who has attained the age of 14 and is under the age of 18: *ibid* s 117(1).

7 For the meaning of 'public place' see para 624 note 3 ante; definition applied by *ibid* s 16(5).

8 'School' has the same meaning as in the Education Act 1996 (see **EDUCATION** vol 15(1) (2006 Reissue) para 81); Crime and Disorder Act 1998 s 16(5).

9 *Ibid* s 16(3). The references in s 16(3) to a specified area and a specified period are to be construed in accordance with s 16(2) (as amended): see the text and note 13 *infra*. A child or young person's absence from a school is taken to be without lawful authority unless the child or young person is prevented from attending by sickness or other unavoidable cause or the absence falls within the Education Act 1996 s 444(3) (as amended) (leave or day set apart for religious observance) (see **EDUCATION** vol 15(1) (2006 Reissue) para 521); Crime and Disorder Act 1998 s 16(4) (amended by the Education and Inspections Act 2006 s 109(10)).

10 'School hours' means any time during a school session of the relevant school or during a break between sessions of that school on the same day: Crime and Disorder Act 1998 s 16(3B) (added by the Education and Inspections Act 2006 s 108(1), (4)). At the date at which this volume states the law this provision had not yet been brought into force in relation to Wales.

11 Crime and Disorder Act 1998 s 16(3ZA) (added by the Education and Inspections Act 2006 s 108(1), (3)). At the date at which this volume states the law this provision had not yet been brought into force in relation to Wales.

12 *le* under the Crime and Disorder Act 1998 s 16(3), (3ZA) (as added): see the text and notes 9-11 *supra*.

13 *Ibid* s 16(2) (amended by the Education and Inspections Act 2006 s 108(1), (2)). The Crime and Disorder Act 1998 s 16(2) (as amended) has effect in relation to the British Transport Police Force; and for that purpose the reference to any area falling within the police area is to be treated as a reference to any area in a place specified in the Railways and Transport Safety Act 2003 s 31(1)(a)-(f) (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) para 283): Crime and Disorder Act 1998 s 16(3A) (added by the Police Reform Act 2002 s 75(1); and substituted by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 1). For these purposes, 'British Transport Police' means the force of constables appointed under the British Transport Commission Act 1949 s 53 (repealed) (see **POLICE** vol 36(1) (2007 Reissue) para 129; **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) para 281 *et seq*): Crime and Disorder Act 1998 s 16(5) (amended by the Police Reform Act 2002 s 75(2)(a)).

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## **G. FINANCIAL TRANSACTIONS**

### **628. Gambling.**

The Gambling Act 2005 makes general provision with regard to the protection of children and young people<sup>1</sup>. Subject to certain exceptions, a person commits an offence if he invites, causes or permits a child<sup>2</sup> or young person<sup>3</sup> to gamble<sup>4</sup>, or invites or permits a child or young person to enter certain premises where betting or gambling is permitted<sup>5</sup>. Subject to certain exceptions, a young person commits an offence if he gambles<sup>6</sup>, enters certain premises where gambling or betting is permitted<sup>7</sup>, or provides facilities for gambling<sup>8</sup>. A person commits an offence if he employs a child or young person: (1) to provide facilities for gambling, including in connection with a lottery (other than the National Lottery) or football pools<sup>9</sup>; (2) to perform any function on bingo or club gaming premises<sup>10</sup>; (3) to perform any function on a premises with gaming machines<sup>11</sup>; (4) to perform any function on premises in respect of which a casino, betting or adult gaming centre premises licence has effect<sup>12</sup>. It is also an offence to invite, cause or permit a child to participate in a lottery (subject to certain exceptions), or in football pools<sup>13</sup>. A person commits an offence if he fails to return a stake to a child under the terms of an operating licence<sup>14</sup>. The Secretary of State may by order create an offence of inviting, causing or permitting a child or young person below a specified age to use a category D gaming machine<sup>15</sup>.

1 See the Gambling Act 2005 ss 45-64; and **LICENSING AND GAMBLING** vol 68 (2008) PARAS 621-636.

2 For the meaning of 'child' see *ibid* s 45(1); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 331.

3 For the meaning of 'young person' see *ibid* s 45(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 353.

4 See the *ibid* s 46; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 621.

5 See the *ibid* s 47; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 622.

6 See *ibid* s 48; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 623.

7 See *ibid* s 49; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 622.

8 See *ibid* s 50; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 624.

9 See *ibid* ss 51, 52; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 625, 626.

10 See *ibid* s 53; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 627.

11 See *ibid* s 54; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 628.

12 See *ibid* s 55; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 629.

13 See *ibid* ss 56, 57; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 630, 631.

14 See *ibid* ss 58, 83; and **LICENSING AND GAMBLING** vol 67 (2008) PARAS 363, 413, vol 68 (2008) PARA 632.

15 See *ibid* s 59; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 633. As to Category D gaming machines see s 236; and **LICENSING AND GAMBLING** vol 68 (2008) PARA 548.

## **UPDATE**

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.



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## **629. Loans and pawns.**

A person who, with a view to financial gain, sends to any minor a document inviting him to borrow money, obtain goods on hire or goods or services on credit or apply for information or advice on obtaining credit or hiring goods commits an offence<sup>1</sup>. Any person who takes an article in pawn from an individual whom he knows to be, or who appears to be and is, a minor commits an offence<sup>2</sup>.

1 See the Consumer Credit Act 1974 s 50(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) para 153. See also *Alliance and Leicester Building Society v Babbs* (1993) 157 JP 706, (1993) 157 JPN 457, DC.

2 See the Consumer Credit Act 1974 s 114(2); and **CONSUMER CREDIT** vol 9(1) (Reissue) para 210.

## **UPDATE**

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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### **630. Purchase of scrap metal from person under 16.**

A scrap metal dealer who acquires from any person apparently under the age of 16 any scrap metal, whether the scrap metal is offered by that person on his own behalf or on behalf of another person, is guilty of an offence and liable on summary conviction to a fine<sup>1</sup>.

<sup>1</sup> Scrap Metal Dealers Act 1964 s 5(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 1 on the standard scale: see the Scrap Metal Dealers Act 1964 s 5(1) (as so amended). As to the standard scale see para 132 note 2 ante. For the meanings of 'scrap metal dealer' and 'scrap metal' see s 9(1)-(4) (as amended); and **TRADE AND INDUSTRY** vol 97 (2010) para 863.

### **UPDATE**

#### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/H. INTOXICATING SUBSTANCES/631. Intoxicating liquor.

## ***H. INTOXICATING SUBSTANCES***

### **631. Intoxicating liquor.**

If any person gives, or causes to be given, to any child under the age of five any alcohol<sup>1</sup>, except upon the order of a duly qualified medical practitioner or in the case of sickness, apprehended sickness, or other urgent cause, he is liable on summary conviction to a fine<sup>2</sup>.

Subject to certain exceptions, a holder of a premises license<sup>3</sup> commits an offence if he allows an unaccompanied child<sup>4</sup> to be on the premises at a time when they are open for the supply of alcohol<sup>5</sup> for consumption there<sup>6</sup>. Subject to certain exceptions, a person commits an offence if he sells alcohol to an individual aged under 18<sup>7</sup>. A person who works at relevant premises in a capacity which authorises him to prevent a sale commits an offence if he knowingly allows the sale of alcohol on the premises to an individual aged under 18<sup>8</sup>. Subject to certain exceptions, it is an offence, on licensed premises, persistently to sell alcohol to children, and where there is a reasonable suspicion that such an offence has been committed, the premises concerned may be susceptible to a closure order<sup>9</sup>. In the event of a conviction for persistent sale to persons under 18 the court may order the suspension of the license permitting the sale of alcohol on the premises to be suspended for a period not exceeding three months<sup>10</sup>. It is an offence to sell liqueur confectionery to children under 16<sup>11</sup>, or to buy or attempt to buy alcohol on behalf of an individual aged under 18<sup>12</sup>, or for a person to allow an individual under 18 to consume alcohol on licensed premises if he works there in a capacity authorising him to prevent the consumption<sup>13</sup>, or for a person working at such premises in any capacity knowingly to deliver alcohol sold or supplied on the premises to a person aged under 18 or to allow someone else to do so<sup>14</sup>. It is an offence for a person knowingly to send a person aged under 18 to obtain alcohol sold on licensed premises for consumption off the premises<sup>15</sup>. A licence holder commits an offence if on licensed premises he knowingly allows a person aged under 18 to sell or supply alcohol unless the sale or supply has been specifically approved<sup>16</sup>.

Subject to certain exceptions, an individual aged under 18 commits an offence if he buys or attempts to buy alcohol, or, where he is a member of a club, alcohol is supplied to him or to his order by or on behalf of the club, as a result of some act or default of his, or he attempts to have alcohol supplied to him or to his order by or on behalf of the club<sup>17</sup>. Such an individual also commits an offence if he knowingly consumes alcohol on relevant premises<sup>18</sup>.

Where a constable, community support officer or accredited person reasonably suspects that a person in a relevant place is in possession of intoxicating liquor and that:

- 1077 (1) he is under the age of 18; or
- 1078 (2) he intends that any of the liquor should be consumed by a person under the age of 18 in that or any other relevant place; or
- 1079 (3) a person under the age of 18 who is, or has recently been, with him has recently consumed intoxicating liquor in that or any other relevant place,

the constable may require him to surrender anything in his possession which is, or which the constable reasonably believes to be, intoxicating liquor or a container for intoxicating liquor and to state his name and address<sup>19</sup>.

1 'Alcohol' has the meaning set out in the Licensing Act 2003 s 191(1)(a)-(e), (2) (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 30): see the Children and Young Persons Act 1933 s 5 (amended by the Licensing Act 2003 s 198(1), Sch 6 paras 12, 13).

2 Children and Young Persons Act 1933 s 5 (as amended (see note 1 supra); and amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 1 on the standard scale: see the Children and Young Persons Act 1933 s 5 (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante.

3 As to premises licences see **LICENSING AND GAMBLING** vol 67 (2008) PARA 53 et seq.

4 For these purposes, 'child' means an individual under 16; and a child is unaccompanied if not in the company of an individual aged 18 or over: see the Licensing Act 2003 s 145(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 142.

5 For the meaning of 'supply of alcohol' see *ibid* s 145(10); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 142.

6 See *ibid* s 145; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 142.

7 See *ibid* s 146; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 143.

8 See *ibid* s 147; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 144.

9 See *ibid* ss 147A, 169A, 169B (all as added); and **LICENSING AND GAMBLING** vol 67 (2008) PARAS 145, 173. As to the form of a closure order see the Licensing Act 2003 (Persistent Selling of Alcohol to Children) (Prescribed Form of Closure Notice) Regulations 2007, SI 2007/1183; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 173.

10 See the Licensing Act 2003 s 147B (as added); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 145.

11 See *ibid* s 148; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 146.

12 See *ibid* s 149(3), (4); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 147.

13 See *ibid* s 150(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 148.

14 See *ibid* s 151; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 149.

15 See *ibid* s 152; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 150.

16 See *ibid* s 153; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 151.

17 See *ibid* s 149(1); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 147.

18 See *ibid* s 150(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 148.

19 See the Confiscation of Alcohol (Young Persons) Act 1997 s 1 (as amended); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 153.

## UPDATE

### 628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/H. INTOXICATING SUBSTANCES/632. Drunkenness in charge of a child.

### **632. Drunkenness in charge of a child.**

A person found drunk in any highway or other public place<sup>1</sup>, whether a building or not, or on any licensed premises<sup>2</sup>, while having the charge of a child apparently under the age of seven years, is liable on summary conviction to a fine or to imprisonment<sup>3</sup>.

1 For these purposes, 'public place' includes any place to which the public has access, whether on payment or otherwise: Licensing Act 1902 s 8.

2 For these purposes, 'licensed premises' includes any licensed premises within the meaning of the Licensing Act 2003 s 193 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 134), and any premises which may be used for a permitted temporary activity by virtue of Pt 5 (ss 98-110) (see **LICENSING AND GAMBLING** vol 67 (2008) PARAS 108-113): Licensing Act 1902 s 8A (added by the Licensing Act 2003 s 198(1), Sch 6 paras 7, 9).

3 See the Licensing Act 1902 s 2(1) (as amended). The penalty is a fine not exceeding level 2 on the standard scale or imprisonment for a term not exceeding one month: see s 2(1) (as amended). As to the standard scale see para 132 note 2 ante. In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 280 (not yet in force) (alteration of penalties for summary offences), the reference to one month is to be read as a reference to 51 weeks: see the Licensing Act 1902 s 2(1) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 5).

If the child appears to the court to be under the age of seven, he is deemed to be under that age unless the contrary is proved: Licensing Act 1902 s 2(2).

## **UPDATE**

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/H. INTOXICATING SUBSTANCES/633. Supply of intoxicating substances to persons under 18.

### **633. Supply of intoxicating substances to persons under 18.**

It is an offence for a person to supply or offer to supply a substance other than a controlled drug<sup>1</sup>: (1) to a person under the age of 18 whom he knows, or has reasonable cause to believe, to be under that age<sup>2</sup>; or (2) to a person who is acting on behalf of a person under that age and whom he knows, or has reasonable cause to believe, to be acting<sup>3</sup>, if he knows or has reasonable cause to believe that the substance is, or its fumes are, likely to be inhaled by the person under the age of 18 for the purpose of causing intoxication<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to a penalty<sup>5</sup>.

1 Intoxicating Substances (Supply) Act 1985 s 1(1). For these purposes, 'controlled drug' has the same meaning as in the Misuse of Drugs Act 1971 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 720); Intoxicating Substances (Supply) Act 1985 s 1(4).

2 See *ibid* s 1(1)(a); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788.

3 See *ibid* s 1(1)(b); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788.

4 See *ibid* s 1(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788. In proceedings against any person for this offence it is a defence for him to show that at the time he made the supply or offer he was under the age of 18 and was acting otherwise than in the course or furtherance of a business: see s 1(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788.

5 See *ibid* s 1(3) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788. The penalty is imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both: see s 1(3) (as amended); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 788. As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/l. TOBACCO/634. Sale of tobacco to persons under 18.

## ***I. TOBACCO***

### **634. Sale of tobacco to persons under 18.**

A person who sells to a person under the age of 18 years any tobacco<sup>1</sup> or cigarette papers, whether for his own use or not, is guilty of an offence<sup>2</sup>. It is a defence for a person charged with such an offence to prove that he took all reasonable precautions and exercised due diligence to avoid commission of the offence<sup>3</sup>. If on a complaint to a magistrates' court it is proved to the satisfaction of the court that any automatic machine for the sale of tobacco kept on any premises has been used by any person under the age of 18 years, the court must order the owner of the machine, or the person on whose premises the machine is kept, to take such precautions to prevent the machine being so used as may be specified in the order or, if necessary, to remove the machine within such time as may be specified in the order<sup>4</sup>. If any person against whom such an order has been made fails to comply with it, he is guilty of an offence<sup>5</sup>.

It is the duty of a constable and of a park-keeper being in uniform to seize any tobacco or cigarette papers in the possession of any person apparently under the age of 18 years whom he finds smoking in any street or public place<sup>6</sup>. A community support officer has the power to seize anything that a constable in uniform has a duty to seize<sup>7</sup>. In addition a constable's powers may be exercised by persons accredited for the purposes of a community safety accreditation scheme<sup>8</sup>.

Nothing in the above provisions, however, makes it an offence to sell tobacco or cigarette papers to, or authorises the seizure of those articles in the possession of, any person who is at the time employed by a manufacturer of or dealer in tobacco, either wholesale or retail, for the purposes of his business, or is a boy messenger in uniform in the employment of a messenger company and employed as such at the time<sup>9</sup>.

Any person carrying on a retail business who sells cigarettes to any person other than in pre-packed quantities of 10 or more cigarettes in their original package<sup>10</sup> commits an offence<sup>11</sup>. At every premises<sup>12</sup> where tobacco is sold by retail, a notice displaying the statement 'It is illegal to sell tobacco products to anyone under the age of 18'<sup>13</sup> must be exhibited in a prominent position where the statement is readily visible to persons at the point of sale of the tobacco<sup>14</sup>. Any person who carries on a business which involves the retail sale of tobacco, and at which no such notice is exhibited, is guilty of an offence<sup>15</sup>. On every automatic machine for the sale of tobacco which is kept available for use as such at any premises, there must be exhibited, so as to be readily visible to persons using the machine, a notice displaying the statement: 'This machine is only for the use of people aged 18 or over'<sup>16</sup>. Where any person is the owner of any such machine which is so kept or the owner of the premises at which any such machine is so kept and no such notice is exhibited on the machine, that person is guilty of an offence<sup>17</sup>.

The Secretary of State<sup>18</sup> may from time to time by order amend these provisions<sup>19</sup> by substituting a different age<sup>20</sup>.

It is the duty of every local authority<sup>21</sup> to consider, at least once in every period of 12 months, the extent to which it is appropriate for it to carry out in its area a programme of enforcement action relating to the above provisions<sup>22</sup>, and, accordingly, to carry out any appropriate programme<sup>23</sup>.

1 'Tobacco' includes cigarettes, any product containing tobacco intended for oral or nasal use and smoking mixtures intended as a substitute for tobacco; and 'cigarette' includes cut tobacco rolled up in paper, tobacco leaf or other material in such form as to be capable of immediate use for smoking: Children and Young Persons Act 1933 s 7(5) (amended by the Protection of Children (Tobacco) Act 1986 s 1).

2 See the Children and Young Persons Act 1933 s 7(1) (amended by the Protection of Children (Tobacco) Act 1986 s 1; the Children and Young Persons (Protection from Tobacco) Act 1991 s 1; and the Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 2). Note that with regard to sales made before 1 October 2007, the relevant age for these purposes is 16: Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 1.

A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Children and Young Persons Act 1933 s 7(1) (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante.

The offence is now one of strict liability: *St Helens Metropolitan Borough Council v Hill* (1992) 156 JP 602, DC (co-owner guilty of offence notwithstanding that he was not present when the sale took place), applying *Moussell Bros Ltd v London and North-Western Rly Co* [1917] 2 KB 836.

3 Children and Young Persons Act 1933 s 7(1A) (added by the Children and Young Persons (Protection from Tobacco) Act 1991 s 1). See *Hereford and Worcester County Council v T & S Stores plc* (1994) 93 LGR 98, (1994) Times, 4 November, DC (the fact that one further precaution was not taken did not preclude justices from finding that the defence was established).

4 Children and Young Persons Act 1933 s 7(2) (amended by the Protection of Children (Tobacco) Act 1986 s 1; the Children and Young Persons (Protection from Tobacco) Act 1991 s 1; the Courts Act 2003 s 109(1), Sch 8 para 72; and the Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 2). Note that with regard to machines used before 1 October 2007, the relevant age for these purposes is 16: Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 1. An appeal from such an order by any person aggrieved lies to the Crown Court: Children and Young Persons Act 1933 s 102(1)(e) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I). Nothing in the Children and Young Persons Act 1933 s 102 (as amended) is to be construed as affecting any other right of appeal conferred by the Children and Young Persons Act 1933 or any other Act: s 102(2) (amended by the Children and Young Persons Act 1969 s 72(4), Sch 6).

5 See the Children and Young Persons Act 1933 s 7(2) (as amended: see note 4 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 7(2) (as so amended). As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante.

6 *Ibid* s 7(3). Any tobacco or cigarette papers so seized must be disposed of, if seized by a constable, in such manner as the police authority may direct; and, if seized by a park-keeper, must be disposed of in such manner as the authority or person by whom he was appointed may direct: s 7(3). As to police authorities see **POLICE** vol 36(1) (2007 Reissue) para 139 et seq.

7 See the Police Reform Act 2002 s 38(6), Sch 4 para 7; and **POLICE** vol 36(1) (2007 Reissue) para 529. Anything seized may be disposed of in such manner as the police authority directs: see Sch 4 para 7; and **POLICE** vol 36(1) (2007 Reissue) para 529.

8 See *ibid* s 41(3), Sch 5 para 6; and **POLICE** vol 36(1) (2007 Reissue) para 533. As to community safety accreditation schemes generally see **POLICE** vol 36(1) (2007 Reissue) para 532 et seq.

9 Children and Young Persons Act 1933 s 7(4).

10 'Original package' means the package in which the cigarettes were supplied for the purpose of retail sale by the manufacturer or importer; and 'package' means any box, carton or other container: Children and Young Persons (Protection from Tobacco) Act 1991 s 3(3).

11 *Ibid* s 3(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 3(2).

12 'Premises' includes any place and any vehicle, vessel, aircraft, hovercraft, stall or moveable structure: *ibid* s 4(8).

13 The dimensions of the notice to be exhibited in accordance with *ibid* s 4(1), (2) and the size of the statement to be displayed on it, is to be such as may be prescribed by regulations made by the Secretary of State, and any such regulations may make different provisions for different cases: s 4(3). Any such regulations



must be made by statutory instrument subject to annulment by resolution of either House of Parliament: s 4(9). In exercise of this power the Protection from Tobacco (Display of Warning Statements) Regulations 1992, SI 1992/3228, have been made. The regulations prescribe that the notice must be not less than 297 mm by 420 mm, and the size of the statement must be such that no character is less than 36 mm high: see reg 2.

14 Children and Young Persons (Protection from Tobacco) Act 1991 s 4(1) (amended by the Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 3).

15 Children and Young Persons (Protection from Tobacco) Act 1991 s 4(1) (as amended: see note 14 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 4(4). It is a defence for a person charged with such an offence to prove that he took all reasonable precautions and exercised due diligence to avoid commission of the offence: s 4(5). Where any such offence is committed by a body corporate and it is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of the offence: see s 4(6).

16 Ibid s 4(2) (amended by the Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, art 3). The notice must be not less than 60 mm by 100 mm, and the size of the statement must be such that no character is less than 6 mm high: Protection from Tobacco (Display of Warning Statements) Regulations 1992, SI 1992/3228, reg 3.

17 See the Children and Young Persons (Protection from Tobacco) Act 1991 s 4(2) (as amended: see note 16 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 4(4). It is a defence for a person charged with any such offence to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of the offence: s 4(5). Where any such offence is committed by a body corporate and it is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of the offence: see s 4(6).

18 As to the Secretary of State see para 155 ante.

19 Ie the Children and Young Persons Act 1933 s 7 (as amended) (see the text and notes 1-9 supra) and the Children and Young Persons (Protection from Tobacco) Act 1991 s 4 (see the text and notes 10-17 supra): Health Act 2006 s 13(1)(a), (b).

20 Ibid s 13(1). The age specified may not be lower than 16 or higher than 18: s 13(2). The Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767, has been made pursuant to this power.

21 This applies to the council of any county, a metropolitan district or a London borough, the Common Council of the City of London and the Council of the Isles of Scilly: Children and Young Persons (Protection from Tobacco) Act 1991 s 5(3). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

22 The duty applies not only to *ibid* ss 3, 4 (see the text and notes 10-17 supra) but also to the Children and Young Persons Act 1933 s 7 (as amended) (see the text and notes 1-9 supra): see the Children and Young Persons (Protection from Tobacco) Act 1991 s 5(1)(a).

23 See *ibid* s 5(1). A programme of enforcement action is a programme involving all or any of the following: (1) the bringing of prosecutions in respect of offences; (2) the investigation of complaints in respect of alleged offences; (3) the taking of other measures intended to reduce the incidence of offences; and (4) the making of complaints under the Children and Young Persons Act 1933 s 7(2) (as amended) (see the text and note 5 supra) and, with a view to determining whether such complaints should be made, the monitoring of the use of such machines: see the Children and Young Persons (Protection from Tobacco) Act 1991 s 5(2).

## UPDATE

### 628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4,

Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

#### **634 Sale of tobacco to persons under 18**

TEXT AND NOTES--As to persistent sales of tobacco to persons under 18 see Children and Young Persons Act 1933 ss 12A-12D (added by Criminal Justice and Immigration Act 2008 s 143(2)). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 37.

NOTE 4--See also Children and Young Persons Act 1933 s 102(1)(f) (added by Criminal Justice and Immigration Act 2008 s 143(3)).

NOTE 21--Children and Young Persons (Protection from Tobacco) Act 1991 s 5(3) amended: Health Act 2009 Sch 4 para 1.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/635. Safety at entertainments.

## ***J. ENTERTAINMENT AND LEISURE ACTIVITIES***

### **635. Safety at entertainments.**

Where there is provided in any building, other than a private dwelling house, an entertainment for children<sup>1</sup>, or an entertainment at which the majority of persons attending are children then if the number of children attending the entertainment exceeds 100, it is the duty of the person providing the entertainment to station and keep stationed wherever necessary a sufficient number of adult attendants, properly instructed as to their duties, to prevent more children or other persons being admitted to the building, or to any part thereof, than the building or part can properly accommodate, and to control the movement of the children and other persons admitted while entering and leaving, and to take all other reasonable precautions for the safety of the children<sup>2</sup>. Where the occupier of a building permits, for hire or reward, the building to be used for the purpose of an entertainment, he must take all reasonable steps to secure the observance of these provisions<sup>3</sup>. A constable or authorised officer of the licensing authority<sup>4</sup> may enter any building in which he has reason to believe that such an entertainment is being, or is about to be, provided, with a view to seeing whether these provisions are carried into effect<sup>5</sup>. Persons failing to fulfil the above obligations are guilty of an offence<sup>6</sup>.

1 le persons under 14 years: see para 938 note 1 ante.

2 Children and Young Persons Act 1933 s 12(1), (6). Note that the provider of the entertainment may not necessarily be the occupier of the building.

3 Ibid s 12(2).

4 As to licensing authorities for entertainments see **LICENSING AND GAMBLING** vol 67 (2008) PARA 35 et seq.

5 See the Children and Young Persons Act 1933 s 12(4).

6 A person who is guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see *ibid* s 12(3) (amended by the Licensing Act 2003 ss 198(1), 199, Sch 6 paras 12, 14(a), Sch 7; and by virtue of the Criminal Justice Act 1982 ss 35, 38, 46). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 611 note 1 ante. The institution of proceedings under this provision is, in the case of a building in respect of which a premises licence authorising the provision of regulated entertainment has effect, the duty of the relevant licensing authority: see the Children and Young Persons Act 1933 s 12(5)(a) (substituted by the Licensing Act 2003 Sch 6 paras 12, 14(b)). 'Premises licence' and 'the provision of regulated entertainment' have the meanings given by the Licensing Act 2003 (see **LICENSING AND GAMBLING** vol 67 (2008) PARAS 31, 53): Children and Young Persons Act 1933 s 12(5A)(a) (added by the Licensing Act 2003 Sch 6 paras 12, 14(c)); and 'the relevant licensing authority', in relation to a building in respect of which a premises licence has effect, means the relevant licensing authority in relation to that building under the Licensing Act 2003 s 12 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 53): Children and Young Persons Act 1933 s 12(5A)(a) (added by the Licensing Act 2003 Sch 6 paras 12, 14(c)). In any other case, proceedings must be instituted by the police authority: Children and Young Persons Act 1933 s 12(5)(b). As to police authorities see **POLICE** vol 36(1) (2007 Reissue) para 139 et seq.

## **UPDATE**

**628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

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Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/636. Children's safety, health and welfare at cinemas.

### **636. Children's safety, health and welfare at cinemas.**

Where a premises licence<sup>1</sup> authorises the exhibition of films the licence must include a condition requiring the admission of children<sup>2</sup> to the exhibition of any film to be restricted in accordance with any recommendation made by the film classification body<sup>3</sup> specified in the licence<sup>4</sup> or, where the film classification body is not specified in the licence or where the relevant licensing authority has notified the holder of the licence that this provision applies to the film in question in accordance with any recommendation made by that licensing authority<sup>5</sup>. Similar provisions apply with regard to club premises licences authorising the exhibition of films<sup>6</sup>.

1 As to premises licences see the Licensing Act 2003 s 11; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 53 et seq.

2 'Children' for these purposes means persons aged under 18: *ibid* s 20(4).

3 'Film classification body' means the person or persons designated as the authority under the Video Recordings Act 1984 s 4 (as amended) (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 279) (authority to determine suitability of video works for classification): Licensing Act 2003 s 20(4).

4 *Ibid* s 20(1), (2).

5 *Ibid* s 20(1), (3).

6 See *ibid* s 74; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 93.

## **UPDATE**

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/637. Safety for children in relation to horse riding and motor vehicles.

### **637. Safety for children in relation to horse riding and motor vehicles.**

It is an offence, subject to regulations<sup>1</sup>, for any person<sup>2</sup> to cause or permit a child under the age of 14 years to ride a horse<sup>3</sup> on a road<sup>4</sup> unless the child is wearing protective headgear of such description as may be specified in regulations<sup>5</sup>, in such manner<sup>6</sup> as may be so specified<sup>7</sup>. This does not apply where: (1) the child is a follower of the Sikh religion while he is wearing a turban<sup>8</sup>; or (2) the riding is within 30 metres of the high water mark of ordinary spring tides, the horse is being led on a leading rein on foot by the owner of the horse or another person aged 18 years or over who is authorised to do so by the owner, and no more than two persons are being led at any time<sup>9</sup>.

Regulations may be made prescribing types of equipment of any description that are recommended as conducive to the safety in the event of accident of prescribed classes of children in prescribed classes of motor vehicles, and to control the sale of such equipment<sup>10</sup>.

1 See the text and notes 5, 8-9 infra.

2 In any person to whom the Horses (Protective Headgear for Young Riders) Act 1990 s 1(1) applies. The provisions of s 1(1) apply to the following persons: (1) any person who for the purposes of the Children and Young Persons Act 1933 Pt I (ss 1-17) (as amended) has responsibility for the child; (2) any owner of the horse; (3) any person other than its owner who has custody of or is in possession of the horse immediately before the child rides it; and (4) where the child is employed, his employer and any other person to whose orders the child is subject in the course of his employment: Horses (Protective Headgear for Young Riders) Act 1990 s 1(2).

3 'Horse' includes pony, mule, donkey or other equine animal: *ibid* s 3(1).

4 'Road' does not include a footpath or bridleway but, subject to that, has in England and Wales, the meaning given by the Road Traffic Act 1988 s 192(1) (as amended) (see **ROAD TRAFFIC** vol 40(1) (2007 Reissue) para 206): Horses (Protective Headgear for Young Riders) Act 1990 s 3(1). 'Footpath' means a way over which the public has a right of way, and which is not associated with a carriageway (s 3(2)(a)); and 'bridleway' means a way over which the public has the following but no other rights of way, namely a right of way on foot, on horseback, or leading a horse, with or without a right to drive animals of any description along the way (s 3(2)(b)).

5 The Secretary of State may by regulations made by statutory instrument: (1) provide that *ibid* s 1 does not apply in relation to children of any prescribed description, or in relation to the riding of horses in such circumstances as may be prescribed; (2) prescribe for the purposes of s 1 (by reference to shape, construction or any other quality) the description of protective headgear to be worn by children of any prescribed description in prescribed circumstances; (3) prescribe for those purposes the manner in which such headgear is to be worn: s 2(1). Before making any such regulations the Secretary of State must consult such representative organisations as he thinks fit: s 2(2). As to the regulations made see the Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201. In the case of a helmet manufactured after 1 July 1992, it must bear the EC mark of conformity and satisfy the basic health and safety requirements for a helmet which is manufactured with the intention that it should be worn by a child riding a horse or a pedal cycle on a road, laid down in EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) of 21 December 1989 on the approximation of the laws of the member states relating to personal protective equipment, Annex II: see the Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201, reg 4(1)(a). In the case of a helmet manufactured before that date, it must: (a) conform to a British Standard and bear a marking applied by the manufacturer indicating compliance with the requirements contained in the British Standard; (b) conform to any relevant national standard of a national standards institution of, or a public authority of, another member state of the European Communities, or conform to any national regulation of such member state, provided that the standard or regulation offers guarantees of safety, suitability and fitness for purpose equivalent to those offered by a British Standard and bears a marking or equivalent indication applied by the manufacturer indicating compliance with the requirements contained in the relevant standard or regulation; or (c) be such that it could

reasonably be expected to afford the child a degree of protection from injury in the event of an accident similar to or greater than that provided by a helmet conforming to a British Standard meeting the requirements of head (a) supra or any relevant national standard or regulation meeting the requirements of head (b) supra: reg 4(1) (b). A helmet is regarded as satisfying the basic health and safety requirements if the manufacturer is able to comply with the provisions of EC Council Directive 89/686 (OJ L399, 30.12.89, p 18), art 5(2) (as amended): Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201, reg 4(2). A reference to a helmet bearing an EC mark of conformity is a reference to a mark properly applied in accordance with EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) arts 8-13 (as amended): Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201, reg 4(3). As to the relevant British Standard see reg 2(a), Schedule.

6 A helmet must be securely fastened to the head of the wearer by means of straps or other fastening provided on the headgear for that purpose: see *ibid* reg 5.

7 Horses (Protective Headgear for Young Riders) Act 1990 s 1(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 1 on the standard scale: s 1(3). As to the standard scale see para 132 note 2 ante.

8 Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201, reg 3(1), (2).

9 *Ibid* reg 3(1), (3).

10 See the Road Traffic Act 1988 s 15A (as added); and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) para 638. At the date at which this volume states the law, no such regulations had been made.

## UPDATE

### **628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/638. Power of Secretary of State to make regulations in respect of activity centres.

### **638. Power of Secretary of State to make regulations in respect of activity centres.**

The Secretary of State<sup>1</sup> must by order designate a person ('the licensing authority') to exercise such functions as may be prescribed by regulations relating to the licensing of persons providing facilities for adventure activities<sup>2</sup>, namely, such facilities, for such sporting, recreational or outdoor activities, as may be prescribed by regulations, other than: (1) facilities which are provided exclusively for persons who have attained the age of 18; or (2) facilities which do not consist of, or include some element of, instruction or leadership<sup>3</sup>. Regulations may make provision<sup>4</sup> as to:

- 1080 (a) the cases or circumstances in which persons providing facilities for adventure activities are, or are not, required to hold a licence<sup>5</sup>;
- 1081 (b) any requirements relating to safety (whether applying to facilities for adventure activities or to other facilities) which must be satisfied by an applicant for a licence<sup>6</sup>;
- 1082 (c) the conditions subject to which licences are granted (which may include conditions relating to inspection by the licensing authority and conditions imposing requirements of the kind referred to in head (b) above)<sup>7</sup>;
- 1083 (d) the variation of such conditions<sup>8</sup>;
- 1084 (e) the renewal, variation, transfer and revocation of licences by the licensing authority<sup>9</sup>;
- 1085 (f) the charging by the licensing authority of such fees in connection with licences as may be specified in the regulations<sup>10</sup>;
- 1086 (g) the making of payments by the licensing authority into the Consolidated Fund<sup>11</sup>;
- 1087 (h) the investigation by the licensing authority of complaints concerning licence holders<sup>12</sup>;
- 1088 (i) the exercise of functions of the licensing authority by persons authorised by it<sup>13</sup>;
- 1089 (j) the keeping, and availability for inspection by the public, of a register of licences<sup>14</sup>;
- 1090 (k) the bringing of appeals to the Secretary of State against such decisions of the licensing authority as may be specified in the regulations<sup>15</sup>;
- 1091 (l) the procedure to be followed on, and the orders which may be made on, determination of such appeals<sup>16</sup>.

In exercising its functions under regulations<sup>17</sup> the licensing authority must have regard to any guidance given to it from time to time by the Health and Safety Commission, and before giving such guidance the Health and Safety Commission must consult such persons (if any) as it considers it appropriate to consult<sup>18</sup>.

Regulations may provide for it to be an offence: (i) to do anything for which a licence is required under the regulations, otherwise than in accordance with a licence<sup>19</sup>; or (ii) to make a statement to the licensing authority (or someone acting on its behalf) knowing it to be false in a material particular, or recklessly to make a statement to the licensing authority (or someone



acting on its behalf) which is false in a material particular, for the purposes of obtaining or holding a licence<sup>20</sup>.

Such regulations<sup>21</sup> must be made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, and may make different provision for different cases and may include transitional provisions<sup>22</sup>. Before making such regulations the Secretary of State must consult the Health and Safety Commission and such other persons (if any) as he considers it appropriate to consult<sup>23</sup>. The Health and Safety Commission may from time to time submit to the Secretary of State such proposals as it considers appropriate for the making of such regulations; and where the Secretary of State proposes to make regulations in the form so submitted, the requirement to consult the Health and Safety Commission does not apply<sup>24</sup>.

The Secretary of State may make grants to the licensing authority in respect of such of its expenses under the Activity (Young Persons' Safety) Act 1995 as are not met by fees, and such grants may be made subject to such conditions as to repayment as the Secretary of State may determine<sup>25</sup>. Any expenditure incurred by the Secretary of State under or by virtue of the Act is to be paid out of money provided by Parliament<sup>26</sup>.

Nothing in, or done by virtue of, the Activity (Young Persons' Safety) Act 1995 or regulations under it prejudices any of the relevant statutory provisions (whenever made) as defined in Part I of the Health and Safety at Work Act 1974<sup>27</sup> or anything done by virtue of those provisions<sup>28</sup>.

1 As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

2 Activity Centres (Young Persons' Safety) Act 1995 s 1(1). The Secretary of State may not make an order under the Activity (Young Persons' Safety) Act 1995 s 1(1) designating a person other than one nominated by the Health and Safety Commission: s 1(2). As to the Health and Safety Commission see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq. The Adventure Activities (Licensing) (Designation) Order 2007, SI 2007/447, has been made under this provision, designating the Health and Safety Executive (see art 2). As to the Health and Safety Executive see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq.

3 Activity Centres (Young Persons' Safety) Act 1995 s 1(3).

4 In exercise of the powers conferred by *ibid* s 1(1) (see the text and notes 1-2 *supra*), s 1(3) (see the text and note 3 *supra*), s 1(4) (see the text and notes 5-16 *infra*), s 2(1) (see the text and notes 19-20 *infra*), s 2(3) (see note 20 *infra*) and s 3(2) (see note 23 *infra*), the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended) have been made: see paras 639-645 *post*. In exercise of the powers in the Activity (Young Persons' Safety) Act 1995 s 1(1) (see the text and notes 1-2 *supra*) and s 1(4) (see the text and notes 5-16 *infra*), the Adventure Activities (Enforcing Authority) Regulations 2004, SI 2004/1359, have been made, applying the Health and Safety (Enforcing Authority) Regulations 1998, SI 1998/494 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 370) to the enforcement of the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended) (see paras 639-645 *post*). Before making any regulations under the Activity Centres (Young Persons' Safety) Act 1995 s 1 or s 2, the Secretary of State must consult the Health and Safety Commission and such other persons, if any, as he considers it appropriate to consult: s 3(3).

5 *Ibid* s 1(4)(a).

6 *Ibid* s 1(4)(b).

7 *Ibid* s 1(4)(c).

8 *Ibid* s 1(4)(d).

9 *Ibid* s 1(4)(e).

10 *Ibid* s 1(4)(f).

11 *Ibid* s 1(4)(g). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 711; **PARLIAMENT** vol 78 (2010) PARA 1028.

12 *Ibid* s 1(4)(h).

13 *Ibid* s 1(4)(i).

14 Ibid s 1(4)(j).

15 Ibid s 1(4)(k).

16 Ibid s 1(4)(l).

17 Ie made under ibid s 1: see the text and notes 1-16 supra.

18 Ibid s 1(5).

19 Ibid s 2(1)(a). See also note 20 infra.

20 Ibid s 2(1)(b). A person convicted of an offence under regulations made under s 2(1) is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; and (2) on conviction on indictment for an offence under regulations made under s 2(1)(a) (see the text and note 19 supra), to imprisonment for a term not exceeding two years or a fine or both, and, on conviction on indictment for an offence under regulations made under s 2(1)(b), to a fine: s 2(2). As to the statutory maximum see para 109 note 23 ante.

Regulations under s 2(1) may provide for defences to be available in proceedings for an offence under the regulations either generally or in specified circumstances, and may make, in relation to provisions of the regulations, provision which applies (with or without modifications), or has a similar purpose to that of, any of the following provisions of the Health and Safety at Work etc Act 1974: s 15(7), s 35 (venue) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 856); ss 18-20 (ss 18, 20 as amended), s 26 (enforcement authorities and inspectors) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 375-376); ss 21-24 (ss 22-24 as amended) (improvement and prohibition notices) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 377-379); s 25 (power to deal with cause of imminent danger) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 380); ss 27, 28 (both as amended) (obtaining and disclosure of information) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 382); s 33(1)(e)-(j) (as amended), s 33(1)(n), (o), (2)-(4) (s 33(2), (4) as amended) (ancillary offences) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARAS 852-853); s 34(2)-(6) (as amended) (extension of time for bringing summary proceedings) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 855); ss 36(1), 37 (offences due to fault of other person and offences by bodies corporate) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 860); s 38 (as amended), s 39 (prosecutions in England and Wales only by inspectors or by or with the consent of the Director of Public Prosecutions) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 856); ss 40, 41 (onus of proving limits of what is practicable and evidence) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 858); s 42 (power of court to order cause of offence to be remedied) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 857); and s 46 (service of notices) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 388); Activity Centres (Young Persons' Safety) Act 1995 s 2(3), (4).

21 Ie under ibid s 1 or s 2: see the text and notes 1-20 supra.

22 Ibid s 3(1), (2), (6).

23 Ibid s 3(3).

24 Ibid s 3(4).

25 Ibid s 3(7).

26 See ibid s 4.

27 Ie the Health and Safety at Work Act 1974 Pt I (ss 1-54) (as amended): see **HEALTH AND SAFETY AT WORK**. As to the relevant statutory provisions see s 53(1) (as amended); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 302.

28 Activity (Young Persons' Safety) Act 1995 s 3(5).

## UPDATE

### 628-638 Gambling ... Power of Secretary of State to make regulations in respect of activity centres

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory

Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

**638 Power of Secretary of State to make regulations in respect of activity centres**

TEXT AND NOTES--Health and Safety Commission replaced by the Health and Safety Executive: see Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq.

NOTE 2--1995 Act s 1(2) amended, s 1(2A) added: SI 2008/960. SI 2007/447 amended: SI 2008/960.

NOTE 18--1995 Act s 1(5) amended: SI 2008/960.

NOTE 20--1995 Act s 2(4) amended: Health and Safety (Offences) Act 2008 Sch 3 para 4.

NOTE 23--1995 Act s 3(3) amended: SI 2008/960.

NOTE 24--1995 Act s 3(4) amended: SI 2008/960.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/639. Licensing of adventure activities.

### **639. Licensing of adventure activities.**

A person is required to hold a licence<sup>1</sup> in respect of the provision of facilities for adventure activities<sup>2</sup> if that person either provides such facilities in return for payment, or is a local authority<sup>3</sup> and the facilities are provided to an educational establishment<sup>4</sup> in respect of the pupils of such an establishment<sup>5</sup>. Where such facilities are so provided by a person at or from more than one activity centre, and those activity centres are being operated by that person at the same time throughout any period of 28 days or more, a separate licence is required in respect of the facilities provided at or from each such centre<sup>6</sup>. However, a person is not required to hold a licence in respect of facilities for adventure activities where those facilities are provided:

- 1092 (1) by a voluntary association<sup>7</sup> to its members, to the members of some other voluntary association pursuant to an agreement between the associations, or to persons who are not its members for the purpose only of encouraging interest in its activities or attracting new members, provided that such facilities are not to be provided, in respect of any one person, on more than three days in any period of 12 months<sup>8</sup>;
- 1093 (2) by an educational establishment to pupils of that establishment<sup>9</sup>;
- 1094 (3) to young persons who are, during their participation in the activities in question, accompanied by an individual who is their parent or guardian or who has parental rights or responsibility for them<sup>10</sup>; or
- 1095 (4) under the authority of a licence held by some other person<sup>11</sup>.

The licensing authority must consider an application for a licence where such application is made in a form and manner approved by the authority, the application is accompanied by such supporting documentation as the authority reasonably requires, and the required fee has been paid<sup>12</sup>. The licensing authority may grant or refuse a licence but, without prejudice to its discretion to refuse a licence on other grounds, the authority will not grant a licence unless the required fee has been paid<sup>13</sup> and it is satisfied that the applicant has: (a) made a suitable and sufficient assessment of the risks to the safety of young persons and other persons who will be engaged in the adventure activities in respect of which the application is made or whose safety may be affected by it<sup>14</sup>; (b) identified the measures he needs to take in consequence of that assessment to ensure, so far as is reasonably practicable, the safety of those persons<sup>15</sup>; (c) made the arrangements required as conditions of the licence<sup>16</sup>; (d) appointed competent persons to advise him on safety matters or has competence in such matters himself<sup>17</sup>.

The licensing authority must, before reaching a decision as to whether or not it will grant a licence, first consider a report made to the authority by a person authorised by it for that purpose<sup>18</sup>.

Where the licensing authority has received an application for the renewal of a licence not less than three months but not more than six months before the expiry date of that licence, then that licence is to be regarded<sup>19</sup> as continuing in force until such time as a decision is issued on that application by the authority<sup>20</sup>.

A licence granted by the licensing authority must be in writing and must state: (i) the name and address of the licence holder<sup>21</sup>; (ii) the facilities for adventure activities which may be provided

pursuant to the licence<sup>22</sup>; (iii) where the licence is issued in respect of a particular activity centre, the address of the centre concerned<sup>23</sup>; (iv) the date on which the licence will commence and the date on which the licence will expire which must be no longer than three years from the date of its commencement<sup>24</sup>; and (v) the conditions subject to which the licence has been granted<sup>25</sup>.

1 'Licence' means a licence granted by the licensing authority in accordance with the Adventure Activities Licensing Regulations 2004, SI 2004/1309, or the Adventure Activities Licensing Regulations 1996, SI 1996/772 (revoked): Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 2(1).

2 'Facilities for adventure activities' means any facilities which consist of, or include, some element of instruction or leadership given to one or more young persons in connection with their engagement in an adventure activity (other than instructions given solely in connection with the supply of equipment for use in such an activity): *ibid* reg 2(1). For these purposes, 'young persons' means persons who have not attained the age of 18: reg 2(1). 'Adventure activity' means caving, climbing, trekking or watersports: reg 2(1). 'Caving' means the exploration of underground passages (other than those principally used as show-places open to the public) in parts of mines which are no longer worked, or in natural caves where the exploration of those passages requires, in order to be carried out safely, the use of rock climbing or diving equipment or the application of special skills or techniques: reg 2(1). 'Climbing' means climbing, traversing, abseiling or scrambling over natural terrain or outdoor man-made structures (other than structures designed for such activities) which requires, in order to be carried out safely, the use of equipment for, or the application of special skills or techniques in, rock climbing or ice climbing: reg 2(1). 'Trekking' means journeying on foot, horse or pedal cycle or skiing over terrain which is moorland or more than 600 metres above sea level, and from which it would take more than 30 minutes travelling time to reach any accessible road or refuge but does not include skiing on a prepared and marked-out ski-run which is patrolled by persons engaged to assist in cases of injury: reg 2(1). 'Horse' includes pony: reg 2(1). 'Moorland' excludes any woodland or cultivated land: reg 2(1). 'Travelling time' means the time it would take a person to walk by the quickest safe route, and for this purpose a person is deemed to walk at 5 kilometres per hour and to take, in addition, one minute for every 10 metres of increase in the height above sea level of any uphill section of that route: reg 2(1). 'Accessible road' means a road which is, at the time in question, accessible to ambulances which are road-going vehicles not specially adapted for rugged terrain: reg 2(1). 'Refuge' means a building which would, in an emergency, provide shelter and which was, at the time in question, either occupied or provided with a telephone, or other means of communication, by which help could be summoned: reg 2(1). 'Skiing' means sliding over snow or ice on skis, skates, sledges or similar equipment: reg 2(1). 'Watersports' means the use on specified waters of: (1) canoes, kayaks or similar craft propelled or steered by paddles held in the hand (but excluding rowing boats propelled or steered by oars); (2) rafts (including those which are inflatable or which are improvised from various materials but excluding those propelled by means of a motor or towed by a motor boat); or (3) sailing boats, windsurfers, sailing dinghies or other craft whose principal means of propulsion is the wind but excluding craft the construction, equipment and use of which is subject to a requirement for a certificate issued pursuant to the Merchant Shipping Act 1995 or any regulation or order made thereunder (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 614 et seq): Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 2(1). 'Specified waters' means: (a) the sea; (b) tidal waters; (c) inland waters at a location where any part of those waters is more than 50 metres from the nearest land excluding any island; or (d) inland waters where the surface of the water is made turbulent because of weirs, rapids, waterfalls or fast-flowing currents: reg 2(1).

3 'Local authority' means, in relation to England, a county council, a unitary authority, a district council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly; and, in relation to Wales, a county council or county borough council: *ibid* reg 2(1). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

4 'Educational establishment' means an educational establishment attended by young persons except such an establishment engaged primarily in the provision of sporting, recreational or outdoor activities: *ibid* reg 2(1).

5 *Ibid* reg 3(1).

6 *Ibid* reg 3(1).

7 'Voluntary association' means an association, club, society, organisation or other body (whether corporate or unincorporate) which provides facilities to its members and is not a business, or part of a business, conducted for profit; and 'member' in relation to such an association excludes a person who is made a member solely in connection with the sale to him by the association of a course or instruction: *ibid* reg 2(1).

8 *Ibid* reg 3(2)(a).

9 Ibid reg 3(2)(b).

10 Ibid reg 3(2)(c). The reference in the text to parental responsibility is to such responsibility within the meaning of the Children Act 1989 (see para 134 ante), or the Children (Scotland) Act 1995; and the reference to parental rights is to such rights within the meaning of the Law Reform (Parent and Child) (Scotland) Act 1986.

11 Ibid reg 3(2)(d).

12 Ibid reg 4. The 'required fee' means, subject to reg 19 (transitional provisions), the fee referred to in reg 5: reg 2(1). A fee of £620 is payable by the applicant to the licensing authority on each application for a licence or renewal of a licence: reg 5.

13 Ibid reg 6(1)(b).

14 Ibid reg 6(1)(a)(i)

15 Ibid reg 6(1)(a)(ii).

16 Ibid reg 6(1)(a)(iii). As to the arrangements required as conditions of the licence see reg 9(1)(a), (b); and para 640 post.

17 Ibid reg 6(1)(a)(iv).

18 Ibid reg 6(2). The reference in the text to a report made by a person authorised by the authority for that purpose is a reference to a person so authorised pursuant to reg 12: see para 642 post. The report must be made only following an inspection by the person making the report and, subject to reg 7(2) (see note 20 infra), carried out after the application for the licence has been received: reg 6(3). Such an inspection must be of any such places, equipment and documents as the person making the inspection thinks necessary for the purpose of enabling the licensing authority to satisfy itself on the matters referred to in reg 6(1) (see the text and notes 13-17 supra): reg 6(4).

19 Ie subject to ibid reg 15(2): see para 644 post.

20 Ibid reg 7(1). In the case of an application for a renewal of a licence, the licensing authority may rely for the purposes of reg 6(3) (see note 18 supra) on a report based on an inspection made in respect of the licence within a period of one year before the date on which the renewal is to commence: reg 7(2).

21 Ibid reg 8(a). 'Licence holder' means a person to whom a licence has been granted in accordance with the Adventure Activities Licensing Regulations 1996, SI 1996/772 (revoked) or the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended): reg 2(1).

22 Ibid reg 8(b).

23 Ibid reg 8(c).

24 Ibid reg 8(d).

25 Ibid reg 8(e).

## **UPDATE**

### **639 Licensing of adventure activities**

NOTE 12--The fee is now £715: SI 2004/1309 reg 5 (amended by SI 2008/1973).

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#### **640. Conditions of adventure activity licences.**

The licensing authority<sup>1</sup> must attach the following conditions to all adventure activity licences<sup>2</sup>:

- 1096 (1) that the licence holder<sup>3</sup> maintains such arrangements as are appropriate for the review of the assessment of the safety risks<sup>4</sup> and for the effective implementation, control, monitoring and review of the measures that need to be taken in light of that assessment<sup>5</sup>;
- 1097 (2) that the licence holder maintains suitable and sufficient arrangements:<sup>3</sup>
  - 45. (a) for the appointment of a sufficient number of competent and adequately qualified instructors<sup>6</sup>;
  - 46. (b) for the giving of safety information to instructors and participants<sup>7</sup>;
  - 47. (c) for the provision of such equipment as is needed to ensure that the activities are carried out safely<sup>8</sup>;
  - 48. (d) for the maintenance of that equipment in an efficient state and in good repair<sup>9</sup>; and
  - 49. (e) for the provision of first aid, for the summoning of medical and rescue services in the event of an emergency, and for otherwise dealing with an emergency<sup>10</sup>;
- .4
  - 1098 (3) that the licence holder ensures that he is advised by competent persons on safety matters unless he has competence in such matters himself<sup>11</sup>;
  - 1099 (4) that the licence holder ensures that the authority is permitted to inspect at any reasonable time any place or equipment used in, or in connection with, the provision of the facilities for adventure activities to which the licence relates and any documents held by or on behalf of the licence holder relating to such provision<sup>12</sup>;
  - 1100 (5) that the licence holder accedes to any reasonable request for information from the authority relating to the provision of such facilities<sup>13</sup>;
  - 1101 (6) that where such facilities are provided at or from an activity centre<sup>14</sup> on two or more consecutive days, the licence holder displays at that centre a copy of the licence; and that where such facilities are not so provided, the licence holder has available for inspection, at any reasonable time, such a copy<sup>15</sup>; and
  - 1102 (7) that the licence holder does not refer to his holding of a licence, in any advertisement or information issued by him or on his behalf, unless that reference states which adventure activities are covered by the licence and gives the telephone number of the licensing authority<sup>16</sup>.

The licensing authority may attach to the licence such other conditions relating to safety as it considers necessary<sup>17</sup>.

<sup>1</sup> For the meaning of 'licensing authority' see para 638 ante.

<sup>2</sup> For the meaning of 'licence' see para 639 note 1 ante.

<sup>3</sup> For the meaning of 'licence holder' see para 639 note 21 ante.

4     Ie the assessment referred to in the Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 6(1)(a)(i): see para 639 ante.

5     Ibid reg 9(1)(a). The reference in the text to the review of measures is to those referred to in reg 6(1)(a)(ii): see para 639 ante.

6     Ibid reg 9(1)(b)(i). 'Instructor' means a person giving instruction or leadership in the course of provision of facilities for adventure activities: reg 2(1). For the meaning of 'facilities for adventure activities' see para 639 note 2 ante. For the meaning of 'adventure activities' see para 639 note 2 ante.

7     Ibid reg 9(1)(b)(ii).

8     Ibid reg 9(1)(b)(iii).

9     Ibid reg 9(1)(b)(iv).

10    Ibid reg 9(1)(b)(v).

11    Ibid reg 9(1)(c).

12    Ibid reg 9(1)(d).

13    Ibid reg 9(1)(e).

14    'Activity centre' means an establishment which is, at the time in question, primarily used for, or as a base for, the provision of instruction or leadership in sporting, recreational or outdoor activities: ibid reg 2(1).

15    Ibid reg 9(1)(f).

16    Ibid reg 9(1)(g).

17    Ibid reg 9(2).



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#### **641. Revocation or variation of licences.**

The licensing authority<sup>1</sup> may at any time revoke or vary a licence<sup>2</sup>: (1) on application being made to it by the licence holder<sup>3</sup>; (2) if there has been a contravention of any condition attached to the licence<sup>4</sup>; (3) if any information supplied by the holder of the licence is false in any material particular<sup>5</sup>; or (4) if it considers such a revocation or variation necessary to ensure safety<sup>6</sup>. The licensing authority must consider an application for the variation of a licence where such application is made in a form and manner approved by the authority, and is accompanied by such supporting documentation as the authority reasonably requires<sup>7</sup>. Where a licence is so revoked or varied the licensing authority must give notice in writing or electronic form to the licence holder informing him of the revocation or, as the case may be, giving details of the variation, and the licence holder must, if so required by the licensing authority, return the licence to the authority and the authority must, if the licence is to be varied, reissue the licence to the licence holder in the varied form<sup>8</sup>.

1 For the meaning of 'licensing authority' see para 638 ante.

2 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 10(1). For the meaning of 'licence' see para 639 note 1 ante. Any reference to varying a licence includes a reference to varying a non-standard condition attached to a licence or adding or deleting such a condition from a licence: reg 2(2). A 'non-standard condition' means a condition imposed on a licence other than a condition imposed under reg 9(1) (see para 640 ante): reg 2(1). The revocation or variation of a licence is subject to the provisions of the Schedule: reg 10(1).

3 Ibid reg 10(1)(a). For the meaning of 'licence holder' see para 639 note 21 ante.

4 Ibid reg 10(1)(b). As to conditions see para 640 ante.

5 Ibid reg 10(1)(c).

6 Ibid reg 10(1)(d).

7 Ibid regs 4(a), (b), 10(2). See also note 2 supra.

8 Ibid reg 10(3). See also note 2 supra.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/642. Complaints, investigations and inspections.

## **642. Complaints, investigations and inspections.**

The licensing authority<sup>1</sup> must consider any complaints which it receives relating to the provision of facilities for adventure activities<sup>2</sup> by licence holders<sup>3</sup> and must, if it considers it necessary, cause those complaints to be investigated<sup>4</sup>. Following the investigation of a complaint the authority must take such action as it considers appropriate and, in particular, it may revoke or vary the relevant licence<sup>5</sup> or refer the matter to the relevant enforcing authority<sup>6</sup>. Where a complaint has been investigated by the authority the authority must advise the complainant of the result of that investigation and of any action taken by it in consequence<sup>7</sup>.

The licensing authority may authorise suitably experienced or qualified persons (whether or not its officers or employees) to exercise any function conferred<sup>8</sup> on the authority<sup>9</sup>. Any person authorised by the licensing authority to conduct investigations or carry out inspections is required to carry and produce on request a written authorisation from the authority stating the functions exercisable by that person and the period for which the authorisation will remain in force<sup>10</sup>.

1 For the meaning of 'licensing authority' see para 638 ante.

2 For the meaning of 'facilities for adventure activities' see para 639 note 2 ante.

3 For the meaning of 'licence holder' see para 639 note 21 ante.

4 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 11(1).

5 *Ie* in accordance with *ibid* reg 10: see para 641 ante.

6 *Ibid* reg 11(2). For the meaning of 'enforcing authority' see the Health and Safety at Work etc Act 1974 s 18(7); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 375 (definition applied by the Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 2(1)).

7 *Ibid* reg 11(3).

8 *Ie* by the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended).

9 *Ibid* reg 12(1) (substituted by SI 2007/446).

10 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 12(2). The licensing authority must as soon as possible after 31 March in each year prepare and submit to the Health and Safety Commission and the relevant national authority a report on the carrying out of the functions of the authority over the period of 12 months preceding that date: reg 18. As to the Health and Safety Commission see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq. 'Relevant national authority' means, in relation to England, the Secretary of State: reg 2(1). As to the Secretary of State see para 155 ante.

## **UPDATE**

## **642 Complaints, investigations and inspections**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 10--Health and Safety Commission replaced by the Health and Safety Executive: see Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq. SI 2004/1309 reg 18 amended: SI 2008/960.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/643. The register of licences and provision of information.

### **643. The register of licences and provision of information.**

The licensing authority<sup>1</sup> must keep, in such form as it considers appropriate, a register of licences<sup>2</sup> which must include the name and address of each licence holder<sup>3</sup>, a description of the facilities for adventure activities<sup>4</sup> which may be provided pursuant to the licence and, where the licence is issued in respect of a particular activity centre, the address of the centre concerned<sup>5</sup>. The licensing authority must make the register available for public inspection without charge during reasonable office hours and must allow copies to be taken on payment of such charge, if any, as it may reasonably require<sup>6</sup>. In addition, the licensing authority must provide information, without charge, to any person seeking to know whether certain named persons are licence holders but the information which the authority is obliged to provide is limited to a request in respect of no more than five such named persons<sup>7</sup>.

1 For the meaning of 'licensing authority' see para 638 ante.

2 For the meaning of 'licence' see para 639 note 1 ante.

3 For the meaning of 'licence holder' see para 639 note 21 ante.

4 For the meaning of 'facilities for adventure activities' see para 639 note 2 ante.

5 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 13(1).

6 Ibid reg 13(2).

7 Ibid reg 13(3).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/644. Appeals.

#### **644. Appeals.**

An applicant for a licence<sup>1</sup> may appeal to the relevant national authority<sup>2</sup> against the refusal of a licence, and a failure to issue a decision on an application or an application for renewal within three months of the date on which the application was received by the licensing authority<sup>3</sup> must be treated as a refusal<sup>4</sup>. A licence holder<sup>5</sup> may appeal to the relevant national authority against any non-standard condition attached to a licence, the revocation or variation of a licence, or the refusal to vary a licence<sup>6</sup>.

Before the determination of an appeal the relevant national authority must ask the appellant and the licensing authority whether they wish to appear and be heard on the appeal<sup>7</sup>. If both of them express a wish not to appear and be heard, the appeal may be determined without a hearing of the parties<sup>8</sup>. If either of the parties expresses a wish to appear and be heard, the relevant national authority must afford to both of them an opportunity of so doing<sup>9</sup>. In determining an appeal the relevant national authority may make an order dismissing the appeal, allowing the appeal or directing the licensing authority to reconsider any matter which is the subject of the appeal<sup>10</sup>. If the relevant national authority allows the appeal it must direct the licensing authority:

- 1103 (1) where the appeal is against refusal of a licence, to grant a licence on the specified conditions<sup>11</sup> and on such other conditions relating to safety, if any, as may be specified in the direction<sup>12</sup>;
- 1104 (2) where the appeal is against any non-standard condition attached to a licence, to remove the condition or vary it in the way specified in the direction<sup>13</sup>;
- 1105 (3) where the appeal is against the revocation of a licence, to reinstate the licence with such variations, if any, as may be specified in the direction<sup>14</sup>; or
- 1106 (4) where the appeal is against the variation of a licence or against the refusal to vary a licence, to reinstate the licence in the form in which it was before the variation, or to vary the licence in the way specified in the direction<sup>15</sup>.

1 For the meaning of 'licence' see para 639 note 1 ante.

2 For the meaning of 'relevant national authority' see para 642 note 10 ante.

3 For the meaning of 'licensing authority' see para 638 ante.

4 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 15(1), (2). Any reference in reg 15 to an application for a licence is a reference to an application which the licensing authority is, by virtue of reg 4 (see para 639 ante), obliged to consider: reg 2(3).

5 For the meaning of 'licence holder' see para 639 note 21 ante.

6 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 15(3). For the meaning of 'non-standard condition' see para 641 note 2 ante. As to the revocation or variation of a licence see para 641 ante.

7 Ibid reg 15(4).

8 Ibid reg 15(4)(a).

9 Ibid reg 15(4)(b). The Health and Safety Licensing Appeals (Hearings Procedure) Rules 1974, SI 1974/2040 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 351) apply to hearings under the Adventure Activities

Licensing Regulations 2004, SI 2004/1309, reg 15(4) as they apply to hearings in pursuance of the Health and Safety at Work etc Act 1974 s 44(3) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 398): Adventure Activities Licensing Regulations 1996, SI 2004/1309, reg 15(5).

10 Ibid reg 15(6).

11 Ie the conditions specified in ibid reg 9(1): see para 640 ante.

12 Ibid reg 15(7)(a).

13 Ibid reg 15(7)(b).

14 Ibid reg 15(7)(c).

15 Ibid reg 15(7)(d).

## **UPDATE**

### **644 Appeals**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/J. ENTERTAINMENT AND LEISURE ACTIVITIES/645. Offences.

#### **645. Offences.**

It is an offence for a person to do anything for which an adventure activity licence<sup>1</sup> is required to be held by him<sup>2</sup> otherwise than in accordance with such a licence<sup>3</sup>. It is an offence for a person for the purposes of obtaining or holding a licence: (1) to make a statement to the licensing authority<sup>4</sup> (or someone acting on its behalf) knowing it to be false in a material particular<sup>5</sup>; or (2) recklessly to make a statement to the licensing authority (or someone acting on its behalf) which is false in a material particular<sup>6</sup>.

1 For the meaning of 'licence' see para 639 note 1 ante.

2 Ie under the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended).

3 Ibid reg 16(1). The Health and Safety Act 1974 ss 18-25 (ss 18, 20, 22-24 as amended) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 375 et seq), s 26 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 375), s 27 (as amended) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 382), s 33(1)(e)-(i), (n), (o) and (2)-(4) (as amended) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARAS 852-853), s 34(2)-(6) (as amended) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 855), s 36(1) (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 860), ss 37-42 (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 857 et seq) and s 46 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 388) apply for the purposes of providing for the enforcement of the Adventure Activities Licensing Regulations 2004, SI 2004/1309 (as amended) and in respect of proceedings for a contravention thereof with the necessary modifications: reg 17.

4 For the meaning of 'licensing authority' see para 638 ante.

5 Adventure Activities Licensing Regulations 2004, SI 2004/1309, reg 16(2)(a).

6 Ibid reg 16(2)(b). See also note 3 supra.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(2) PROTECTION FROM CRUELTY AND DANGER/(ii) Protection from Danger/K. TATTOOS AND MEDICAL TREATMENT/646. Tattooing of minors and medical treatment.

## ***K. TATTOOS AND MEDICAL TREATMENT***

### **646. Tattooing of minors and medical treatment.**

It is an offence for any person to tattoo<sup>1</sup> a person under the age of 18 except when the tattoo is performed for medical reasons by a duly qualified medical practitioner<sup>2</sup> or by a person working under his direction<sup>3</sup>.

A person who has attained the age of 16 may give effective consent to medical treatment<sup>4</sup>.

1 'Tattoo' means the insertion into the skin of any colouring material designed to leave a permanent mark: Tattooing of Minors Act 1969 s 3.

2 As to duly qualified medical practitioners see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) paras 3-4.

3 Tattooing of Minors Act 1969 s 1. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 2 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see para 132 note 2 ante. It is a defence for a person charged to show that at the time the tattoo was performed he had reasonable cause to believe that the person tattooed was of or over the age of 18 and did in fact so believe: Tattooing of Minors Act 1969 s 1.

As to the cleanliness of tattooing premises see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 973 et seq.

4 See the Family Law Reform Act 1969 s 8; para 4 ante; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) para 201.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(i) Introduction/647. Introduction.

### **(3) RESTRICTIONS ON WORKING WITH CHILDREN**

#### **(i) Introduction**

##### **647. Introduction.**

At the date at which this volume states the law restrictions on working with children are governed primarily by the Protection of Children Act 1999, which imposes a duty on the Secretary of State<sup>1</sup> to keep a list of individuals who are considered unsuitable to work with children<sup>2</sup> and makes related provision. In addition, the Criminal Justice and Court Services Act 2000 makes provision with regard to disqualification orders, by which method a person can be disqualified from working with children<sup>3</sup>. However, as from a day to be appointed<sup>4</sup>, this system is repealed by the Safeguarding Vulnerable Groups Act 2006<sup>5</sup>, which also makes provision for a new children's barred list<sup>6</sup> under the auspices of a newly constituted Independent Barring Board<sup>7</sup>. The tribunal established under the Protection of Children Act 1999<sup>8</sup> will remain the destination for appeals concerning decisions to include or fail to remove a person from the new list<sup>9</sup>.

1 As to the Secretary of State see para 155 ante.

2 See para 648 et seq post.

3 See para 663 et seq post.

4 Ie as from a day to be appointed under the Safeguarding Vulnerable Groups Act 2006 s 65. At the date at which this volume states the law no such day had been appointed.

5 See ibid s 63, Sch 10. As to the system under the Safeguarding Vulnerable Groups Act 2006 see para 675 et seq post. As to transitional provisions see s 62, Sch 8.

6 As to the children's barred list see para 681 post.

7 As to the Independent Barring Board see paras 675-680 post.

8 Ie the tribunal established under the Protection of Children Act 1999 s 9 (as amended): see para 708 post.

9 See para 708 et seq post.

#### **UPDATE**

##### **647 Introduction**

TEXT AND NOTES--For transitional provision in relation to those subject to existing restrictions under the Protection of Children Act 1999 etc, see the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008, SI 2008/473 (amended by SI 2008/2683, SI 2009/37); and the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008, SI 2008/1062.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/(A) Duty to Keep List/648. Duty of Secretary of State to keep list.

## **(ii) The System under the Protection of Children Act 1999 etc**

### ***A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN***

#### **(A) DUTY TO KEEP LIST**

#### **648. Duty of Secretary of State to keep list.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

The Secretary of State<sup>2</sup> must keep a list of individuals who are considered unsuitable to work with children<sup>3</sup>. An individual must not be included in the list unless: (1) he has been referred to the Secretary of State<sup>4</sup>; (2) he has been included in the list following a relevant inquiry<sup>5</sup>; or (3) he is transferred to the list from the Consultancy Service Index<sup>6</sup>. The Secretary of State may at any time remove an individual from the list if he is satisfied that the individual should not have been included in it<sup>7</sup>.

1 The Protection of Children Act 1999 s 1 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 As to the Secretary of State see para 155 ante. Any expenditure incurred by the Secretary of State under or by virtue of the Protection of Children Act 1999, and any increase attributable to that Act in the sums payable out of money so provided under any other Act must be paid out of money provided by Parliament: s 11.

3 Ibid s 1(1). See note 1 supra. For these purposes, 'child' means a person aged under 18: s 12(1).

As to temporary access to the list see the Care Standards Act 2000 s 103; and the Protection of Children (Access to Lists) (Prescribed Individuals) Regulations 2000, SI 2000/2537 (amended by SI 2001/744).

4 Protection of Children Act 1999 s 1(2)(a) (amended by the Care Standards Act 2000 ss 95(2), 97(2), 98(4)). See note 1 supra. The reference in the text to an individual having been referred to the Secretary of State is to an individual having been referred under s 2 (as amended; prospectively repealed) (see paras 649-651 post), s 2A (as added; prospectively repealed) (see para 652 post), s 2D (as added; prospectively repealed) (see para 657 post), or the Care Standards Act 2000 Pt 7 (ss 80-104) (as amended; prospectively repealed) (protection of vulnerable adults).

5 Protection of Children Act 1999 s 1(2)(aa) (added by the Care Standards Act 2000 s 96(2)). See note 1 supra. The reference in the text to a relevant inquiry is to one under the Protection of Children Act 1999 s 2B (as added; prospectively repealed): see para 653 post.

6 Ibid s 1(2)(b). See note 1 supra. For the meaning of 'the Consultancy Service Index' see para 658 note 2 post.

7 Ibid s 1(3). See note 1 supra.

## **UPDATE**

### **648 Duty of Secretary of State to keep list**

NOTE 1--Appointed day is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/649. Referrals to Secretary of State for inclusion in list by a child care organisation and other organisations.

## (B) REFERRALS

### **649. Referrals to Secretary of State for inclusion in list by a child care organisation and other organisations.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

A child care organisation<sup>2</sup> must, and any other organisation may, refer to the Secretary of State an individual who is or has been employed<sup>3</sup> in a child care position<sup>4</sup> if there is fulfilled any of the primary conditions mentioned in heads (1) to (4) below<sup>5</sup> or the secondary condition mentioned in heads (a) to (c) below<sup>6</sup>. The primary conditions are:

- 1107 (1) that the organisation has dismissed the individual on the grounds of misconduct (whether or not in the course of his employment) which harmed<sup>7</sup> a child or placed a child at risk of harm<sup>8</sup>;
- 1108 (2) that the individual has resigned, retired or been made redundant<sup>9</sup> in circumstances such that the organisation would have dismissed him, or would have considered dismissing him, on such grounds if he had not resigned, retired or been made redundant<sup>10</sup>;
- 1109 (3) that the organisation has, on such grounds, transferred the individual to a position within the organisation which is not a child care position<sup>11</sup>;
- 1110 (4) that the organisation has, on such grounds, suspended the individual or provisionally transferred him to such a position as is mentioned in head (3) above, but has not yet decided whether to dismiss him or to confirm the transfer<sup>12</sup>.

The secondary condition referred to above is that:

- 1111 (a) in circumstances not falling within heads (1) to (4) above, the organisation has dismissed the individual, he has resigned or retired, or the organisation has transferred him to a position within the organisation which is not a child care position<sup>13</sup>;
- 1112 (b) information not available to the organisation at the time of the dismissal, resignation, retirement or transfer has since become available<sup>14</sup>; and
- 1113 (c) the organisation has formed the opinion that, if that information had been available at that time and if (where applicable) the individual had not resigned or retired, the organisation would have dismissed him, or would have considered dismissing him, on such grounds as are mentioned in head (1) above<sup>15</sup>.

If it appears from the information submitted with a reference to the Secretary of State<sup>16</sup> that it may be appropriate for the individual to be included in the list<sup>17</sup>, the Secretary of State must determine the reference in accordance with the following requirements<sup>18</sup>; and pending that determination, he must provisionally include the individual in the list<sup>19</sup>. The Secretary of State must: (i) invite observations from the individual on the information submitted with the

reference and, if he thinks fit, on any observations submitted under head (ii) below<sup>20</sup>; and (ii) invite observations from the organisation on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (i) above<sup>21</sup>. Where the Secretary of State has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant<sup>22</sup>, and, in the case of a reference under head (4) above<sup>23</sup>, the organisation has dismissed the individual or, as the case may be, has confirmed his transfer on such grounds as are there mentioned<sup>24</sup>, the Secretary of State must confirm the individual's inclusion in the list if the Secretary of State is of the opinion:

- 1114 (A) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm<sup>25</sup>; and
- 1115 (B) that the individual is unsuitable to work with children<sup>26</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the individual from the list<sup>27</sup>.

A child care organisation is not required to refer an individual to the Secretary of State in any case where the dismissal, resignation, retirement, transfer or suspension took place or, as the case may be, the opinion was formed before the commencement of these provisions<sup>28</sup>.

1 The Protection of Children Act 1999 ss 2, 13 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 'Child care organisation' means an organisation: (1) which is concerned with the provision of accommodation, social services or health care services to children or the supervision of children; (2) whose activities are regulated by or by virtue of any prescribed enactment; and (3) which fulfils such other conditions as may be prescribed: Protection of Children Act 1999 s 12(1). For the prescribed enactments see the Protection of Children (Child Care Organisations) Regulations 2000, SI 2000/2432. Where part of an organisation fulfils the condition in head (2) supra and part of it does not, the Protection of Children Act 1999 has effect as if the two parts were separate organisations: s 12(2). 'Organisation' means a body corporate or unincorporate or an individual who employs others in the course of a business: s 12(1). The Protection of Children Act 1999 has effect as if the Children and Family Court Advisory and Support Service ('CAFCASS') were a child care organisation within the meaning of that Act: Criminal Justice and Court Services Act 2000 s 24(1) (prospectively repealed); and see para 662 post. As to CAFCASS see para 230 et seq ante.

'Prescribed' means prescribed by regulations made by the Secretary of State: Protection of Children Act 1999 s 12(1). Regulations under the Protection of Children Act 1999 must be made by statutory instrument and are subject to annulment in pursuance of a resolution of either House of Parliament: see s 12(4). As to the Secretary of State see para 155 ante.

3 'Employment' means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract, and includes an office established by or by virtue of a prescribed enactment; and references to an individual being employed are to be construed accordingly: *ibid* s 12(1).

4 'Child care position' means a position which: (1) is a regulated position for the purposes of the Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (as amended; prospectively repealed); but (2) is not a position within the Protection of Children Act 1999 s 12(3) (as amended): s 12(1) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 154, 158(a)). A position is within the Protection of Children Act 1999 s 12(3) (as amended) if it involves work to which the Education Act 2002 s 142 (prospectively repealed) applies (see EDUCATION vol 15(2) (2006 Reissue) para 782), and it is not a position at a school which is a children's home for the purposes of the Care Standards Act 2000: Protection of Children Act 1999 s 12(3) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 154, 158(b); and the Education Act 2002 s 215(1), Sch 21 para 123(1), (3)).

5 Protection of Children Act 1999 s 2(1)(a). See note 1 supra.

6 *Ibid* s 2(1)(b). See note 1 supra.

7 For the meaning of 'harm' see para 274 ante; definition applied by *ibid* s 12(1).

8 *Ibid* s 2(2)(a). See note 1 *supra*.

9 For the purposes of the Protection of Children Act 1999, an individual is made redundant if: (1) he is dismissed; and (2) for the purposes of the Employment Rights Act 1996 (see EDUCATION) the dismissal is by reason of redundancy: Protection of Children Act 1999 s 12(3A) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (4)(b)).

10 Protection of Children Act 1999 s 2(2)(b) (amended by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (2)(a)). See note 1 *supra*.

11 Protection of Children Act 1999 s 2(2)(c). See note 1 *supra*.

12 *Ibid* s 2(2)(d). See note 1 *supra*.

13 *Ibid* s 2(3)(a). See note 1 *supra*.

14 *Ibid* s 2(3)(b). See note 1 *supra*.

15 *Ibid* s 2(3)(c). See note 1 *supra*.

16 *Ie* under *ibid* s 2(1): see the text and notes 5-6 *supra*.

17 *Ie* the list kept under *ibid* s 1 (as amended; prospectively repealed): see para 648 ante.

18 *Ibid* s 2(4)(a). See note 1 *supra*. The Secretary of State must determine the reference in accordance with s 2(5)-(7): see the text and notes 20-26 *infra*.

19 *Ibid* s 2(4)(b). See note 1 *supra*.

20 *Ibid* s 2(5)(a). See note 1 *supra*.

21 *Ibid* s 2(5)(b). See note 1 *supra*.

22 *Ibid* s 2(6)(a). See note 1 *supra*.

23 *Ie* under *ibid* s 2(2)(d): see the text and note 12 *supra*.

24 *Ibid* s 2(6)(b). The reference in s 2(6)(b) to the organisation dismissing the individual on such grounds as are mentioned in head (4) in the text includes a reference to his resigning, retiring or being made redundant in circumstances such that the organisation would have dismissed him, or would have considered dismissing him, on such grounds if he had not resigned, retired or been made redundant (s 2(8)(a) (amended by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (2)(b))); and a reference to the organisation transferring him, on such grounds, to a position within the organisation which is not a child care position (Protection of Children Act 1999 s 2(8)(b)). See note 1 *supra*.

25 *Ibid* s 2(6), (7)(a). See note 1 *supra*.

26 *Ibid* s 2(6), (7)(b). See note 1 *supra*.

27 See *ibid* s 2(6). See note 1 *supra*.

28 *Ibid* s 2(10). See note 1 *supra*.

## UPDATE

### **649 Referrals to Secretary of State for inclusion in list by a child care organisation and other organisations**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/650. Referrals to Secretary of State for inclusion in list by employment agency and agency for the supply of nurses.

**650. Referrals to Secretary of State for inclusion in list by employment agency and agency for the supply of nurses.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An organisation which carries on an employment agency<sup>2</sup>, or an agency for the supply of nurses<sup>3</sup> must refer to the Secretary of State<sup>4</sup> an individual who is or has been employed<sup>5</sup> in a child care position if<sup>6</sup>:

- 1116 (1) the organisation<sup>7</sup> has decided not to do any further business with the individual on the grounds of misconduct (whether or not in the course of his employment) which harmed<sup>8</sup> a child or placed a child at risk of harm<sup>9</sup>;
- 1117 (2) the organisation has decided on such grounds not to find the individual further employment, or supply him for further employment, in a child care position<sup>10</sup>.

If it appears from the information submitted with a reference to the Secretary of State<sup>11</sup> that it may be appropriate for the individual to be included in the list<sup>12</sup>, the Secretary of State must determine the reference in accordance with the following requirements<sup>13</sup>, and pending that determination, provisionally include the individual in the list<sup>14</sup>. The Secretary of State must: (a) invite observations from the individual on the information submitted with the reference and, if he thinks fit, on any observations submitted under head (b) below<sup>15</sup>; and (b) invite observations from the organisation on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (a) above<sup>16</sup>. Where the Secretary of State has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant<sup>17</sup>, he must confirm the individual's inclusion in the list if he is of the opinion:

- 1118 (i) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm<sup>18</sup>; and
- 1119 (ii) that the individual is unsuitable to work with children<sup>19</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the individual from the list<sup>20</sup>.

A child care organisation is not required to refer an individual to the Secretary of State in any case where the dismissal, resignation, retirement, transfer or suspension took place or, as the case may be, the opinion was formed before the commencement of these provisions<sup>21</sup>.

1 The Protection of Children Act 1999 s 2 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 'Employment agency' has the same meaning as in the Employment Agencies Act 1973 (see TRADE AND INDUSTRY vol 97 (2010) PARA 881); Protection of Children Act 1999 s 12(1).

3 'Agency for the supply of nurses' has the same meaning as in the Nurses Agencies Act 1957 (repealed): Protection of Children Act 1999 s 12(1) (definition prospectively repealed by the Care Standards Act 2000 s 117(2), Sch 6).

4 As to the Secretary of State see para 155 ante.

5 For the meaning of 'employment' see para 649 note 3 ante.

6 Protection of Children Act 1999 s 2(1); modified by s 2(9) (amended by the Care Standards Act 2000 s 94(1)(a)). See note 1 supra. For the meaning of 'child care position' see para 649 note 4 ante.

7 For the meaning of 'organisation' see para 649 note 2 ante.

8 For the meaning of 'harm' see para 274 ante; definition applied by the Protection of Children Act 1999 s 12(1).

9 Ibid s 2(1)(a) (as modified: see note 6 supra). See note 1 supra.

10 Ibid s 2(1)(b) (as modified: see note 6 supra). See note 1 supra.

11 Ie under ibid s 2(1): see the text and notes 5-10 supra.

12 Ie the list kept under ibid s 1 (as amended; prospectively repealed): see para 648 ante.

13 Ibid s 2(4)(a). The Secretary of State must determine the reference in accordance with s 2(5)-(7): see the text and notes 15-20 infra. See note 1 supra.

14 Ibid s 2(4)(b). See note 1 supra.

15 Ibid s 2(5)(a). See note 1 supra.

16 Ibid s 2(5)(b). See note 1 supra.

17 Ibid s 2(6)(a). See note 1 supra.

18 Ibid s 2(6), (7)(a). See note 1 supra.

19 Ibid s 2(6), (7)(b). See note 1 supra.

20 See ibid s 2(6). See note 1 supra.

21 Ibid s 2(10). See note 1 supra.

## UPDATE

### **650-651 Referrals to Secretary of State for inclusion in list by employment agency and agency for the supply of nurses, Referrals to Secretary of State for inclusion in list by an employment business**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **650 Referrals to Secretary of State for inclusion in list by employment agency and agency for the supply of nurses**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2 is 12 October 2009: SI 2009/1611.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/651. Referrals to Secretary of State for inclusion in list by an employment business.

#### **651. Referrals to Secretary of State for inclusion in list by an employment business.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An organisation which carries on an employment business<sup>2</sup> must refer to the Secretary of State<sup>3</sup> an individual who has been supplied by the organisation for employment<sup>4</sup> in a child care position<sup>5</sup> if there is fulfilled any of the conditions mentioned in heads (1) to (3) below<sup>6</sup>. The conditions are:

- 1120 (1) that the organisation<sup>7</sup> has dismissed the individual on the grounds of misconduct (whether or not in the course of his employment) which harmed<sup>8</sup> a child or placed a child at risk of harm<sup>9</sup>;
- 1121 (2) that the individual has resigned, retired or been made redundant<sup>10</sup> in circumstances such that the organisation would have dismissed him, or would have considered dismissing him, on such grounds if he had not resigned, retired or been made redundant<sup>11</sup>;
- 1122 (3) that the organisation has, on such grounds, decided not to supply the individual for further employment in a child care position<sup>12</sup>.

If it appears from the information submitted with a reference to the Secretary of State<sup>13</sup> that it may be appropriate for the individual to be included in the list<sup>14</sup>, the Secretary of State must determine the reference in accordance with the following requirements<sup>15</sup>; and pending that determination, he must provisionally include the individual in the list<sup>16</sup>. The Secretary of State must: (a) invite observations from the individual on the information submitted with the reference and, if he thinks fit, on any observations submitted under head (b) below<sup>17</sup>; and (b) invite observations from the organisation on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (a) above<sup>18</sup>. Where the Secretary of State has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant<sup>19</sup>, the Secretary of State must confirm the individual's inclusion in the list if he is of the opinion:

- 1123 (i) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm<sup>20</sup>; and
- 1124 (ii) that the individual is unsuitable to work with children<sup>21</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the individual from the list<sup>22</sup>.

A child care organisation is not required to refer an individual to the Secretary of State in any case where the dismissal, resignation, retirement, transfer or suspension took place or, as the case may be, the opinion was formed before the commencement of these provisions<sup>23</sup>.

1 The Protection of Children Act 1999 s 2 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 'Employment business' has the same meaning as in the Employment Agencies Act 1973 (see TRADE AND INDUSTRY vol 97 (2010) PARA 881); Protection of Children Act 1999 s 12(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (4)(a)(i)).

3 As to the Secretary of State see para 155 ante.

4 For the meaning of 'employment' see para 649 note 3 ante.

5 For the meaning of 'child care position' see para 649 note 4 ante.

6 Protection of Children Act 1999 s 2(1)(a); s 2(1) modified by s 2(9A)(a) (added by the Care Standards Act 2000 s 94(2)). See note 1 supra.

7 'Organisation' means a body corporate or unincorporate or an individual who employs others in the course of a business: Protection of Children Act 1999 s 12(1).

8 For the meaning of 'harm' see para 274 ante; definition applied by *ibid* s 12(1).

9 *Ibid* s 2(2)(a). See note 1 supra.

10 As to the meaning of 'redundancy' see para 649 note 9 ante.

11 Protection of Children Act 1999 s 2(2)(b) (amended by the Care Standards Act 2000 Sch 4 para 26(1), (2)(a)). See note 1 supra.

12 Protection of Children Act 1999 s 2(2)(c); modified by s 2(9A)(b) (as added: see note 6 supra). See note 1 supra.

13 *Ie* under *ibid* s 2(1): see the text and notes 1-6 supra.

14 *Ie* the list kept under *ibid* s 1 (as amended; prospectively repealed): see para 648 ante.

15 *Ibid* s 2(4)(a). The Secretary of State must determine the reference in accordance with s 2(5)-(7): see the text and notes 16-20 *infra*.

16 *Ibid* s 2(4)(b). See note 1 supra.

17 *Ibid* s 2(5)(a). See note 1 supra.

18 *Ibid* s 2(5)(b). See note 1 supra.

19 *Ibid* s 2(6)(a). See note 1 supra.

20 *Ibid* s 2(6), (7)(a). See note 1 supra.

21 *Ibid* s 2(6), (7)(b). See note 1 supra.

22 See *ibid* s 2(6). See note 1 supra.

23 *Ibid* s 2(10). See note 1 supra.

## UPDATE

### **650-651 Referrals to Secretary of State for inclusion in list by employment agency and agency for the supply of nurses, Referrals to Secretary of State for inclusion in list by an employment business**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**651 Referrals to Secretary of State for inclusion in list by an employment business**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/652. Power of certain authorities to refer individuals for inclusion in the list.

## **652. Power of certain authorities to refer individuals for inclusion in the list.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

The following persons, namely the Commission for Social Care Inspection<sup>2</sup>, the Commission for Healthcare Audit and Inspection<sup>3</sup>, the Welsh Ministers<sup>4</sup>, and Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>5</sup>, may refer to the Secretary of State<sup>6</sup> an individual who is or has been employed<sup>7</sup> in a child care position<sup>8</sup> if on the basis of evidence obtained by the person in the exercise of functions under certain enactments<sup>9</sup>, the person considers that the individual has been guilty of misconduct (whether or not in the course of his employment) which harmed<sup>10</sup> a child<sup>11</sup> or placed a child at risk of harm<sup>12</sup>, and the individual has not been referred to the Secretary of State in respect of the misconduct<sup>13</sup>.

The procedure that the Secretary of State must adhere to in order to determine a reference by a child care organisation for an individual to be included in the list of individuals who are considered unsuitable to work with children<sup>14</sup> also applies in relation to a reference made by any of the persons listed in heads (1) to (3) above<sup>15</sup>.

1 The Protection of Children Act 1999 s 2A (as added and amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Protection of Children Act 1999 s 2A(2)(a) (s 2A added by the Care Standards Act 2000 s 95(1); and the Protection of Children Act 1999 s 2A(2)(a) substituted by the Health and Social Care (Community Health and Standards) Act 2003 s 147, Sch 9 para 14). See note 1 supra. As to the Commission for Social Care Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 42; and SOCIAL SERVICES AND COMMUNITY CARE.

3 Protection of Children Act 1999 s 2A(2)(aa) (s 2A as added (see note 2 supra); and s 2A(2)(aa) added by the Health and Social Care (Community Health and Standards) Act 2003 s 147, Sch 9 para 14). See note 1 supra. As to the Commission for Healthcare Audit and Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 41; and SOCIAL SERVICES AND COMMUNITY CARE.

4 Ibid s 2A(2)(b) (as added: see note 2 supra). See note 1 supra. As to the Welsh Ministers see para 155 ante.

5 Ibid s 2A(2)(c) (as added (see note 2 supra); and substituted by the Education and Inspections Act 2006 s 157, Sch 14 para 36). See note 1 supra. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION vol 15(2) (2006 Reissue) para 1168.

6 As to the Secretary of State see para 155 ante.

7 For the meaning of 'employment' see para 649 note 3 ante.

8 For the meaning of 'child care position' see para 649 note 4 ante.

9 Ie the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended), the Children Act 1989 Pt 10A (ss 79A-79X) (as added) or the Childcare Act 2006 Pt 3 (ss 31-98) (as amended).

10 For the meaning of 'harm' see para 274 ante; definition applied by the Protection of Children Act 1999 s 12(1).

11 For the meaning of 'child' see para 648 note 3 ante.

12 Protection of Children Act 1999 s 2A(1)(a) (as added (see note 2 supra); and amended by the Childcare Act 2006 s 103(1), Sch 2 para 37). See note 1 supra.

13 Protection of Children Act 1999 s 2A(1)(b) (as added: see note 2 supra). See note 1 supra. The reference in s 2A(1) (as added) to misconduct is to misconduct which occurs after the commencement of s 2A (as added): s 2A(4) (as so added).

14 Ie the procedure in *ibid* s 2(4)-(7) (as amended; prospectively repealed): see para 649 ante.

15 *Ibid* s 2A(3) (as added: see note 2 supra). See note 1 supra.

## **UPDATE**

### **652 Power of certain authorities to refer individuals for inclusion in the list**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2A is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/653. Individuals named in the findings of certain inquiries.

### **653. Individuals named in the findings of certain inquiries.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where: (1) a relevant inquiry<sup>2</sup> has been held<sup>3</sup>; (2) the report of the person who held the inquiry names an individual who is or has been employed<sup>4</sup> in a child care position<sup>5</sup>; and (3) it appears to the Secretary of State from the report that the person who held the inquiry found that the individual was guilty of relevant misconduct<sup>6</sup>, and that the individual is unsuitable to work with children<sup>7</sup>, the Secretary of State may provisionally include the individual in the list<sup>8</sup>. If the Secretary of State does include the individual in the list he must determine<sup>9</sup> whether such inclusion in the list should be confirmed<sup>10</sup>. The Secretary of State must: (a) invite observations from the individual on the report, so far as relating to him, and, if the Secretary of State thinks fit, on any observations submitted under head (b) below<sup>11</sup>; and (b) invite observations from the relevant employer<sup>12</sup> on any observations on the report and, if the Secretary of State thinks fit, on any other observations under head (a) above<sup>13</sup>. Where the Secretary of State has considered the report, any observations submitted to him and any other information which he considers relevant, he must confirm that individual's inclusion in the list if the Secretary of State is of the opinion:

- 1125 (i) that the person who held the inquiry reasonably considered the individual to be guilty of relevant misconduct<sup>14</sup>; and
- 1126 (ii) that the individual is unsuitable to work with children<sup>15</sup>.

Otherwise, the Secretary of State must remove the individual from the list<sup>16</sup>.

1 The Protection of Children Act 1999 s 2B (as added and amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For these purposes, 'relevant inquiry' means any of the following:

- 317 (1) an inquiry held under the Inquiries Act 2005 (see ADMINISTRATIVE LAW) or under (a) the Care Standards Act 2000 s 10 (as amended) (see para 985 note 4 post); (b) the Government of Wales Act 1998 s 35 (repealed); (c) the Children Act 1989 s 81 (repealed); (d) the National Health Service Act 1977 s 84 (repealed); (e) the Local Authority Social Services Act 1970 s 7C (as added) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1011); (f) the Adoption and Children Act 2002 s 17 (repealed) (Protection of Children Act 1999 s 2B(7)(a) (s 2B added by the Care Standards Act 2000 s 96(1); and the Protection of Children Act 1999 s 2B(7)(a) amended by the Inquiries Act 2005 s 48(1), Sch 2 para 18));
- 318 (2) an inquiry to which the Tribunals of Inquiry (Evidence) Act 1921 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 959) applies (Protection of Children Act 1999 s 2B(7)(b) (as so added));
- 319 (3) any other inquiry or hearing designated for the purposes of s 2B (as added and amended) by an order made by the Secretary of State (s 2B(7)(c) (as so added)).

An order under s 2B(7) (as added and amended) must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 2B(8) (as so added). Before making an

order under s 2B(7) (as added and amended) the Secretary of State must consult the Welsh Ministers: s 2B(9) (as so added). See note 1 supra. As to the Secretary of State and the Welsh Ministers see para 155 ante).

3 Ibid s 2B(1)(a) (as added: see note 2 supra). See note 1 supra.

4 For the meaning of 'employed' see para 649 note 3 ante.

5 Protection of Children Act 1999 s 2B(1)(b) (as added: see note 2 supra). See note 1 supra.

6 Ibid s 2B(1)(c)(i) (as added: see note 2 supra). For the purposes of s 2B (as added and amended), 'relevant misconduct' means misconduct which harmed a child or placed a child at risk of harm and was committed (whether or not in the course of his employment) at a time when the individual was employed in a child care position: see s 2B(6) (as so added). See note 1 supra. For the meaning of 'harm' see para 274 ante; definition applied by s 12(1). For the meaning of 'child' see para 648 note 3 ante. For the meaning of 'child care position' see para 649 note 4 ante.

7 Ibid s 2B(1)(c)(ii) (as added: see note 2 supra). See note 1 supra.

8 Ibid s 2B(1), (2)(a) (as added: see note 2 supra). See note 1 supra. As to the list kept by the Secretary of State under s 1 (as amended; prospectively repealed) see para 648 ante.

9 In accordance with ibid s 2B(3)-(5) (as added; prospectively repealed): see the text and notes 11-16 infra.

10 Ibid s 2B(1), (2)(b) (as added: see note 2 supra). See note 1 supra.

11 Ibid s 2B(3)(a) (as added: see note 2 supra). See note 1 supra.

12 For the purposes of ibid s 2B (as added and amended), 'relevant employer' means the person who, at the time referred to in the definition of 'relevant misconduct' (see note 6 supra), employed the individual in a child care position: s 2B(6) (as added: see note 2 supra). See note 1 supra.

13 Ibid s 2B(3)(b) (as added: see note 2 supra). See note 1 supra.

14 Ibid s 2B(4), (5)(a) (as added: see note 2 supra). See note 1 supra.

15 Ibid s 2B(4), (5)(b) (as added: see note 2 supra). See note 1 supra.

16 Ibid s 2B(4) (as added: see note 2 supra). See note 1 supra.

## UPDATE

### 653 Individuals named in the findings of certain inquiries

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2B is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/654. Inclusion in list on reference by persons who provide care for vulnerable adults.

**654. Inclusion in list on reference by persons who provide care for vulnerable adults.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

In the case of any reference to the Secretary of State<sup>2</sup> by a person who provides care for vulnerable adults ('the provider')<sup>3</sup> or by a registration authority<sup>4</sup>, for a care worker to be included in the list of individuals who are considered unsuitable to work with vulnerable adults<sup>5</sup>, if it appears from the information submitted with such a reference that it may be appropriate for the worker to be included in the list kept under the Protection of Children Act 1999<sup>6</sup> the Secretary of State must determine the reference in accordance with the following requirements<sup>7</sup>; and, pending that determination, he must provisionally include the individual in the list kept under the Protection of Children Act 1999<sup>8</sup>.

The Secretary of State must: (1) invite observations from the worker on the information submitted with the reference and, if he thinks fit, on any observations submitted under head (2) below<sup>9</sup>; and (2) invite observations from the provider on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (1) above<sup>10</sup>. Where the Secretary of State has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant, and, in the case of a reference where the provider had not decided whether to dismiss the worker or to confirm the transfer<sup>11</sup>, the provider has dismissed the worker or, as the case may be, has confirmed his transfer on the grounds of misconduct (whether or not in the course of employment) which harmed<sup>12</sup> or placed at risk of harm a vulnerable adult<sup>13</sup>, the Secretary of State must confirm the worker's inclusion in the list kept under the Protection of Children Act 1999<sup>14</sup> if he is of the opinion:

- 1127 (a) that the provider reasonably considered the worker to be guilty of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult<sup>15</sup>; and
- 1128 (b) that the worker is unsuitable to work with children<sup>16</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the worker from the list kept under the Protection of Children Act 1999<sup>17</sup>.

1 The Protection of Children Act 1999 s 2C (as added) and the Care Standards Act 2000 ss 81-84 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 Pt 1 paras 8(1), (2), 9, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 As to the Secretary of State see para 155 ante.

3 Ie under the Care Standards Act 2000 s 82(1). See note 1 supra.

4 Ie under ibid s 84. See note 1 supra.

5 Ie kept under ibid s 81. See note 1 supra.



6 le the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante.

7 le in accordance with the Care Standards Act 2000 s 82(5)-(7): see the text and notes 9-17 infra.

8 Ibid s 82(4); modified by the Protection of Children Act 1999 s 2C(1) (s 2C added by the Care Standards Act 2000 s 97(1)). However, the Secretary of State may not provisionally include the individual in the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) (see para 648 ante) unless he provisionally includes him in the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults): Protection of Children Act 1999 s 2C(4). See note 1 supra. For a consideration of the Care Standards Act 2000 s 82(4) see *R (on the application of Wright) v Secretary of State for Health* [2007] EWCA Civ 999, [2007] All ER (D) 361 (Oct).

9 Care Standards Act 2000 s 82(5)(a); modified by the Protection of Children Act 1999 s 2C (as added: see note 8 supra). See note 1 supra.

10 Care Standards Act 2000 s 82(5)(b); modified by the Protection of Children Act 1999 s 2C (as added: see note 8 supra). See note 1 supra.

11 le under the Care Standards Act 2000 s 82(2)(d). See note 1 supra.

12 For the meaning of 'harm' see para 274 ante.

13 le the grounds referred to in the Care Standards Act 2000 s 82(1)(a). See note 1 supra.

14 Ibid s 82(6); modified by the Protection of Children Act 1999 s 2C(1) (as added: see note 8 supra). However, the Secretary of State may not confirm the individual's inclusion in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) unless he confirms his inclusion in the list kept under the Care Standards Act 2000 s 81: see the Protection of Children Act 1999 s 2C(4) (as so added). See note 1 supra.

15 Care Standards Act 2000 s 82(7)(a); modified by the Protection of Children Act 1999 s 2C(1) (as added: see note 8 supra). See note 1 supra.

16 Care Standards Act 2000 s 82(7)(b); modified by the Protection of Children Act 1999 s 2C(1) (as added: see note 8 supra). See note 1 supra.

17 Care Standards Act 2000 s 82(6); modified by the Protection of Children Act 1999 s 2C(1) (as added: see note 8 supra). See note 1 supra. As to appeals against inclusion by virtue of s 2C (as added) in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) see para 659 note 10 post.

## UPDATE

### 654 Inclusion in list on reference by persons who provide care for vulnerable adults

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2C and Care Standards Act 2000 ss 81-84 is 12 October 2009: SI 2009/1611.

NOTE 8--*Wright*, cited, reversed: [2009] UKHL 3, [2009] 2 All ER 129 (provisional inclusion in list without prior opportunity to answer accusations contravened right to fair hearing and right to respect for private life).

NOTES 15, 16--See *Joyce v Secretary of State for Health* [2008] EWHC 1891 (Admin), [2009] PTSR 266, [2008] All ER (D) 14 (Aug).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/655. Inclusion in list on reference by employment agencies and businesses in respect of workers supplied to care for vulnerable adults.

**655. Inclusion in list on reference by employment agencies and businesses in respect of workers supplied to care for vulnerable adults.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

In the case of any reference<sup>2</sup> to the Secretary of State<sup>3</sup> by an employment agency or an employment business ('the provider') for a supply worker to be included in the list of individuals who are considered unsuitable to work with vulnerable adults<sup>4</sup>, if it appears from the information submitted with such a reference that it may be appropriate for the worker to be included in the list kept under the Protection of Children Act 1999<sup>5</sup> the Secretary of State must determine the reference in accordance with the following requirements<sup>6</sup>; and pending that determination, he must provisionally include the individual in the list kept under the Protection of Children Act 1999<sup>7</sup>. The Secretary of State must: (1) invite observations from the worker on the information submitted with the reference and, if he thinks fit, on any observations submitted under head (2) below<sup>8</sup>; and (2) invite observations from the provider on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (1) above<sup>9</sup>. Where the Secretary of State has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant, the Secretary of State must confirm the worker's inclusion in the list under the Protection of Children Act 1999<sup>10</sup> if he is of the opinion:

- 1129 (a) that the provider reasonably considered the worker to be guilty of misconduct (whether or not in the course of his employment) which harmed<sup>11</sup> or placed at risk of harm a vulnerable adult<sup>12</sup>; and
- 1130 (b) that the worker is unsuitable to work with children<sup>13</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the worker from the list kept under the Protection of Children Act 1999<sup>14</sup>.

1 The Protection of Children Act 1999 s 2C (as added) and the Care Standards Act 2000 ss 81-84 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 Pt 1 paras 8(1), (2), 9, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Ie under the Care Standards Act 2000 s 83(1).

3 As to the Secretary of State see para 155 ante.

4 Ie the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults). See note 1 supra.

5 Ie the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante.

6 Ie in accordance with the Care Standards Act 2000 s 83(5)-(7): see the text and notes 8-14 infra. See note 1 supra.

7 Ibid s 83(4); modified by the Protection of Children Act 1999 s 2C(2) (added by the Care Standards Act 2000 s 97(1)). However, the Secretary of State may not provisionally include the individual in the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) (see para 648 ante) unless he provisionally includes him in the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults): see the Protection of Children Act 1999 s 2C(4) (as so added). See note 1 supra.

8 Care Standards Act 2000 s 83(5)(a); modified by the Protection of Children Act 1999 s 2C(2) (as added: see note 7 supra). See note 1 supra.

9 Care Standards Act 2000 s 83(5)(b); modified by the Protection of Children Act 1999 s 2C(2) (as added: see note 7 supra). See note 1 supra.

10 Care Standards Act 2000 s 83(6); modified by the Protection of Children Act 1999 s 2C(2) (as added: see note 7 supra). However, the Secretary of State may not confirm the individual's inclusion in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) unless he confirms his inclusion in the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults): see the Protection of Children Act 1999 s 2C(4) (as so added). See note 1 supra.

11 For the meaning of 'harm' see para 274 ante.

12 Care Standards Act 2000 s 83(7)(a); modified by the Protection of Children Act 1999 s 2C (as added: see note 7 supra). See note 1 supra.

13 Care Standards Act 2000 s 83(7)(b); modified by the Protection of Children Act 1999 s 2C(2) (as added: see note 7 supra). See note 1 supra.

14 Care Standards Act 2000 s 83(6); modified by the Protection of Children Act 1999 s 2C (as added: see note 7 supra). See note 1 supra. As to appeals against inclusion by virtue of s 2C (as added) in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) see para 659 note 10 ante.

## **UPDATE**

### **655 Inclusion in list on reference by employment agencies and businesses in respect of workers supplied to care for vulnerable adults**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2C and Care Standards Act 2000 ss 81-84 is 12 October 2009: SI 2009/1611.

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**656. Inclusion in list where individuals employed in care positions are named in the findings of certain inquiries.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where:

- 1131 (1) a relevant inquiry<sup>2</sup> has been held<sup>3</sup>;
- 1132 (2) the report of the person who held the inquiry names an individual who is or has been employed in a care position<sup>4</sup>; and
- 1133 (3) it appears to the Secretary of State from the report that the person who held the inquiry found that the individual was guilty of relevant misconduct<sup>5</sup>, and that the individual is unsuitable to work with children<sup>6</sup>,

the Secretary of State may provisionally include the individual in the list kept under the Protection of Children Act 1999<sup>7</sup>; and, if he does so, he must determine<sup>8</sup> whether the individual's inclusion in the list should be confirmed<sup>9</sup>.

The Secretary of State must: (a) invite observations from the individual on the report, so far as relating to him, and, if the Secretary of State thinks fit, on any observations submitted under head (b) below<sup>10</sup>; and (b) invite observations from the relevant employer<sup>11</sup> on any observations on the report and, if the Secretary of State thinks fit, on any other observations under head (a) above<sup>12</sup>.

Where the Secretary of State has considered the report, any observations submitted to him and any other information which he considers relevant, he must confirm that individual's inclusion in the list<sup>13</sup> if he is of the opinion:

- 1134 (i) that the person who held the inquiry reasonably considered the individual to be guilty of relevant misconduct<sup>14</sup>; and
- 1135 (ii) that the individual is unsuitable to work with children<sup>15</sup>.

Otherwise, if the Secretary of State is not of that opinion, he must remove the worker from the list<sup>16</sup>.

1 The Protection of Children Act 1999 s 2C (as added) and the Care Standards Act 2000 ss 81-85 (s 85 as amended) are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 Pt 1 paras 8(1), (2), 9, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For these purposes, 'relevant inquiry' means any of the following:

320 (1) an inquiry held under the Inquiries Act 2005 (see ADMINISTRATIVE LAW) or under (a) the Care Standards Act 2000 s 10 (as amended) (see para 985 note 4 post); (b) the Government of Wales Act 1998 s 35 (repealed); (c) the Children Act 1989 s 81 (repealed); (d) the National Health Service Act 1977 s 84 (repealed); (e) the Local Authority Social Services Act 1970 s 7C (as

added) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1011) (Care Standards Act 2000 s 85(7)(a) (amended by the Inquiries Act 2005 s 48(1), Sch 2 para 19); modified by the Protection of Children Act 1999 s 2C(3) (s 2C added by the Care Standards Act 2000 s 97(1)));

321 (2) an inquiry to which the Tribunals of Inquiry (Evidence) Act 1921 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 959) applies (Care Standards Act 2000 s 85(7)(b); modified by the Protection of Children Act 1999 s 2C(3) (as so added));

322 (3) any other inquiry or hearing designated for the purposes of the Care Standards Act 2000 s 85 (as amended) by an order made by the Secretary of State (s 85(7)(c); modified by the Protection of Children Act 1999 s 2C(3) (as so added)).

Before making an order under the Care Standards Act 2000 s 85(7), the Secretary of State must consult the Welsh Ministers: s 85(8); modified by the Protection of Children Act 1999 s 2C(3) (as so added). See note 1 supra. As to the Secretary of State and the Welsh Ministers see para 155 ante.

3 Care Standards Act 2000 s 85(1)(a); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

4 Care Standards Act 2000 s 85(1)(b); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

5 'Relevant misconduct' means misconduct which harmed or placed at risk of harm a vulnerable adult and was committed (whether or not in the course of his employment) at a time when the individual was employed in a care position: Care Standards Act 2000 s 85(6); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

6 Care Standards Act 2000 s 85(1)(c); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

7 Care Standards Act 2000 s 85(2)(a); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra. As to the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) see para 648 ante. The Secretary of State may not provisionally include the individual in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) unless he provisionally includes him in the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults): see the Protection of Children Act 1999 s 2C(4) (as so added).

8 le in accordance with the Care Standards Act 2000 s 85(3)-(5): see the text and notes 10-16 infra. See note 1 supra.

9 Ibid s 85(2)(b); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

10 Care Standards Act 2000 s 85(3)(a); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

11 'Relevant employer' means the person who, at the time mentioned in the definition of 'relevant misconduct' (see note 5 supra) employed the individual in a care position: Care Standards Act 2000 s 85(6); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

12 Care Standards Act 2000 s 85(3)(b); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

13 Care Standards Act 2000 s 85(4); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra. However, the Secretary of State may not confirm the individual's inclusion in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) unless he confirms his inclusion in the list kept under the Care Standards Act 2000 s 81 (protection of vulnerable adults): see the Protection of Children Act 1999 s 2C(4) (as so added). See note 1 supra.

14 Care Standards Act 2000 s 85(5)(a); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

15 Care Standards Act 2000 s 85(5)(b); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra.

16 Care Standards Act 2000 s 85(4); modified by the Protection of Children Act 1999 s 2C(3) (as added: see note 2 supra). See note 1 supra. As to appeals against inclusion by virtue of s 2C (as added) in the list kept under s 1 (as amended; prospectively repealed) (see para 648 ante) see para 659 note 10 ante.

**UPDATE**

**656 Inclusion in list where individuals employed in care positions are named in the findings of certain inquiries**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2C and Care Standards Act 2000 ss 81-85 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/657. Referral of individuals providing funded care.

### **657. Referral of individuals providing funded care.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

The local authority<sup>2</sup> may refer a relevant individual<sup>3</sup> to the Secretary of State<sup>4</sup> where, as a result of inquiries made, or caused to be made, by it in relation to its duty to investigate whether it should take any action to safeguard or promote a child's welfare under the Children Act 1989<sup>5</sup>, the authority considers that the individual has been guilty of misconduct<sup>6</sup> (whether or not in the course of his employment) which harmed<sup>7</sup> a child<sup>8</sup> or placed a child at risk of harm<sup>9</sup>. The procedure that the Secretary of State must adhere to in order to determine a reference by a child care organisation for an individual to be included in the list of individuals who are considered unsuitable to work with children<sup>10</sup> also applies in relation to such a reference made by the local authority<sup>11</sup>.

1 The Protection of Children Act 1999 s 2D (as added) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For the meaning of 'local authority' see para 138 note 13 ante; definition applied by the Protection of Children Act 1999 s 12(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (4)(a)(ii)).

3 For these purposes, 'relevant individual' means an individual who is or has been employed to provide funded care to a child: see the Protection of Children Act 1999 s 2D(3) (s 2D added by the Care Standards Act 2000 s 98(1)). For these purposes, 'funded care' means care in respect of a person's securing the provision of which the authority has made a payment under the Children Act 1989 s 17A (as added and amended) (direct payments) (see para 861 post): Protection of Children Act 1999 s 2D(3) (as so added). See note 1 supra.

4 As to the Secretary of State see para 155 ante.

5 Ie under the Children Act 1989 s 47 (as amended): see paras 599, 601-603 ante.

6 The reference in the Protection of Children Act 1999 s 2D(1) (as added) to misconduct is to misconduct which occurred after 1 April 2001 (ie after the commencement of s 2D (as added)): s 2D(4) (as added: see note 3 supra). See note 1 supra.

7 For the meaning of 'harm' see para 274 ante; definition applied by ibid s 12(1).

8 For the meaning of 'child' see para 648 note 3 ante.

9 Protection of Children Act 1999 s 2D(1) (as added: see note 3 supra). See note 1 supra.

10 Ie the procedure in ibid s 2(4)-(7) (as amended; prospectively repealed): see para 649 ante.

11 Ibid s 2D(2) (as added: see note 3 supra). See note 1 supra.

## **UPDATE**

### **657 Referral of individuals providing funded care**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 2D is 12 October 2009: SI 2009/1611.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (B) Referrals/658. Inclusion in list on transfer from Consultancy Service Index.

#### **658. Inclusion in list on transfer from Consultancy Service Index.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where an individual is included in the Consultancy Service Index<sup>2</sup> (otherwise than provisionally) immediately before 2 October 2000<sup>3</sup>, and he was so included on a reference made to the Secretary of State by an organisation<sup>4</sup>, and any of the conditions for inclusion on the list<sup>5</sup> was fulfilled in relation to that reference<sup>6</sup>, if it appears from the information submitted with the reference that it may be appropriate for the individual to be included in the list kept by the Secretary of State<sup>7</sup>, the Secretary of State must: (1) invite observations from the individual on the information submitted with the reference and, if he thinks fit, on any observations submitted under head (2) below<sup>8</sup>; and (2) invite observations from the organisation on any observations on the information submitted with the reference and, if he thinks fit, on any other observations under head (1) above<sup>9</sup>.

Where an individual is included in the Consultancy Service Index (otherwise than provisionally) immediately before 2 October 2000<sup>10</sup>, and he was so included on a reference made to the Secretary of State by an organisation<sup>11</sup>, and any of the conditions for inclusion on the list<sup>12</sup> was fulfilled in relation to that reference<sup>13</sup>, the Secretary of State must include the individual in the list kept by him<sup>14</sup> if, after he has considered the information submitted with the reference, any observations submitted to him and any other information which he considers relevant, he is of the opinion that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment<sup>15</sup>) which harmed<sup>16</sup> a child<sup>17</sup> or placed a child at risk of harm<sup>18</sup>, and that the individual is unsuitable to work with children<sup>19</sup>.

Where: (a) a relevant inquiry<sup>20</sup> has been held<sup>21</sup>; (b) the report of the person who held the inquiry names an individual who is or has been employed<sup>22</sup> in a child care position<sup>23</sup>; (c) it appears to the Secretary of State from the report that the person who held the inquiry found that the individual was guilty of relevant misconduct<sup>24</sup>, and that the individual is unsuitable to work with children<sup>25</sup>; and (d) the individual is included in the Consultancy Service Index (otherwise than provisionally) immediately before 2 October 2000<sup>26</sup>, the Secretary of State must: (i) invite observations from the individual on the report, so far as relating to him, and, if the Secretary of State thinks fit, on any observations submitted under head (ii) below; and (ii) invite observations from the relevant employer<sup>27</sup> on any observations on the report and, if the Secretary of State thinks fit, on any other observations under head (i) above<sup>28</sup>.

Similarly, where: (A) a relevant inquiry has been held<sup>29</sup>; (B) the report of the person who held the inquiry names an individual who is or has been employed in a child care position<sup>30</sup>; (C) it appears to the Secretary of State from the report that the person who held the inquiry found that the individual was guilty of relevant misconduct<sup>31</sup>, and that the individual is unsuitable to work with children<sup>32</sup>; and (D) the individual is included in the Consultancy Service Index (otherwise than provisionally) immediately before 2 October 2000<sup>33</sup>, the Secretary of State must include the individual in the list kept by him<sup>34</sup> if, after he has considered the report, any observations submitted to him and any other information which he considers relevant, he is of the opinion that the person who held the inquiry reasonably considered the individual to be guilty of relevant misconduct, and that the individual is unsuitable to work with children<sup>35</sup>.

1 The Protection of Children Act 1999 s 3 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 'The Consultancy Service Index' means the list kept under that name by the Secretary of State: Protection of Children Act 1999 s 12(1). The consultancy service is provided to all child care organisations to assist them in deciding whether a prospective employee is suitable to work with children by enabling prospective employers to contact former employers who had concerns about the prospective employee's suitability for child care work: see *R v Secretary of State for Health, ex p C* [1999] 1 FLR 1073 at 1074-1075 per Richards J; affd [2000] 1 FCR 471, [2000] 1 FLR 627, CA. Challenges have been made to the legality of the Consultancy Service Index: see *R v Secretary of State for Health, ex p C* [1999] 1 FLR 1073 (affd [2000] 1 FCR 471, [2000] 1 FLR 627, CA); *R v Worcester County Council, ex p SW* [2000] 3 FCR 174. See also *S v Newham London Borough Council* [1998] 3 FCR 277, [1998] 1 FLR 1061, CA.

3 Protection of Children Act 1999 s 3(1)(a) (amended by the Care Standards Act 2000 s 99(1), (2)). See note 1 supra. The Protection of Children Act 1999 s 1 (as amended; prospectively repealed) (see para 648 ante) came into force on 2 October: see the Protection of Children Act 1999 (Commencement No 2) Order 2000, SI 2000/2337, art 2(2). As to the Secretary of State see para 155 ante.

4 Protection of Children Act 1999 s 3(1)(b). See note 1 supra. For the meaning of 'organisation' see para 649 note 2 ante.

5 Is any of the conditions mentioned in para 649 heads (1)-(4) ante, or the condition mentioned in para 649 heads (a)-(c) ante.

6 Protection of Children Act 1999 s 3(1)(c). See note 1 supra.

7 Is under *ibid* s 1 (as amended; prospectively repealed): see para 648 ante.

8 *Ibid* s 3(2)(a). See note 1 supra.

9 *Ibid* s 3(2)(b). See note 1 supra.

10 *Ibid* s 3(1)(a) (as amended: see note 3 supra). See notes 1, 2 supra.

11 *Ibid* s 3(1)(b). See note 1 supra.

12 Is any of the conditions mentioned in para 649 heads (1)-(4) ante, or the condition mentioned in para 649 heads (a)-(c) ante.

13 Protection of Children Act 1999 s 3(1)(c). See note 1 supra.

14 Is under *ibid* s 1 (as amended; prospectively repealed): see para 648 ante.

15 For the meaning of 'employment' see para 649 note 3 ante.

16 For the meaning of 'harm' see para 274 ante; definition applied by the Protection of Children Act 1999 s 12(1).

17 For the meaning of 'child' see para 648 note 3 ante.

18 Protection of Children Act 1999 s 3(3)(a). See note 1 supra.

19 *Ibid* s 3(3)(b). See note 1 supra.

20 For the meaning of 'relevant inquiry' see para 653 note 2 ante; definition applied by s 3(7) (added by the Care Standards Act 2000 s 99(1), (3)). See note 1 supra.

21 Protection of Children Act 1999 s 3(4)(a) (s 3(4) added by the Care Standards Act 2000 s 99(1), (3)). See note 1 supra.

22 For the meaning of 'employed' see para 649 note 3 ante.

23 Protection of Children Act 1999 s 3(4)(b) (as added: see note 21 supra). For the meaning of 'child care position' see para 649 note 4 ante.

24 Ibid s 3(4)(c)(i) (as added: see note 21 supra). For these purposes, 'relevant misconduct' means misconduct which harmed a child or placed a child at risk of harm and was committed (whether or not in the course of his employment) at a time when the individual was employed in a child care position: see s 3(7) (as added: see note 20 supra).

25 Ibid s 3(4)(c)(ii) (as added: see note 21 supra). See note 1 supra.

26 Ibid s 3(4)(d) (as added: see note 21 supra). See notes 1, 3 supra.

27 For these purposes, 'relevant employer', in relation to an individual named in the report of a relevant inquiry, means the person who, at the time referred to in the definition of 'relevant misconduct' (see note 24 supra), employed the individual in a child care position: see s 3(7) (as added: see note 20 supra). See note 1 supra.

28 Ibid s 3(5) (added by the Care Standards Act 2000 s 99(1), (3)). See note 1 supra.

29 Protection of Children Act 1999 s 3(4)(a) (as added: see note 21 supra).

30 Ibid s 3(4)(b) (as added: see note 21 supra). See note 1 supra.

31 Ibid s 3(4)(c)(i) (as added: see note 21 supra). See note 1 supra.

32 Ibid s 3(4)(c)(ii) (as added: see note 21 supra). See note 1 supra.

33 Ibid s 3(4)(d) (as added: see note 21 supra). See notes 1, 3 supra.

34 Ie under ibid s 1 (as amended; prospectively repealed): see para 648 ante.

35 Ibid s 3(6) (added by the Care Standards Act 2000 s 99(1), (3)). See note 1 supra.

## **UPDATE**

### **658 Inclusion in list on transfer from Consultancy Service Index**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 3 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (C) Appeals and Applications/659. Appeals against inclusion in list.

## (C) APPEALS AND APPLICATIONS

### **659. Appeals against inclusion in list.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual who is included (otherwise than provisionally) in the list kept by the Secretary of State<sup>2</sup> may appeal to the Tribunal<sup>3</sup> against the decision to include him in the list<sup>4</sup>; or, with the leave of the Tribunal, against any decision of the Secretary of State not to remove him from the list<sup>5</sup>. An individual who has been provisionally included for a period of more than nine months in the list kept by the Secretary of State<sup>6</sup> may, with the leave of the Tribunal, have the issue of his inclusion in the list determined by the Tribunal instead of by the Secretary of State<sup>7</sup>. If on an appeal or determination under this provision the Tribunal is not satisfied of either of the following, namely:

- 1136 (1) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed<sup>8</sup> a child<sup>9</sup> or placed a child at risk of harm; and
- 1137 (2) that the individual is unsuitable to work with children,

the Tribunal must allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise, it must dismiss the appeal or direct the individual's inclusion in the list<sup>10</sup>.

Where an individual has been convicted of an offence involving misconduct (whether or not in the course of his employment<sup>11</sup>) which harmed a child or placed a child at risk of harm, no finding of fact on which the conviction must be taken to have been based can be challenged on an appeal or determination under this provision<sup>12</sup>. Where the misconduct of which the individual is alleged to have been guilty is the subject of any civil or criminal proceedings, an application for leave<sup>13</sup> may not be made before the end of the period of six months immediately following the final determination of the proceedings<sup>14</sup>. For these purposes<sup>15</sup>, proceedings are finally determined when:

- 1138 (a) the proceedings are terminated without a decision being made<sup>16</sup>;
- 1139 (b) a decision is made against which no appeal lies<sup>17</sup>;
- 1140 (c) in a case where an appeal lies with leave against a decision, the time limited for applications for leave expires without leave being granted<sup>18</sup>; or
- 1141 (d) in a case where leave to appeal against a decision is granted or is not required, the time limited for appeal expires without an appeal being brought<sup>19</sup>.

<sup>1</sup> The Protection of Children Act 1999 s 2C (as added) and s 4 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

<sup>2</sup> le under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante. As to the Secretary of State see para 155 ante.

3 le the Tribunal established under *ibid* s 9 (as amended) (see para 708 post): s 12(1). The Tribunal, rather than a judicial review hearing, is the appropriate forum for a person seeking to appeal against the inclusion of his name on the list: *R (on the application of M) v Bromley London Borough Council* [2002] EWCA Civ 1113, [2002] 3 FCR 193.

4 Protection of Children Act 1999 s 4(1)(a). The provisions of s 4 also apply, with modifications (see notes 10, 12 *infra*), to those individuals who are included in the list on a reference under the Care Standards Act 2000 Pt VII (ss 80-104) (as amended; prospectively repealed): see the Protection of Children Act 1999 s 2C(5) (added by the Care Standards Act 2000 s 97(1)). See note 1 *supra*.

5 Protection of Children Act 1999 s 4(1)(b). See note 1 *supra*. As to removal from the list see s 1(3) (prospectively repealed); and para 648 *ante*.

6 le under *ibid* s 1 (as amended; prospectively repealed): see para 648 *ante*.

7 *Ibid* s 4(2). See note 1 *supra*. Section 4(2) is expressed to be subject to s 4(5): see the text and note 14 *infra*.

8 For the meaning of 'harm' see para 274 *ante*; definition applied by *ibid* s 12(1).

9 For the meaning of 'child' see para 648 note 3 *ante*.

10 Protection of Children Act 1999 s 4(3). See note 1 *supra*. In the case of those individuals who are included in the list on a reference under the Care Standards Act 2000 Pt VII (as amended; prospectively repealed) (see note 4 *supra*), if on an appeal or determination under the Protection of Children Act 1999 s 4 the Tribunal is not satisfied of either of the following, namely: (1) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed a vulnerable adult or placed a vulnerable adult at risk of harm; and (2) that the individual is unsuitable to work with children, the Tribunal must allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise, it must dismiss the appeal or direct the individual's inclusion in the list: see s 4(3); and see s 2C(5) (as added: see note 4 *supra*). As to the duty of the Tribunal under s 4 see *Secretary of State for Education and Skills v Mairs* [2005] EWHC 996 (Admin), [2005] ICR 1714 (where its view differed from those of a statutory inquiry, the Tribunal was required to show a justifiable basis for its view, acting not as a court of appeal but rather exercising its own judgment in accordance with its statutory obligations). Where, without any explanation, the individual fails to attend his appeal hearing, the Tribunal is entitled to conclude that he did not consider that his account could survive oral examination: *Secretary of State for Health v C* [2003] EWCA Civ 10, [2003] 2 FCR 274.

11 For the meaning of 'employment' see para 649 note 3 *ante*.

12 Protection of Children Act 1999 s 4(4). See note 1 *supra*. In the case of those individuals who are included in the list on a reference under the Care Standards Act 2000 Pt VII (as amended; prospectively repealed) (see note 4 *supra*), where an individual has been convicted of an offence involving misconduct (whether or not in the course of his employment) which harmed a vulnerable adult or placed a vulnerable adult at risk of harm, no finding of fact on which the conviction must be taken to have been based can be challenged on an appeal or determination under the Protection of Children Act 1999 s 4: see s 4(4); and see s 2C(5) (as added: see note 4 *supra*).

13 le under *ibid* s 4(2): see the text and note 7 *supra*.

14 *Ibid* s 4(5). See note 1 *supra*.

15 le for the purposes of *ibid* s 4(5): see the text and note 14 *supra*. See note 1 *supra*.

16 *Ibid* s 4(6)(a). See note 1 *supra*.

17 *Ibid* s 4(6)(b). See note 1 *supra*.

18 *Ibid* s 4(6)(c). See note 1 *supra*.

19 *Ibid* s 4(6)(d). See note 1 *supra*.

## UPDATE

### 659 Appeals against inclusion in list

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 ss 2C, 4 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/A. LIST UNDER THE PROTECTION OF CHILDREN ACT 1999 OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/ (C) Appeals and Applications/660. Applications for removal from or restoration to the list.

## **660. Applications for removal from or restoration to the list.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual who is included in the list kept by the Secretary of State<sup>2</sup> may make an application to the Tribunal<sup>3</sup> whereupon the Tribunal must determine whether or not the individual should continue to be included in the list<sup>4</sup>. If the Tribunal is satisfied that the individual is no longer unsuitable to work with children it must direct his removal from the list; otherwise, it must dismiss the application<sup>5</sup>.

An individual may only make an application to be removed from the list with the leave of the Tribunal<sup>6</sup> and such an application may not be made unless the appropriate conditions are satisfied in the individual's case<sup>7</sup>. In the case of an individual who was a child when he was included (otherwise than provisionally) in the list, the appropriate conditions are satisfied if: (1) he has been so included for a continuous period of at least five years<sup>8</sup>; and (2) in the period of five years ending with the time when he makes the application, he has made no other such application<sup>9</sup>. In the case of any other individual, the appropriate conditions are satisfied if: (a) he has been included (otherwise than provisionally) in the list for a continuous period of at least 10 years<sup>10</sup>; and (b) in the period of 10 years ending with the time when he makes the application, he has made no other such application<sup>11</sup>. The Tribunal may not grant the application unless it considers that the individual's circumstances have changed since he was included (otherwise than provisionally) in the list, or, as the case may be, since he last made an application and that the change is such that leave should be granted<sup>12</sup>.

If it appears to a chief officer of police or a director of children's services of a local authority in England or a director of social services of a local authority in Wales<sup>13</sup> that the following conditions are satisfied in the case of an individual, the chief officer or (as the case may be) the director may apply to the High Court for an order for the restoration of the individual's inclusion in the list to be made<sup>14</sup> in respect of him<sup>15</sup>. The conditions are that:

- 1142 (i) the individual is no longer included in the list kept by the Secretary of State<sup>16</sup>; and
- 1143 (ii) the individual has acted in such a way (whether before or after he ceased to be included in the list) as to give reasonable cause to believe that an order<sup>17</sup> is necessary to protect children in general, or any children in particular, from serious harm from him<sup>18</sup>.

Such an application may be made at any time after the individual ceased to be included in the list<sup>19</sup>. If the High Court is satisfied that the conditions set out in heads (i) and (ii) above are satisfied, it must order the restoration of the individual's inclusion in the list; otherwise, it must dismiss the application<sup>20</sup>.

1 The Protection of Children Act 1999 ss 4A-4C (all as added; s 4C as amended) are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 le under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante. As to the Secretary of State see para 155 ante.

3 Ibid s 4A(1) (s 4A added by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 154-155). This is expressed to be subject to the Protection of Children Act 1999 s 4B (as added): see the text and notes 6-12 infra. As to the Tribunal see para 708 et seq post. See note 1 supra.

4 See ibid s 4A(2) (as added: see note 3 supra). See note 1 supra.

5 Ibid s 4A(3) (as added: see note 3 supra). See note 1 supra.

6 See ibid s 4B(1) (s 4B added by the Criminal Justice and Court Services Act 2000 Sch 7 Pt II paras 154-155). See note 1 supra.

7 Protection of Children Act 1999 s 4B(2) (as added: see note 6 supra).

8 Ibid s 4B(3)(a) (as added: see note 6 supra). See note 1 supra.

9 Ibid s 4B(3)(b) (as added: see note 6 supra). See note 1 supra.

10 Ibid s 4B(4)(a) (as added: see note 6 supra). See note 1 supra.

11 Ibid s 4B(4)(b) (as added: see note 6 supra). See note 1 supra.

12 Ibid s 4B(5) (as added: see note 6 supra). See note 1 supra.

13 For these purposes, 'local authority' has the same meaning as in the Education Act 1996 s 579 (see EDUCATION vol 15(1) (2006 Reissue) para 20): Protection of Children Act s 4C(7) (s 4C added by the Criminal Justice and Court Services Act 2000 Sch 7 Pt II paras 154-155). See note 1 supra.

14 le under the Protection of Children Act 1999 s 4C (as added). See note 1 supra.

15 See ibid s 4C(1) (as added (see note 13 supra); and amended by the Children Act 2004 s 18(9), (10), Sch 2 para 6). The amendment made by the Children Act 2004 has effect, in relation to any authority which appoints a director of children's services before 1 January 2008, from the day of his appointment (see s 18(9) (a)) and, otherwise, from 1 January 2008 (see the Children Act 2004 (Director of Children's Services) Appointed Day Order 2007, SI 2007/1792, art 2). Prior to the appointment of a director of children's services or 1 January 2008, the power to apply to the high court for an order of restoration lies with a chief officer of police or a director of social services of a local authority: Protection of Children Act 1999 s 4C(1) (as so added). See note 1 supra.

16 Ibid s 4C(2)(a) (as added: see note 13 supra). See note 1 supra. As to the list kept by the Secretary of State under s 1 (as amended; prospectively repealed) see para 648 ante. For the purposes of s 4C (as added and amended) an individual is no longer included in the list if a direction under s 4A(3) (as added) (see the text and note 5 supra) has been given in respect of him and his inclusion in the list is not restored by virtue of an order under s 4C (as added and amended): s 4C(6) (as so added).

17 le under ibid s 4C (as added and amended). See note 1 supra.

18 Ibid s 4C(2)(b) (as added: see note 13 supra). See note 1 supra.

19 Ibid s 4C(3) (as added: see note 13 supra). See note 1 supra.

20 Ibid s 4C(4) (as added: see note 13 supra). See note 1 supra. Where an individual who has been restored to the list kept by the Secretary of State under s 1 (as amended; prospectively repealed) (see para 648 ante) by an order under s 4C (as added and amended) wishes to make an application to the Tribunal under s 4A (as added) (see the text and notes 2-5 supra), he may only make such an application with the leave of the Tribunal: see s 4B(1) (as added: see note 6 supra), s 4C(5) (as added: see note 13 supra). Such an application for leave may not be made unless the appropriate conditions are satisfied in the individual's case: s 4B(2) (as so added), s 4C(5) (as so added). In the case of an individual who was a child when the order under s 4C (as added and amended) was made, the appropriate conditions are satisfied if: (1) he has been so included for a continuous period of at least five years beginning with the making of the order under s 4C (as added and amended); and (2) in the period of five years ending with the time when he makes the application, he has made no other such application: s 4B(3) (as so added), s 4C(5) (as so added). In the case of any other individual, the appropriate conditions are satisfied if: (a) he has been included (otherwise than provisionally) in the list for a continuous period of at least 10 years beginning with the making of the order under s 4C (as added and amended); and (b) in the period of 10 years ending with the time when he makes the application, he has made no other such application: s 4B(4) (as so added), s 4C(5) (as so added). The Tribunal may not grant the application unless it



considers that the individual's circumstances have changed since the order under s 4C (as added and amended) was made or, as the case may be, since he last made an application under s 4C (as added and amended), and that the change is such that leave should be granted: s 4B(5) (as so added), s 4C(5) (as so added).

## **UPDATE**

### **660 Applications for removal from or restoration to the list**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 ss 4A-4C is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/B. DUTY TO CONSULT THE LISTS OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/661. Duty of prospective employers to consult statutory list and ascertain prohibition from teaching, etc.

## ***B. DUTY TO CONSULT THE LISTS OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN***

### **661. Duty of prospective employers to consult statutory list and ascertain prohibition from teaching, etc.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where a child care organisation<sup>2</sup> proposes to offer an individual employment<sup>3</sup> in a child care position<sup>4</sup>, the organisation must ascertain whether the individual is included in the list of persons considered unsuitable to work with children<sup>5</sup> or whether the individual is subject to a direction prohibiting him from teaching etc given on the grounds that he is unsuitable to work with children<sup>6</sup> and, if he is included in the list or subject to such a direction, it must not offer him employment in such a position<sup>7</sup>. Where a child care organisation discovers that an individual employed<sup>8</sup> by it in a child care position is included in any such list, it must cease to employ him in a child care position<sup>9</sup>. For these purposes, an individual is not employed in a child care position if he has been suspended or provisionally transferred to a position which is not a child care position<sup>10</sup>.

Where a child care organisation proposes to offer employment in a child care position to an individual who has been supplied by an organisation which carries on an employment agency<sup>11</sup>, or an employment business<sup>12</sup> or an agency for the supply of nurses<sup>13</sup>, the child care organisation complies with its duty if<sup>14</sup>: (1) it satisfies itself that, on a date within the last 12 months, the other organisation ascertained whether the individual was included in the list<sup>15</sup> or subject to a direction; (2) it obtains written confirmation of the facts as ascertained by that organisation<sup>16</sup>; (3) if the individual was included in the list on that date, it does not offer him employment in a child care position<sup>17</sup>; and (4) if the individual was subject to a direction, it does not offer him employment in a child care position<sup>18</sup>. It is immaterial for these purposes<sup>19</sup> whether the individual is already employed by the child care organisation<sup>20</sup>.

These provisions do not apply to an offer of relevant NHS employment<sup>21</sup> if certain conditions apply with regard to an individual to whom the offer is made<sup>22</sup>.

1 The Protection of Children Act 1999 s 7 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 para 8(1), (2), Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For the meaning of 'child care organisation' see para 649 note 2 ante.

3 For the meaning of 'employment' see para 649 note 3 ante.

4 For the meaning of 'child care position' see para 649 note 4 ante.

5 Protection of Children Act 1999 s 7(1)(a)(i) (s 7(1) substituted by the Care Standards Act 2000 s 101(1), (2)). See note 1 supra. The list referred to in the text is that kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante.

6 Ibid s 7(1)(c) (s 7(1) as substituted (see note 5 supra); and s 7(1)(c) added by the Education Act 2002 s 215(1), Sch 21 para 121(1), (2)). See note 1 supra. The direction referred to in the text is one given under the Education Act 2002 s 142 (prospectively repealed): see EDUCATION vol 15(1) (2006 Reissue) para 782.

7 Protection of Children Act 1999 s 7(1)(b), (d) (s 7(1) as substituted (see note 5 supra); and s 7(1)(d) added by the Education Act 2002 Sch 21 para 121(1), (2)). Where a person ('the recipient') employs, or proposes to employ, an individual to provide care for a child and a local authority proposes to make a payment to the recipient under the Children Act 1989 s 17A (as added and amended) (see para 861 post) in respect of his securing the provision of the care, the authority must, if the recipient asks it to do so, ascertain whether the individual is included in the list mentioned in the Protection of Children Act 1999 s 7(1) (as substituted) (see note 5 supra): s 7(1A) (s 7(1A) added by the Care Standards Act 2000 s 98(2)). See note 1 supra. See also note 9 infra. For the meaning of 'child' see para 648 note 3 ante. For the meaning of 'local authority' see para 138 note 13 ante; definition applied by the Protection of Children Act 1999 s 12(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (4)(a)(ii)).

8 For the meaning of 'employed' see para 649 note 3 ante.

9 Protection of Children Act 1999 s 7(1A) (s 7(1A) added by the Care Standards Act 2000 Sch 4 para 26(1), (2)(a)). See note 1 supra. It seems that inadvertently two different provisions of the Protection of Children Act 1999 have been numbered s 7(1A) (as added). See note 7 supra.

10 Ibid s 7(1A) (as added: see note 9 supra). See note 1 supra.

11 For the meaning of 'employment agency' see para 650 note 2 ante.

12 For the meaning of 'employment business' see para 651 note 2 ante.

13 For the meaning of 'agency for the supply of nurses' see para 650 note 3 ante.

14 Protection of Children Act 1999 s 7(2) (amended by the Care Standards Act 2000 Sch 4 para 26(1), (2)(b)). See note 1 supra. As from a day to be appointed the provisions of the Protection of Children Act 1999 s 7(2) (as amended) will not apply to an agency for the supply of nurses: see s 7(2) (as so amended; and prospectively amended by the Care Standards Act 2000 s 117(2), Sch 6). At the date at which this volume states the law no such day had been appointed.

Where a local authority is required under the Protection of Children Act 1999 s 7(1A) (as added) (see note 7 supra) to ascertain whether an individual who has been supplied as mentioned in s 7(2) (as amended) is included in the list there mentioned, there is sufficient compliance with s 7(1A) (as added) if the authority satisfies itself that, on a date within the last 12 months, the organisation which supplied the individual ascertained whether he was included in any of those lists, and obtains written confirmation of the facts as ascertained by the organisation: s 7(2A) (added by the Care Standards Act 2000 s 98(3)).

15 Protection of Children Act 1999 s 7(2)(a) (amended by the Care Standards Act 2000 s 101(1), (3)(a)). See note 1 supra.

16 Protection of Children Act 1999 s 7(2)(b). See note 1 supra.

17 Ibid s 7(2)(c) (amended by the Care Standards Act 2000 s 101(1), (3)(b)). See note 1 supra.

18 Protection of Children Act 1999 s 7(2)(d) (added by the Education Act 2002 s 215(1), Sch 21 para 121(1), 3(d)). See note 1 supra.

19 Ie for the purposes of the Protection of Children Act 1999 s 7(1) (as substituted and amended) (see the text and notes 1-7 supra) or s 7(2) (as amended) (see the text and notes 11-18 supra).

20 Ibid s 7(3). See note 1 supra.

21 Relevant NHS employment is employment in a child care position in an NHS body: ibid s 7(3B) (added by the Health and Social Care (Community Health and Standards) Act 2003 s 189(1), (4)). Each of the following is an NHS body: a national health service trust; a strategic health authority; an NHS foundation trust; a health authority; a local health board; a special health authority; and a primary care trust: Protection of Children Act 1999 s 7(3C) (added by the Health and Social Care (Community Health and Standards) Act 2003 s 189(1), (4)). See note 1 supra. As to these NHS bodies see HEALTH SERVICES.

22 Protection of Children Act 1999 s 7(3A) (added by the Health and Social Care (Community Health and Standards) Act 2003 s 189(1), (4)). See note 1 supra. The conditions are as follows:

- 323 (1) at the time the offer is made the individual is employed by an NHS body (Protection of Children Act 1999 s 7(3A)(a) (as so added));

- 324 (2) that NHS body has ascertained that he is not included in the list kept under s 1 (prospectively repealed) (see para 648 ante) or (during the period that he is employed by that body) another NHS body or an employment agency or employment business has ascertained that he is not included in the list (s 7(3A)(b) (as so added));
- 325 (3) the provisions of s 7(1A) (as added) (see the text and notes 8-10 supra) do not apply to him (s 7(3A)(c) (as so added));
- 326 (4) he accepts the offer and for so long as he is employed in the employment to which the offer relates head (3) above applies (s 7(3A)(d) (as so added)).

## **UPDATE**

### **661 Duty of prospective employers to consult statutory list and ascertain prohibition from teaching, etc**

NOTE 1--Appointed day for the repeal of the Protection of Children Act 1999 s 7 is 12 October 2009: SI 2009/1611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/B. DUTY TO CONSULT THE LISTS OF PERSONS CONSIDERED UNSUITABLE TO WORK WITH CHILDREN/662. CAFCASS and the duty to consult statutory lists before appointing individuals to child care positions.

## **662. CAFCASS and the duty to consult statutory lists before appointing individuals to child care positions.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

The Protection of Children Act 1999 has effect as if the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>2</sup> were a child care organisation within the meaning of that Act<sup>3</sup>. Arrangements which CAFCASS makes with an organisation<sup>4</sup> must provide that, before selecting an individual to be employed under the arrangements in a child care position<sup>5</sup>, the organisation<sup>6</sup> must ascertain whether the individual is included in a list of persons considered unsuitable to work with children<sup>7</sup> or is subject to a direction prohibiting him from teaching etc on the grounds that he is unsuitable to work with children<sup>8</sup> and, if he is included or prohibited, must not select him for that employment<sup>9</sup>. Such arrangements must provide that, if at any time the organisation has power to refer a relevant individual<sup>10</sup> to the Secretary of State under the Protection of Children Act 1999<sup>11</sup>, the organisation must so refer him<sup>12</sup>.

1 The Criminal Justice and Court Services Act 2000 s 24 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 As to CAFCASS see para 230 et seq ante.

3 Criminal Justice and Court Services Act 2000 s 24(1). For the meaning of 'child care organisation' see para 649 note 2 ante. See note 1 supra.

4 Ie under ibid s 13(1): see para 241 ante.

5 For the meaning of 'child care position' see para 649 note 4 ante; definition applied by ibid 24(4). See note 1 supra.

6 Ibid s 24(2). See note 1 supra.

7 Ie the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante.

8 Criminal Justice and Court Services Act 2000 24(2)(a). See note 1 supra. The direction referred to in the text is one given under the Education Act 2002 s 142 (prospectively repealed): see EDUCATION vol 15(1) (2006 Reissue) para 782.

9 Criminal Justice and Court Services Act 2000 s 24(2)(b). See note 1 supra. For the meaning of 'employment' see para 674 note 13 post; definition applied by 24(4).

10 'Relevant individual' means an individual who is or has been employed in a child care position under the arrangements: ibid s 24(3). See note 1 supra.

11 Ie under the Protection of Children Act 1999 s 2 (as amended; prospectively repealed) (inclusion in list on reference following disciplinary action etc): see para 649 ante.

12 Criminal Justice and Court Services Act 2000 s 24(3). See note 1 supra.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000/663. Disqualification of adults from working with children.

### ***C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000***

#### **663. Disqualification of adults from working with children.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where, in the case of an individual, either of the conditions set out below is satisfied<sup>2</sup>, the court must order the individual to be disqualified from working<sup>3</sup> with children<sup>4</sup>. Such an order is known as a 'disqualification order'<sup>5</sup>. The conditions are that:

- 1144 (1) the individual is convicted of an offence against a child<sup>6</sup> committed when he was aged 18 or over<sup>7</sup>, and a qualifying sentence<sup>8</sup> is imposed by a senior court<sup>9</sup> in respect of the conviction<sup>10</sup>; or
- 1145 (2) the individual is charged with an offence against a child committed when he was aged 18 or over, and a relevant order<sup>11</sup> is made by a senior court in respect of the act or omission charged against him as the offence<sup>12</sup>.

A disqualification order may not be made under these provisions if the court is satisfied, having regard to all the circumstances, that it is unlikely that the individual will commit any further offence against a child<sup>13</sup>.

If the court does not make a disqualification order, it must state its reasons for not doing so and cause those reasons to be included in the record of the proceedings<sup>14</sup>.

1 The Criminal Justice and Court Services Act 2000 ss 28, 30, 38 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Criminal Justice and Court Services Act 2000 s 28(1). See note 1 supra.

3 'Work' includes: (1) work of any kind, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract; and (2) an office established by or by virtue of an enactment; and 'working' must be read accordingly: *ibid* s 42(1).

4 *Ibid* s 28(4). 'Child' means a person under the age of 18: s 42(1).

5 *Ibid* ss 30(5)(a), 42(1). See note 1 supra. As to subsequent application for a disqualification order see para 665 post. A disqualification order is not a sentence for the purposes of the Rehabilitation of Offenders Act 1974: see the Criminal Justice and Court Services Act 2000 s 38(1). As to the rehabilitation of offenders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

6 For the meaning of 'offence against a child' see para 667 post.

7 If, for the purpose of making an order under the Criminal Justice and Court Services Act 2000 s 28 (prospectively repealed) or s 29 (prospectively repealed) (see para 664 post), the court determines, after considering any available evidence, that an individual was, or was not, under the age of 18 at the time when the offence in question was committed, his age at that time must be taken for those purposes (and in particular

for the purpose of determining any question as to the validity of the order) to be that which the court determined it to be: s 30(4). See note 1 supra.

8 'Qualifying sentence' means:

- 327 (1) a sentence of imprisonment for a term of 12 months or more (ibid s 30(1)(a));
- 328 (2) a sentence of detention in a young offender institution for a term of 12 months or more (s 30(1)(b));
- 329 (3) a sentence of detention during Her Majesty's pleasure (s 30(1)(c));
- 330 (4) a sentence of detention for a period of 12 months or more under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended) (offenders under 18 convicted of certain serious offences) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78) (Criminal Justice and Court Services Act 2000 s 30(1)(d));
- 331 (5) a sentence of detention under the Criminal Justice Act 2003 s 226 (detention for life or detention for public protection for serious offences committed by those under 18) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83) or s 228 (extended sentence for certain violent or sexual offences: persons 18 or over) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84) (Criminal Justice and Court Services Act 2000 s 30(1)(dd) (added by the Criminal Justice Act 2000 s 299, Sch 30 paras 1, 3(1), (3)(b)));
- 332 (6) a detention and training order for a term of 12 months or more (Criminal Justice and Court Services Act 2000 s 30(1)(e));
- 333 (7) a sentence of detention for a term of 12 months or more imposed by a court-martial or the Courts-Martial Appeal Court (s 30(1)(f));
- 334 (8) a hospital order within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 491) (Criminal Justice and Court Services Act 2000 s 30(1)(g)); or
- 335 (9) a guardianship order (s 30(1)(h)).

As from a day to be appointed under s 80(1), the provisions of s 30(1)(b) (see head 2 supra) are repealed by ss 61(9)(a), 75, Sch 8. At the date at which this volume states the law no such day had been appointed. As from a day to be appointed under the Armed Forces Act 2006 s 383(2), the Criminal Justice and Court Services Act 2000 s 30(1)(d) (see head (4) supra) is amended by the Armed Forces Act 2006 s 378(1), Sch 16 para 180(1) so as to include a sentence of detention for a period of 12 months or more under s 209 (see ARMED FORCES); the Criminal Justice and Court Services Act 2000 s 30(1)(e) (see head (6) supra) is amended by the Armed Forces Act 2006 Sch 16 para 180(1), (2)(b)(ii) so as to include references to the Powers of Criminal Courts (Sentencing) Act 2000 s 100 (as amended) (see para 1398 post) or the Armed Forces Act 2006 s 211 (see ARMED FORCES); and the Criminal Justice and Court Services Act 2000 s 30(1)(f) (see head (7) supra) is repealed by the Armed Forces Act 2006 Sch 16 para 180(1), (2)(b)(iii), Sch 17. At the date at which this volume states the law no such day or days had been appointed.

'Guardianship order' means a guardianship order within the meaning of the Army Act 1955, the Air Force Act 1955, the Naval Discipline Act 1957 or the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 502): Criminal Justice and Court Services Act 2000 s 30(1). As from a day to be appointed, this provision is amended so as to remove the references to the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957: see the Criminal Justice and Court Services Act 2000 s 30(1) (amended by the Armed Forces Act 2006 s 378, Sch 16 para 180(1), (2)(a), Sch 17). At the date at which this volume states the law no such day had been appointed.

References to a sentence of imprisonment, or to a sentence of detention imposed by a court-martial or the Courts-Martial Appeal Court, include references to a suspended sentence: s 30(3).

The reference to detention in head (3) supra includes a reference to detention by virtue of a custodial order under the Army Act 1955 s 71AA (as added; prospectively amended; prospectively repealed) or Sch 5A para 10 (as added; prospectively amended; prospectively repealed), the Air Force Act 1955 s 71AA (as added; prospectively amended; prospectively repealed) or Sch 5A para 10 (as added; prospectively amended; prospectively repealed), or the Naval Discipline Act 1957 s 43AA (as added; prospectively amended; prospectively repealed) or Sch 4A para 10 (as added; prospectively amended; prospectively repealed) (see ARMED FORCES): see the Criminal Justice and Court Services Act 2000 s 30(2).

See note 1 supra.

9 'Senior court' means the Crown Court, the Court of Appeal, a court-martial or the Courts-Martial Appeal Court: Criminal Justice and Court Services Act 2000 s 30(1). See note 1 supra. As from a day to be appointed

references to a 'senior court' will be replaced by references to a superior court: see s 28(2) (ss 28, 30(1) prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 35(a), (d)). At the date at which this volume states the law, no such day had been appointed.

10 Criminal Justice and Court Services Act 2000 s 28(2) (prospectively amended: see note 9 supra).

11 'Relevant order' means: (1) an order made by the Crown Court, the Court of Appeal, a court-martial or the Courts-Martial Appeal Court that the individual in question be admitted to hospital; or (2) a guardianship order: *ibid* s 30(1). See note 1 supra.

12 *Ibid* s 28(3) (prospectively amended: see note 9 supra). See note 1 supra.

13 *Ibid* s 28(5). See note 1 supra. The civil standard of proof is to be applied in order to determine whether a defendant is unlikely to re-offend: *R v MG* [2001] EWCA Crim 2308, [2002] 1 FLR 694. The offender bears this burden of proof: *R v Clayton* [2003] EWCA Crim 2161, [2004] 1 Cr App Rep (S) 201. A disqualification order is a preventative rather than a punitive measure: *R v Field*, *R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 2 Cr App Rep 38.

14 Criminal Justice and Court Services Act 2000 s 28(6). See note 1 supra.

## UPDATE

### 663 Disqualification of adults from working with children

NOTE 8--Appointed day for the commencement of the Armed Forces Act 2006 Sch 16 para 180 is 31 October 2009: SI 2009/1167.

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000/664. Disqualification of juveniles from working with children.

#### **664. Disqualification of juveniles from working with children.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where, in the case of an individual, either of the conditions set out below is satisfied<sup>2</sup>, namely that:

- 1146 (1) the individual is convicted of an offence against a child<sup>3</sup> committed at a time when the individual was under the age of 18<sup>4</sup>, and a qualifying sentence<sup>5</sup> is imposed by a senior court<sup>6</sup> in respect of the conviction<sup>7</sup>; or
- 1147 (2) the individual is charged with an offence against a child committed at a time when the individual was under the age of 18, and a relevant order<sup>8</sup> is made by a senior court in respect of the act or omission charged against him as the offence<sup>9</sup>,

and the court is satisfied, having regard to all the circumstances, that it is likely that the individual will commit a further offence against a child, the court must order the individual to be disqualified from working<sup>10</sup> with children<sup>11</sup>. Such an order is known as a 'disqualification order'<sup>12</sup>.

If the court makes such an order, it must state its reasons for doing so and cause those reasons to be included in the record of the proceedings<sup>13</sup>.

1 The Criminal Justice and Court Services Act 2000 s 29 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Criminal Justice and Court Services Act 2000 s 29(1). See note 1 supra.

3 For the meaning of 'offence against a child' see para 667 post. For the meaning of 'child' see para 663 note 4 ante.

4 As to determinations of age see para 663 note 7 ante.

5 For the meaning of 'qualifying sentence' see para 663 note 8 ante.

6 For the meaning of 'senior court' see para 663 note 9 ante. See also note 7 infra.

7 Criminal Justice and Court Services Act 2000 s 29(2). As from a day to be appointed references to a 'senior court' will be replaced by references to a superior court: see s 29(2) (prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 35(b)). At the date at which this volume states the law, no such day had been appointed. See note 1 supra.

8 For the meaning of 'relevant order' see para 663 note 11 ante.

9 Criminal Justice and Court Services Act 2000 s 29(3). See note 1 supra.

10 For the meanings of 'work' and 'working' see para 663 note 3 ante.

11 Criminal Justice and Court Services Act 2000 s 29(4). See note 1 supra.

12 Ibid ss 30(5)(a), 42(1). See note 1 supra. As to subsequent application for a disqualification order see para 666 post. A disqualification order is not a sentence for the purposes of the Rehabilitation of Offenders Act 1974: see the Criminal Justice and Court Services Act 2000 s 38(1). As to the rehabilitation of offenders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

13 Ibid s 29(5). See note 1 supra.

## **UPDATE**

### **664 Disqualification of juveniles from working with children**

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000/665. Disqualification at the discretion of the court.

### **665. Disqualification at the discretion of the court.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where an individual is convicted of an offence against a child<sup>2</sup> (whether or not committed when he was 18 or over), the individual is sentenced by a senior court<sup>3</sup>, and no qualifying sentence<sup>4</sup> is imposed in respect of the conviction<sup>5</sup>, if the court is satisfied, having regard to all the circumstances, that it is likely that the individual will commit a further offence against a child, it may order the individual to be disqualified from working with children<sup>6</sup>. If the court makes such a disqualification order it must state its reasons for doing so and cause those reasons to be included in the record of the proceedings<sup>7</sup>.

1 The Criminal Justice and Court Services Act 2000 s 29A (as added; prospectively amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For the meaning of 'offence against a child' see para 667 post. For the meaning of 'child' see para 663 note 4 ante.

3 For the meaning of 'senior court' see para 663 note 9 ante. See also note 5 infra.

4 For the meaning of 'qualifying sentence' see para 663 note 8 ante.

5 Criminal Justice and Court Services Act 2000 s 29A(1) (s 29A added by the Criminal Justice Act 2003 s 299, Sch 30 para 2). As from a day to be appointed references to a 'senior court' will be replaced by references to a superior court: see Criminal Justice and Court Services Act 2000 s 29A(1) (as so added; prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 35(c)). At the date at which this volume states the law, no such day had been appointed. See note 1 supra.

6 Criminal Justice and Court Services Act 2000 s 29A(2) (as added: see note 5 supra). See note 1 supra.

7 Ibid s 29A(3) (as added: see note 5 supra). See note 1 supra.

### **UPDATE**

### **665 Disqualification at the discretion of the court**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000/666. Subsequent application for a disqualification order.

#### **666. Subsequent application for a disqualification order.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

Where the provisions with regard to disqualification orders apply<sup>2</sup> but the court has, in the case of an adult, neither made a disqualification order nor given reasons for not doing so<sup>3</sup> or, in the case of a juvenile, the court has not made a disqualification order and it appears to the prosecutor that the court has not considered the making of a disqualification order<sup>4</sup>, the prosecutor may at any time apply to that court for an order under either provision<sup>5</sup>. On such an application: (1) in a case where the conditions with regard to an adult are satisfied<sup>6</sup>, the court must make a disqualification order unless it is satisfied having regard to all the circumstances that it is unlikely that the individual will commit any further offences against a child<sup>7</sup>, and, if it does not make an order, it must comply with the requirement to give reasons for not doing so<sup>8</sup>; and (2) in a case where the conditions with regard to a juvenile are satisfied<sup>9</sup>, the court must make a disqualification order if it is satisfied having regard to all the circumstances that it is likely that the individual will commit any further offences against a child<sup>10</sup>, and, if it does so, it must give reasons for so doing<sup>11</sup>. On such an application an order cannot be made where the court is satisfied that it had considered the making of such an order at the time when it imposed the qualifying sentence or made the relevant order<sup>12</sup>.

1 The Criminal Justice and Court Services Act 2000 s 29B (as added) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 *Ie* under the Criminal Justice and Court Services Act 2000 ss 28, 29 (both prospectively amended; and prospectively repealed) (see paras 663-664 ante).

3 *Ibid* s 29B(1)(a) (s 29B added by the Criminal Justice Act 2003 s 299, Sch 30 paras 1, 2).

4 Criminal Justice and Court Services Act 2000 s 29B(1)(b) (as added: see note 3 supra). See note 1 supra.

5 *Ibid* s 29B(1) (as added: see note 3 supra). See note 1 supra.

6 *Ie* under *ibid* s 28 (prospectively amended; and prospectively repealed): see para 663 ante.

7 *Ibid* s 29B(2)(a)(i) (as added: see note 3 supra). See note 1 supra. For the meaning of 'child' see para 663 note 4 ante.

8 *Ibid* s 29B(2)(a)(ii) (as added: see note 3 supra). See note 1 supra.

9 *Ie* under *ibid* s 29 (prospectively amended; and prospectively repealed): see para 664 ante.

10 *Ibid* s 29B(2)(b)(i) (as added: see note 3 supra). See note 1 supra.

11 *Ibid* s 29B(2)(b)(ii) (as added: see note 3 supra). See note 1 supra.

12 *Ibid* s 29B(3) (as added: see note 3 supra). See note 1 supra.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/C. DISQUALIFICATION ORDERS UNDER THE CRIMINAL JUSTICE AND COURT SERVICES ACT 2000/667. Meaning of 'offence against a child'.

### **667. Meaning of 'offence against a child'.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

For the purposes of Part II of the Criminal Justice and Court Services Act 2000<sup>2</sup>, an individual commits an offence against a child<sup>3</sup> if:

- 1148 (1) he commits any offence mentioned in heads (a) to (f) below<sup>4</sup>;
- 1149 (2) he commits against a child any offence mentioned in heads (i) to (viii) below<sup>5</sup>; or
- 1150 (3) he falls within heads (A) to (E) below<sup>6</sup>,

and references to being convicted of, or charged with, an offence against a child are to be read accordingly<sup>7</sup>.

The offences referred to in head (1) above are as follows:

- 1151 (a) cruelty to children<sup>8</sup>;
- 1152 (b) infanticide<sup>9</sup>;
- 1153 (c) an offence in relation to indecent photographs of children<sup>10</sup>;
- 1154 (d) abduction of a child by a parent<sup>11</sup>;
- 1155 (e) possession of an indecent photograph of a child<sup>12</sup>;
- 1156 (f) offences against children under the Sexual Offences Act 2003<sup>13</sup>.

The offences referred to in head (2) above are as follows:

- 1157 (i) murder<sup>14</sup>;
- 1158 (ii) manslaughter<sup>15</sup>;
- 1159 (iii) kidnapping<sup>16</sup>;
- 1160 (iv) false imprisonment<sup>17</sup>;
- 1161 (v) wounding and causing grievous bodily harm<sup>18</sup>;
- 1162 (vi) assault occasioning actual bodily harm<sup>19</sup>;
- 1163 (vii) certain offences under the Sexual Offences Act 2003<sup>20</sup>;
- 1164 (viii) trafficking people for exploitation<sup>21</sup>.

A person falls within head (3) above if:

- 1165 (A) he makes a threat to kill a child<sup>22</sup>;
- 1166 (B) he supplies or offers to supply a Class A drug to a child, or is concerned in the supplying of such a drug to a child, or is concerned in the making to a child of an offer to supply such a drug<sup>23</sup>;
- 1167 (C) he commits an offence, or trespasses, with intent to commit a sexual offence where the intended offence was an offence against a child<sup>24</sup>;
- 1168 (D) he causes or allows the death of a child<sup>25</sup>;

1169 (E) he aids, abets, counsels, procures or incites the commission of an offence against a child, or conspires or attempts to commit such an offence<sup>26</sup>.

1 The Criminal Justice and Court Services Act 2000 s 26 and Sch 4 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 The Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (as amended; prospectively repealed).

3 For the meaning of 'child' see para 663 note 4 ante.

4 Criminal Justice and Court Services Act 2000 s 26(1)(a). The offences referred to in the text are those mentioned in Sch 4 para 1 (as amended): see the text and notes 8-13 *infra*. The Secretary of State may by order amend Sch 4 (as amended) so as to add, modify or omit any entry: s 26(2). See notes 1 *supra*. As to the Secretary of State see para 155 ante.

5 *Ibid* s 26(1)(b). The offences referred to in the text are those mentioned in Sch 4 para 2 (as amended): see the text and notes 14-21 *infra*. See notes 1, 4 *supra*.

6 *Ibid* s 26(1)(c). The text refers to an individual who falls within Sch 4 para 3 (as amended): see the text and notes 22-26 *infra*. See notes 1, 4 *supra*.

7 *Ibid* s 26(1). See note 1 *supra*.

8 *Ibid* Sch 4 para 1(a). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Children and Young Persons Act 1933 s 1 (as amended): see para 611 ante.

9 Criminal Justice and Court Services Act 2000 Sch 4 para 1(b). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Infanticide Act 1938 s 1 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 103.

10 Criminal Justice and Court Services Act 2000 Sch 4 para 1(j). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Protection of Children Act 1978 s 1 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 757.

11 Criminal Justice and Court Services Act 2000 Sch 4 para 1(k). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Child Abduction Act 1984 s 1 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 137 et seq.

12 Criminal Justice and Court Services Act 2000 Sch 4 para 1(l). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Criminal Justice Act 1988 s 160 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 758.

13 Criminal Justice and Court Services Act 2000 Sch 4 para 1(m) (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 44(1), (5)(a)). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Sexual Offences Act 2003 ss 5-26 (as amended), ss 47-50: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 165 et seq.

14 Criminal Justice and Court Services Act 2000 Sch 4 para 2(a). See notes 1, 4 *supra*. As to murder see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 89-91.

15 *Ibid* Sch 4 para 2(b). See notes 1, 4 *supra*. As to manslaughter see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 92-102.

16 *Ibid* Sch 4 para 2(c). See notes 1, 4 *supra*. As to kidnapping see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136.

17 *Ibid* Sch 4 para 2(d). See notes 1, 4 *supra*. As to false imprisonment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 135.

18 *Ibid* Sch 4 para 2(e). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Offences against the Person Act 1861 s 18 (as amended) or s 20 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 118, 120.

19 Criminal Justice and Court Services Act 2000 Sch 4 para 2(f). See notes 1, 4 *supra*. The offence referred to in the text is an offence under the Offences against the Person Act 1861 s 47 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 149.

20 Criminal Justice and Court Services Act 2000 Sch 4 para 2(n) (added by the Nationality, Immigration and Asylum Act 2002 s 146(4); and substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 44(1), (5)(b)). See notes 1, 4 supra. The offence referred to in the text is an offence under the Sexual Offences Act 2003 ss 1-4, 30-41, 52, 53, 57-61 (as amended), 66, 67: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 165 et seq.

21 Criminal Justice and Court Services Act 2000 Sch 4 para 2(o) (added by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 5(6)). See notes 1, 4 supra. The offence referred to in the text is an offence under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 4 (as amended): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

22 Criminal Justice and Court Services Act 2000 Sch 4 para 3(a). See notes 1, 4 supra. Making a threat to kill a child is an offence under the Offences against the Person Act 1861 s 16 (as substituted): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 105.

23 Criminal Justice and Court Services Act 2000 Sch 4 para 3(s). See notes 1, 4 supra. The text refers to an offence under the Misuse of Drugs Act 1971 s 4(3): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 772; MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) para 249 et seq. For these purposes, 'Class A drug' has the same meaning as in the Misuse of Drugs Act 1971 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 770): Criminal Justice and Court Services Act 2000 s 42(1).

24 Ibid Sch 4 para 3(sa) (added by the Sexual Offences Act 2003 s 139, Sch 6 para 44(1), (5)(c)). See notes 1, 4 supra. The offence referred to in the text is an offence under the Sexual Offences Act 2003 ss 62, 63: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 231 et seq.

25 Criminal Justice and Court Services Act 2002 Sch 4 para 3(sb) (added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 paras 54, 56). See notes 1, 4 supra. The offence referred to in the text is an offence under the Domestic Violence, Crime and Victims Act 2004 s 5: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 107.

26 Criminal Justice and Court Services Act 2000 Sch 4 para 3(t). See notes 1, 4 supra. As to the modification of this provision in relation to equivalent armed forces offences see para 668 text and note 7 post. As to aiding, abetting, counselling or procuring the commission of a crime see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 49 et seq. As to incitement, conspiracy and attempt see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 65 et seq.

## UPDATE

### 667 Meaning of 'offence against a child'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 26--See further Serious Crime Act 2007 Sch 6 para 40 (references to common law offence of incitement).

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## **668. Equivalent armed forces offences.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

For the purposes of Part II of the Criminal Justice and Court Services Act 2000<sup>2</sup>, an individual is treated as being convicted of or (as the case may be) charged with an offence against a child<sup>3</sup> if he is convicted of or charged with an equivalent armed forces offence<sup>4</sup>. An 'equivalent armed forces offence' means an armed forces offence constituted by an act or omission which is an offence against a child or would, if committed in England or Wales, be an offence against a child<sup>5</sup>. It also includes a civil offence<sup>6</sup> of attempting to commit an offence against a child, or an act that would, if committed in England or Wales, be an offence against a child<sup>7</sup>.

1 The Criminal Justice and Court Services Act 2000 s 27 (prospectively amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Ie the Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (as amended; prospectively repealed).

3 For the meaning of 'offence against a child' see para 667 ante. For the meaning of 'child' see para 663 note 4 ante.

4 Criminal Justice and Court Services Act 2000 s 27(1). See note 1 supra. 'Armed forces offence' means an offence under the Army Act 1955 s 70 (as amended; prospectively repealed), the Air Force Act 1955 s 70 (as amended; prospectively repealed), or the Naval Discipline Act 1957 s 42 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 422); Criminal Justice and Court Services Act 2000 s 42(1). This definition is repealed by the Armed Forces Act 2006 s 378(1), Sch 16 para 179(1), (2) as from a day to be appointed under s 383(2). At the date at which this volume states the law no such day had been appointed.

5 Criminal Justice and Court Services Act 2000 s 27(2). See note 1 supra. Section 27(2) is amended by the Armed Forces Act 2006 s 378(1), Sch 16 para 179(1), (2) as from a day to be appointed under s 383(2) so that the reference to an armed forces offence is replaced by a reference to an offence under the Armed Forces Act 2006 s 42 (not yet in force) (see ARMED FORCES). At the date at which this volume states the law no such day had been appointed.

6 'Civil offence' has the same meaning as in the Army Act 1955 (see ARMED FORCES vol 2(2) (Reissue) para 422); Criminal Justice and Court Services Act 2000 s 27(5). See note 1 supra. The provisions of s 27(3)-(5) are substituted by the Armed Forces Act 2006 s 378(1), Sch 16 para 179(1), (2) as from a day to be appointed under s 383(2) so as to apply the Armed Forces Act 2006 s 48 (not yet in force) (see ARMED FORCES) with certain modifications. At the date at which this volume states the law no such day had been appointed.

7 Criminal Justice and Court Services Act 2000 s 27(3) (prospectively substituted: see note 6 supra). See note 1 supra.

For the purpose of determining whether an offence is an equivalent armed forces offence, Sch 4 (as amended) has effect as if the reference to attempt were omitted from Sch 4 para 3(t) (see para 667 text and note 26 ante): s 27(4) (as so prospectively substituted).

## **UPDATE**

### **668 Equivalent armed forces offences**

NOTE 4--Repeal of definition of 'armed forces offence' in force on 31 October 2009: SI 2009/1167.



NOTES 5, 6--Appointed day for the commencement of the Armed Forces Act 2006 Sch 16 para 179 is 31 October 2009: SI 2009/1167.

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### **669. Appeals against disqualification order.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual may appeal against a disqualification order<sup>2</sup>:

- 1170 (1) where he is convicted of an offence against a child<sup>3</sup> and a qualifying sentence<sup>4</sup> is imposed in respect of the conviction<sup>5</sup>, as if the order were a sentence passed on him for the offence of which he has been convicted<sup>6</sup>;
- 1171 (2) where he is charged with an offence against a child and a relevant order<sup>7</sup> is made in respect of the act or omission charged against him as the offence<sup>8</sup>, as if he had been convicted of an offence on indictment and the order were a sentence passed on him for the offence<sup>9</sup>;
- 1172 (3) where the order is made at the discretion of the court<sup>10</sup>, as if the order were a sentence passed on him for the offence of which he has been convicted<sup>11</sup>.

1 The Criminal Justice and Court Services Act 2000 s 31 is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 Criminal Justice and Court Services Act 2000 s 31(1). See note 1 supra. As to disqualification orders see paras 663-666 ante.

In relation to a disqualification order made by a court-martial, this provision has effect as if the reference to conviction on indictment were a reference to conviction by a court-martial: s 31(2). This provision is amended by the Armed Forces Act 2006 s 378(1), Sch 16 para 181 as from a day to be appointed under s 382(3) so that the term 'the Court Martial' will be substituted for 'a court-martial'. At the date at which this volume states the law no such day had been appointed.

3 For the meaning of 'offence against a child' see para 667 ante. For the meaning of 'child' see para 663 note 4 ante.

4 For the meaning of 'qualifying sentence' see para 663 note 8 ante.

5 Ie the condition mentioned in the Criminal Justice and Court Services Act 2000 s 28(2) (prospectively amended; prospectively repealed) or s 29(2) (prospectively amended; prospectively repealed) is satisfied in his case (see paras 663-664 ante): s 31(1)(a). See note 1 supra.

6 Ibid s 31(1)(a). See note 1 supra.

7 For the meaning of 'relevant order' see para 663 note 11 ante.

8 Ie the condition mentioned in the Criminal Justice and Court Services Act 2000 s 28(3) (prospectively amended; prospectively repealed) or s 29(3) (prospectively amended; prospectively repealed) is satisfied in his case (see paras 663-664 ante): s 31(1)(b). See note 1 supra.

9 Ibid s 31(1)(b). See note 1 supra.

10 Ie under ibid s 29A (as added; prospectively amended; prospectively repealed) (see para 665 ante).

11 Ibid s 31(1)(c) (added by the Criminal Justice Act 2003 s 299, Sch 30 paras 1, 4). See note 1 supra.

### **UPDATE**

**669 Appeals against disqualification order**

NOTE 2--Appointed day for the commencement of the Armed Forces Act 2006 Sch 16 para 181 is 31 October 2009: SI 2009/1167.

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## **670. Review of disqualification order.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual who is subject to a disqualification order<sup>2</sup> may make an application to the Tribunal<sup>3</sup>, which must determine whether or not the individual is to continue to be subject to the order<sup>4</sup>. If the Tribunal is satisfied that the individual is suitable to work<sup>5</sup> with children<sup>6</sup>, it must direct that the order is to cease to have effect; otherwise, it must dismiss the application<sup>7</sup>.

An individual may only make such an application with the leave of the Tribunal<sup>8</sup>, and an application for such leave may not be made unless<sup>9</sup>:

1173 (1) in the case of an individual who was under the age of 18 when he committed the offence against a child<sup>10</sup>: (a) at least five years have elapsed since the relevant date<sup>11</sup>; and (b) in the period of five years ending with the time when he makes the application, he has made no other such application<sup>12</sup>;

1174 (2) in the case of any other individual<sup>13</sup>: (a) at least 10 years have elapsed since the relevant date<sup>14</sup>; and (b) in the period of 10 years ending with the time when he makes the application, he has made no other such application<sup>15</sup>.

The Tribunal may not grant an application for leave unless it considers that the individual's circumstances have changed since the order was made or, as the case may be, since he last made such an application, and that the change is such that leave should be granted<sup>16</sup>.

1 The Criminal Justice and Court Services Act 2000 ss 32-34 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 As to disqualification orders see paras 663-666 ante.

3 Criminal Justice and Court Services Act 2000 s 32(1). See note 1 supra. 'The Tribunal' means the Tribunal established under the Protection of Children Act 1999 s 9 (as amended; prospectively amended) (see para 708 et seq post); Criminal Justice and Court Services Act 2000 s 42(1). As to the procedure to be followed in the event of such a review see the Protection of Children and Vulnerable Adults and Care Standards Tribunal (Review of Disqualification Orders) Regulations 2006, SI 2006/1929 (modified by SI 2007/2620).

4 Criminal Justice and Court Services Act 2000 s 32(2). See note 1 supra.

5 For the meaning of 'work' see para 663 note 3 ante.

6 For the meaning of 'child' see para 663 note 4 ante.

7 Criminal Justice and Court Services Act 2000 s 32(3). See note 1 supra.

8 Ibid s 33(1). See note 1 supra.

9 Ibid s 33(2). See note 1 supra.

10 Ibid s 33(3). See note 1 supra. Where an order has been made under s 34 (as amended) restoring a disqualification order (see para 671 post), the reference to the individual being under the age of 18 when he

committed the offence against a child is to be read as a reference to his being under that age when the order restoring the disqualification was made: s 34(5)(a).

11 Ibid s 33(3)(a). See note 1 supra. 'The relevant date' means:

- 336 (1) in relation to an individual whose sentence is an actual term of custody, the day on which he is released or, if later, the day on which the disqualification order is made (s 33(6)(a));
- 337 (2) in relation to an individual whose sentence is suspended and does not take effect, the day on which the disqualification order is made (s 33(6)(b));
- 338 (3) in relation to an individual whose sentence is an order for admission to hospital: (a) if he is detained in a hospital pursuant to the order, the day on which he ceases to be liable to be detained there; or (b) if he is not so detained, the day on which the disqualification order is made (s 33(6)(c));
- 339 (4) in relation to an individual whose sentence is a guardianship order, the day on which the disqualification order is made (s 33(6)(d)); and
- 340 (5) in relation to an individual not falling within heads (1)-(4) supra, the day on which the disqualification order is made (s 33(6)(e) (added by the Criminal Justice Act 2004 s 299, Sch 30 paras 1, 5(1), (2))).

Where an order has been made under the Criminal Justice and Court Services Act 2000 s 34 (as amended) restoring a disqualification order (see para 671 post), the reference to the relevant date is to be read as a reference to the date on which the order restoring the disqualification was made: s 34(5)(b).

'Actual term of custody' means a term of imprisonment or detention which is not suspended, or is suspended but takes effect: s 33(7). 'Detention' means detention (or detention and training) under any sentence or order mentioned in para 663 note 8 heads (2)-(6) ante or any sentence or order which would fall within those heads if it were for a term or period of 12 months or more: s 33(8) (substituted by the Criminal Justice Act 2003 Sch 30 paras 1, 5(1), (3)). 'Order for admission to hospital' means: (i) an order made by the Crown Court, the Court of Appeal, a court-martial or the Courts-Martial Appeal Court that the individual be admitted to hospital; or (ii) a hospital order within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 391): Criminal Justice and Court Services Act 2000 s 33(7). This definition is amended by the Armed Forces Act 2006 s 378, Sch 16 para 182(a), Sch 17 as from a day to be appointed under s 382(3) so as to repeal head (i) supra. At the date at which this volume states the law no such day had been appointed). For the meaning of 'guardianship order' see para 663 note 8 ante; definition applied by the Criminal Justice and Court Services Act 2000 s 33(7).

References, in relation to a suspended sentence, to its taking effect are to its taking effect by virtue of: (A) an order or direction under the Naval Discipline Act 1957 s 91 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 477), or the Criminal Justice Act 2003 Sch 12 para 8(2)(a) or (b) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 128); or (B) the determination of the suspension under the Army Act 1955 s 120 (as amended; prospectively repealed) or the Air Force Act 1955 s 120 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 514): Criminal Justice and Court Services Act 2000 s 42(2) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 133, 135). This provision is repealed by the Armed Forces Act 2006 s 378, Sch 16 para 183(b), Sch 17 as from a day to be appointed under s 382(3). At the date at which this volume states the law no such day had been appointed.

12 Criminal Justice and Court Services Act 2000 s 33(3)(b). See note 1 supra.

13 Ibid s 33(4). See note 1 supra.

14 Ibid s 33(4)(a). See note 1 supra. Where an order has been made under s 34 (as amended) restoring a disqualification order (see para 1031 post), the reference to the relevant date is to be read as a reference to the date on which the order restoring the disqualification was made: s 34(5)(b).

15 Ibid s 33(4)(b). See note 1 supra.

16 Ibid s 33(5). See note 1 supra. Where an order has been made under s 34 (as amended) restoring a disqualification order (see para 671 post), the reference to the individual's circumstances changing since the disqualification order was made is to be read as a reference to his circumstances changing since the order restoring the disqualification was made: s 34(5)(c).

## UPDATE

### 670 Review of disqualification order

NOTE 3--SI 2007/2620 revoked: SI 2008/2683.

NOTE 11--Appointed day for commencement of Armed Forces Act 2006 Sch 16 paras 182, 183, Sch 17 is 31 October 2009: SI 2009/1167.

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### **671. Restoration of disqualification order.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

If it appears to a chief officer of police<sup>2</sup> or a director of children's services of a local authority in England or a director of social services of a local authority in Wales that<sup>3</sup>:

1175 (1) a disqualification order<sup>4</sup> made in respect of the individual is no longer in force<sup>5</sup>; and

1176 (2) the individual has acted in such a way (whether before or after the order ceased to be in force) as to give reasonable cause to believe that an order restoring the disqualification is necessary to protect children<sup>7</sup> in general, or any children in particular, from serious harm from him<sup>8</sup>,

the chief officer or (as the case may be) the director may apply to the High Court for an order restoring the disqualification in respect of the individual<sup>9</sup>. Such an application may be made at any time after the disqualification order ceased to be in force<sup>10</sup>.

If the High Court is satisfied that the conditions set out in heads (1) and (2) above are satisfied, it must order that the disqualification order be restored<sup>11</sup>; otherwise, it must dismiss the application<sup>12</sup>.

1 The Criminal Justice and Court Services Act 2000 s 34 (as amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 As to chief officers of police see POLICE vol 36(1) (2007 Reissue) para 178 et seq.

3 Criminal Justice and Court Services Act 2000 s 34(1) (amended by the Children Act 2004 s 18(9), Sch 2 para 7(1), (2)). The amendment made by the Children Act 2004 has effect, in relation to any authority which appoints a director of children's services before 1 January 2008, from the day of his appointment (see s 18(9) (a)) and, otherwise, from 1 January 2008 (see Children Act 2004 (Director of Children's Services) Appointed Day Order 2007, SI 2007/1792, art 2). Prior to the appointment of a director of children's services or 1 January 2008, the power to apply to the high court for an order of restoration lies with a chief officer of police or a director of social services of a local authority: Criminal Justice and Court Services Act 2000 s 34(1) (as originally enacted). See note 1 supra.

4 As to disqualification orders see paras 663-666 ante.

5 Criminal Justice and Court Services Act 2000 s 34(2)(a). See note 1 supra. For these purposes, a disqualification order is no longer in force if a direction under s 32(3) (prospectively repealed) (see para 670 ante) has been given in respect of it and it is not restored by virtue of an order under s 34 (as amended): s 34(6).

7 For the meaning of 'child' see para 663 note 4 ante.

8 Criminal Justice and Court Services Act 2000 s 34(2)(b).

9 Ibid s 34(1). See note 1 supra.

10 Ibid s 34(3). See note 1 supra.

11 If an order is made, *ibid* s 33 (as amended; prospectively repealed) has effect with certain modifications: see para 670 notes 10-11, 14, 16 *ante*.

12 *Ibid* s 34(4). See note 1 *supra*.



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## ***D. EFFECT OF DISQUALIFICATION FROM WORKING WITH CHILDREN***

### **672. Grounds of disqualification for individuals working with children.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual is disqualified from working<sup>2</sup> with children<sup>3</sup> for the purposes of Part II of the Criminal Justice and Court Services Act 2000<sup>4</sup> if<sup>5</sup>:

- 1177 (1) he is included (otherwise than provisionally) in the list of individuals considered unsuitable to work with children kept under the Protection of Children Act 1999<sup>6</sup>;
- 1178 (2) he is subject to a direction prohibiting him from teaching etc on the grounds of being unsuitable to work with children<sup>7</sup>;
- 1179 (3) he is included, on the grounds that he is unsuitable to work with children, in any list kept by the Secretary of State<sup>8</sup> or the Welsh Ministers<sup>9</sup> of persons disqualified under the Education Act 1996<sup>10</sup>; or
- 1180 (4) he is subject to a disqualification order<sup>11</sup>.

1 The Criminal Justice and Court Services Act 2000 s 35 (as amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For the meaning of 'work' see para 663 note 3 ante.

3 For the meaning of 'child' see para 663 note 4 ante.

4 Ie the Criminal Justice and Court Services Act 2000 Pt 2 (ss 26-42) (as amended; prospectively repealed): see para 663 et seq ante.

5 Ibid s 35(4). See note 1 supra.

6 Ibid s 35(4)(a). See note 1 supra. As to the list see the Protection of Children Act 1999 s 1 (as amended; prospectively repealed); and para 648 ante.

7 Criminal Justice and Court Services Act 2000 s 35(4)(b) (substituted by the Education Act 2002 s 215(1), Sch 21 para 128(1), (2)). See note 1 supra. The direction referred to in the text is one made under the Education Act 2002 s 142 (prospectively repealed): see EDUCATION vol 15(2) (2006 Reissue) para 782.

8 As to the Secretary of State see para 155 ante.

9 As to the Welsh Ministers see para 155 ante.

10 Criminal Justice and Court Services Act 2000 s 35(4)(c). See note 1 supra. The text refers to a list kept under the Education Act 1996 ss 470, 471 (both repealed).

11 Criminal Justice and Court Services Act 2000 s 35(4)(d). See note 1 supra. As to disqualification orders see paras 663-666 ante.

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### **673. Effect of disqualification.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

An individual who is disqualified from working<sup>2</sup> with children<sup>3</sup> is guilty of an offence if he knowingly applies for, offers to do, accepts or does any work in a regulated position<sup>4</sup>. It is a defence for an individual charged with this offence to prove that he did not know, and could not reasonably be expected to know, that he was disqualified from working with children<sup>5</sup>.

If an individual knowingly: (1) offers work in a regulated position to, or procures work in a regulated position for, an individual who is disqualified from working with children<sup>6</sup>; or (2) fails to remove such an individual from such work<sup>7</sup>, he is guilty of an offence<sup>8</sup>.

An individual who is guilty of an offence under these provisions is liable on conviction to imprisonment or to a fine or to both<sup>9</sup>.

The Secretary of State<sup>10</sup> may by order apply these provisions to an individual who, under the law of Scotland or Northern Ireland, is subject to a prohibition or disqualification which, in the opinion of the Secretary of State, corresponds to disqualification from working with children<sup>11</sup>.

1 The Criminal Justice and Court Services Act 2000 ss 35, 37 are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 For the meaning of 'work' see para 663 note 3 ante.

3 For the grounds of disqualification for individuals working with children see para 672 ante. For the meaning of 'child' see para 663 note 4 ante.

4 Criminal Justice and Court Services Act 2000 s 35(1). See note 1 supra.

5 Ibid s 35(3). See note 1 supra.

6 Ibid s 35(2)(a). See note 1 supra. As to regulated positions see para 674 post.

7 Ibid s 35(2)(b). See note 1 supra.

8 Ibid s 35(2). See note 1 supra.

9 Ibid s 35(6). See note 1 supra. An individual guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both: see s 35(6). As to the statutory maximum see para 109 note 23 ante.

10 As to the Secretary of State see para 155 ante.

11 See the Criminal Justice and Court Services Act 2000 s 37(1), (2). See note 1 supra.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/ (ii) The System under the Protection of Children Act 1999 etc/D. EFFECT OF DISQUALIFICATION FROM WORKING WITH CHILDREN/674. Regulated positions.

#### **674. Regulated positions.**

The following provisions have effect until a day to be appointed<sup>1</sup>.

For the purposes of Part II of the Criminal Justice and Court Services Act 2000<sup>2</sup>, the following are regulated positions<sup>3</sup>:

- 1181 (1) a position whose normal duties include work in an establishment of one of the following types<sup>4</sup>, namely:
- .5**
- 50. (a) an institution which is exclusively or mainly for the detention of children<sup>5</sup>;
  - 51. (b) a hospital which is exclusively or mainly for the reception and treatment of children<sup>6</sup>;
  - 52. (c) a care home<sup>7</sup> which is exclusively or mainly for children<sup>8</sup>;
  - 53. (d) an educational institution<sup>9</sup>;
  - 54. (e) a children's home<sup>10</sup>;
  - 55. (f) a home provided by the Secretary of State<sup>11</sup>;
- .6**
- 1182 (2) a position whose normal duties include work on day care premises<sup>12</sup>;
  - 1183 (3) a position whose normal duties include caring for, training, supervising or being in sole charge of children<sup>13</sup>;
  - 1184 (4) a position whose normal duties involve unsupervised contact with children under arrangements made by a responsible person<sup>14</sup>;
  - 1185 (5) a position whose normal duties include caring for children under the age of 16 in the course of the children's employment<sup>15</sup>;
  - 1186 (6) a position a substantial part of whose normal duties includes supervising or training children under the age of 16 in the course of the children's employment<sup>16</sup>;
  - 1187 (7) one of the following positions<sup>17</sup>, namely:
- .7**
- 56. (a) member of the governing body of an educational institution<sup>18</sup>;
  - 57. (b) member of a relevant local government body<sup>19</sup>;
  - 58. (c) director of children's services and director of adult social services of a local authority in England<sup>20</sup>;
  - 59. (d) director of social services of a local authority in Wales<sup>21</sup>;
  - 60. (e) chief education officer of a local education authority in Wales<sup>22</sup>;
  - 61. (f) charity trustee of a children's charity<sup>23</sup>;
  - 62. (g) member of the Youth Justice Board for England and Wales<sup>24</sup>;
  - 63. (h) Children's Commissioner and deputy Children's Commissioner<sup>25</sup>;
  - 64. (i) Children's Commissioner for Wales or deputy Children's Commissioner for Wales<sup>26</sup>;
  - 65. (j) member, or chief executive, of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>27</sup>;
- .8**
- 1188 (8) a position whose normal duties include supervising or managing an individual in his work in a regulated position<sup>28</sup>.

1 The Criminal Justice and Court Services Act 2000 s 36 (as amended) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 10 as from a day to be appointed under s 65. At the date at which this volume states the law, no such day had been appointed.

2 In the Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (as amended; prospectively repealed): see para 663 et seq ante.

3 Ibid s 36(1). See note 1 supra. For the purpose of amending the definition of 'regulated position', the Secretary of State may by order make any amendment of s 36 (as amended) (apart from s 36(15)) which he thinks appropriate: s 36(15). As to the Secretary of State see para 155 ante.

4 Ibid s 36(1)(a). See note 1 supra.

5 Ibid s 36(2)(a). See note 1 supra. 'Detention' means detention by virtue of an order of a court or under an enactment: s 36(14).

6 Ibid s 36(2)(b). See note 1 supra. 'Hospital' has the meaning given by the National Health Service Act 1977 s 128(1) (see HEALTH SERVICES vol 54 (2008) PARA 12): Criminal Justice and Court Services Act 2000 s 42(1).

7 'Care home' has the same meaning as in the Care Standards Act 2000 (see para 985 note 1 post): Criminal Justice and Court Services Act 2000 s 42(1).

8 Ibid s 36(2)(c). See note 1 supra.

9 Ibid s 36(2)(d). See note 1 supra. 'Educational institution' means an institution which is exclusively or mainly for the provision of full time education to children: s 42(1). See EDUCATION.

10 Ibid s 36(2)(e). See note 1 supra. 'Children's home' has the same meaning as in the Care Standards Act 2000 (see para 983 post): Criminal Justice and Court Services Act 2000 s 42(1).

11 Ibid s 36(2)(f). See note 1 supra. The home referred to in the text means a home provided by the Secretary of State under the Children Act 1989 s 82(5): see para 158 ante.

12 Criminal Justice and Court Services Act 2000 s 36(1)(b). See note 1 supra. For the purposes of s 36 (as amended), work done on any premises is treated as not being done on day care premises to the extent that it is done in a part of the premises in which children are not looked after, or it is done at times when children are not looked after there: s 36(3). 'Day care premises' means premises in respect of which a person is registered under the Children Act 1989 Pt 10A (ss 79A-79X) (as added and amended) (see para 1070 et seq post) for providing day care: Criminal Justice and Court Services Act 2000 s 42(1).

13 Ibid s 36(1)(c). See note 1 supra. The duties referred to in head (3) in the text do not include caring for, training, supervising or being in sole charge of children in the course of the children's employment: s 36(4)(a). 'Employment' means paid employment, whether under a contract of service or apprenticeship or under a contract for services: s 42(1).

14 Ibid s 36(1)(d). See note 1 supra. The duties referred to in head (4) in the text do not include duties involving contact with children in the course of the children's employment: s 36(4)(b). The reference in head (4) in the text to unsupervised contact is to contact in the absence of any responsible person or carer; and in this context 'carer' means a person who holds a position such as is mentioned in head (3) in the text: s 36(5).

For the purposes of s 36 (as amended), the following are responsible persons in relation to a child:

341 (1) the child's parent or guardian and any adult with whom the child lives (s 36(13)(a));

342 (2) the person in charge of any establishment mentioned in heads (1)(a)-(f) in the text in which the child is accommodated, is a patient or receives education, and any person acting on behalf of such a person (s 36(13)(b));

343 (3) in relation to England: (a) a person registered under the Childcare Act 2006 Pt 3 (ss 31-98) (as amended) otherwise than as a child minder, for providing care on premises on which the child is cared for; and (b) a person registered under the Childcare Act 2006 Pt 3 (as amended) as a child minder who is providing early years or later years child minding (within the meaning of that Pt 3 (as amended)) for the child (Criminal Justice and Court Services Act 2000 s 36(13)(c) (substituted by the Childcare Act 2006 s 103(1), Sch 2 para 39));

344 (4) in relation to Wales, a person registered under the Children Act 1989 Pt 10A (as added and amended) (see para 1070 et seq post) (Criminal Justice and Court Services Act 2000 s 36(13)(ca) (added by the Childcare Act 2006 Sch 2 para 39)); and

- 345 (5) any person holding a position mentioned in heads (7)(a)-(j) in the text (Criminal Justice and Court Services Act 2000 s 36(13)(d)).
- 15 Ibid s 36(1)(e).
- 16 Ibid s 36(1)(f).
- 17 Ibid s 36(1)(g).
- 18 Ibid s 36(6)(a). As to governing bodies of educational institutions see EDUCATION.
- 19 Ibid s 36(6)(b). For this purpose, a person is a member of a relevant local government body if: (1) he is a member of, or of an executive of, a local authority and discharges any education functions, or social services functions, of a local authority; or (2) he is a member of an executive of a local authority which discharges any such functions; or (3) he is a member of: (a) a committee of an executive of a local authority; or (b) an area committee, or any other committee, of a local authority, which discharges any such functions: s 36(7). Any reference in s 36(7) to a committee includes a reference to any sub-committee which discharges any functions of that committee: s 36(9). 'Area committee' has the same meaning as in the Local Government Act 2000 s 18 (see LOCAL GOVERNMENT vol 69 (2009) PARA 360); 'executive', in relation to a local authority, has the same meaning as in Pt II (ss 10-48) (see LOCAL GOVERNMENT vol 69 (2009) PARA 327 et seq); 'education functions', in relation to a local authority, means any functions with respect to education which are conferred on the authority in its capacity as a local education authority (see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq); and 'social services functions', in relation to a local authority, has the same meaning as in the Local Authority Social Services Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006): Criminal Justice and Court Services Act 2000 s 36(14). For these purposes, 'local authority' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 20): Criminal Justice and Court Services Act 2000 s 42(1).
- 20 Ibid s 36(6)(ba) (added by the Children Act 2004 s 18(9), (10), Sch 2 para 7(1), (3)(a)).
- 21 Criminal Justice and Court Services Act 2000 s 36(6)(c) (amended by the Children Act 2004 s 18(9), (10), Sch 2 para 7(1), (3)(b)).
- 22 Criminal Justice and Court Services Act 2000 s 36(6)(d) (amended by the Children Act 2004 s 18(9), (10), Sch 2 para 7(1), (3)(c)).
- 23 Criminal Justice and Court Services Act 2000 s 36(6)(e). 'Charity' and 'charity trustee' have the same meanings as in the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 1): Criminal Justice and Court Services Act 2000 s 42(1). For these purposes, a charity is a children's charity if the individuals who are workers for the charity normally include individuals working in regulated positions: s 36(11). An individual is a worker for a charity if he does work under arrangements made by the charity, but this does not include any arrangements made for purposes which are merely incidental to the purposes for which the charity is established: s 36(12).
- 24 Ibid s 36(6)(f). As to the Youth Justice Board see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1705.
- 25 Ibid s 36(6)(fa) (added by the Children Act 2004 s 1(2), Sch 1 para 11).
- 26 Criminal Justice and Court Services Act 2000 s 36(6)(g). As to the Children's Commissioner for Wales see para 167 et seq ante.
- 27 Ibid s 36(6)(h). As to CAFCASS see para 230 et seq ante.
- 28 Ibid s 36(1)(h). For this purpose, the holder of a position only supervises an individual if he supervises the day-to-day performance of the individual's duties (s 36(10)(a)), and only manages an individual if the individual is directly responsible to him for the performance of his duties or he has authority to dismiss the individual (s 36(10)(b)).

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### **(iii) The System under the Safeguarding Vulnerable Groups Act 2006**

#### **A. THE INDEPENDENT BARRING BOARD**

##### **675. Membership and tenure of office.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board is a body corporate<sup>2</sup> consisting of a chairman, and such number of other members as the Secretary of State<sup>3</sup> decides<sup>4</sup>. The chairman and other members are to be appointed by the Secretary of State, and must appear to the Secretary of State to have knowledge or experience of any aspect of child protection<sup>5</sup>.

The chairman and members hold and must vacate office as such in accordance with the terms of their respective appointments<sup>6</sup>. The appointment of a person to hold office is for a term not exceeding five years<sup>7</sup>. A person holding office may at any time resign that office by giving notice in writing to the Secretary of State<sup>8</sup>. The Secretary of State may by notice in writing remove a person from office if satisfied that any of the following applies to him:

- 1189 (1) he has, without reasonable excuse, failed, for a continuous period of three months, to carry out his functions<sup>9</sup>;
- 1190 (2) he has been convicted (whether before or after his appointment) of a criminal offence<sup>10</sup>;
- 1191 (3) he is an undischarged bankrupt or his estate has been sequestrated and he has not been discharged<sup>11</sup>;
- 1192 (4) he is the subject of a bankruptcy restrictions order or an interim order<sup>12</sup> or an order to the like effect made under any corresponding enactment in force in Scotland or Northern Ireland<sup>13</sup>;
- 1193 (5) he has made a composition or arrangement with, or granted a trust deed for, his creditors<sup>14</sup>;
- 1194 (6) he has failed to comply with the terms of his appointment<sup>15</sup>;
- 1195 (7) he is otherwise unable or unfit to carry out his functions as chairman or member<sup>16</sup>.

A person who ceases to be chairman or a member is eligible for re-appointment, except where he is removed from office under the provisions above<sup>17</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Ibid s 1(1). See note 1 supra.

<sup>3</sup> As to the Secretary of State see para 155 ante.

<sup>4</sup> Safeguarding Vulnerable Groups Act 2006 s 1(1), Sch 1 para 1(1). See note 1 supra.

- 5 Ibid Sch 1 para 1(2). See note 1 supra. 'Child' means a person who has not attained the age of 18: s 60(1). See note 1 supra.
- 6 Ibid Sch 1 para 2(1). See note 1 supra.
- 7 Ibid Sch 1 para 2(2). See note 1 supra.
- 8 Ibid Sch 1 para 2(3). See note 1 supra.
- 9 Ibid Sch 1 para 2(4)(a). See note 1 supra.
- 10 Ibid Sch 1 para 2(4)(b). See note 1 supra.
- 11 Ibid Sch 1 para 2(4)(c). See note 1 supra.
- 12 Ie under the Insolvency Act 1986 Sch 4A (as added): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.
- 13 Safeguarding Vulnerable Groups Act 2006 Sch 1 para 2(4)(d). See note 1 supra.
- 14 Ibid Sch 1 para 2(4)(e). See note 1 supra.
- 15 Ibid Sch 1 para 2(4)(f). See note 1 supra.
- 16 Ibid Sch 1 para 2(4)(g). See note 1 supra.
- 17 Ibid Sch 1 para 2(5). See note 1 supra.

## **UPDATE**

### **675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/A. THE INDEPENDENT BARRING BOARD/676. Remuneration, pension etc of members.

### **676. Remuneration, pension etc of members.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board must pay to the chairman and each of the other members such remuneration and allowances as may be determined by the Secretary of State<sup>2</sup>, and must, in addition and if required to do so by the Secretary of State:

- 1196 (1) pay such pension, allowances or gratuities as may be determined by the Secretary of State to or in respect of a person who is or has been the chairman or a member<sup>3</sup>; or
- 1197 (2) make such payments as may be so determined towards provision for the payment of a pension, allowances or gratuities to or in respect of such a person<sup>4</sup>.

If the Secretary of State thinks that there are special circumstances which make it right for a person ceasing to hold office as chairman or a member to receive compensation, the Board must pay to him a sum by way of compensation of such amount as may be determined by the Secretary of State<sup>5</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Ibid s 1(1), Sch 1 para 3(1). See note 1 supra. As to the appointment etc of the chairman and other members of the Board see para 675 ante. Service as chairman or other member of the Board is included among the kinds of service to which a scheme under the Superannuation Act 1972 s 1 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 567) can apply: Safeguarding Vulnerable Groups Act 2006 Sch 1 para 3(4). The Board must pay to the Minister for the Civil Service, at such times as he may direct, such sums as he may determine in respect of any increase attributable to such a scheme in the sums payable out of money provided by Parliament under the Superannuation Act 1972: Safeguarding Vulnerable Groups Act 2006 Sch 1 para 3(5). As to the Secretary of State see para 155 ante. As to the Minister for the Civil Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 395, 427.

<sup>3</sup> Ibid Sch 1 para 3(2)(a). See note 1 supra.

<sup>4</sup> Ibid Sch 1 para 3(2)(b). See note 1 supra.

<sup>5</sup> Ibid Sch 1 para 3(3). See note 1 supra.

## **UPDATE**

### **675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/A. THE INDEPENDENT BARRING BOARD/677. Staff and staff transfer schemes.

### **677. Staff and staff transfer schemes.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board must have a chief executive<sup>2</sup>, who may be the chairman<sup>3</sup>, and such other employees as it may appoint<sup>4</sup>. The Board may make arrangements for persons to be seconded to it to serve as members of its staff<sup>5</sup>. A member of a police force on temporary such service is under the direction and control of the Board<sup>6</sup>.

The Board must pay to its employees such remuneration and allowances as it may determine<sup>7</sup>, and it may pay, or make payments in respect of, such pensions, allowances or gratuities to or in respect of its employees or former employees as it may determine<sup>8</sup>.

The Secretary of State<sup>9</sup> may make a staff transfer scheme providing<sup>10</sup>:

- 1198 (1) for a person employed in the civil service of the state to become an employee of the Board<sup>11</sup>;
- 1199 (2) for his terms of employment to have effect (subject to any necessary modifications) as the terms of his contract of employment with the Board<sup>12</sup>;
- 1200 (3) for the accompanying transfer of the rights, powers, duties and liabilities of the Crown under or in connection with his terms of employment<sup>13</sup>;
- 1201 (4) for anything done (or having effect as if done) before that transfer by or in relation to the Crown in respect of the terms of employment or the person to be treated as having been done by or in relation to the Board<sup>14</sup>.

A staff transfer scheme<sup>15</sup> may provide for a period before a person became an employee of the Board to count as a period during which he was such an employee (and for the operation of the scheme not to be treated as having interrupted the continuity of that period)<sup>16</sup>. Such a scheme may also provide for a person in the civil service of the state who would otherwise become an employee of the Board not to become such an employee if he gives notice objecting to the operation of the scheme in relation to him<sup>17</sup>. Such a scheme may also provide for any person who would be treated (whether by an enactment or otherwise) as having his employment terminated by the operation of the scheme not to be so treated<sup>18</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Ibid s 1(1), Sch 1 para 4(1)(a). See note 1 supra.

<sup>3</sup> Ibid Sch 1 para 4(2). See note 1 supra. As to the appointment etc of the chairman see para 675 ante.

<sup>4</sup> Ibid Sch 1 para 4(1)(b). See note 1 supra.

<sup>5</sup> Ibid Sch 1 para 4(3). See note 1 supra.

<sup>6</sup> Ibid Sch 1 para 4(4). See note 1 supra.

<sup>7</sup> Ibid Sch 1 para 5(1). See note 1 supra. Employment with the Independent Barring Board is included among the kinds of service to which a scheme under the Superannuation Act 1972 s 1 (as amended) (see

CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 567) can apply: Safeguarding Vulnerable Groups Act 2006 Sch 1 para 4(3). If any person on ceasing to be employed by the Board becomes or continues to be one of its members, and was, by reference to his employment, a participant in such a scheme, the Minister for the Civil Service may determine that his service as a member of the Board is to be treated for the purposes of the scheme as if his service as a member were service as an employee of the Board (whether or not any benefits are payable to or in respect of him): Sch 1 para 5(4). The Board must pay to the Minister for the Civil Service, at such times as he may direct, such sums as he may determine in respect of any increase attributable to Sch 1 para 5 in the sums payable out of money provided by Parliament under the Superannuation Act 1972: Safeguarding Vulnerable Groups Act 2006 Sch 1, para 5(5). As to the Minister for the Civil Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 395, 427.

8 Ibid Sch 1 para 5(2). See note 1 supra.

9 As to the Secretary of State see para 155 ante.

10 Safeguarding Vulnerable Groups Act 2006 s 1(2), Sch 2 para 1(1). See note 1 supra.

11 Ibid Sch 2 para 1(1)(a). See note 1 supra.

12 Ibid Sch 2 para 1(1)(b). See note 1 supra.

13 Ibid Sch 2 para 1(1)(c). See note 1 supra.

14 Ibid Sch 2 para 1(1)(d). See note 1 supra.

15 A staff transfer scheme may make supplementary, incidental, transitional and consequential provision: *ibid* Sch 2 para 3. See note 1 supra.

16 Ibid Sch 2 para 1(2). See note 1 supra.

17 Ibid Sch 2 para 1(3). See note 1 supra.

18 Ibid Sch 2 para 1(4). See note 1 supra.

## **UPDATE**

### **675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/A. THE INDEPENDENT BARRING BOARD/678. Delegation of functions.

### **678. Delegation of functions.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board may to such extent as it may determine delegate any of its functions to:

- 1202 (1) one of its members<sup>2</sup>;
- 1203 (2) a member of its staff<sup>3</sup>;
- 1204 (3) a committee consisting of some of its members, members of its staff or both members and members of staff<sup>4</sup>, which must be chaired by a member<sup>5</sup>.

The Board may, additionally, to such extent as it may determine, delegate any of its functions, other than a core function<sup>6</sup>, to a person who is neither a member nor a member of staff<sup>7</sup>, or to a committee (including a committee which comprises or includes persons who are neither members nor members of staff)<sup>8</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Ibid s 1(1), Sch 1 para 6(1)(a). See note 1 supra.

<sup>3</sup> Ibid Sch 1 para 6(1)(b). See note 1 supra.

<sup>4</sup> Ibid Sch 1 para 6(1)(c). See note 1 supra.

<sup>5</sup> Ibid Sch 1 para 6(2). See note 1 supra.

<sup>6</sup> A core function is: (1) determining whether it is appropriate for a person to be included in a barred list (see para 681 post); (2) determining whether to remove a person from a barred list (see para 681 post); (3) considering representations made for the purposes of ibid Sch 3 (see para 681 et seq post): Sch 1 para 8. See note 1 supra.

<sup>7</sup> Ibid Sch 1 para 7(a). See note 1 supra.

<sup>8</sup> Ibid Sch 1 para 7(b). See note 1 supra.

## **UPDATE**

### **675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/A. THE INDEPENDENT BARRING BOARD/679. Reports, funding and accounts.

### **679. Reports, funding and accounts.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

As soon as possible after the end of each financial year<sup>2</sup> the Independent Barring Board must issue a report on the exercise of its functions during that year<sup>3</sup>, and must arrange for the report to be published in such manner as it considers appropriate<sup>4</sup>. The Secretary of State<sup>5</sup> may direct the Board to submit a report to him on any matter regarding the exercise of its functions as may be specified in the direction<sup>6</sup>.

The Secretary of State may make payments to the Board of such amounts, at such times and on such conditions (if any) as he thinks appropriate<sup>7</sup>.

The Board must keep its accounts in such form as the Secretary of State determines<sup>8</sup>, and must prepare annual accounts in respect of each financial year in such form as the Secretary of State decides<sup>9</sup>. Before the end of the specified period<sup>10</sup> following the end of each financial year to which the annual accounts relate the Board must send a copy of the accounts to the Secretary of State and the Comptroller and Auditor General<sup>11</sup>. The Comptroller and Auditor General must examine, certify and report on the annual accounts<sup>12</sup>, and send a copy of the accounts and of his report to the Secretary of State, who must lay them before each House of Parliament<sup>13</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 The financial year is the period starting on the day the Board is established and ending on the next 31 March; and each succeeding period of 12 months: *ibid* s 1(1) Sch 1 para 12(5). See note 1 *supra*.

3 *Ibid* Sch 1 para 9(1). See note 1 *supra*.

4 *Ibid* Sch 1 para 9(2). See note 1 *supra*.

5 As to the Secretary of State see para 155 *ante*.

6 Safeguarding Vulnerable Groups Act 2006 Sch 1 para 10. See note 1 *supra*.

7 *Ibid* Sch 1 para 11. See note 1 *supra*.

8 *Ibid* Sch 1 para 12(1). See note 1 *supra*.

9 *Ibid* Sch 1 para 12(2). See note 1 *supra*.

10 The specified period is such period as the Secretary of State directs: *ibid* Sch 1 para 12(6). See note 1 *supra*.

11 *Ibid* Sch 1 para 12(3). See note 1 *supra*.

12 *Ibid* Sch 1 para 12(4)(a). See note 1 *supra*.

13 *Ibid* Sch 1 para 12(4)(b). See note 1 *supra*.

### **UPDATE**

**675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/A. THE INDEPENDENT BARRING BOARD/680. Other matters.

## **680. Other matters.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown<sup>2</sup>. Nor is the Board's property to be regarded as property of, or property held on behalf of, the Crown<sup>3</sup>.

If the Board thinks that action<sup>4</sup> taken by or on behalf of itself amounts to maladministration, and that a person has been adversely affected by the action, it may make such payment (if any) to the person as it thinks appropriate<sup>5</sup>.

In connection with the exercise of any of its functions the Board may:

- 1205 (1) enter into contracts and other agreements (whether legally binding or not)<sup>6</sup>;
- 1206 (2) acquire and dispose of property (including land)<sup>7</sup>;
- 1207 (3) borrow money<sup>8</sup>;
- 1208 (4) do such other things as it thinks necessary or expedient<sup>9</sup>.

The Board may exercise the power conferred by head (2) or head (3) above only with the consent of the Secretary of State<sup>10</sup>. Such consent may be given with respect to a particular case or with respect to a class of cases<sup>11</sup>, and subject to such conditions as the Secretary of State thinks appropriate<sup>12</sup>.

A document purporting to be signed on behalf of the Board must be received in evidence and, unless the contrary is proved, must be taken to be so signed<sup>13</sup>.

The Secretary of State may make a property transfer scheme<sup>14</sup> providing for the transfer to the Board of any property, rights or liabilities of the Secretary of State<sup>15</sup>. The things that may be transferred by a property transfer scheme include:

- 1209 (a) property, rights and liabilities that could not otherwise be transferred<sup>16</sup>;
- 1210 (b) property acquired, and rights and liabilities arising, after the making of the scheme<sup>17</sup>.

A property transfer scheme may:

- 1211 (i) create interests in, or rights in relation to, anything that is or could be transferred by the scheme<sup>18</sup>;
- 1212 (ii) impose liabilities in relation to anything that is or could be transferred or created by the scheme<sup>19</sup>;
- 1213 (iii) apportion property, rights and liabilities<sup>20</sup>;
- 1214 (iv) provide for things done by or in relation to the Secretary of State in connection with any property, rights or liabilities transferred by the scheme to be treated as done, or to be continued, by or in relation to the Board<sup>21</sup>;
- 1215 (v) make provision about the continuation of legal proceedings<sup>22</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 1(1), Sch 1 para 13(1). Subject to certain exceptions, the Safeguarding Vulnerable Groups Act 2006 binds the Crown: see s 51. See note 1 supra.

3 Ibid Sch 1 para 13(2). See note 1 supra.

4 'Action' includes failure to act: ibid Sch 1 para 14(2). See note 1 supra.

5 Ibid Sch 1 para 14(1). See note 1 supra.

6 Ibid Sch 1 para 15(1)(a). See note 1 supra.

7 Ibid Sch 1 para 15(1)(b). See note 1 supra. The power conferred by head (2) in the text includes accepting gifts of money, and gifts or loans of other property, on such terms as the Board thinks appropriate: Sch 1 para 15(2).

8 Ibid Sch 1 para 15(1)(c). See note 1 supra.

9 Ibid Sch 1 para 15(1)(d). See note 1 supra.

10 Ibid Sch 1 para 15(3). See note 1 supra. As to the Secretary of State see para 155 ante.

11 Ibid Sch 1 para 15(4)(a). See note 1 supra.

12 Ibid Sch 1 para 15(4)(b). See note 1 supra.

13 Ibid Sch 1 para 16. See note 1 supra.

14 A property transfer scheme may make supplementary, incidental, transitional and consequential provision: ibid Sch 2 para 3. See note 1 supra.

15 Ibid s 1(2), Sch 2 para 2(1). See note 1 supra.

16 Ibid Sch 2 para 2(2)(a). See note 1 supra.

17 Ibid Sch 2 para 2(2)(b). See note 1 supra.

18 Ibid Sch 2 para 2(3)(a). See note 1 supra.

19 Ibid Sch 2 para 2(3)(b). See note 1 supra.

20 Ibid Sch 2 para 2(3)(c). See note 1 supra.

21 Ibid Sch 2 para 2(3)(d). See note 1 supra.

22 Ibid Sch 2 para 2(3)(e). See note 1 supra.

## **UPDATE**

### **675-680 The Independent Barring Board**

Safeguarding Vulnerable Groups Act 2006 s 1, Schs 1, 2 in force 2 January 2008: SI 2007/3545.

### **680 Other matters**

NOTE 2--2006 Act s 51 in force for all purposes on 12 October 2009: SI 2009/2611.

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## **B. BARRING**

### **681. The children's barred list.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board<sup>2</sup> must establish and maintain the children's barred list<sup>3</sup>.

If it appears to the Secretary of State<sup>4</sup> that a person satisfies certain prescribed criteria<sup>5</sup> he must refer the matter to Board<sup>6</sup>. On the reference being made, the Board must include the person in the children's barred list<sup>7</sup>. If it appears to the Secretary of State that a person satisfies certain other prescribed criteria<sup>8</sup> he must, again, refer the matter to Board<sup>9</sup>. On the reference being made the Board must include that person in the children's barred list, and give him the opportunity to make representations as to why he should be removed from the children's barred list<sup>10</sup>. If it appears that it is not appropriate for the person to be included in the list under these circumstances, the Board must remove him from the list<sup>11</sup>.

If it appears to the Board that a person has (at any time) engaged in relevant conduct<sup>12</sup>, and it proposes to include him in the children's barred list<sup>13</sup>, then it must give the person the opportunity to make representations as to why he should not be included in the children's barred list<sup>14</sup>. The Board must include the person in the children's barred list if it is satisfied that the person has engaged in relevant conduct, and it appears that it is appropriate to include the person in the list<sup>15</sup>.

If it appears to the Board that a person may:

- 1216 (1) harm a child<sup>16</sup>;
- 1217 (2) cause a child to be harmed<sup>17</sup>;
- 1218 (3) put a child at risk of harm<sup>18</sup>;
- 1219 (4) attempt to harm a child<sup>19</sup>; or
- 1220 (5) incite another to harm a child<sup>20</sup>,

and it proposes to include him in the children's barred list<sup>21</sup>, then it must give the person the opportunity to make representations as to why he should not be included in the children's barred list<sup>22</sup>.

The Board must include the person in the children's barred list if it is satisfied that the person falls within heads (1) to (5) above and it appears that it is appropriate to include the person in the list<sup>23</sup>.

The Board must not include a person in the children's barred list:

- 1221 (a) only on a particular ground if a relevant Scottish authority<sup>24</sup> has already considered whether the person should be included in a corresponding list<sup>25</sup> on the same ground (whether or not it decided to include him in the list)<sup>26</sup>; or
- 1222 (b) if, in accordance with such criteria as the Secretary of State specifies by order, it is more appropriate for the person's case to be considered by the relevant Scottish authority<sup>27</sup>.



In respect of an individual who is included in a barred list, the Board must keep other information of such description as is prescribed<sup>28</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Independent Barring Board see para 675 et seq ante.

3 Safeguarding Vulnerable Groups Act 2006 s 2(1)(a). See note 1 supra. For the meaning of 'child' see para 675 note 5 ante.

4 As to the Secretary of State see para 155 ante.

5 Safeguarding Vulnerable Groups Act 2006 s 2(2) Sch 3 para 1(1). See note 1 supra. As to the criteria which may be specified for the purposes of Sch 3 para 1 see para 684 post. 'Prescribed' means prescribed by regulations made by the Secretary of State: s 60(1). See para 687 note 50 post. At the date at which this volume states the law no such regulations had been prescribed.

6 Ibid Sch 3 para 1(2). See note 1 supra.

7 Ibid Sch 3 para 1(3). See note 1 supra.

8 Ibid Sch 3 para 2(1). See note 1 supra. As to the criteria which may be specified for the purposes of Sch 3 para 2 see para 684 post. See para 687 note 50 post.

9 Ibid Sch 3 para 2(2). See note 1 supra.

10 Ibid Sch 3 para 2(3). See note 1 supra.

11 Ibid Sch 3 para 2(4). See note 1 supra.

12 'Relevant conduct' is: (1) conduct which endangers a child or is likely to endanger a child; (2) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him; (3) conduct involving sexual material relating to children (including possession of such material); (4) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to the Board that the conduct is inappropriate; (5) conduct of a sexual nature involving a child, if it appears to the Board that the conduct is inappropriate: *ibid* Sch 3 para 4(1). For the purposes of heads (4) and (5) supra, the Board must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate: Sch 3 para 4(6).

A person's conduct endangers a child if he: (a) harms a child; (b) causes a child to be harmed; (c) puts a child at risk of harm; (d) attempts to harm a child; or (e) incites another to harm a child: Sch 3 para 4(2).

'Sexual material relating to children' means indecent images of children, or material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification: Sch 3 para 4(3).

'Image' means an image produced by any means, whether of a real or imaginary subject: Sch 3 para 4(4).

A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes: Sch 3 para 4(5).

See note 1 supra.

13 Ibid Sch 3 para 3(1). Schedule 3 para 3 does not apply to a person if the relevant conduct consists only of an offence committed against a child (construed in accordance with the Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (as amended; prospectively repealed) (see para 663 et seq ante) before the commencement of the Safeguarding Vulnerable Groups Act 2006 s 2 and the court, having considered whether to make a disqualification order under the Criminal Justice and Court Services Act 2000 s 28 (as amended; prospectively repealed), s 29 (as amended; prospectively repealed) or s 29A (as added; prospectively repealed) (see para 663 et seq ante), decided not to: Safeguarding Vulnerable Groups Act 2006 Sch 3 para 3(4), (5). At the date at which this volume states the law, s 2 had not yet been brought into force. See note 1 supra.

14 Ibid Sch 3 para 3(2). See note 1 supra.

15 Ibid Sch 3 para 3(3). See note 1 supra.

16 Ibid Sch 3 para 5(1)(a), (4)(a). See note 1 supra.

17 Ibid Sch 3 para 5(1)(a), (4)(b). See note 1 supra.

18 Ibid Sch 3 para 5(1)(a), (4)(c). See note 1 supra.

19 Ibid Sch 3 para 5(1)(a), (4)(d). See note 1 supra.

20 Ibid Sch 3 para 5(1)(a), (4)(e). See note 1 supra.

21 Ibid Sch 3 para 5(1)(b). See note 1 supra.

22 Ibid Sch 3 para 5(2). See note 1 supra.

23 Ibid Sch 3 para 5(3). See note 1 supra.

24 A relevant Scottish authority is such authority as the Secretary of State specifies by order as exercising for the purposes of the law of Scotland functions which correspond to those of the Independent Barring Board: *ibid* Sch 3 para 6(2). See note 1 supra.

25 A corresponding list is a list maintained for the purposes of the law of Scotland which the Secretary of State specifies by order as corresponding to the children's barred list: *ibid* Sch 3 para 6(3). See note 1 supra.

26 Ibid Sch 3 para 6(1)(a). See note 1 supra.

27 Ibid Sch 3 para 6(1)(b). See note 1 supra.

28 *Ibid* s 2(5). See note 1 supra. At the date at which this volume states the law no such information had been prescribed.

## UPDATE

### 681 The children's barred list

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 s 2, Sch 3 in force for all purposes on 12 October 2009: SI 2009/2611.

NOTE 5--See the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, SI 2009/37.

NOTE 28--The following information, relating to the identity of the individual and provided to the Board, is prescribed: (1) any alternative names and aliases of the individual; (2) the individual's date and place of birth; (3) the address of the individual; (4) all information on any monitoring application submitted by the individual; (5) the unique identification number accorded to the monitoring application or referral to the Board in respect of the individual; (6) the Police National Computer identification number relating to the individual; (7) the Criminal Records Bureau disclosure number relating to the monitoring application or the referral to the IBB in respect of the individual; (8) the national insurance number of the individual; and (9) all additional information relating to the identity of the individual: Safeguarding Vulnerable Groups Act 2006 (Barred List Prescribed Information) Regulations 2008, SI 2008/16, reg 3. The information so prescribed is the following information related to the Board's functions: (a) the date of the individual's inclusion on the barred list; (b) all information provided to the Board which it considers relevant to the decision of whether or not the individual ought to be barred; (c) any information provided to the Board by keepers of relevant registers or supervisory authorities in accordance with the Safeguarding Vulnerable Groups Act 2006 ss 41 (see PARA 701) and 45 (see PARA 701); (d) relevant police information provided to the Board but which the Board must not take account of for the purpose of deciding whether or not the individual ought to be barred, in accordance with Sch 3 para 19(5), (6) (see PARA 683); (e) the reasons for the Board's decision to bar the individual, including any findings of fact made by the Board giving rise to that decision; (f) any information provided to the Board, including

representations made to it by the individual, which the Board considers might be relevant to any subsequent appeal or review; and (g) the outcome of any such appeal or review and any information provided to or held by the Board following such proceedings, including any findings of fact: SI 2008/16 reg 4.

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## **682. Procedural matters.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board<sup>2</sup> must ensure that, in respect of any information it receives in relation to an individual from whatever source or of whatever nature, it considers whether the information is relevant to its consideration as to whether the individual should be included in the barred list<sup>3</sup>. However, this requirement does not, without more, require the Board to give an individual the opportunity to make representations as to why he should not be included in a barred list<sup>4</sup>. When an individual is included in a barred list the Board must take all reasonable steps to notify the individual of that fact<sup>5</sup>.

The Secretary of State<sup>6</sup> may, by regulations, make provision as to the procedure to be followed for the purposes of any decision the Board is required or authorised to take<sup>7</sup>, including provision as to the time within which anything is to be done<sup>8</sup>.

A person who is given an opportunity to make representations<sup>9</sup> must have the opportunity to make representations in relation to all of the information on which the Board intends to rely in taking a decision<sup>10</sup>. Any requirement<sup>11</sup> to give a person an opportunity to make representations does not apply if the Board does not know and cannot reasonably ascertain the whereabouts of the person<sup>12</sup>. The opportunity to make representations does not include the opportunity to make representations that findings of fact made by a competent body<sup>13</sup> were wrongly made<sup>14</sup>.

Where the Board was unable to ascertain the whereabouts of a person who is included in a barred list (except a person who is subject to automatic inclusion<sup>15</sup>) before he was included in the list<sup>16</sup>, or it grants a person, who did not (before the end of any time prescribed<sup>17</sup> for the purpose) make representations as to why he should not be included in the list, permission to make such representations out of time<sup>18</sup>, then the Board must consider the representations<sup>19</sup>; and if it thinks that it is not appropriate for the person to be included in the list concerned, it must remove him from the list<sup>20</sup>. For these purposes, it is immaterial that any such representations relate to a time after the person was included in the list concerned<sup>21</sup>.

A person who is included in a barred list may, with the permission of the Board<sup>22</sup>, apply to the Board for a review of his inclusion<sup>23</sup>. A person may apply for permission only if the application is made after the end of the minimum barred period<sup>24</sup>, and in the prescribed period ending with the time when he applies for permission, he has made no other such application<sup>25</sup>. The Board must not grant permission unless it thinks that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be)<sup>26</sup>, and that the change is such that permission should be granted<sup>27</sup>. On a review of a person's inclusion, if the Board is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise, it must dismiss the application<sup>28</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Independent Barring Board see para 675 et seq ante.

3 Safeguarding Vulnerable Groups Act 2006 s 2(4), Sch 3 para 13(1). See note 1 supra.

4 Ibid Sch 3 para 13(2). See note 1 supra.

5 Ibid Sch 3 para 14. See note 1 supra.

6 As to the Secretary of State see para 155 ante.

7 Ie decisions the Board is required or authorised to take under the Safeguarding Vulnerable Groups Act 2006 Sch 3: Sch 3 para 15(1). See note 1 supra.

8 Ibid Sch 3 para 15. See note 1 supra.

9 Ie by virtue of any provision of ibid Sch 3: Sch 3 para 16(1). See note 1 supra.

10 Ibid Sch 3 para 16(1). See note 1 supra.

11 Ie any requirement of ibid Sch 3: Sch 3 para 16(2). See note 1 supra.

12 Ibid Sch 3 para 16(2). See note 1 supra.

13 Findings of fact made by a competent body are findings of fact made in proceedings before one of the following bodies or any of its committees:

346 (1) the General Teaching Council for England (see EDUCATION vol 15(2) (2006 Reissue) para 822) (ibid Sch 3 para 16(4)(a));

347 (2) the General Teaching Council for Wales (see EDUCATION vol 15(2) (2006 Reissue) para 847) (Sch 3 para 16(4)(b));

348 (3) the Council of the Pharmaceutical Society of Great Britain (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 881 et seq) (Sch 3 para 16(4)(c));

349 (4) the General Medical Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 13 et seq) (Sch 3 para 16(4)(d));

350 (5) the General Dental Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 389 et seq) (Sch 3 para 16(4)(e));

351 (6) the General Optical Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 813 et seq) (Sch 3 para 16(4)(f));

352 (7) the General Osteopathic Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 499 et seq) (Sch 3 para 16(4)(g));

353 (8) the General Chiropractic Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 591 et seq) (Sch 3 para 16(4)(h));

354 (9) the Nursing and Midwifery Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 691 et seq) (Sch 3 para 16(4)(i));

355 (10) the Health Professions Council (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 308 et seq) (Sch 3 para 16(4)(j));

356 (11) the General Social Care Council (see SOCIAL SERVICES AND COMMUNITY CARE) (Sch 3 para 16(4)(k));

357 (12) the Care Council for Wales (see SOCIAL SERVICES AND COMMUNITY CARE) (Sch 3 para 16(4)(l)).

The Secretary of State may by order amend this list: Sch 3 para 16(5). See note 1 supra.

14 Ibid Sch 3 para 16(3). See note 1 supra.

15 Ie a person included in pursuance of ibid Sch 3 para 1 (see para 681 ante): Sch 3 para 17(1). See note 1 supra.

16 Ibid Sch 3 para 17(1). See note 1 supra.

17 For the meaning of 'prescribed' see para 681 note 5 ante. At the date at which this volume states the law no such time had been prescribed.

18 Ibid Sch 3 para 17(2). See note 1 supra.

19 Ibid Sch 3 para 17(3)(a). See note 1 supra.

20 Ibid Sch 3 para 17(3)(b). See note 1 supra.

21 Ibid Sch 3 para 17(4). See note 1 supra.

22 Ibid Sch 3 para 18(2). See note 1 supra.

23 Ibid Sch 3 para 18(1). See note 1 supra.

24 Ibid Sch 3 para 18(3)(a). See note 1 supra. The minimum barred period is the prescribed period beginning with such of the following as may be prescribed: (1) the date on which the person was first included in the list; (2) the date on which any criterion prescribed for the purposes of Sch 3 paras 1, 2 (see para 681 ante) is first satisfied; (3) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence (within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000 s 76 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 20) was imposed, the date of his release; (4) the date on which the person made any representations as to why he should not be included in the list: Sch 3 para 18(6).

25 Ibid Sch 3 para 18(3)(b). See note 1 supra.

26 Ibid Sch 3 para 18(4)(a). See note 1 supra. At the date at which this volume states the law no such period had been prescribed.

27 Ibid Sch 3 para 18(5)(b). See note 1 supra.

28 Ibid Sch 3 para 18(5). See note 1 supra.

## **UPDATE**

### **682 Procedural matters**

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 s 2, Sch 3 in force for all purposes on 12 October 2009: SI 2009/2611.

NOTES 8, 24--See Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008, SI 2008/474 (amended by SI 2008/2683).

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### **683. Information.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Independent Barring Board<sup>2</sup> may require:

- 1223 (1) any person who holds records of convictions or cautions<sup>3</sup> for the use of police forces generally to provide to it any relevant information<sup>4</sup> relating to a relevant person<sup>5</sup>;
- 1224 (2) any person who holds such records to provide to it prescribed details of relevant matter<sup>6</sup> relating to a relevant person<sup>7</sup>;
- 1225 (3) the chief officer of a relevant police force<sup>8</sup> to provide to it any such relevant information<sup>9</sup>;
- 1226 (4) any person who holds information<sup>10</sup> to provide to it any such information relating to a relevant person<sup>11</sup>.

For the purpose of deciding whether or not a person is included in a barred list the Board must not take account of relevant police information<sup>12</sup> if the chief officer of the relevant police force thinks that it would not be in the interests of the prevention or detection of crime to disclose the information to the person<sup>13</sup>. If the Board so requests, the Secretary of State must inform the Board which police forces are relevant police forces in relation to a person<sup>14</sup>.

The Secretary of State may provide to the Board any information relating to a person which is held by him in connection with his functions under certain enactments<sup>15</sup>; and he must provide any information relating to a person which is held by him in connection with his functions with regard to safeguarding children<sup>16</sup>.

The Board must provide the Secretary of State with the prescribed information relating to a person if:

- 1227 (a) it includes that person in a barred list<sup>17</sup>;
- 1228 (b) it is considering whether to include him in a barred list<sup>18</sup>;
- 1229 (c) it thinks that any of the prescribed criteria<sup>19</sup> is satisfied in relation to him and that the Secretary of State does not already have the information<sup>20</sup>.

The Secretary of State must inform the Scottish Ministers if a person is included in a barred list<sup>21</sup>. The Board may, at the request of the Welsh Ministers<sup>22</sup>, provide them with such information relating to the exercise of its functions as it thinks may be relevant to the exercise by the Welsh Ministers of any of their functions<sup>23</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Independent Barring Board see para 675 et seq ante.

3 'Caution' has the same meaning as in the Police Act 1997 s 126 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 1049): Safeguarding Vulnerable Groups Act 2006 s 2(4), Sch 3 para 19(7). See note 1 supra.

4 For these purposes relevant information relating to a person is information which the person holding the records thinks might be relevant in relation to the regulated activity concerned: *ibid* Sch 3 para 19(2). See note 1 *supra*. As to regulated activity see para 687 *post*.

5 *Ibid* Sch 3 para 19(1)(a). See note 1 *supra*. A relevant person is one to whom any of Sch 3 paras 1-5 (see para 681 *ante*) applies.

6 *Ie* a matter within the meaning of the Police Act 1997 s 113A (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 712.

7 Safeguarding Vulnerable Groups Act 2006 Sch 3 para 19(1)(b). See note 1 *supra*. At the date at which this volume states the law no such details had been prescribed. For the meaning of 'prescribed' see para 681 note 5 *ante*.

8 'Relevant police force' must be construed in accordance with the Police Act 1997 s 113B(9) (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 715) as if the person had made an application for the purposes of that provision: Safeguarding Vulnerable Groups Act 2006 Sch 3 para 19(7). See note 1 *supra*.

9 *Ibid* Sch 3 para 19(1)(c). See note 1 *supra*. For these purposes relevant information relating to a person is information which the chief officer thinks might be relevant in relation to the regulated activity concerned: Sch 3 para 19(3). The Board must pay to the appropriate police authority such fee as the Secretary of State thinks appropriate for such information provided to it: Sch 3 para 19(4). As to chief officers of police see POLICE vol 36(1) (2007 Reissue) para 178 *et seq*. As to police authorities see POLICE vol 36(1) (2007 Reissue) para 139 *et seq*.

10 *Ie* information prescribed for the purposes of *ibid* s 24(8)(c) (see para 697 note 7 *post*): Sch 3 para 19(1)(d). See note 1 *supra*.

11 *Ibid* Sch 3 para 19(1)(d). See note 1 *supra*.

12 For these purposes, relevant police information is information which falls within *ibid* Sch 3 para 19(3) (see note 9 *supra*) whether it is obtained by the Board in pursuance of Sch 3 para 19(1)(c) (see the text and note 9 *supra*) or Sch 3 para 20(2) (see the text and note 16 *infra*): Sch 3 para 19(6). See note 1 *supra*.

13 *Ibid* Sch 3 para 19(5). See note 1 *supra*.

14 *Ibid* Sch 3 para 19(8). See note 1 *supra*.

15 *Ibid* Sch 3 para 20(1). See note 1 *supra*. The enactments referred to in the text are: (1) the Protection of Children Act 1999, except s 9 (see para 708 *et seq post*); (2) the Care Standards Act 2000 Pt VII (ss 80-104) (as amended; prospectively repealed) (see para 654 *et seq ante*); (3) the Education Act 2002 ss 142-144 (prospectively repealed) (see EDUCATION vol 15(1) (2006 Reissue) para 782 *et seq*): Safeguarding Vulnerable Groups Act 2006 Sch 3 para 20(1)(a)-(c).

16 *Ibid* Sch 3 para 20(2). See note 1 *supra*. The functions referred to in the text are those under the Safeguarding Vulnerable Groups Act 2006, except information relating to an offence prescribed for the purposes of Sch 3 para 4(5): see para 681 *ante*. For the meaning of 'child' see para 675 note 5 *ante*.

17 *Ibid* Sch 3 para 21(a). See note 1 *supra*.

18 *Ibid* Sch 3 para 21(b). See note 1 *supra*.

19 *Ie* criteria prescribed for the purposes of *ibid* Sch 3 para 1 or 2: see para 681 *ante*. As to the prescribed criteria see para 684 *post*. At the date at which this volume states the law no such criteria had been prescribed.

21 *Ibid* Sch 3 para 22.

22 As to the Welsh Ministers see para 155 *ante*.

23 Safeguarding Vulnerable Groups Act 2006 Sch 3 para 23.

## UPDATE

### 683 Information



TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 Sch 3 paras 19, 20, 22, 23 in force for all purposes, Sch 3 para 21 in force for certain purposes, by 20 January 2009: SI 2007/3545, SI 2008/1320, SI 2009/39.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/B. BARRING/684. Prescribed criteria.

#### **684. Prescribed criteria.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The following criteria may be prescribed for the relevant purposes<sup>2</sup>:

- 1230 (1) that a person has been convicted of, or cautioned in relation to, an offence of a specified description<sup>3</sup>;
- 1231 (2) that an order of a specified description requiring the person to do or not to do anything has been made against him<sup>4</sup>;
- 1232 (3) that a person is included in a specified list maintained for the purposes of a country or territory outside the United Kingdom<sup>5</sup>;
- 1233 (4) that an order or direction of a specified description requiring the person to do or not to do anything has been made against him for the purposes of a country or territory outside the United Kingdom<sup>6</sup>.

For the purposes of determining whether any of the criteria is satisfied in relation to a person<sup>7</sup>, any offence committed before he attained the age of 18<sup>8</sup>, and any order or direction made before that time, should be ignored<sup>9</sup>.

For the purpose of considering whether the criteria apply to an individual, the Secretary of State must, from time to time, examine records of convictions or cautions held for the use of police forces generally<sup>10</sup>.

A court by or before which a person is convicted of an offence of a specified description<sup>11</sup>, or which makes an order of a specified description<sup>12</sup>, must inform the person at the time he is convicted or the order is made that the Independent Barring Board will include him in the barred list concerned<sup>13</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 I.e. for the purposes of *ibid* s 2(4), Sch 3 paras 1, 2: see para 681 ante. See note 1 supra.

The prescribed criteria must not consist only of circumstances in which the person has committed an offence against a child before the commencement of s 2 (see para 681 ante) if the court, having considered whether to make a disqualification order, decided not to: Sch 3 para 24(5). The reference to an offence committed against a child must be construed in accordance with the Criminal Justice and Court Services Act 2000 Pt 2 (ss 26-42) (as amended) (see para 663 et seq ante); and a disqualification order is an order under the Criminal Justice and Court Services Act 2000 s 28 (as amended; prospectively repealed), s 29 (as amended; prospectively repealed), s 29A (as added; prospectively repealed) (see paras 663-665 ante): Safeguarding Vulnerable Groups Act 2006 Sch 3 para 24 (6). For the meaning of 'child' see para 675 note 5 ante.

At the date at which this volume states the law no such criteria had been prescribed. For the meaning of 'prescribed' see para 681 note 5 ante.

3 *Ibid* Sch 3 para 24(1)(a). See note 1 supra. The power to specify offences includes power to specify offences under: (1) the law of Scotland, Northern Ireland, the Channel Islands or the Isle of Man; (2) the Army Act 1955 s 70 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 422); (3) the Air Force Act 1955 s 70 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 422); (4) the Naval Discipline Act 1957 s 42 (as amended; prospectively repealed) (see ARMED FORCES vol 2(2) (Reissue) para 422); (5) the Armed Forces Act 2006 s 42 (not yet in force) (see ARMED FORCES): Safeguarding Vulnerable Groups Act 2006 Sch 3 para 24(2).

- 4 Ibid Sch 3 para 24(1)(b). See note 1 supra.
- 5 Ibid Sch 3 para 24(1)(c). See note 1 supra. The Secretary of State may specify a list for these purposes only if he thinks that inclusion in the list has a corresponding or similar effect to inclusion in a barred list: Sch 3 para 24(3).
- 6 Ibid Sch 3 para 24(1)(d). See note 1 supra.
- 7 Ibid Sch 3 para 24(4). See note 1 supra. For these purposes, an offence committed over a period of time must be treated as committed on the last day of the period: Sch 3 para 24(7).
- 8 Ibid Sch 3 para 24(4)(a). See note 1 supra.
- 9 Ibid Sch 3 para 24(4)(b). See note 1 supra.
- 10 Ibid Sch 3 para 24(8). See note 1 supra. Schedule 3 para 24(8) does not apply to records of convictions made, or cautions given, before such date as is prescribed: Sch 3 para 24(9).
- 11 le of a description specified for the purposes of ibid Sch 3 para 24(1)(a) (see the text and note 3 supra).
- 12 le of a description specified for the purposes of ibid Sch 3 para 24(1)(b) (see the text and note 4 supra).
- 13 Ibid Sch 3 para 25. See note 1 supra. As to the Independent Barring Board see para 675 et seq ante.

## **UPDATE**

### **684 Prescribed criteria**

TEXT AND NOTES--As to the criteria which have been prescribed, see the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, SI 2009/37.

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 Sch 3 paras 24(1)-(7), 25 in force for all purposes, Sch 3 para 24(8) in force for certain purposes, by 20 January 2009: SI 2007/3545, SI 2009/39.

NOTE 3--2006 Act Sch 3 para 24(2) amended, Sch 3 para 24(10) added: SI 2008/3050.

TEXT AND NOTES 11-13--2006 Act Sch 3 para 25 amended: SI 2008/3050.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/B. BARRING/685. Barred persons.

## **685. Barred persons.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A person is barred from regulated activity<sup>2</sup> relating to children<sup>3</sup> if he is included in the children's barred list<sup>4</sup>, or included in a list maintained under the law of Scotland or Northern Ireland which the Secretary of State<sup>5</sup> specifies by order as corresponding to the children's barred list<sup>6</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A reference to a person being barred from regulated activity must be construed in accordance with *ibid* s 3: s 3(1). See note 1 *supra*. As to regulated activity see para 687 *post*.

3 For the meaning of 'children' see para 675 note 5 *ante*.

4 Safeguarding Vulnerable Groups Act 2006 s 3(2)(a). See note 1 *supra*. As to the children's barred list see para 681 *ante*.

5 As to the Secretary of State see para 155 *ante*.

6 Safeguarding Vulnerable Groups Act 2006 s 3(2)(b). See note 1 *supra*.

## **UPDATE**

### **685 Barred persons**

TEXT AND NOTE 1--These provisions in force for all purposes on 12 October 2009: SI 2008/1320, SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/B. BARRING/686. Appeals.

## **686. Appeals.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

An individual who is included in a barred list may, with the permission of the Tribunal<sup>2</sup>, appeal to the Tribunal<sup>3</sup> against a decision not to remove him from the list<sup>4</sup>, or to include him in the list<sup>5</sup>.

Such an appeal may be made only on the grounds that the Independent Barring Board<sup>6</sup> has made a mistake on any point of law, or in any finding of fact which it has made and on which its decision was based<sup>7</sup>.

Unless the Tribunal finds that the Board has made a mistake of law or fact, it must confirm the decision<sup>8</sup>. If the Tribunal finds that the Board has made such a mistake it must direct the Board to remove the person from the list, or remit the matter to the Board for a new decision<sup>9</sup>.

If the Tribunal remits a matter to the Board, it may set out any findings of fact which it has made (on which the Board must base its new decision)<sup>10</sup>, and the person must be removed from the list until the Board makes its new decision, unless the Tribunal directs otherwise<sup>11</sup>.

The Secretary of State<sup>12</sup> may by regulations make provision as to the procedure of the Tribunal (including provision as to the award of costs by the Tribunal)<sup>13</sup>.

A person may, with the permission of the Court of Appeal<sup>14</sup>, appeal on a point of law to the Court of Appeal against a decision of the Tribunal<sup>15</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 4(4). See note 1 supra.

3 'The Tribunal' means the Tribunal established under the Protection of Children Act 1999 s 9 (as amended; prospectively further amended) (see para 708 et seq post): Safeguarding Vulnerable Groups Act 2006 s 4(11). See note 1 supra.

4 I.e. under ibid Sch 3 para 2, 17 or 18 (see paras 681-682 ante): s 4(1)(a), (c). See note 1 supra.

5 Ibid s 4(1). See note 1 supra. The decision to include an individual in the list is one taken under Sch 3 paras 3, 5 (see para 681 ante): s 4(1)(b).

6 As to the Independent Barring Board see para 675 et seq ante.

7 Safeguarding Vulnerable Groups Act 2006 s 4(2). See note 1 supra. The decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact: s 4(3).

8 Ibid s 4(5). See note 1 supra.

9 Ibid s 4(6). See note 1 supra.

10 Ibid s 4(7)(a). See note 1 supra.

11 Ibid s 4(7)(b). See note 1 supra.

12 As to the Secretary of State see para 155 ante.

13 Safeguarding Vulnerable Groups Act 2006 s 4(8). See note 1 supra. At the date at which this volume states the law no such regulations had been made.

14 Ibid s 4(10). See note 1 supra.

15 Ibid s 4(9). See note 1 supra.

## **UPDATE**

### **686 Appeals**

TEXT AND NOTE 1--These provisions in force for all purposes by 19 May 2008: SI 2007/3545, SI 2008/1320.

NOTE 3--'The Tribunal' means the First-tier Tribunal: Safeguarding Vulnerable Groups Act 2006 s 4 (amended by SI 2008/2833).

TEXT AND NOTES 12-15--Repealed: SI 2008/2833.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/C. REGULATED ACTIVITY/687. Regulated activity.

### ***C. REGULATED ACTIVITY***

#### **687. Regulated activity.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

When they are carried out frequently by the same person, or the period condition<sup>2</sup> is satisfied<sup>3</sup>, the following activities are regulated activities relating to children<sup>4</sup>:

- 1234 (1) any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children<sup>5</sup>;
- 1235 (2) any form of care for or supervision of children, unless the care or supervision is merely incidental to care for or supervision of persons who are not children<sup>6</sup>;
- 1236 (3) any form of advice or guidance provided wholly or mainly for children, if the advice or guidance relates to their physical, emotional or educational well-being<sup>7</sup>;
- 1237 (4) any form of treatment or therapy provided for a child<sup>8</sup>;
- 1238 (5) moderating a public electronic interactive communication service which is likely to be used wholly or mainly by children<sup>9</sup>;
- 1239 (6) driving a vehicle which is being used only for the purpose of conveying children and any person supervising or caring for the children pursuant to arrangements made in prescribed circumstances<sup>10</sup>.

Where the child has attained the age of 16, and the activity is not carried out by a person in respect of whom arrangements exist principally for that purpose<sup>11</sup>, heads (1) to (4) above do not include the activities described when carried out in the course of a child's employment<sup>12</sup>. For the purposes of head (5) above a person moderates a public electronic interactive communication service if, for the purpose of protecting children, he has any function relating to monitoring the content of matter which forms any part of the service<sup>13</sup>, removing matter from, or preventing the addition of matter to, the service<sup>14</sup>, or controlling access to, or use of, the service<sup>15</sup>.

When an activity is carried out frequently by the same person or the period condition is satisfied<sup>16</sup>, and in one of the following establishments:

- 1240 (a) an educational institution which is exclusively or mainly for the provision of full time education to children<sup>17</sup>;
- 1241 (b) an establishment which is exclusively or mainly for the provision of nursery education<sup>18</sup>;
- 1242 (c) a hospital which is exclusively or mainly for the reception and treatment of children<sup>19</sup>;
- 1243 (d) an institution which is exclusively or mainly for the detention of children<sup>20</sup>;
- 1244 (e) a children's home<sup>21</sup>;
- 1245 (f) a home provided in pursuance of arrangements for the accommodation of children who are in need of particular facilities and services<sup>22</sup>;

1246 (g) relevant child care premises<sup>23</sup>,

it is a regulated activity relating to children if it is carried out by a person while engaging in any form of work (whether or not for gain)<sup>24</sup>, it is carried out for or in connection with the purposes of the establishment<sup>25</sup>, and it gives that person the opportunity, in consequence of anything he is permitted or required to do in connection with the activity, to have contact with children<sup>26</sup>.

The exercise of a function of any of the following so far as it relates to the inspection of an establishment mentioned in heads (a) to (g) above is a regulated activity relating to children<sup>27</sup>:

- 1247 (i) Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>28</sup>;
- 1248 (ii) Her Majesty's Chief Inspector of Education and Training in Wales<sup>29</sup>;
- 1249 (iii) a body approved to inspect a registered independent school<sup>30</sup>;
- 1250 (iv) Her Majesty's Chief Inspector of Prisons<sup>31</sup>;
- 1251 (v) the Commission for Social Care Inspection<sup>32</sup>;
- 1252 (vi) the Commission for Healthcare Audit and Inspection<sup>33</sup>;
- 1253 (vii) the Welsh Ministers<sup>34</sup>.

Providing registered child minding<sup>35</sup> is a regulated activity relating to children<sup>36</sup>; and it is a regulated activity to foster a child<sup>37</sup>. The exercise of any function of an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>38</sup>, or a Welsh family proceedings officer<sup>39</sup>, or certain other designated persons<sup>40</sup> is a regulated activity relating to children<sup>41</sup>.

The exercise of a function of the Commission for Healthcare Audit and Inspection<sup>42</sup> or the Welsh Ministers<sup>43</sup>, so far as it relates to the inspection of a relevant establishment<sup>44</sup> or agency<sup>45</sup> or NHS body<sup>46</sup> which provides any form of treatment or therapy for children, is a regulated activity relating to children<sup>47</sup>.

A person who is part of a group in relation to which another engages in regulated activity relating to children does not engage in regulated activity only because he assists that person or does anything on behalf of or under his direction which, but for these provisions, would amount to engaging in regulated activity relating to children<sup>48</sup>.

The Secretary of State may, by order, provide that in such circumstances as are specified an activity which is a regulated activity in relation to children is not to be treated as a regulated activity<sup>49</sup>; and he may vary the meaning of regulated activity relating to children<sup>50</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force on a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 The period condition is satisfied if the person carrying out the activity does so at any time on more than two days in any period of 30 days: *ibid* s 5, Sch 4 para 10(1). In relation to an activity that falls within heads (1)-(4) in the text the period condition is also satisfied if the person carrying out the activity does so at any time between 2 am and 6 am, and the activity gives the person the opportunity to have face to face contact with children: Sch 4 para 10(2). See note 1 *supra*.

3 *Ibid* Sch 4 para 1(1)(b). See note 1 *supra*. Any activity which consists in or involves on a regular basis the day to day management or supervision of a person carrying out an activity mentioned in Sch 4 para 1(1), (2), (8) or (10) is a regulated activity relating to children: Sch 4 para 1(14).

4 *Ibid* Sch 4 para 1(1)(a). See notes 1, 3 *supra*. A reference to regulated activity relating to children must be construed in accordance with Sch 4 Pt 1: s 5(1). For the meaning of 'children' see para 675 note 5 *ante*.

5 *Ibid* Sch 4 para 2(1)(a). See note 1 *supra*.

6 *Ibid* Sch 4 para 2(1)(b). See note 1 *supra*.

7 *Ibid* Sch 4 para 2(1)(c). See note 1 *supra*.



- 8 Ibid Sch 4 para 2(1)(d). See note 1 supra.
- 9 Ibid Sch 4 para 2(1)(e). See note 1 supra.
- 10 Ibid Sch 4 para 2(1)(f). See note 1 supra. See also para 687 note 50 post.
- 11 Ibid Sch 4 para 2(3). See note 1 supra.
- 12 Ibid Sch 4 para 2(2). See note 1 supra. Employment includes any form of work which is carried out under the supervision or control of another, whether or not the person carrying it out is paid for doing so: Sch 4 para 2(6).
- 13 Ibid Sch 4 para 2(4)(a). See note 1 supra.
- 14 Ibid Sch 4 para 2(4)(b). See note 1 supra. A person does not moderate a public electronic interactive communications service unless he has access to the content of the matter: Sch 4 para 2(5)(a).
- 15 Ibid Sch 4 para 2(4)(c). See note 1 supra. A person does not moderate a public electronic interactive communications service unless he has contact with users of the service: Sch 4 para 2(5)(b).
- 16 Ibid Sch 4 para 1(2)(a). See notes 1, 3 supra.
- 17 Ibid Sch 4 paras 1(2)(b), 3(1)(a). See notes 1, 3 supra. 'Educational institution' includes any training provider (within the meaning of the Education Act 2005 Pt 3 (ss 74-100): see EDUCATION vol 15(1) (2006 Reissue) para 793 et seq), whether or not the training provider would otherwise be regarded as an institution: Safeguarding Vulnerable Groups Act 2006 s 60(1).
- 18 Ibid Sch 4 paras 1(2)(b), 3(1)(b). The text refers to nursery education within the meaning of the School Standards and Framework Act 1998 s 117: see EDUCATION vol 15(1) (2006 Reissue) para 85. See notes 1, 3 supra.
- 19 Safeguarding Vulnerable Groups Act 2006 Sch 4 paras 1(2)(b), 3(1)(c). See note 3 supra.
- 20 Ibid Sch 4 paras 1(2)(b), 3(1)(d). See notes 1, 3 supra.
- 21 Ibid Sch 4 paras 1(2)(b), 3(1)(e). The text refers to a children's home within the meaning of the Care Standards Act 2000 s 1: see para 983 post. See notes 1, 3 supra.
- 22 Safeguarding Vulnerable Groups Act 2006 Sch 4 paras 1(2)(b), 3(1)(f). As to the facilities and services referred to in the text see the Children Act 1989 s 82(5); and para 158 ante. See notes 1, 3 supra.
- 23 Safeguarding Vulnerable Groups Act 2006 Sch 4 paras 1(2)(b), 3(1)(g). See notes 1, 3 supra. Relevant child care premises are any part of premises on which a person carries on:
- 358 (1) any form of child care (within the meaning of the Childcare Act 2006 s 18 (not yet fully in force): see para 1109 note 3 post) in respect of which he must be registered under the Childcare Act 2006 (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 3(2)(a));
  - 359 (2) any form of such child care in respect of which he may be registered under the Childcare Act 2006, whether or not he is so registered (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 3(2)(b));
  - 360 (3) any form of day care (within the meaning of the Children Act 1989 s 79A (as added): see para 1072 post) in respect of which he must be registered under the Children Act 1989 (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 3(2)(c)).
- 24 Ibid Sch 4 para 1(2)(c). See notes 1, 3 supra.
- 25 Ibid Sch 4 para 1(2)(d). See notes 1, 3 supra.
- 26 Ibid Sch 4 para 1(2)(e). See notes 1, 3 supra.
- 27 Ibid Sch 4 para 1(10). See notes 1, 3 supra.
- 28 Ibid Sch 4 para 1(10)(a). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. See notes 1, 3 supra.

29 Ibid Sch 4 para 1(10)(b). As to Her Majesty's Chief Inspector of Education and Training in Wales see the Learning and Skills Act 2000 s 73; and EDUCATION vol 15(2) (2006 Reissue) para 1188. See notes 1, 3 supra.

30 Ibid Sch 4 para 1(10)(c). Such a body must be approved in pursuance of the Education Act 2002 s 163(1) (b) (as substituted): see EDUCATION vol 15(1) (2006 Reissue) para 484. See notes 1, 3 supra.

31 Ibid Sch 4 para 1(10)(d). As to Her Majesty's Chief Inspector of Prisons see PRISONS vol 36(2) (Reissue) para 508. See notes 1, 3 supra.

32 Ibid Sch 4 para 1(10)(e). As to the Commission for Social Care Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 42; and SOCIAL SERVICES AND COMMUNITY CARE. See notes 1, 3 supra.

33 Ibid Sch 4 para 1(10)(f). As to the Commission for Healthcare Audit and Inspection see HEALTH SERVICES vol 54 (2008) PARA 552 et seq. See notes 1, 3 supra.

34 Ibid Sch 4 para 1(10)(g). See notes 1, 3 supra.

35 If carried out in England, the following are regulated activities:

- 361 (1) early years child minding in respect of which a requirement to register arises by the Childcare Act 2006 s 33(1) (see para 1118 post) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(3)(a));
- 362 (2) providing later years child minding in respect of which a requirement to register arises by the Childcare Act 2006 s 52(1) (see para 1127 post) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(3)(b));
- 363 (3) providing early years child minding or later years child minding, if it is provided by a person who is voluntarily registered by virtue of the Childcare Act 2006 s 62(1) (see para 1134 post) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(3)(c));
- 364 (4) providing later years child minding for a child who has attained the age of eight, if a requirement to register would arise in respect of that provision by the Childcare Act 2006 s 52(1) (see para 1127 post) if the child had not attained that age (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(3)(a)).

If carried out in Wales, the following are regulated activities:

- 365 (a) acting as a child minder (in accordance with the Children Act 1989 s 79A (as added) (see para 1163 post)) so as to give rise to a requirement to register under s 79D (as added) (see para 1166 post) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(6)(a), (7));
- 366 (b) an activity which would give rise to such a requirement if the child in relation to whom the activity is carried out were under the age of eight (Sch 4 para 1(6)(b)).

See note 1 supra.

36 Ibid Sch 4 para 1(3). See note 1 supra.

37 Ibid Sch 4 para 1(5). See note 1 supra. Further provision is made to ensure that it is an offence for a barred person to act as a local authority foster carer, foster carer employed by a voluntary organisation, or a person who fosters a child for reward or through the arrangements made by a person other than a member of the child's family: see s 53.

38 As to CAFCASS see para 230 ante.

39 Ie within the meaning of the Children Act 2004 Pt 4 (ss 35-43) (as amended): see para 230 et seq ante.

40 The exercise of a function of any of the following persons is a regulated activity relating to children:

- 367 (1) a member of the governing body of an educational establishment mentioned in the Safeguarding Vulnerable Groups Act 2006 s 8(5) (see para 690 post) (Sch 4 para 4(1)(a));
- 368 (2) a member of a relevant local government body (Sch 4 para 4(1)(c)), ie a person who:
  - 4. (a) is a member of a local authority and discharges any education functions, or social services functions, of a local authority (Sch 4 para 4(2)(a));

5. (b) is a member of an executive of a local authority which discharges any such functions (Sch 4 para 4(2)(b));
6. (c) is a member of a committee (or any sub-committee which discharges any functions of that committee) of an executive of a local authority which discharges any such functions (Sch 4 para 4(2)(c), (3));
7. (d) is a member of an area committee, or any other committee (or any sub-committee which discharges any functions of those committees) of a local authority which discharges any such functions (Sch 4 para 4(2)(d), (3)).
- 369 (3) a director of children's services of a local authority in England (see para 190 ante) (Sch 4 para 4(1)(c));
- 370 (4) a director of social services of a local authority in Wales (Sch 4 para 4(1)(e));
- 371 (5) a chief education officer of a local authority in Wales (Sch 4 para 4(1)(f));
- 372 (6) a charity trustee of a children's charity (ie a charity in which the individuals who are workers for the charity normally include individuals engaging in regulated activity relating to children; an individual is a worker for a charity if he does work under arrangements made by the charity, not including any arrangements made for purposes which are merely incidental to the purposes for which the charity is established) (Sch 4 para 4(1)(g), (4), (5));
- 373 (7) a member of the Youth Justice Board for England and Wales (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1705) (Sch 4 para 4(1)(h));
- 374 (8) the Children's Commissioner or deputy Children's Commissioner appointed under the Children Act 2004 Pt 1 (ss 1-9) (see para 164 et seq) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 4(1)(i));
- 375 (9) the Children's Commissioner for Wales or deputy Children's Commissioner for Wales (see para 167 et seq ante) (Sch 4 para 4(1)(j));
- 376 (10) an operator of a database (ie a person who establishes or maintains a database, or otherwise exercises any function in relation to the management or control of the database) established in pursuance of the Children Act 2004 s 12(1)(a) or (b) or s 29(1)(a) or (b) (see paras 188, 193 ante) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 4(1)(k), (6));
- 377 (11) a member of a local safeguarding children board established under the Children Act 2006 ss 13, 31 (see paras 189, 194 ante) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 4(1)(l));
- 378 (12) a member or the chief executive of CAFCASS (see para 230 ante) (Sch 4 para 4(m)(a));
- 379 (13) a deputy appointed in respect of a child under the Mental Capacity Act 2005 s 16(2)(b) (see MENTAL HEALTH vol 30(2) (Reissue) para 757) (Safeguarding Vulnerable Groups Act 2006 Sch 4 para 4(1)(n));
- 380 (14) a member, the chief executive or a member of staff of the Independent Barring Board (see para 675 ante) (Sch 4 para 4(1)(o)).

See note 1 supra.

41 Ibid Sch 4 para 1(8), (9). See notes 1, 3 supra.

42 Ibid Sch 4 para 1(11)(a). As to the Commission for Healthcare Audit and Inspection see HEALTH SERVICES vol 54 (2008) PARA 552 et seq.

43 Ibid Sch 4 para 1(11)(b). See note 1 supra.

44 Ibid Sch 4 para 1(12)(a). See note 1 supra. The establishment referred to in the text is one in relation to which a requirement to register arises under the Care Standards Act 2000 s 11 (as amended): see para 985 post.

45 Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(12)(b). See note 1 supra. The agency referred to in the text is one in relation to which a requirement to register arises under the Care Standards Act 2000 s 11 (as amended): see para 985 post.

46 Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(12)(c). See note 1 supra. A relevant NHS body is one within the meaning of the Health and Social Care (Community Health and Standards) Act 2003 s 148 (see HEALTH SERVICES vol 54 (2008) PARA 548) and includes a reference to any person who provides, or is to provide, health care for the body (wherever the health care is or is to be provided): Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(12)(c), (13).

47 Ibid Sch 4 para 1(12). See note 1 supra.

48 Ibid Sch 4 para 5. See note 1 supra.

49 Ibid Sch 4 para 6. See note 1 supra.

50 Ibid s 5(3). See note 1 supra. If the exercise of a power to make subordinate legislation under s 5(3), s 21(12) (see para 696 post), s 26(1) (see para 697 post), s 31(6) (see para 699 post), s 35(1) (see para 701 post), s 36(1)-(3) (see para 701 post), s 37(2) (see para 702 post), s 39(1), (5) (see para 701 post), s 40(2) (see para 702 post), s 41(1), (5), (8) (see para 701 post), s 42(2) (see para 702 post), s 64(2) (see para 707 post), s 65, Sch 3 para 1(1), 2(1) (see para 681 ante), Sch 4 para 2(1)(f) (see the text and note 10 supra) will have effect in relation to Wales, the Secretary of State must not exercise the power unless he first consults the Welsh Ministers: s 56(3).

## UPDATE

### 687 Regulated activity

TEXT AND NOTES--These provisions in force for all purposes by 20 January 2009: SI 2007/3545, SI 2008/1320, SI 2009/39.

The exercise of a function of the Care Quality Commission so far as the function relates to the inspection of anything which is listed in the Health and Social Care Act 2008 s 60(1) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1011A.5), and involves the provision of any form of treatment or therapy for children, is a regulated activity relating to children: Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(13A) (added by the Health and Social Care Act 2008 Sch 5 para 92(4)).

NOTE 3--Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(14) amended: Health and Social Care Act 2008 Sch 5 para 92(5).

NOTE 10--See the Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2009, SI 2009/1548.

TEXT AND NOTES 16-26--Add head (fa) a children's centre within the meaning of Childcare Act 2006 s 5A(4) (PARA 1107A): Safeguarding Vulnerable Groups Act 2006 Sch 4 para 3(1)(fa) (added by Apprenticeships, Skills, Children and Learning Act 2009 s 200).

TEXT AND NOTES 27-34--Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(10) amended: Education and Skills Act 2008 Sch 1 para 41 (not yet in force); Health and Social Care Act 2008 Sch 5 para 92(2).

TEXT AND NOTE 42--Safeguarding Vulnerable Groups Act 2006 Sch 4 para 1(11)(a) repealed: Health and Social Care Act 2008 Sch 5 para 92(3).

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### **688. Regulated activity providers.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A person is a regulated activity provider<sup>2</sup> if:

- 1254 (1) he is responsible for the management or control of regulated activity<sup>3</sup>;
- 1255 (2) where the regulated activity is carried out for the purposes of an organisation, his exercise of that responsibility is not subject to supervision or direction by any other person for those purposes<sup>4</sup>;
- 1256 (3) he makes, or authorises the making of, arrangements (whether in connection with a contract of service or for services or otherwise) for another person to engage in that activity<sup>5</sup>;
- 1257 (4) he makes arrangements for another person to foster a child as a private foster parent and has power to terminate the arrangements<sup>6</sup>.

A person is not a regulated activity provider if he is an individual and the arrangements he makes are private arrangements<sup>7</sup>. Arrangements are private arrangements if the regulated activity is for, or for the benefit of, the individual<sup>8</sup>, or if the regulated activity is for, or for the benefit of, a child who is a member of his family, or is a friend of his<sup>9</sup>.

A person does not make arrangements for another to engage in a regulated activity merely because he (alone or together with others) appoints that person:

- 1258 (a) to a relevant position<sup>10</sup>;
- 1259 (b) as a deputy acting on behalf of a person lacking mental capacity<sup>11</sup>;
- 1260 (c) as member or chief executive of the Independent Barring Board<sup>12</sup>.

If a regulated activity provider is an unincorporated association, any requirement of or liability (including criminal liability) under the Safeguarding Vulnerable Groups Act 2006 must be taken to be a requirement on or liability of the person responsible for the management and control of the association, or if there is more than one such person, all of them jointly and severally<sup>13</sup>.

The Secretary of State<sup>14</sup> may by order provide that in specified circumstances a person who makes, or authorises the making of, arrangements (of any description) for another to engage in regulated activity either is or is not a regulated activity provider<sup>15</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A reference to a regulated activity provider must be construed in accordance with *ibid* s 6: s 6(1). See note 1 *supra*.

3 *Ibid* s 6(2)(a). See note 1 *supra*. As to regulated activities see para 687 *ante*.

4 *Ibid* s 6(2)(b). See note 1 *supra*.

5 *Ibid* s 6(2)(c). See note 1 *supra*.

- 6 Ibid ss 6(3), 54(3), (4). See note 1 supra. For the meaning of 'child' see para 675 note 5 ante.
- 7 Ibid s 6(5). See note 1 supra.
- 8 Ibid s 6(6). See note 1 supra.
- 9 Ibid 6(7). See note 1 supra. For these purposes it is immaterial whether the individual concerned is also acting in any capacity other than as a family member or friend: s 6(9). 'Family' and 'friend' must be construed in accordance with s 58 (see para 706 post): s 6(11).
- 10 Ibid s 6(8)(a). See note 1 supra. The relevant positions referred to in the text are those mentioned in Sch 4 paras 4(1)(a), (b), (g)-(j), (m), 8(1)(a), (d), (e): see para 687 ante.
- 11 Ibid s 6(8)(b). See note 1 supra. The deputy referred to in the text is one appointed under the Mental Capacity Act 2005 s 16(2)(b): see MENTAL HEALTH vol 30(2) (Reissue) para 757.
- 12 Safeguarding Vulnerable Groups Act 2006 s 6(8)(d). See note 1 supra. As to the Independent Barring Board see para 675 et seq ante.
- 13 Ibid s 6(10). See note 1 supra.
- 14 As to the Secretary of State see para 155 ante.
- 15 Safeguarding Vulnerable Groups Act 2006 s 6(12). See note 1 supra. At the date at which this volume states the law no such order had been made.

## UPDATE

### 688 Regulated activity providers

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 s 6 in force for all purposes by 12 October 2009: SI 2007/3545, SI 2008/1320, SI 2009/39, SI 2009/2611.

TEXT AND NOTES 10-11--The Secretary of State does not make arrangements for another to engage in a regulated activity by virtue of anything the Secretary of State does under the National Health Service Act 2006 s 12A or 12D, or regulations under s 12B: Safeguarding Vulnerable Groups Act 2006 s 6(8C) (s 6(8C), (8D) added by the Health Act 2009 Sch 1 para 13). A primary care trust does not make arrangements for another to engage in a regulated activity by virtue of anything the primary care trust does under regulations under the National Health Service Act 2006 s 12A(4) or 12B: Safeguarding Vulnerable Groups Act 2006 s 6(8D).

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### **689. Barred person not to engage in regulated activity.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

An individual commits an offence if he seeks to engage in, offers to engage in, or engages in, regulated activity from which he is barred<sup>2</sup>.

It is a defence for a person charged with such an offence to prove that he did not know, and could not reasonably be expected to know, that he was barred from that activity<sup>3</sup>, or to prove<sup>4</sup>:

- 1261 (1) that he reasonably thought that it was necessary for him to engage in the activity for the purpose of preventing harm to a child<sup>5</sup>;
- 1262 (2) that he reasonably thought that there was no other person who could engage in the activity for that purpose<sup>6</sup>; and
- 1263 (3) that he engaged in the activity for no longer than was necessary for that purpose<sup>7</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Ibid s 7(1). See note 1 supra. A person guilty of an offence under s 7(1) is liable on conviction on indictment to imprisonment for a term not exceeding five years, or to a fine, or to both; or on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both: s 7(2). As to the statutory maximum see para 109 note 23 ante. In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 282(3) (increase in maximum term that may be imposed on summary conviction of an offence triable either way: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1121), the reference to 12 months must be taken to be six months: Safeguarding Vulnerable Groups Act 2006 s 7(6). At the date at which this volume states the law, no day had been appointed for the commencement of the Criminal Justice Act 2003 s 282(3).

The provisions of the Safeguarding Vulnerable Groups Act 2006 Sch 4 paras 1, 7 (see para 687 ante) are modified for these purposes: see s 7(5).

<sup>3</sup> Ibid s 7(3). See note 1 supra.

<sup>4</sup> Ibid s 7(4). See note 1 supra.

<sup>5</sup> Ibid s 7(4)(a). See note 1 supra. As to the meaning of 'child' see para 675 note 5 ante.

<sup>6</sup> Ibid s 7(4)(b). See note 1 supra.

<sup>7</sup> Ibid s 7(4)(c). See note 1 supra.

### **UPDATE**

### **689 Barred person not to engage in regulated activity**

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 s 7 in force for all purposes by 12 October 2009: SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/C. REGULATED ACTIVITY/690. Person not to engage in regulated activity unless subject to monitoring.

**690. Person not to engage in regulated activity unless subject to monitoring.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

An individual commits an offence<sup>2</sup> if:

- 1264 (1) he engages in regulated activity<sup>3</sup> with the permission of a regulated activity provider<sup>4</sup>, and he is not subject to monitoring in relation to that activity<sup>5</sup>;
- 1265 (2) he engages in an relevant regulated activity<sup>6</sup>, and he is not subject to monitoring in relation to regulated activity relating to children<sup>7</sup>;
- 1266 (3) he acts as a member of the governing body of an educational institution which is exclusively or mainly for the provision of full time education to children or a maintained nursery school<sup>8</sup>, and he is not subject to monitoring in relation to regulated activity relating to children<sup>9</sup>.

A person does not commit an offence under head (1) or head (2) above if he has not attained the age of 16<sup>10</sup>.

It is a defence for a person charged with an offence under these provisions to prove that he did not know, and could not reasonably be expected to know, that he was not subject to monitoring in relation to the activity<sup>11</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A person guilty of an offence under *ibid* s 8 is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 8(4). As to the standard scale see para 132 note 2 *ante*. In determining what is the appropriate sentence to pass in respect of a person who is convicted of an offence under s 8 in a case where the regulated activity falls within Sch 4 paras 1(1), (2), 7(1), (4) (see para 687 *ante*) the court must consider the extent to which the offender had regard to any guidance issued by the Secretary of State as to the circumstances in which an activity is carried out frequently: s 8(14). See note 1 *supra*. As to the Secretary of State see para 155 *ante*.

3 As to regulated activity in relation to children see para 687 *ante*.

4 *Ibid* s 8(1)(a). See note 1 *supra*. A person does not commit an offence under s 8(1) under certain circumstances relating to permissions given before s 8 is brought into force: see s 8(7)-(9).

5 *Ibid* s 8(1)(b). See notes 1, 4 *supra*.

6 *Ibid* s 8(2)(a). See note 1 *supra*. A relevant regulated activity is one which is a regulated activity by virtue of Sch 4 para 1(3), (6): see para 687 *ante*.

7 *Ibid* s 8(2)(b). See note 1 *supra*. As to the meaning of 'children' see para 675 note 5 *ante*.

8 *Ibid* s 8(3)(a), (5). See note 1 *supra*. A maintained nursery school means such a school within the meaning of the Education Act 2002 s 39: see EDUCATION vol 15(2) (2006 Reissue) para 98. A person does not commit an offence under the Safeguarding Vulnerable Groups Act 2006 s 8(3) under certain circumstances relating to permissions given before s 8 is brought into force: see s 8(11)-(12).

9 *Ibid* s 8(3)(b). See notes 1, 8 *supra*.



10 Ibid s 8(6). See note 1 supra.

11 Ibid s 8(13). See note 1 supra.

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### **691. Use of barred person for regulated activity.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A person commits an offence<sup>2</sup> if he permits an individual to engage in regulated activity<sup>3</sup> from which that individual is barred<sup>4</sup>, when he knows or has reason to believe that that individual is barred from that activity<sup>5</sup>, and that individual engages in the activity<sup>6</sup>.

A personnel supplier<sup>7</sup> commits an offence if he supplies one individual to another<sup>8</sup>, when he knows or has reason to believe that the latter will make arrangements for the former to engage in regulated activity from which he is barred<sup>9</sup>, and the personnel supplier knows or has reason to believe that he is barred from that activity<sup>10</sup>.

It is a defence for a person charged with an offence under these provisions to prove:

- 1267 (1) that he reasonably thought that it was necessary for the barred person to engage in the activity for the purpose of preventing harm to a child<sup>11</sup>;
- 1268 (2) that he reasonably thought that there was no other person who could engage in the activity for that purpose<sup>12</sup>; and
- 1269 (3) that the barred person engaged in the activity for no longer than was necessary for that purpose<sup>13</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A person guilty of an offence under *ibid* s 9 is liable on conviction on indictment to imprisonment for a term not exceeding five years, or to a fine, or to both; or on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both: s 9(3). See note 1 *supra*. As to the statutory maximum see para 109 note 23 *ante*. In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 282(3) (increase in maximum term that may be imposed on summary conviction of an offence triable either way: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1121), the reference to 12 months must be taken to be six months: Safeguarding Vulnerable Groups Act 2006 s 9(6). At the date at which this volume states the law, no day had been appointed for the commencement of the Criminal Justice Act 2003 s 282(3).

The provisions of the Safeguarding Vulnerable Groups Act 2006 Sch 4 paras 1, 7 (see para 687 *ante*) are modified for these purposes: see s 9(5).

3 As to regulated activity relating to children see para 687 *ante*.

4 Safeguarding Vulnerable Groups Act 2006 s 9(1)(a). See note 1 *supra*.

5 *Ibid* s 9(1)(b). See note 1 *supra*.

6 *Ibid* s 9(1)(c). See note 1 *supra*.

7 A 'personnel supplier' means a person carrying on an employment agency or an employment business, or an educational institution which supplies to another person a student who is following a course at the institution, for the purpose of enabling the student to obtain experience of engaging in regulated or controlled activity: *ibid* s 60(1). 'Employment agency' and 'employment business' must be construed in accordance with the Employment Agencies Act 1973 (see TRADE AND INDUSTRY vol 97 (2010) PARA 881): Safeguarding Vulnerable Groups Act 2006 s 60(1). See note 1 *supra*. For the meaning of 'educational institution' see para 687 note 17 *ante*.

- 8 Ibid s 9(2)(a). See note 1 supra.
- 9 Ibid s 9(2)(b). See note 1 supra.
- 10 Ibid s 9(2)(c). See note 1 supra.
- 11 Ibid s 9(4)(a). See note 1 supra. As to the meaning of 'child' see para 675 note 5 ante.
- 12 Ibid s 9(4)(b). See note 1 supra.
- 13 Ibid s 9(4)(c). See note 1 supra.

## **UPDATE**

### **691 Use of barred person for regulated activity**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 1--Safeguarding Vulnerable Groups Act 2006 s 9 in force for all purposes by 12 October 2009: SI 2009/2611.

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## **692. Use of person not subject to monitoring for regulated activity.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A regulated activity provider<sup>2</sup> commits an offence<sup>3</sup> if he permits an individual to engage in regulated activity<sup>4</sup> in relation to which that individual is not subject to monitoring<sup>5</sup>, when he knows or has reason to believe that that individual is not subject to monitoring in relation to that activity<sup>6</sup>, and that individual engages in the activity<sup>7</sup>.

A personnel supplier<sup>8</sup> commits an offence if he supplies one individual to another<sup>9</sup>, when he knows or has reason to believe that the latter will make arrangements for the former to engage in regulated activity in relation to which the former is not subject to monitoring<sup>10</sup>, and he knows or has reason to believe that the former is not subject to monitoring in relation to that activity<sup>11</sup>.

A person does not commit an offence under these provisions if he has not attained the age of 16<sup>12</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to regulated activity providers see para 688 ante.

3 A person guilty of an offence under the Safeguarding Vulnerable Groups Act 2006 s 10(1), (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 10(4). As to the standard scale see para 132 note 2 ante. In determining what is the appropriate sentence to pass in respect of a person who is convicted of an offence under s 10 in a case where the regulated activity falls within Sch 4 paras 1(1), (2), 7(1), (4) (see para 687 ante) the court must consider the extent to which the offender had regard to any guidance issued by the Secretary of State as to the circumstances in which an activity is carried out frequently: s 10(10). See note 1 supra. As to the Secretary of State see para 155 ante.

4 As to regulated activity see para 687 ante.

5 Safeguarding Vulnerable Groups Act 2006 s 10(1)(a). See note 1 supra. A person does not commit an offence under s 10(1) under certain circumstances relating to permissions given before s 10 is brought into force: see s 10(6)-(7). A person may not engage in a regulated activity unless he is subject to monitoring: see para 690 ante. As to monitoring see para 697 post.

6 Ibid s 10(1)(b). See notes 1, 5 supra.

7 Ibid s 10(1)(c). See notes 1, 5 supra.

8 For the meaning of 'personnel supplier' see para 691 note 7 ante.

9 Safeguarding Vulnerable Groups Act 2006 s 10(2)(a). See note 1 supra. A person does not commit an offence under s 10(2) under certain circumstances relating to permissions given before s 10 is brought into force: see s 10(11)-(12).

10 Ibid s 10(2)(b). See notes 1, 9 supra.

The provisions of Sch 4 paras 1, 7 (see para 687 ante) are modified for the purposes of s 10(2)(b): see s 10(3).

11 Ibid s 10(2)(c). See notes 1, 9 supra.

12 Ibid s 10(5). See note 1 supra.



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### **693. Failure to check.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A regulated activity provider<sup>2</sup> commits an offence<sup>3</sup> if he permits an individual to engage in regulated activity<sup>4</sup>, which that individual then engages in<sup>5</sup>, and he fails to ascertain whether the individual is subject to monitoring<sup>6</sup> in relation to the activity<sup>7</sup>. A regulated activity provider ascertains whether the individual concerned is subject to monitoring only if he obtains an appropriate verification<sup>8</sup>. A person does not commit an offence under these provisions if the regulated activity concerned is relevant NHS employment<sup>9</sup> or if the individual concerned has not attained the age of 16<sup>10</sup>. A person commits an offence if he provides written confirmation on an appropriate verification<sup>11</sup> that is false in any material respect, and he either knows that it is false or is reckless as to whether it is false<sup>12</sup>.

Certain similar offences and responsibilities pertain to a person who carries on an employment business<sup>13</sup> and supplies for employment an individual, knowing or having reason to believe that that person will engage in regulated activity<sup>14</sup>.

The appropriate officer<sup>15</sup> commits an offence<sup>16</sup> if he fails in the prescribed period to make a check<sup>17</sup> relating to any person who is appointed to the governing body of an educational establishment<sup>18</sup>.

The Secretary of State may by regulations provide that a person commits an offence if he engages in activity that is regulated activity by virtue of being a function of a relevant office holder<sup>19</sup>, and he is not subject to monitoring in relation to that activity<sup>20</sup>. The Secretary of State may also by regulations provide that a prescribed person commits an offence if he fails in the prescribed period to make a check<sup>21</sup> in relation to another person appointed to a relevant office<sup>22</sup>. Regulations may also provide for defences to these offences<sup>23</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to regulated activity providers see para 688 ante.

3 A person guilty of an offence under the Safeguarding Vulnerable Groups Act 2006 s 11(1) or (8) (see the text to note 12 infra) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 11(9). As to the standard scale see para 132 note 2 ante. A person does not commit an offence under s 11(1) under certain circumstances relating to permissions given before s 11 is brought into force: see s 11(6)-(7). In determining what is the appropriate sentence to pass in respect of a person who is convicted of an offence under s 11 in a case where the regulated activity falls within Sch 4 paras 1(1), (2), 7(1), (4) (see para 687 ante) the court must consider the extent to which the offender had regard to any guidance issued by the Secretary of State as to the circumstances in which an activity is carried out frequently: s 11(10). See note 1 supra. As to the Secretary of State see para 155 ante.

If the commission of an offence under s 11 is due to the act or reckless default of a person who acts for or appears to act for the regulated activity provider then that person is guilty of the offence, and he may be proceeded against and punished whether or not proceedings are also taken against the regulated activity provider: s 19(6). In the application of s 19(6) to a person who is in Crown employment, s 51(2) (see para 680 note 2 ante) must be ignored: s 19(7).

4 Ibid s 11(1)(a). See note 1 supra. As to regulated activity see para 687 ante.

5 Ibid s 11(1)(b). See note 1 supra.

6 A person may not engage in a regulated activity unless he is subject to monitoring: see para 690 ante. As to monitoring see para 697 post.

7 Safeguarding Vulnerable Groups Act 2006 s 11(1)(c). See note 1 supra.

8 Ibid s 11(2). As to appropriate verification see Sch 5. See note 1 supra.

9 Ibid s 11(4). As to relevant NHS employment see s 17. See note 1 supra.

10 Ibid s 11(5). See note 1 supra.

11 Ie under ibid Sch 5.

12 Ibid 11(8). See notes 1, 3 supra.

13 For the meaning of 'employment business' see para 691 note 7 ante.

14 See the Safeguarding Vulnerable Groups Act 2006 s 12, Sch 6. See note 1 supra.

15 Ie such person as is prescribed by regulations: ibid s 13(5); and see para 681 note 5 ante. See note 1 supra. At the date at which this volume states the law, no regulations had been made for these purposes.

16 A person guilty of an offence under ibid s 13(1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 13(2). A person does not commit an offence under s 11(1) under certain circumstances relating to permissions given before s 11 is brought into force: see s 13(3)-(4). See note 1 supra.

17 Ie a check in accordance with ibid s 15. See note 1 supra. At the date at which this volume states the law no period had been prescribed for these purposes. Such a check requires that a person obtains relevant information under s 30 (see para 699 post), and a copy of an enhanced criminal record certificate, amongst other requirements: see s 15. An enhanced criminal record certificate means, in relation to a person appointed to a position mentioned in Sch 4 para 4(1) (see para 687 ante), an enhanced criminal record certificate issued under the Police Act 1997 (within the meaning of s 113BA (as added) containing suitability information relating to children: Safeguarding Vulnerable Groups Act 2006 s 15(7)(a).

18 Ibid s 13(1). See note 1 supra. The text refers to an educational establishment mentioned in s 8(5): see para 690 text and note 8 ante.

19 Ie by virtue of ibid Sch 4 para 1(9): see para 687 ante.

20 Ibid s 14(1). See note 1 supra. An offence created by regulations under s 14 is punishable on summary conviction with a maximum fine not exceeding level 5 on the standard scale: s 14(4).

21 Ie a check in accordance with ibid s 15: see note 17 supra.

22 Ibid s 14(2). See notes 1, 20 supra.

23 Ibid s 14(3). See note 1 supra.

## UPDATE

### 693 Failure to check

TEXT AND NOTES--These provisions in force in part for certain purposes 19 May 2008: SI 2008/1320.

NOTES 8, 11--Safeguarding Vulnerable Groups Act 2006 Sch 5 amended: SI 2009/203.

NOTE 14--Safeguarding Vulnerable Groups Act 2006 Sch 6 amended: SI 2009/203.

NOTE 17--Police Act 1997 s 113BA amended: Education and Inspections Act 2006 s 170(2) (in force in relation to Wales: see SI 2009/2545), Education and Skills Act 2008 Sch 1 para 12 (not yet in force). Safeguarding Vulnerable Groups Act 2006 s 15 amended: SI 2009/203. See also Police Act 1997 (Criminal Records) (No 2) Regulations

2009, SI 2009/1882, reg 5 (cases in which suitability information in relation to children must be included in an enhanced criminal records certificate).



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#### **694. Offences committed by companies and partnerships.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

If an offence<sup>2</sup> is committed by a body corporate or a partnership (whether or not a limited partnership) and is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of<sup>3</sup>:

- 1270 (1) a director<sup>4</sup>, manager, secretary or other similar officer of the body, or a partner (as the case may be)<sup>5</sup>;
- 1271 (2) or a person purporting to act in such a capacity,

he (as well as the body, or the partnership, as the case may be) commits the offence<sup>6</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> ie an offence under *ibid* ss 9-11, 23, 27, 38 or Sch 6: see paras 691-693 *ante*, 696, 698, 701-702 *post*.

<sup>3</sup> *Ibid* s 18(1), (2). See note 1 *supra*.

<sup>4</sup> 'Director' in relation to a body corporate whose affairs are managed by its members, means a member of the body: *ibid* s 18(3). See note 1 *supra*.

<sup>5</sup> *Ibid* s 18(1)(a), (2)(a). See note 1 *supra*.

<sup>6</sup> *Ibid* s 18(1)(b), (2)(b). See note 1 *supra*.

#### **UPDATE**

#### **694 Offences committed by companies and partnerships**

TEXT AND NOTE 1--These provisions in force for certain purposes 12 October 2009: SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/C. REGULATED ACTIVITY/695. Offences committed by other persons.

### **695. Offences committed by other persons.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A person commits an offence<sup>2</sup> if, in the course of acting or appearing to act on behalf of a regulated activity provider<sup>3</sup>, he permits an individual to engage in a regulated activity<sup>3</sup> in relation to which that individual is not subject to monitoring<sup>5</sup>, when he knows or has reason to believe that that individual is not subject to monitoring in relation to that activity<sup>6</sup>, and the individual engages in the activity<sup>7</sup>.

A person commits an offence<sup>8</sup> if, in the course of acting or appearing to act on behalf of a personnel supplier<sup>9</sup> he supplies one individual to another<sup>10</sup>, when he knows or has reason to believe that the latter will make arrangements for the former to engage in regulated activity from which he is barred<sup>11</sup>, and he knows or has reason to believe that the former individual is barred from the activity<sup>12</sup>.

A person commits an offence<sup>13</sup> if, in the course of acting or appearing to act on behalf of a personnel supplier, he supplies one individual to another<sup>14</sup>, when he knows or has reason to believe that the latter will make arrangements for the former to engage in regulated activity in relation to which he is not subject to monitoring<sup>15</sup>, and he knows or has reason to believe that the former individual is not subject to monitoring in relation to the activity<sup>16</sup>.

A person does not commit an offence under these provisions if the individual concerned has not attained the age of 16<sup>17</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A person guilty of an offence under *ibid* s 19(1) or s 19(3) (see the text and notes 13-16 *infra*) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 19(4). See note 1 *supra*. As to the standard scale see para 132 note 2 *ante*. In determining what is the appropriate sentence to pass in respect of a person who is convicted of an offence under s 19(1) in a case where the regulated activity falls within Sch 4 paras 1(1), (2), 7(1), (4) (see para 687 *ante*) the court must consider the extent to which the offender had regard to any guidance issued by the Secretary of State as to the circumstances in which an activity is carried out frequently: s 19(9). As to the Secretary of State see para 155 *ante*.

3 As to regulated activity providers see para 688 *ante*.

4 As to regulated activity see para 687 *ante*.

5 Safeguarding Vulnerable Groups Act 2006 s 19(1)(a). See note 1 *supra*. A person may not engage in a regulated activity unless he is subject to monitoring: see para 690 *ante*. As to monitoring see para 697 *post*.

6 *Ibid* s 19(1)(b). See note 1 *supra*.

7 *Ibid* s 19(1)(c). See note 1 *supra*.

8 A person guilty of an offence under *ibid* s 19(2) is liable on conviction on indictment to imprisonment for a term not exceeding five years, or to a fine, or to both; or on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both: s 19(5). See note 1 *supra*. As to the statutory maximum see para 109 note 23 *ante*.

9 For the meaning of 'personnel supplier' see para 691 note 7 *ante*.

- 10 Safeguarding Vulnerable Groups Act 2006 s 19(2)(a). See note 1 *supra*.
- 11 Ibid s 19(2)(b). See note 1 *supra*. Schedule 4 para 1 is modified for the purposes of s 19(2)(b) and s 19(3)(b) (see the text and note 15 *infra*): s 19(8).
- 12 Ibid s 19(2)(c). See note 1 *supra*.
- 13 See note 2 *supra*.
- 14 Safeguarding Vulnerable Groups Act 2006 s 19(3)(a). See note 1 *supra*.
- 15 Ibid s 19(3)(b). See notes 1, 11 *supra*.
- 16 Ibid s 19(3)(c). See note 1 *supra*.
- 17 Ibid s 20(1). See note 1 *supra*. Offences committed under s 19 (see the text and notes 1-16 *supra*) are subject to other exclusions and defences: see s 20(3)-(7).

## **UPDATE**

### **695 Offences committed by other persons**

TEXT AND NOTE 1--These provisions in force in part 12 October 2009: SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/D. CONTROLLED ACTIVITY/696. Controlled activity relating to children.

## ***D. CONTROLLED ACTIVITY***

### **696. Controlled activity relating to children.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

An activity is a controlled activity<sup>2</sup>, to the extent that it is not regulated activity relating to children<sup>3</sup>, if:

1272 (1) it consists in or is carried out in connection with any form of health care, treatment or therapy<sup>4</sup>, it is carried out frequently by the same person or it is carried out by the same person on more than two days in any period of 30 days<sup>5</sup>, and it gives the person an opportunity to have any form of contact with children, or to have access to the health records of children<sup>6</sup>;

1273 (2) it is carried out in a further education institution<sup>7</sup>, it is carried out frequently by the same person or it is carried out by the same person on more than two days in any period of 30 days<sup>8</sup>, it is carried out by the person while engaging in any form of work (whether or not for gain)<sup>9</sup>, it is carried out for or in connection with the purposes of the institution<sup>10</sup>, and it gives the person an opportunity to have any form of contact with children<sup>11</sup>;

1274 (3) it consists in making direct payments authorised by the Secretary of State<sup>12</sup> or the provision of assistance either in connection with the making of such payments or securing the provision of services paid for out of them<sup>13</sup>, and it is carried out frequently by the same person or it is carried out by the same person on more than two days in any period of 30 days<sup>14</sup>, and it gives the person an opportunity to have any form of contact with children<sup>15</sup>;

1275 (4) if it is carried out, frequently<sup>16</sup>:

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66. (a) for, or on behalf of, a local authority (in the exercise of its educational or social services functions)<sup>17</sup>;

67. (b) for, or on behalf of, the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>18</sup>;

68. (c) for, or on behalf of, the National Assembly for Wales<sup>19</sup>;

69. (d) for, or on behalf of, the Qualifications and Curriculum Authority<sup>20</sup>;

70. (e) for, or on behalf of, Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>21</sup>;

71. (f) for, or on behalf of, Her Majesty's Chief Inspector of Education and Training in Wales<sup>22</sup>;

72. (g) for, or on behalf of, a relevant establishment or agency<sup>23</sup>,

.10

1276 and it gives the person carrying out the activity the opportunity to have access to various records and information relating to children<sup>24</sup>;

1277 (5) if it consists in or involves on a regular basis the day to day management or supervision of a person carrying out an activity which falls within head (1), (2) or (4) above<sup>25</sup>.

The Secretary of State may, by order, amend the above provisions<sup>26</sup>, and, by regulations, make provision as to controlled activity generally<sup>27</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 A reference to a controlled activity relating to children must be construed in accordance with *ibid* s 21: s 21(1). See note 1 *supra*.

3 *Ibid* s 21(2). See note 1 *supra*. As to the meaning of 'child' see para 675 note 5 *ante*.

4 *Ibid* s 21(3)(a). The health care, treatment or therapy which is referred to in the text is that which is provided for a child in pursuance of arrangements made by or under an enactment, in an establishment in relation to which a requirement to register arises under the Care Standards Act 2000 s 11 (see para 985 *post*), or by an agency in relation to which such a requirement arises: Safeguarding Vulnerable Groups Act 2006 s 21(8). See note 1 *supra*.

5 *Ibid* s 21(3)(b). See note 1 *supra*.

6 *Ibid* s 21(3)(c), (9). See note 1 *supra*.

7 *Ibid* s 21(4)(a). See note 1 *supra*. The text refers to an educational institution within the meaning of the Education Act 2002 s 140(3): see EDUCATION vol 15(2) (2006 Reissue) para 782.

8 Safeguarding Vulnerable Groups Act 2006 s 21(4)(b). See note 1 *supra*.

9 *Ibid* s 21(4)(c). See note 1 *supra*.

10 *Ibid* s 21(4)(d). See note 1 *supra*.

11 *Ibid* s 21(4)(e), (9)(a). See note 1 *supra*.

12 *le* payments under the Children Act 1989 s 17A (as added and amended): see para 861 *post*.

13 Safeguarding Vulnerable Groups Act 2006 s 21(5)(a). See note 1 *supra*.

14 *Ibid* s 21(5)(b). See note 1 *supra*.

15 *Ibid* s 21(5)(c), (9)(a). See note 1 *supra*.

16 *Ibid* s 21(6). See note 1 *supra*.

17 *Ibid* s 21(6), (10)(a). See note 1 *supra*. 'Local authority', in relation to the education functions of a local authority, has the same meaning as in the Education Act 1996 s 579(1) (see EDUCATION vol 15(1) (2006 Reissue) para 50); in any other case, it has the meaning given by the Local Authority Social Services Act 1970 s 1 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1005): Safeguarding Vulnerable Groups Act 2006 s 21(11). 'Social services functions' has the meaning given by the Local Authority Social Services Act 1970 s 1A (as added) (see LOCAL GOVERNMENT vol 69 (2009) PARA 588; SOCIAL SERVICES AND COMMUNITY CARE): Safeguarding Vulnerable Groups Act 2006 s 21(11).

18 *Ibid* s 21(6), (10)(b). See note 1 *supra*. As to CAFCASS see para 230 *ante*.

19 *Ibid* s 21(6), (10)(c). See note 1 *supra*. The text refers to an activity carried out in exercise of the functions of the National Assembly for Wales under the Children's Act 2004 Pt 4 (ss 35-43) (as amended): see para 230 *et seq ante*. As to the National Assembly for Wales see para 155 *ante*.

20 Safeguarding Vulnerable Groups Act 2006 s 21(6), (10)(d). See note 1 *supra*. As to the Qualifications and Curriculum Authority see EDUCATION vol 15(2) (2006 Reissue) para 874 *et seq*.

21 *Ibid* s 21(6), (10)(e). See note 1 *supra*. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 *ante*; and EDUCATION.

22 *Ibid* s 21(6), (10)(f). See note 1 *supra*. As to Her Majesty's Chief Inspector of Education and Training in Wales see the Learning and Skills Act 2000 s 73; and EDUCATION vol 15(2) (2006 Reissue) para 1188.

23 Safeguarding Vulnerable Groups Act 2006 s 21(6), (10)(g). See note 1 supra. A relevant establishment or agency is one in respect of which a requirement to register arises under the Care Standards Act 2000 s 11 (as amended): see para 985 post.

24 Safeguarding Vulnerable Groups Act 2006 s 21(6). See note 1 supra. The records and information referred to in the text are:

- 381 (1) health, educational or social services records relating to children (s 21(6)(a));
- 382 (2) information relating to educational institutions provided pursuant to the Learning and Skills Act 2000 s 17(1) (see EDUCATION vol 15(2) (2006 Reissue) para 1097) (Safeguarding Vulnerable Groups Act 2006 s 21(6)(b));
- 383 (3) in the case of a person carrying out an activity mentioned in head (4)(b) in the text, records of family proceedings (within the meaning of the Children Act 1989 s 8(3): see para 199 ante) held by CAFCASS (Safeguarding Vulnerable Groups Act 2006 s 21(6)(c));
- 384 (4) in the case of a person carrying out an activity mentioned in head (4)(c) in the text, records of family proceedings (within the meaning of the Children Act 1989 s 8(3): see para 199 ante) held by the National Assembly for Wales (Safeguarding Vulnerable Groups Act 2006 s 21(6)(d)).

'Educational records' includes individual child information within the meaning of the Childcare Act 2006 s 99 (and s 99 as modified by s 10) or s 101: Safeguarding Vulnerable Groups Act 2006 s 21(11). 'Social services records' means records obtained or held by a local authority in the exercise of its social services functions: s 21(11).

25 Ibid s 21(7). See note 1 supra.

26 Ibid s 21(12). See note 1 supra. At the date at which this volume states the law no such order had been made. As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante. See also para 687 note 50 ante.

27 See ibid s 23. See note 1 supra. In so far as it is exercisable only in relation to Wales, the power to make regulations under s 23(1) is exercisable by the Welsh Ministers instead of the Secretary of State: s 56(1)(f). At the date at which this volume states the law no regulations had been made under s 23.

## UPDATE

### 696 Controlled activity relating to children

TEXT AND NOTE 1--These provisions in force for certain purposes on 20 January 2009 and 12 October 2009: SI 2009/39, SI 2009/2611.

NOTE 4--The health care, treatment or therapy also which is referred to in the text is that which is provided for a child out of direct payments made under the National Health Service Act 2006 s 12A(1), or under regulations under s 12A(4): Safeguarding Vulnerable Groups Act 2006 s 21(8) (amended by the Health Act 2009 Sch 1 para 14).

NOTES 12, 13--Direct payments also refers to payments under the National Health Service Act 2006 s 12A(1), or regulations under s 12(4): Safeguarding Vulnerable Groups Act 2006 s 21(5)(a) (amended by the Health Act 2009 Sch 1 para 14).

TEXT AND NOTE 20--Reference to Qualifications and Curriculum Authority is now to Qualifications and Curriculum Development Agency: Safeguarding Vulnerable Groups Act 2006 s 21(10)(d) (amended by Apprenticeships, Skills, Children and Learning Act 2009 Sch 12 para 43).

NOTE 24--Head (2). Safeguarding Vulnerable Groups Act 2006 s 21(6)(b) amended: Education and Skills Act 2008 Sch 1 para 89.

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## **E. MONITORING**

### **697. Monitoring.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

An individual is subject to monitoring in relation to regulated activity<sup>2</sup> if he is not barred from engaging in the activity<sup>3</sup>, he makes a monitoring application<sup>4</sup>, he satisfies the prescribed requirements<sup>5</sup>, and he pays such fee (if any) as is prescribed<sup>6</sup>. On a monitoring application being made, the Secretary of State must make such enquiries as he thinks appropriate to ascertain whether any relevant information<sup>7</sup> exists in relation to the individual<sup>8</sup>, and request the person who holds such information to provide it to him<sup>9</sup>. The Secretary of State must provide the individual with any disclosable information<sup>10</sup> that he has<sup>11</sup>, or notify the individual that he has no disclosable information<sup>12</sup>.

The Secretary of State must also ensure that: (1) at such intervals as he thinks appropriate such enquiries are made as he thinks appropriate to ascertain whether any new relevant information<sup>13</sup> exists in relation to the individual<sup>14</sup>; and (2) the person who holds such new relevant information is requested to provide it to him<sup>15</sup>.

The Secretary of State may cease monitoring in relation to an individual in such circumstances as are prescribed<sup>16</sup>. He must cease such monitoring in relation to an individual who satisfies the Secretary of State that he is not engaged in the regulated activity concerned<sup>17</sup>, and requests the Secretary of State to cease monitoring<sup>18</sup>.

The Secretary of State may, by order, make such provision as he thinks necessary or expedient in consequence of or having regard to any relevant Scottish legislation or relevant Northern Ireland legislation; and such an order may include provision for treating a person to whom a monitoring provision applies as if he were subject to monitoring in relation to regulated activity<sup>19</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to regulated activity see para 687 ante.

3 Safeguarding Vulnerable Groups Act 2006 s 24(1)(a). See note 1 supra.

4 Ibid s 24(1)(b). See note 1 supra. A monitoring application must specify that it is in respect of regulated activity relating to children: s 24(2). A monitoring application is an application made to the Secretary of State in the prescribed form and manner (s 24(10)), including requirements as to the manner in which the applicant must prove his identity (see s 24(11), (12)). For the meaning of 'prescribed' see para 681 note 5 ante. At the date at which this volume states the law no such form and manner had been prescribed. As to the Secretary of State see para 155 ante. As to the meaning of 'child' see para 675 note 5 ante.

5 Ibid s 24(1)(c). See note 1 supra. At the date at which this volume states the law no such requirements had been prescribed.

6 Ibid 24(1)(d). See note 1 supra. As to the fees which may be prescribed in relation to monitoring see s 25. At the date at which this volume states the law no such fees had been prescribed.

7 'Relevant information' is:

385 (1) the prescribed details of relevant matter (within the meaning of the Police Act 1997 s 113A (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 712) (Safeguarding Vulnerable Groups Act 2006 s 24(8)(a));

386 (2) information which the chief officer of a relevant police force thinks might be relevant in relation to the regulated activity concerned (s 24(8)(b));

387 (3) such other information as may be prescribed (s 24(8)(c)).

At the date at which this volume states the law no other such information had been prescribed. See note 1 supra.

8 Ibid s 24(3)(a). See note 1 supra.

9 Ibid s 24(3)(b). See note 1 supra.

10 'Disclosable information' is information provided to the Secretary of State under ibid s 24(3)(b) (see the text to note 9 supra) in relation to the individual, but does not include information mentioned in note 7 head 2 supra which the chief officer of a relevant police force thinks it would not be in the interests of the prevention or detection of crime to disclose: s 24(5), (9). This decision is subject to review by an independent monitor: see the Police Act 1997 s 119B(5)(d) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 729.

11 Ibid s 24(4)(a). See note 1 supra. Section 24(4) does not apply if the individual made an application for an enhanced criminal record certificate (under the Police Act 1997 s 113B (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq)) simultaneously with his monitoring application: s 24(6). These cases are subject to review by an independent monitor: see the Police Act 1997 s 119B(5)(e) (as added): see POLICE.

12 Safeguarding Vulnerable Groups Act 2006 s 24(4)(b). See notes 1, 11 supra.

13 Relevant information is new if it was not discovered when any earlier inquiries under ibid s 24 were carried out: s 24(13). See note 1 supra.

14 Ibid s 24(7)(a). See note 1 supra.

15 Ibid s 24(7)(b). See note 1 supra.

16 Ibid s 26(1). See note 1 supra. See also para 687 note 50 ante. At the date at which this volume states the law no such circumstances had been prescribed.

17 Ibid s 26(2)(a). See note 1 supra.

18 Ibid s 26(2)(b). See note 1 supra.

19 See ibid s 54. See note 1 supra. At the date at which this volume states the law no such order had been made. As to the making of orders generally see para 707 post.

## **UPDATE**

### **697 Monitoring**

TEXT AND NOTES--Safeguarding Vulnerable Groups Act 2006 ss 24, 26 in force in part for certain purposes, s 25 in force, 19 May 2008: SI 2008/1320. Safeguarding Vulnerable Groups Act 2006 s 54 in force for all purposes on 12 October 2009: SI 2009/2611.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/E. MONITORING/698. Prohibition of requirement to produce certain records.

#### **698. Prohibition of requirement to produce certain records.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

A person must not, in connection with the recruitment of another person as an employee<sup>2</sup>, or the continued employment of another person, require that other person or a third party to supply him with a relevant record<sup>3</sup>. However, these provisions do not apply if the duties of the employee include certain regulated activities<sup>4</sup> and the activity is for, or for the benefit of, the person himself, a child<sup>5</sup> who is a member of his family, or a child who is a friend of his<sup>6</sup>.

A person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public must not, as a condition of providing or offering to provide any goods, facilities or services to another person, require that other person or a third party to supply him with a relevant record<sup>7</sup>.

A person who contravenes these provisions is guilty of an offence<sup>8</sup>.

<sup>1</sup> The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> An employee is an individual who works under a contract of employment, as defined by the Employment Rights Act 1996 s 230(2) (see EMPLOYMENT vol 39 (2009) PARA 2), provides any service under a contract for services, or holds any office, whether or not he is entitled to remuneration; and 'employment' must be construed accordingly: Safeguarding Vulnerable Groups Act 2006 s 27(7). See note 1 supra.

<sup>3</sup> Ibid s 27(1). See note 1 supra. A relevant record is the record of information provided by the Secretary of State under s 24(4) (see para 697 ante): s 27(6).

<sup>4</sup> I.e. those of a kind mentioned in ibid Sch 4 para 2(1): see para 687 ante.

<sup>5</sup> As to the meaning of 'child' see para 675 note 5 ante.

<sup>6</sup> Safeguarding Vulnerable Groups Act 2006 s 27(3). See note 1 supra. 'Family' and 'friend' must be construed in accordance with s 58 (see para 706 post): s 27(4).

<sup>7</sup> Ibid s 27(2). See note 1 supra.

<sup>8</sup> Ibid s 27(5). See note 1 supra. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 27(5). As to the standard scale see para 132 note 2 ante.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/699. Provision of vetting information.

## **F. NOTICES AND INFORMATION**

### **699. Provision of vetting information.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Secretary of State<sup>2</sup> must provide a person with relevant information relating to children<sup>3</sup> in relation to another person<sup>4</sup> if he makes an application for that information<sup>5</sup>, the application contains the appropriate declaration<sup>6</sup>, and the Secretary of State has no reason to believe that the declaration is false<sup>7</sup>. Where a person consents to the provision of information to another person in relation to such an application, the consent also has effect in relation to any subsequent such application by that same person<sup>8</sup>. The Secretary of State may prescribe<sup>9</sup> the form, manner and contents of an application (including the form and manner of a declaration contained in such an application)<sup>10</sup>.

For these purposes, relevant information relating to children is whether a person is subject to monitoring in relation to regulated activity relating to children<sup>11</sup>, and, if so, whether he is undergoing assessment<sup>12</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Secretary of State see para 155 ante.

3 Safeguarding Vulnerable Groups Act 2006 s 30(4)(a). See note 1 supra. As to the meaning of 'children' see para 675 note 5 ante.

4 Ibid s 30(1). See note 1 supra.

5 Ibid s 30(1)(a). See note 1 supra. An individual commits an offence if he makes a false declaration in an application, and he either knows that it is false or is reckless as to whether it is false: s 34(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 34(2). As to the standard scale see para 132 note 2 ante.

6 Ibid s 30(1)(b). See note 1 supra. An appropriate declaration is a declaration by the person seeking the information that he falls within one of the categories specified in Sch 7 (which lists the categories of person who qualify to apply to the Secretary of State for the provision of information), and that the person about whom the information is sought has consented to the provision of that information to the applicant: s 30(2). No consent is required where the applicant is an appropriate officer (within the meaning of s 13: see para 693 ante) who is required to obtain information: s 30(5); and see Sch 7 entry 17.

7 Ibid s 30(1)(c). See note 1 supra.

8 Ibid s 30(6). See note 1 supra.

9 For the meaning of 'prescribe' see para 681 note 5 ante.

10 Safeguarding Vulnerable Groups Act 2006 s 30(7). See note 1 supra. At the date at which this volume states the law no regulations had been made prescribing the form, manner and contents of an application.

11 Ibid s 31(1), (2)(a). See note 1 supra. The Secretary of State may by order amend s 31 for the purpose of altering the meaning of relevant information relating to children: s 31(6). See also para 687 note 50 ante.

12 Ibid s 31(1), (2)(b). See notes 1, 11 supra. A person is undergoing assessment if: (1) the Secretary of State is required to notify him as mentioned in s 24(4) (see para 697 ante) in connection with his monitoring application but has not yet done so; (2) he has made a simultaneous application under the Police Act 1997 s 113B (as added and amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq) but the Secretary of State has not yet issued an enhanced criminal record certificate; (3) the Independent Barring Board is considering whether to include him in the children's barred list in pursuance of the Safeguarding Children Act 2006 Sch 3 para 3 or 5 (see para 681 ante): s 31(4).

## **UPDATE**

### **699 Provision of vetting information**

TEXT AND NOTE 1--These provisions in force in part for certain purposes 19 May 2008: SI 2008/1320.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/700. Registration.

## **700. Registration.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Secretary of State<sup>2</sup> must establish and maintain a register<sup>3</sup>, in which he must register one person (A) in relation to another (B) if<sup>4</sup>:

- 1278 (1) A makes an application to be registered in relation to B<sup>5</sup>;
- 1279 (2) the application contains the appropriate declaration<sup>6</sup>;
- 1280 (3) the Secretary of State has no reason to believe that the declaration is false<sup>7</sup>; and
- 1281 (4) B is subject to monitoring in relation to the regulated activity<sup>8</sup> to which the application relates<sup>9</sup>.

Consent with regard to the provision of vetting information<sup>10</sup> also has effect as consent to any application to be registered under these provisions<sup>11</sup>. The Secretary of State may prescribe<sup>12</sup> the form, manner and contents of an application (including the form and manner of a declaration contained in such an application)<sup>13</sup>.

The Secretary of State must notify A if B ceases to be subject to monitoring in relation to the regulated activity to which the registration relates<sup>14</sup>. Once a person is so notified, his registration ceases<sup>15</sup>. The Secretary of State may cancel a person's registration in such circumstances as are prescribed<sup>16</sup>. The Secretary of State must cancel a person's registration if the person applies for it to be cancelled<sup>17</sup>, and, in prescribed circumstances, if the person in relation to whom he is registered applies for it to be cancelled<sup>18</sup>. When a person's registration is cancelled under prescribed circumstances the Secretary of State must notify him of that fact<sup>19</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Secretary of State see para 155 ante.

3 Safeguarding Vulnerable Groups Act 2006 s 32(1). See note 1 supra.

4 Ibid s 32(2). See note 1 supra.

5 Ibid s 32(2)(a). See note 1 supra. An individual commits an offence if he makes a false declaration in an application, and he either knows that it is false or is reckless as to whether it is false: s 34(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 34(2). As to the standard scale see para 132 note 2 ante.

6 Ibid s 32(2)(b). See note 1 supra. An appropriate declaration is a declaration by the person seeking the information that he falls within one of the categories specified in Sch 7, and that the person about whom the information is sought has consented to the provision of that information to the applicant: s 32(3). No consent is required where the applicant is an appropriate officer (within the meaning of s 13: see para 693 ante) who is required to obtain information: s 32(8); and see Sch 7, entry 17.

7 Ibid s 32(2)(c). See note 1 supra.

8 As to regulated activity see para 687 ante.

9 Safeguarding Vulnerable Groups Act 2006 s 32(2)(d). See note 1 supra.

10 le under *ibid* s 30: see para 699 ante.

11 *Ibid* s 32(9). See note 1 *supra*.

12 For the meaning of 'prescribe' see para 681 note 5 ante.

13 Safeguarding Vulnerable Groups Act 2006 s 32(10). See note 1 *supra*. At the date at which this volume states the law, no regulation had been made prescribing the form, manner and contents of an application.

14 *Ibid* s 32(6). See note 1 *supra*. This requirement is satisfied if notification is sent to any address recorded against the relevant person's name in the register: s 32(7).

15 *Ibid* s 33(2). See note 1 *supra*.

16 *Ibid* s 33(3). See note 1 *supra*. At the date at which this volume states the law no such circumstances had been prescribed.

17 *Ibid* s 33(4)(a). See note 1 *supra*.

18 *Ibid* s 33(4)(b). See note 1 *supra*. At the date at which this volume states the law no such circumstances had been prescribed.

19 *Ibid* s 33(5). See note 1 *supra*. This requirement is satisfied if notification is sent to any address recorded against the relevant person's name in the register: s 33(6).

## **UPDATE**

### **700 Registration**

TEXT AND NOTE 1--These provisions in force in part for certain purposes 19 May 2008: SI 2008/1320.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/701. Duty to refer.

### **701. Duty to refer.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

Certain persons and bodies have a duty to refer any prescribed<sup>2</sup> information to the Independent Barring Board<sup>3</sup>, where they think that a person is on the children's barred list<sup>4</sup>, that the person has engaged in relevant inappropriate conduct<sup>5</sup>, or that the harm test is satisfied<sup>6</sup>.

Those persons and bodies are:

- 1282 (1) regulated activity providers<sup>7</sup>;
- 1283 (2) a person responsible for the management or control of a controlled activity<sup>8</sup>;
- 1284 (3) personnel suppliers<sup>9</sup>, including a personnel supplier which is an employment agency or employment business<sup>10</sup> or an educational institution<sup>11</sup>;
- 1285 (4) local authorities<sup>12</sup>;
- 1286 (5) keepers of relevant registers<sup>13</sup>;
- 1287 (6) supervisory authorities<sup>14</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'prescribed' see para 681 note 5 ante. See also para 687 note 50 ante. At the date at which this volume states the law no such information had been prescribed.

3 As to the Independent Barring Board see para 675 et seq ante.

4 See the Safeguarding Vulnerable Groups Act 2006 ss 35(3)(a), 36(4)(a), 39(2)(a), 41(2)(a), 45(2)(a). See note 1 supra. As to offences under ss 35, 36 see s 38. As to the children's barred list see para 681 ante. For the meaning of 'children' see para 675 note 5 ante.

5 Ibid ss 35(3)(b), 36(4)(b), 39(2)(b), 41(2)(b), 45(2)(b). See note 1 supra. It is immaterial whether there is a finding of fact in any proceedings under these provisions: see s 52.

6 Ibid s 35(3)(c), 36(4)(c), 39(2)(c), 41(2)(c), 45(2)(c). See note 1 supra. It is immaterial whether there is a finding of fact in any proceedings under these provisions: see s 52. The harm test is that the person in question may: (1) harm a child; (2) cause a child to be harmed; (3) put a child at risk of harm; (4) attempt to harm a child; or (5) incite another to harm a child: ss 35(4), 36(5), 39(3), 41(3), 45(3).

7 See ibid s 35. See note 1 supra. As to regulated activity providers see para 688 ante.

8 See ibid ss 23, 35; and para 696 ante. See note 1 supra.

9 For the meaning of 'personnel supplier' see para 691 note 7 ante.

10 As to the meanings of 'employment agency' and 'employment business' see para 691 note 7 ante.

11 See the Safeguarding Vulnerable Groups Act 2006 s 36. See note 1 supra. For the meaning of 'educational institution' see para 687 note 17 ante.

12 See ibid s 39. See note 1 supra. It is immaterial whether there is a finding of fact in any proceedings under s 39(5)(a): see s 52. 'Local authority' has the same meaning as in the Local Authorities (Goods and Services) Act 1970 s 1 (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 23.

13 See the Safeguarding Vulnerable Groups Act 2006 s 41. See note 1 *supra*. It is immaterial whether there is a finding of fact in any proceedings under s 41(5)(a): see s 52. Section 41(7) provides that the relevant registers are:

- 388 (1) the register of teachers maintained under the Teaching and Higher Education Act 1998 s 3 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 822);
- 389 (2) the register of pharmaceutical chemists maintained under the Pharmacy Act 1954 s 2 (repealed: see now the Pharmacists and Pharmacy Technicians Order 2007, SI 2007/289, art 10; and MEDICAL PROFESSIONS);
- 390 (3) either of the lists of medical practitioners kept under the Medical Act 1983 s 2 (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 34);
- 391 (4) the dentists register kept under the Dentists Act 1984 s 14 (as substituted) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 417 et seq) or the dental care professionals register kept under s 36B (as added) (see MEDICAL PROFESSIONS);
- 392 (5) the register of optometrists or the register of dispensing opticians maintained under the Opticians Act 1989 s 7 (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 837), or the register of persons undertaking training as optometrists or the register of persons undertaking training as dispensing opticians maintained under s 8A (as added) (see MEDICAL PROFESSIONS);
- 393 (6) the register of osteopaths maintained under the Osteopaths Act 1993 s 2 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 519 et seq);
- 394 (7) the register of chiropractors maintained under the Chiropractors Act 1994 s 2 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 614);
- 395 (8) the register of social workers and social care workers maintained under the Care Standards Act 2000 s 56 (see SOCIAL SERVICES AND COMMUNITY CARE);
- 396 (9) the register of qualified nurses and midwives maintained under the Nursing and Midwifery Order 2001, SI 2002/253, art 5 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 694 et seq);
- 397 (10) the register of members of relevant professions maintained under the Health Professions Order 2001, SI 2002/254, art 5 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 325).

14 See the Safeguarding Vulnerable Groups Act 2006 s 45. See note 1 *supra*. It is immaterial whether there is a finding of fact in any proceedings under s 45(5)(a): see s 52. Section 45(7) provides that a supervisory authority is:

- 398 (1) a registration authority within the meaning of the Care Standards Act 2000 s 5 (as amended) in respect of its functions under Pt 2 (ss 11-42) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE);
- 399 (2) the National Assembly for Wales in respect of its functions under the Education Act 2002 Pt 10 Ch 1 (ss 157-171) (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 478 et seq);
- 400 (3) the Commission for Healthcare Audit and Inspection in respect of its functions under the Health and Social Care (Community Health and Standards) Act 2003 Pt 2 Ch 3 (ss 48-69A) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE);
- 401 (4) the Commission for Social Care Inspection in respect of its functions under Pt 2 Ch 5 (ss 76-91) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE);
- 402 (5) the National Assembly for Wales in respect of its functions under Pt 2 Ch 4 (ss 70-75) (as amended), Pt 2 Ch 6 (ss 92-101) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE);
- 403 (6) the Public Guardian in the exercise of his functions (see MENTAL HEALTH vol 30(2) (Reissue) para 761 et seq);
- 404 (7) Her Majesty's Chief Inspector of Education, Children's Services and Skills in the exercise of his functions (see the Education and Inspections Act 2006 s 113; para 196 ante; and EDUCATION);

405 (8) Her Majesty's Chief Inspector of Education and Training in Wales in the exercise of his functions (see the Learning and Skills Act 2000 s 73; and EDUCATION vol 15(2) (2006 Reissue) para 1188);

406 (9) the Charity Commission in the exercise of its functions (see CHARITIES).

## **UPDATE**

### **701 Duty to refer**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 1--These provisions in force for all purposes on 12 October 2009: SI 2009/2611.

NOTE 2--See the Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008, SI 2008/3265.

NOTE 13--2006 Act s 41 prospectively amended as from a day to be appointed: SI 2009/1182. SI 2007/289 art 10 amended: SI 2007/3101.

NOTE 14--Head (3) now the Care Quality Commission in respect of its functions under the Health and Social Care Act 2008 Pt 1 (ss 1-97): Safeguarding Vulnerable Groups Act 2006 s 45(7) (amended by the Health and Social Care Act 2008 Sch 5 para 91, Sch 15 Pt 1). Add head (10) the Welsh Ministers in the exercise of their functions under the Children Act 1989 Pt 10A, Pt 11 or Pt 12 (ss 79A-108): Safeguarding Vulnerable Groups Act 2006 s 45(7) (amended by SI 2009/1797).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/702. Duty to provide information on request.

## **702. Duty to provide information on request.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

Where it is considering whether to include any person in a barred list, or whether to remove any person from a barred list<sup>2</sup>, the Independent Barring Board<sup>3</sup> may require the following persons and bodies to provide it with any prescribed<sup>4</sup> information they hold relating to the person<sup>5</sup>:

- 1288 (1) any regulated activity provider<sup>6</sup> who has made arrangements for that person to engage in regulated activity (whether or not the arrangements are still in place)<sup>7</sup>;
- 1289 (2) any person responsible for the management or control of controlled activities<sup>8</sup> who permits or has permitted that person to engage in controlled activity<sup>9</sup>;
- 1290 (3) any personnel supplier<sup>10</sup> which is an employment agency or employment business<sup>11</sup> and which acts for or has acted for that person<sup>12</sup>;
- 1291 (4) any personnel supplier which is an educational institution<sup>13</sup> and which has supplied that person to another person for him to engage in regulated or controlled activity<sup>14</sup>;
- 1292 (5) any local authority<sup>15</sup>;
- 1293 (6) any keeper of a relevant register<sup>16</sup>;
- 1294 (7) any supervisory authority<sup>17</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the children's barred list see para 681 ante.

3 As to the Independent Barring Board see para 675 et seq ante.

4 For the meaning of 'prescribed' see para 681 note 5 ante. See also para 687 note 50 ante. At the date at which this volume states the law no such information had been prescribed.

5 See the Safeguarding Vulnerable Groups Act 2006 ss 37, 40, 42, 46. As to offences under s 37 see s 38.

6 As to regulated activity providers see para 688 ante.

7 See the Safeguarding Vulnerable Groups Act 2006 s 37(2)(a).

8 Ie within the meaning of *ibid* s 23: see para 696 ante.

9 See *ibid* s 37(2)(b).

10 For the meaning of 'personnel supplier' see para 691 note 7 ante.

11 For the meanings of 'employment agency' and 'employment business' see para 691 note 7 ante.

12 See the Safeguarding Vulnerable Groups Act 2006 s 37(2)(c).

13 For the meaning of 'educational institution' see para 687 note 17 ante.

- 14 See the Safeguarding Vulnerable Groups Act 2006 s 37(2)(d).
- 15 See *ibid* s 40(2). For the meaning of 'local authority' see para 701 note 12 ante.
- 16 See *ibid* s 42(2). As to relevant registers see para 701 note 13 ante.
- 17 See *ibid* s 46(2). For the meaning of 'supervisory authority' see para 701 note 14 ante.

## **UPDATE**

### **702 Duty to provide information on request**

TEXT AND NOTE 1--These provisions in force for all purposes on 20 January 2009: SI 2009/39.

NOTE 4--See the Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008, SI 2008/3265.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/703. Notice of barring and cessation of monitoring.

### **703. Notice of barring and cessation of monitoring.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

If the Secretary of State<sup>2</sup> knows or thinks that a person appears on a relevant register<sup>3</sup>, and the person is newly included in a barred list<sup>4</sup> or is subject to a relevant disqualification<sup>5</sup> or, having been subject to monitoring<sup>6</sup>, the person ceases to be so subject<sup>7</sup>, then the Secretary of State must notify the keeper of the register of that circumstance<sup>8</sup>; and, in a case where the person is newly included in a barred list, he must require the Independent Barring Board<sup>9</sup> to provide the keeper with all the information on which it relied in deciding to include the person in the list<sup>10</sup>.

Likewise, if a person is newly included in the barred list<sup>11</sup>, or if the Secretary of State becomes aware that a person is subject to a relevant disqualification<sup>12</sup>, or if, having been subject to monitoring, a person ceases to be so subject<sup>13</sup>, then the Secretary of State must notify every interested supervisory authority<sup>14</sup> of that circumstance<sup>15</sup>.

If the Independent Barring Board knows or thinks that a person appears on a relevant register<sup>16</sup>, and becomes aware of relevant information<sup>17</sup> relating to that person<sup>18</sup>, it must provide the keeper of the register with that information<sup>19</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to the Secretary of State see para 155 ante.

3 As to relevant registers see para 701 note 13 ante.

4 As to the children's barred list see para 681 ante.

5 Safeguarding Vulnerable Groups Act 2006 s 43(1)(a). A person is subject to a relevant disqualification if he is included in a list maintained under the law of Scotland or Northern Ireland which the Secretary of State specifies by order as corresponding to a barred list: s 43(7), 48(6).

6 A person may not engage in a regulated activity unless he is subject to monitoring: see para 690 ante. As to monitoring see para 697 ante.

7 Safeguarding Vulnerable Groups Act 2006 s 43(1)(b). A person ceases to be subject to monitoring by virtue of s 23: see para 696 ante.

8 Ibid s 43(2)(a).

9 As to the Independent Barring Board see para 675 et seq ante.

10 Safeguarding Vulnerable Groups Act 2006 s 43(2)(b).

11 Ibid s 48(1)(a).

12 Ibid s 48(1)(b).

13 Ibid s 48(1)(c). A person ceases to be subject to monitoring by virtue of s 23: see para 696 ante.

14 A supervisory authority is an interested supervisory authority only if it has applied to the Secretary of State to be notified if any of the circumstances mentioned in the text to notes 11-13 supra occurs in relation to

the person, and the application has not been withdrawn: *ibid* s 48(3). For the meaning of 'supervisory authority' see para 701 note 14 ante.

The Secretary of State may by regulations prescribe the form, manner and contents of an application for these purposes: s 48(8). He may also make regulations providing that in prescribed circumstances a supervisory authority is not for these purposes an interested supervisory authority: s 48(7). If the exercise of a power to make subordinate legislation under s 48(7), (8) and s 47(7) (see para 704 post) will have effect in relation to any function of the Welsh Ministers to which the provision applies, or would apply in consequence of the exercise of the power, the Secretary of State must not exercise the power without the consent of the Welsh Ministers: s 56(2). As to the Welsh Ministers see para 155 ante. At the date at which this volume states the law no regulations had been made under s 48.

15 *Ibid* s 48(2).

16 *Ibid* s 43(3)(a).

17 Relevant information is information which relates to the protection of children in general, or of any child in particular, and is relevant to the exercise of any function of the keeper of the register, subject to certain exceptions: see *ibid* s 43(4), (5). As to the meaning of 'child' see para 675 note 5 ante.

18 *Ibid* s 43(3)(b).

19 *Ibid* s 43(3).

## **UPDATE**

### **703 Notice of barring and cessation of monitoring**

TEXT AND NOTE 1--These provisions in force in part for certain purposes by 19 May 2008: SI 2007/3545; SI 2008/1320.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/F. NOTICES AND INFORMATION/704. Power to apply for vetting information, and the provision of information.

#### **704. Power to apply for vetting information, and the provision of information.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

Upon application by the keeper of a relevant register<sup>2</sup> or a supervisory authority<sup>3</sup> the Secretary of State<sup>4</sup> must provide the keeper of the register or the supervisory authority with the following information<sup>5</sup>:

- 1295 (1) whether a person is barred from regulated activity relating to children<sup>6</sup>;
- 1296 (2) whether the Independent Barring Board<sup>7</sup> is considering whether to include the person in the barred list<sup>8</sup>;
- 1297 (3) whether the person is subject to monitoring<sup>9</sup> in relation to regulated activity relating to children<sup>10</sup>;
- 1298 (4) if the person is subject to such monitoring and the Secretary of State is required to notify him<sup>11</sup>, whether the Secretary of State has yet done so<sup>12</sup>; and
- 1299 (5) if the person is subject to such monitoring and has made a simultaneous application for an enhanced criminal record certificate<sup>13</sup>, whether the Secretary of State has yet issued a certificate<sup>14</sup>.

The keeper of a relevant register may apply for information under these provisions in relation to a person only if the person appears in the register, or the person is being considered for inclusion in the register<sup>15</sup>. A supervisory authority may apply for information under these provisions only if the information is required in connection with the exercise of a function of the supervisory authority<sup>16</sup>.

The Secretary of State may by order amend the information which may be required<sup>17</sup>, and may prescribe<sup>18</sup> the form, manner and contents of an application<sup>19</sup>.

The Independent Barring Board must provide a supervisory authority with information that it thinks is relevant to that supervisory authority<sup>20</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 As to relevant registers see para 701 note 13 ante.

3 For the meaning of 'supervisory authority' see para 701 note 14 ante.

4 As to the Secretary of State see para 155 ante.

5 Safeguarding Vulnerable Groups Act 2006 ss 44(1), 47(1).

6 Ibid ss 44(2)(a), 47(2)(a). As to regulated activity relating to children see para 687 ante. As to the meaning of 'children' see para 675 note 5 ante.

7 As to the Independent Barring Board see para 675 ante.

8 Safeguarding Vulnerable Groups Act 2006 ss 44(2)(b), 47(2)(b). As to the children's barred list see para 681 ante.

9 A person may not engage in a regulated activity unless he is subject to monitoring: see para 690 ante. As to monitoring see para 697 ante.

10 Safeguarding Vulnerable Groups Act 2006 ss 44(2)(c), 47(2)(c).

11 *Ie* as mentioned in *ibid* s 24(4): see para 696 ante.

12 *Ibid* ss 44(2)(d), 47(2)(d).

13 *Ie* under the Police Act 1997 s 113B (as added and amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq.

14 Safeguarding Vulnerable Groups Act 2006 ss 44(2)(e), 47(2)(e).

15 *Ibid* s 44(3).

16 *Ibid* s 47(4)

17 *Ibid* ss 44(6), 47(6).

18 For the meaning of 'prescribe' see para 681 note 5 ante. See also para 703 note 14 ante.

19 Safeguarding Vulnerable Groups Act 2006 ss 44(7), 47(7). At the date at which this volume states the law no regulations had been made prescribing the form, manner and contents of an application.

20 *Ibid* s 50(1), (2). Information is relevant to a supervisory authority if it relates to the protection of children in general, or of any child in particular, and is relevant to the exercise of any function of the authority, subject to certain exceptions: see s 50(3).

## UPDATE

### 704 Power to apply for vetting information, and the provision of information

TEXT AND NOTE 1--These provisions in force in part for certain purposes by 19 May 2008 (SI 2007/3545, SI 2008/1320) and for certain purposes on 22 June 2009 (SI 2009/1503).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/G. IN GENERAL/705. Damages.

## **G. IN GENERAL**

### **705. Damages.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

No claim for damages lies in respect of any loss or damage suffered by any person in consequence of<sup>2</sup>:

- 1300 (1) the fact that an individual is included in a barred list<sup>3</sup>;
- 1301 (2) the fact that an individual is not included in a barred list<sup>4</sup>;
- 1302 (3) the provision of prescribed information<sup>5</sup>, although not including the provision of information which is untrue by a person who knows the information is untrue<sup>6</sup> where he is the originator of the information and he knew at the time he originated the information that it was not true<sup>7</sup>, or he causes another person to be the originator of the information knowing, at the time the information is originated, that it is untrue<sup>8</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 57(1).

3 Ibid s 57(1)(a). As to the children's barred list see para 681 ante.

4 Ibid s 57(1)(b).

5 Ibid s 57(1)(c). The text refers to information prescribed under ss 35-37, 40, 41, 42, 45, 46: see para 701 et seq ante.

6 Ibid s 57(2).

7 Ibid s 57(2)(a).

8 Ibid s 57(2)(b).

## **UPDATE**

### **705 Damages**

TEXT AND NOTE 1--These provisions in force for all purposes by 20 January 2009: SI 2007/3545, SI 2009/39.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/G. IN GENERAL/706. Family and personal relationships.

## **706. Family and personal relationships.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

The Safeguarding Vulnerable Groups Act 2006 does not apply to any activity which is carried out in the course of a family relationship<sup>2</sup>. Nor does it apply to any activity which is carried out in the course of a personal relationship<sup>3</sup>, and for no commercial consideration<sup>4</sup>.

The Secretary of State may by order provide that an activity carried out in specified circumstances either is or is not carried out in the course of a family relationship, or is or is not carried out in the course of a personal relationship<sup>5</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 58(1). A family relationship includes a relationship between two persons who live in the same household and treat each other as though they were members of the same family: s 58(3).

3 Ibid s 58(2)(a). A personal relationship is a relationship between or among friends: s 58(4). A friend of a person includes someone who is a friend of a member of that person's family: s 58(5).

4 Ibid s 58(2)(b).

5 Ibid s 58(6). At the date at which this volume states the law no such order had been made. As to the making of orders generally see para 707 post.

## **UPDATE**

### **706 Family and personal relationships**

TEXT AND NOTE 1--These provisions in force on 12 October 2009: SI 2009/2611.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iii) The System under the Safeguarding Vulnerable Groups Act 2006/G. IN GENERAL/707. Orders and regulations.

## **707. Orders and regulations.**

The following provisions are to have effect as from a day to be appointed<sup>1</sup>.

Any power under the Safeguarding Vulnerable Groups Act 2006 to make orders or regulations is exercisable by statutory instrument<sup>2</sup>, and orders or regulations so made are subject to annulment in pursuance of a resolution of either House of Parliament<sup>3</sup>. Certain instruments must not be made unless a draft of the instrument is laid before and approved by a resolution of each House of Parliament<sup>4</sup>. A power to make an order or regulations may be exercised so as to make different provision for different purposes<sup>5</sup>.

Power to make subordinate legislation under the Safeguarding Vulnerable Groups Act 2006 includes power to make such supplementary, incidental or consequential provision, or such transitory, transitional or saving provision, as the person making the subordinate legislation thinks necessary or expedient<sup>6</sup>; and the Secretary of State<sup>7</sup> may by order make such further provision as he considers appropriate for the general purposes, or any particular purpose, of the Act, or in consequence of any provision made by the Act, or for giving full effect to the Act or any provision made by it<sup>8</sup>. Subordinate legislation<sup>9</sup> may amend, repeal, revoke or otherwise modify any enactment (including the Safeguarding Vulnerable Groups Act 2006)<sup>10</sup>.

1 The Safeguarding Vulnerable Groups Act 2006 is to come into force as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 61(1).

3 Ibid s 61(2). This provision does not apply to an order made under s 65 (commencement), including such an order which contains provision made under s 64 (see the text and notes 6-10 infra) (except s 64(3): see the text and note 10 infra): s 61(4).

In its application to the exercise of a power by the Welsh Ministers the reference in s 61(2) to either House of Parliament must be taken to be a reference to the National Assembly for Wales: s 56(5)(a). As to the Welsh Ministers see para 155 ante.

4 Ibid s 61(3). The instruments referred to in the text are those containing provision made:

407 (1) by order under s 5(3) (see para 687 ante);

408 (2) by order under s 21(12) (see para 696 ante);

409 (3) in regulations under s 23 (see para 696 ante);

410 (4) by order under s 54(1) if it contains provision amending any Act or confers power to make subordinate legislation (see para 697 ante);

411 (5) under s 64(3) (see the text and note 10 infra);

412 (6) in regulations prescribing criteria for the purpose of Sch 3 paras 1, 2 (see para 681 ante);

413 (7) by order under Sch 3 para 6 (see para 681 ante).

In its application to the exercise of a power by the Welsh Ministers the reference in s 61(3) to each House of Parliament must be taken to be a reference to the National Assembly for Wales: s 56(5)(b).

5 Ibid s 61(5).

6 Ibid s 64(1). References in s 64 to subordinate legislation are to an order or regulations under the Safeguarding Vulnerable Groups Act 2006: s 64(4).

Nothing in the Safeguarding Vulnerable Groups Act 2006 affects the generality of the power conferred by s 64: s 64(5).

7 As to the Secretary of State see para 155 ante.

8 Safeguarding Vulnerable Groups Act 2006 s 64(2). See also para 687 note 50 ante.

9 le under ibid s 64(1) or (2).

10 Ibid s 64(3).

## **UPDATE**

### **707 Orders and regulations**

TEXT AND NOTE 1--These provisions in force 31 December 2007: SI 2007/3545.

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## **(iv) The Tribunal**

### **A. ESTABLISHMENT AND CONSTITUTION**

#### **708. Establishment and constitution of the Tribunal.**

There is a Tribunal<sup>1</sup> to be constituted as follows. There must be appointed: (1) a President of the Tribunal<sup>2</sup>; (2) a panel of persons ('the chairmen's panel') who may serve as chairmen of the Tribunal<sup>3</sup>; and (3) a panel of persons ('the lay panel') who may serve as the other two members of the Tribunal apart from the chairman<sup>4</sup>. The Tribunal consists of a chairman nominated by the President from the chairmen's panel<sup>5</sup>, and two other persons nominated by the President from the lay panel<sup>6</sup>. The President and the members of the chairmen's panel are each appointed by the Lord Chancellor<sup>7</sup>. No person may be appointed President or member of the chairmen's panel unless he has a seven year general qualification<sup>8</sup>. The members of the lay panel are each appointed by the Lord Chancellor after consultation with the Secretary of State<sup>9</sup>. No person may be appointed member of the lay panel unless he satisfies such requirements as may be prescribed<sup>10</sup>. The President and each member of the chairmen's panel or lay panel is to hold and vacate office under the terms of the instrument under which he is appointed<sup>11</sup>. The President or a member of the chairmen's panel or lay panel may resign office by notice in writing to the Lord Chancellor<sup>12</sup>, and is eligible for re-appointment if he ceases to hold office<sup>13</sup>. The President must arrange such meetings for the members of the chairmen's and lay panels, and such training for them, as he considers appropriate<sup>14</sup>.

1 Protection of Children Act 1999 s 9(1). This provision refers to the jurisdiction conferred on the Tribunal by s 4 (prospectively repealed) (see para 659 ante) and regulations made under s 6 (repealed), but this part of s 9(1) is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 Pt 1 para 8(1), (3)(a), Sch 10, as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed).

2 Protection of Children Act 1999 s 9(7), Schedule para 1(1)(a).

3 Ibid Schedule para 1(1)(b).

4 Ibid Schedule para 1(1)(c). As to the requirements for membership of the lay panel see para 711 post.

5 Ibid Schedule para 1(2)(a).

6 Ibid Schedule para 1(2)(b).

7 Ibid Schedule para 2(1). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.

8 Ibid Schedule para 2(2). The reference in the text to a seven year qualification is to one within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended): see LEGAL PROFESSIONS vol 65 (2008) PARA 742.

9 Protection of Children Act 1999 Schedule para 2(3). As to the Secretary of State see para 155 ante.

10 Ibid Schedule para 2(4). 'Prescribed' means prescribed by regulations made by the Secretary of State: s 12(1). The Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended) have been made under the Protection of Children Act 1999 Schedule para 2(4): see para 710 et seq post.

- 11 Ibid Schedule para 3(1).
- 12 Ibid Schedule para 3(2)(a).
- 13 Ibid Schedule para 3(2)(b).
- 14 Ibid Schedule para 4.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **708 Establishment and constitution of the Tribunal**

NOTE 1--Appointed day is 12 October 2009: SI 2009/2611.

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### **709. Staff and remuneration.**

The Secretary of State may, with the consent of the Treasury, provide such staff and accommodation as the Tribunal may require<sup>1</sup>. The Secretary of State may pay to the President of the Tribunal, and to any other person in respect of his service as a member of the Tribunal, such remuneration and allowances as the Secretary of State may, with the consent of the Treasury, determine<sup>2</sup>. The Secretary of State may defray the expenses of the Tribunal to such amount as he may, with the consent of the Treasury, determine<sup>3</sup>. The Secretary of State may pay such allowances for the purpose of, or in connection with, the attendance of persons at the Tribunal as he may, with the consent of the Treasury, determine<sup>4</sup>.

1 Protection of Children Act 1999 s 9(7), Schedule para 5. As to the establishment and constitution of the Tribunal see para 708 ante. As to the Secretary of State see para 155 ante. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517.

2 Ibid Schedule para 6(1).

3 Ibid Schedule para 6(2).

4 Ibid Schedule para 7.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/A. ESTABLISHMENT AND CONSTITUTION/710. Delegation of powers and functions of the President and Secretary.

### **710. Delegation of powers and functions of the President and Secretary.**

Anything which must or may be done by the President of the Tribunal<sup>1</sup> may be done by a member of the chairmen's panel authorised by the President<sup>2</sup>. Anything which must or may be done by the Secretary to the Tribunal may be done by a member of the Tribunal's staff authorised by the Secretary to the Tribunal<sup>3</sup>.

1     Ile except under the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 5(1), (2), (4), (5) (see para 723 post) or reg 25(4) (see para 738 post). As to the establishment and constitution of the Tribunal, and as to the President and the chairmen's panel, see para 708 ante.

2     Ibid reg 2(1).

3     Ibid reg 2(2). As to the Tribunal's staff see para 709 ante.

### **UPDATE**

#### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/A. ESTABLISHMENT AND CONSTITUTION/711. Requirements for membership of the lay panel.

### **711. Requirements for membership of the lay panel.**

A person may be appointed a member of the lay panel of the Tribunal if he satisfies the requirements in head (1) below<sup>1</sup> or the requirements of heads (2) and (3) below<sup>2</sup> or the requirements of head (4) below<sup>3</sup>.

1303 (1) The requirements of this head are:

.11

- 73. (a) experience in the provision of services: (i) which must or may be provided by local authorities<sup>4</sup> under the relevant enactments<sup>5</sup> or which are similar to such services<sup>6</sup>; (ii) for vulnerable adults<sup>7</sup>; or (iii) in a residential family centre<sup>8</sup>; and
- 74. (b) experience in relevant social work<sup>9</sup>;

.12

1304 (2) the requirements of this head are:

.13

- 75. (a) experience in the provision of services by a health authority, a special health authority, a national health service trust, an NHS foundation trust or a primary care trust<sup>10</sup>;
- 76. (b) experience in the provision of education in a school<sup>11</sup> or in an institution within the further education sector<sup>12</sup>; or
- 77. (c) experience of being employed by a local education authority<sup>13</sup> in connection with the exercise of certain of its functions<sup>14</sup>;

.14

1305 (3) the requirements of this head are:

.15

- 78. (a) experience in the conduct of disciplinary investigations<sup>15</sup>;
- 79. (b) experience as a member of an area child protection committee, or similar experience<sup>16</sup>;
- 80. (c) experience of taking part in child protection conferences or in child protection review conferences, or similar experience<sup>17</sup>; or
- 81. (d) experience in negotiating the conditions of service of employees<sup>18</sup>;

.16

1306 (4) the requirements of this head are:

.17

- 82. (a) experience in carrying out inspections of a registered establishment or agency<sup>19</sup>;
- 83. (b) experience in carrying out inspections of registered homes<sup>20</sup>;
- 84. (c) experience in carrying out inspections under certain other enactments<sup>21</sup>;
- 85. (d) experience in managing a registered establishment or agency<sup>22</sup>;
- 86. (e) experience in managing a children's home<sup>23</sup>;
- 87. (f) experience in managing an adoption society<sup>24</sup> or a registered adoption society<sup>25</sup>;
- 88. (g) experience in managing a nursing home, mental nursing home or residential care home<sup>26</sup>;
- 89. (h) experience in managing the provision of local authority social services<sup>27</sup>;
- 90. (i) the person is a registered nurse or registered medical practitioner who has experience of the provision of health care services<sup>28</sup>;

- 91. (j) experience in managing or inspecting child minding and day care provision for children under eight years of age<sup>29</sup>; or
- 92. (k) experience in a professional, managerial or supervisory position in the provision of early childhood education, child minding or day care or child development<sup>30</sup>.

**.18**

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(1)(a). As to the establishment and constitution of the Tribunal see para 708 ante.

2 Ibid reg 3(1)(b).

3 Ibid reg 3(1)(c).

4 For the meaning of 'local authority' see para 138 note 3 ante; definition applied by ibid reg 1(2).

5 Ie the Children Act 1989, the Adoption Act 1976 or the Adoption and Children Act 2002.

6 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(2)(a)(i) (amended by SI 2003/1060; SI 2005/3504).

7 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(2)(a)(ii).

8 Ibid reg 3(2)(a)(iii). For the meaning of 'residential family centre' see para 983 note 8 post; definition applied by reg 1(2).

9 Ibid reg 3(2)(b). 'Relevant social work' means social work which is required in connection with any health, education or social services provided by any person: Care Standards Act 2000 s 55(4); Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2).

10 Ibid reg 3(3)(a) (amended by SI 2004/696). As to the provision of services by health authorities, special health authorities, national health service trusts, national health service foundation trusts and primary care trusts see HEALTH SERVICES.

11 'School' has the same meaning as in the Education Act 1996 s 4 (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 81); Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2).

12 Ibid reg 3(3)(b).

13 'Local education authority' is to be construed in accordance with the Education Act 1996 s 12 (see EDUCATION vol 15(1) (2006 Reissue) para 20); Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2).

14 Ibid reg 3(3)(c). The functions referred to in the text are those under the Education Act 1996 Pt I (ss 1-29) (as amended): see EDUCATION.

15 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(4)(a).

16 Ibid reg 3(4)(b). The regulations refer to area child protection committees, but these have been replaced by local safeguarding children's boards: see para 189 ante.

17 Ibid reg 3(4)(c).

18 Ibid reg 3(4)(d).

19 Ibid reg 3(5)(a). The text refers to inspections under the Care Standards Act 2000 Pt 2 (ss 11-42) (as amended): see para 985 et seq post.

20 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(b). The regulations refer inspections carried out under the Registered Homes Act 1984, but this Act has been repealed.



21 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(c) (amended by SI 2003/1060; SI 2005/3504). The enactments referred to in the text are the Children Act 1989, the Adoption Act 1976, or the Adoption and Children Act 2002.

22 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(d). The text refers to managing an establishment or agency under the Care Standards Act 2000 Pt 2 (as amended): see para 985 et seq post.

23 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(e). The text refers to managing a children's home under the Children Act 1989: see para 965 post.

24 The regulations refer to an adoption society approved under the Adoption Act 1976, but this has been repealed in so far as it applies to adoption societies.

25 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(ee) (added by SI 2003/1060; and amended by SI 2005/3504). The text refers to an adoption society registered under the Care Standards Act 2000 Pt 2 (as amended): see para 985 et seq post.

26 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(f). The regulations refer to managing such homes under the Registered Homes Act 1984, but this Act has been repealed.

27 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(g).

28 Ibid reg 3(5)(h).

29 Ibid reg 3(5)(i) (amended by SI 2003/1060).

30 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 3(5)(j).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

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## ***B. PROCEDURAL REGULATIONS***

### **712. Power to make regulations.**

The Secretary of State may by regulations<sup>1</sup> make provision about the proceedings of the Tribunal on an appeal or determination<sup>2</sup>. The regulations may, in particular, include provision:

- 1307 (1) as to the manner in which appeals are to be instituted or applications for determinations are to be made<sup>3</sup>;
- 1308 (2) as to the period within which appeals are to be instituted<sup>4</sup>;
- 1309 (3) as to the circumstances in which applications for leave may be made<sup>5</sup>;
- 1310 (4) for enabling any functions which relate to applications for leave or other matters preliminary or incidental to an appeal or determination to be performed by the President of the Tribunal, or by the chairman<sup>6</sup>;
- 1311 (5) for the holding of hearings in private in prescribed<sup>7</sup> circumstances<sup>8</sup>;
- 1312 (6) for imposing reporting restrictions in prescribed circumstances<sup>9</sup>;
- 1313 (7) as to the persons who may appear on behalf of the parties<sup>10</sup>;
- 1314 (8) for granting any person such disclosure or inspection of documents or right to further particulars as might be granted by a county court<sup>11</sup>;
- 1315 (9) for obtaining a medical report in a case where the decision appealed against was made on medical grounds<sup>12</sup>;
- 1316 (10) for requiring persons to attend to give evidence and produce documents<sup>13</sup>;
- 1317 (11) for authorising the administration of oaths to witnesses<sup>14</sup>;
- 1318 (12) for the determination of appeals or issues or applications for leave without a hearing in prescribed circumstances<sup>15</sup>;
- 1319 (13) as to the withdrawal of appeals or applications for determinations<sup>16</sup>;
- 1320 (14) for the award of costs or expenses<sup>17</sup>;
- 1321 (15) for taxing or otherwise settling any such costs or expenses (and, in particular, for enabling such costs to be taxed in the county court)<sup>18</sup>;
- 1322 (16) for the recording and proof of decisions and orders of the Tribunal<sup>19</sup>;
- 1323 (17) for enabling the Tribunal to review its decisions, or revoke or vary its orders, in such circumstances as may be determined in accordance with the regulations<sup>20</sup>; and
- 1324 (18) for notification of the result of an appeal or determination to be given to such persons as may be prescribed<sup>21</sup>.

Regulations may make further provision in relation to the Tribunal<sup>22</sup>.

Part I of the Arbitration Act 1996<sup>23</sup> does not apply to any proceedings before the Tribunal but regulations may make provision corresponding to any provision of that Act<sup>24</sup>.

Any person who without reasonable excuse fails to comply with: (a) any requirement imposed by the regulations by virtue of head (6) above; (b) any requirement in respect of the disclosure or inspection of documents imposed by the regulations by virtue of head (8) above; or (c) any requirement imposed by the regulations by virtue of head (10) above, is liable on summary conviction to a fine<sup>25</sup>.

1 The Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended) (see paras 710-711 ante, 713-742 post) have been made under the Protection of Children Act 1999 s 9(1)-(4) (as amended) (see the text and notes 2-25 infra). As to the Secretary of State see para 155 ante.

2 See *ibid* s 9(2). See note 1 *supra*.

The Secretary of State may by regulations make provision about the proceedings of the Tribunal:

- 414 (1) on an appeal or determination under s 4 (prospectively repealed), s 4A (as added; prospectively repealed) or s 4B (as added; prospectively repealed) (see paras 659-660 ante) (s 9(2)(a) (added by the Care Standards Act 2000 s 116, Sch 4 para 26(1), (3)(a); and amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 154, 157(a)));
- 415 (2) on an appeal, application for leave or review under the Education Act 2002 s 144 (prospectively repealed) (see EDUCATION vol 15(2) (2006 Reissue) para 783) (Protection of Children Act 1999 s 9(2)(b) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(a)));
- 416 (3) as from a day to be appointed, on an appeal under the Education Act 2002 s 167B (prospectively added) (see EDUCATION) (Protection of Children Act 1999 s 9(2)(ba) (prospectively added by the Education and Inspections Act 2006 s 170(3)));
- 417 (4) on an appeal under the Children Act 1989 s 65A (as added) (see para 978 post) or under, or by virtue of, Pt XA (ss 79A-79X) (as added) (see para 1163 et seq post) (Protection of Children Act 1999 s 9(2)(c) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(a)));
- 418 (5) on an appeal or determination under the Care Standards Act 2000 s 21 (see SOCIAL SERVICES AND COMMUNITY CARE), s 68 (as amended), s 86 (prospectively repealed), s 87 (prospectively repealed) or s 88 (prospectively repealed) (Protection of Children Act 1999 s 9(2)(d) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(a)));
- 419 (6) on a determination under Criminal Justice and Court Services Act 2000 s 32 (prospectively repealed) or s 33 (as amended; prospectively repealed) (see para 670 post) (Protection of Children Act 1999 s 9(2)(e) (added by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 154, 157(d)));
- 420 (7) on an appeal under the Education Act 2002 s 166 (see EDUCATION vol 15(1) (2006 Reissue) para 489) (Protection of Children Act 1999 s 9(2)(f) (added by the Education Act 2002 s 215(1), Sch 21 para 122(b))); or
- 421 (8) on an appeal under, or by virtue of, the Childcare Act 2006 Pt 3 (ss 31-98) (as amended) (see para 1117 et seq post) (Protection of Children Act 1999 s 9(2)(g) (added by the Childcare Act 2006 s 103(1), Sch 2 para 38(b))).

As from a day to be appointed, the Protection of Children Act 1999 s 9(2)(a) (as added and amended) (see head (1) *supra*) and s 9(2)(b) (as added) (see head (2) *supra*) are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63, Sch 9 Pt 1 para 8(1), (3)(b)(i), Sch 10; the Protection of Children Act 1999 s 9(2)(d) (as added) (see head (5) *supra*) is amended by the Safeguarding Vulnerable Groups Act 2006 Sch 9 para 8(1), (3)(b)(ii) so as to remove the references to the Care Standards Act 2000 ss 86, 87, 88 (all prospectively repealed); and the Protection of Children Act 1999 s 9(2)(e) (as added) (see head (6) *supra*) is repealed by the Safeguarding Vulnerable Groups Act 2006 Sch 9 para 8(1), (3)(b)(iii). At the date at which this volume states the law, no such day or days had been appointed.

The Protection of Children and Vulnerable Adults and Care Standards Tribunal (Review of Disqualification Orders) Regulations 2006, SI 2006/1929 (modified by SI 2007/2620) have been made pursuant to the Protection of Children Act 1999 s 9(2)(e) (as added; prospectively repealed) (see head (6) *supra*).

3 *Ibid* s 9(3)(a); and see paras 713, 715-717 post. See note 1 *supra*.

4 *Ibid* s 9(3)(b); and see para 713 post. See note 1 *supra*.

5 *Ibid* s 9(3)(c); and see para 713 post. See note 1 *supra*.

6 *Ibid* s 9(3)(d). As to the delegation of powers and functions exercisable by the President of the Tribunal see para 710 ante. See note 1 *supra*.

7 'Prescribed' means prescribed by regulations made by the Secretary of State: *ibid* s 12(1).

- 8 Ibid s 9(3)(e); and see para 734 post. See note 1 supra.
- 9 Ibid s 9(3)(f); and see para 733 post. See note 1 supra.
- 10 Ibid s 9(3)(g); and see paras 714, 735 post. See note 1 supra.
- 11 Ibid s 9(3)(h); and see para 726 post. See note 1 supra.
- 12 Ibid s 9(3)(i). As to withholding a medical report from disclosure in exceptional circumstances see para 730 post. See note 1 supra.
- 13 Ibid s 9(3)(j); and see paras 728, 732 post. See note 1 supra. See also note 22 infra.
- 14 Ibid s 9(3)(k); and see para 735 post. See note 1 supra. See also note 22 infra.
- 15 Ibid s 9(3)(l); and see para 718 post. See note 1 supra.
- 16 Ibid s 9(3)(m); and see para 721 post. See note 1 supra.
- 17 Ibid s 9(3)(n); and see para 736 post. See note 1 supra.
- 18 Ibid s 9(3)(o); and see para 736 post. See note 1 supra.
- 19 Ibid s 9(3)(p); and see paras 735, 741 post. See note 1 supra.
- 20 Ibid s 9(3)(q); and see paras 738-739 post. See note 1 supra.
- 21 Ibid s 9(3)(r); and see paras 718, 735 post. See note 1 supra.
- 22 The regulations may also include provision for enabling the Tribunal to make investigations for the purposes of a determination under the Care Standards Act 2000 s 87 (prospectively repealed) or s 88 (prospectively repealed) (applications for removal from the list relating to the protection of vulnerable adults), and the provision that may be made by virtue of heads (10) and (11) in the text includes provision in relation to such investigations: Protection of Children Act 1999 s 9(3A) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(b)). This provision is repealed by the Safeguarding Vulnerable Groups Act 2006 Sch 9 Pt 1 para 8(1), (3)(c), Sch 10, as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.
- Regulations under the Protection of Children Act 1999 s 9 (as amended) may make different provision for different cases or classes of case: s 9(3B) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(b)).
- Before making such provision as is mentioned in the Protection of Children Act 1999 s 9(2)(c) (as added) (see note 2 head (4) supra) or s 9(2)(d) (as added; prospectively amended) (see note 2 head (5) supra), the Secretary of State must consult the Welsh Ministers: s 9(3C) (added by the Care Standards Act 2000 Sch 4 para 26(1), (3)(b)). As to the Welsh Ministers see para 155 ante.
- See note 1 supra.
- 23 Ie the Arbitration Act 1996 Pt I (ss 1-84): see ARBITRATION vol 2 (2008) PARA 1209 et seq.
- 24 Protection of Children Act 1999 s 9(4). See note 1 supra.
- 25 Ibid s 9(5). The fine must not exceed level 3 on the standard scale: see s 9(5). As to the standard scale see para 132 note 2 ante.

## UPDATE

### 708-742 The Tribunal

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### 712 Power to make regulations

NOTE 2--Head (3). Appointed day is 12 October 2009 in relation to Wales: SI 2009/2545. Appointed day for amendments of the Protection of Children Act 1999 s 9 by the Safeguarding Vulnerable Groups Act 2006 is 12 October: SI 2009/2611.

NOTE 22--Appointed day for repeal of the Care Standards Act 2000 ss 87, 88 is 12 October 2009: SI 2009/2611.

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### **C. APPLICATIONS**

#### **713. Initiating an appeal and applying for leave.**

A person who wishes to:

- 1325 (1) apply for leave to appeal against any decision by the Secretary of State<sup>1</sup> not to remove him from the list<sup>2</sup>, or for the issue of his inclusion in the list to be determined by the Tribunal instead of by the Secretary of State<sup>3</sup>;
- 1326 (2) make such an appeal<sup>4</sup> or request such a determination<sup>5</sup>;
- 1327 (3) appeal against a decision to include him in the list<sup>6</sup>; or
- 1328 (4) appeal against a direction prohibiting him from teaching or working with children<sup>7</sup>, or a refusal to revoke or vary such a direction<sup>8</sup>,

must do so by application in writing to the Secretary to the Tribunal<sup>9</sup>. Such an application must:

- 1329 (a) give the applicant's name, date of birth and full postal address<sup>10</sup>;
- 1330 (b) give sufficient information concerning the decision appealed against to make clear whether it falls within head (1), (2), (3) or (4) above<sup>11</sup>;
- 1331 (c) give the reasons why the applicant believes that the decision was wrong, or why he should not be included in the list, or why he believes the direction should not have been given, or should be revoked or varied, as the case may be<sup>12</sup>;
- 1332 (d) in the case of an application for leave, give the dates of any previous appeal<sup>13</sup> and application for leave the applicant has made to the Tribunal<sup>14</sup>;
- 1333 (e) in the case of an application for leave, give details of any new evidence or material change of circumstances since that appeal and application was determined which might lead the Tribunal to a different decision<sup>15</sup>;
- 1334 (f) in the case of an application for leave to have the issue of inclusion in the list determined by the Tribunal, give details of any civil or criminal proceedings relating to the misconduct of which the applicant is alleged to have been guilty<sup>16</sup>;
- 1335 (g) give the name, address and profession of the person (if any) representing the applicant<sup>17</sup>;
- 1336 (h) give the address within the United Kingdom to which the Secretary to the Tribunal should send documents<sup>18</sup> concerning the appeal<sup>19</sup>;
- 1337 (i) give, where these are available, his telephone number, fax number and email address and those of his representative<sup>20</sup>; and
- 1338 (j) be signed and dated by the applicant<sup>21</sup>.

Such an application must be received by the Secretary to the Tribunal no later than the first working day<sup>22</sup> after the expiry of three months from the date of the letter informing the applicant of the decision<sup>23</sup>, and may be made on the application form available from the Secretary to the Tribunal<sup>24</sup>.

1 As to the Secretary of State see para 155 ante.

- 2     le a decision made under the Protection of Children Act 1999 s 4(1)(b) (prospectively repealed) (see para 659 ante), with regard to inclusion on the list kept under s 1(3) (prospectively repealed) (see para 648 ante).
- 3     Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4(4)(a), Sch 4 para 2(1).
- 4     Ibid reg 4(4)(c).
- 5     Ibid reg 4(4)(d).
- 6     Ibid reg 4(4)(b), Sch 4, para 1(1)(a). The appeal is made under the Protection of Children Act 1999 s 4(1)(a) (prospectively repealed): see para 659 ante.
- 7     Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4(4)(e), Sch 4 para 1(1)(b) (substituted by SI 2007/1684). The appeal is made under the Education (Prohibition from Teaching or Working with Children) Regulations 2003, SI 2003/1184, reg 12(1)(a) (see EDUCATION vol 15(2) (2006 Reissue) para 783) against a decision made under the Education Act 2002 s 142 (prospectively repealed) (see EDUCATION vol 15(2) (2006 Reissue) para 782).
- 8     Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4(4)(f), (g), Sch 4 para 1(1)(c), (d) (substituted by SI 2007/1684). The appeal is made under the Education (Prohibition from Teaching or Working with Children) Regulations 2003, SI 2003/1184, reg 12(1)(aa) (as added), reg 12(1)(b) (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 783).
- 9     Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 paras 1(1), 2(1).
- 10    Ibid Sch 4 paras 1(4)(a), 2(4)(a).
- 11    Ibid Sch 4 paras 1(4)(b), 2(4)(b) (Sch 4 para 1(4)(b) amended by SI 2007/1184).
- 12    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 paras 1(4)(c), 2(4)(c).
- 13    le an appeal under the Protection of Children Act 1999.
- 14    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 2(4)(d).
- 15    Ibid Sch 4 para 2(4)(e).
- 16    Ibid Sch 4 para 2(4)(f).
- 17    Ibid Sch 4 paras 1(4)(d), 2(4)(g).
- 18    'Document' means information recorded in writing or in any other form: ibid reg 1(2).
- 19    Ibid Sch 4 paras 1(4)(e), 2(4)(h).
- 20    Ibid Sch 4 paras 1(4)(f), 2(4)(i).
- 21    Ibid Sch 4 paras 1(4)(g), 2(4)(j).
- 22    'Working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday in England and Wales within the meaning of the Banking and Financial Dealings Act 1971 (see TIME vol 37 (2010) PARA 321): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2) (amended by SI 2006/1930).
- 23    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 paras 1(2), 2(2).
- 24    Ibid Sch 4 paras 1(3), 2(3).

## UPDATE

### 708-742 The Tribunal

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **713 Initiating an appeal and applying for leave**

NOTES 7, 8--SI 2003/1184 reg 12(1) amended: SI 2008/2683.



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#### **714. Application on behalf of a person under a disability.**

A person may, by writing to the Secretary to the Tribunal, request authorisation by the President or the nominated chairman to make any application to the Tribunal on behalf of any person who is prevented by mental or physical infirmity from acting on his own behalf<sup>1</sup>. A person acting in accordance with such an authorisation may on behalf of the other person take any step or do anything which that person is required or permitted to do<sup>2</sup>, subject to any conditions which the President or the nominated chairman may impose<sup>3</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 30(1).

2 Ibid under the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended).

3 Ibid reg 30(2).

#### **UPDATE**

#### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/715. Acknowledgement and notification of application.

### **715. Acknowledgement and notification of application.**

On receiving an application<sup>1</sup>, the Secretary to the Tribunal must immediately send an acknowledgement of its receipt to the applicant<sup>2</sup>, and subject to the following provisions, enter particulars of it in the records<sup>3</sup> and send a copy of it, together with any documents<sup>4</sup> supplied by the applicant in support of it, to the respondent<sup>5</sup>. If the President is of the opinion that the applicant is asking the Tribunal to do something which it cannot do, he may notify the applicant in writing of the reasons for his opinion<sup>6</sup>, and that the application will not be entered in the records unless within five working days the applicant notifies the President in writing that he wishes to proceed with it<sup>7</sup>. If in the opinion of the Secretary to the Tribunal there is an obvious error in the application he may correct it<sup>8</sup>, and notify the applicant accordingly<sup>9</sup>, and unless within five working days of receipt of such notification the applicant notifies him in writing that he objects to the correction, the application must be amended accordingly<sup>10</sup>.

1 As to applications see para 713 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4, Sch 4 para 3(1)(a).

3 'Records' means the records of the Tribunal: *ibid* reg 1(2).

4 For the meaning of 'document' see para 713 note 18 ante.

5 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 3(1)(b). 'The respondent' means, in relation to an appeal or application under the Protection of Children Act 1999 s 4 (prospectively repealed) (see para 659 ante), the relevant Secretary of State and, in relation to an appeal under the Education (Prohibition from Teaching or Working with Children) Regulations 2003, SI 2003/1184 (as amended), the relevant Secretary of State or the Welsh Ministers: Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2) (amended by SI 2007/3224). As to the Secretary of State and the Welsh Ministers see para 155 ante.

6 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 3(2)(a).

7 *Ibid* Sch 4 para 3(2)(b).

8 *Ibid* Sch 4 para 3(3)(a).

9 *Ibid* Sch 4 para 3(3)(b).

10 *Ibid* Sch 4 para 3(3)(c).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).



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### **716. Response to application.**

The Secretary to the Tribunal must send information provided by the applicant<sup>1</sup> to the respondent<sup>2</sup> together with a request that he respond to the application<sup>3</sup> within 20 working days<sup>4</sup> of receiving it<sup>5</sup>. If the respondent fails to respond as requested, he is not entitled to take any further part in the proceedings<sup>6</sup>. The response must: (1) acknowledge that the respondent has received a copy of the application<sup>7</sup>; (2) indicate whether or not he opposes it, and if he does, why<sup>8</sup>; and (3) provide the following information and documents<sup>9</sup>:

- 1339 (a) the name, address and profession of the person (if any) representing the respondent and whether the Secretary to the Tribunal should send documents concerning the application to the representative rather than to the respondent<sup>10</sup>;
- 1340 (b) copies of any letters informing the applicant of the decision which is the subject of the appeal or the application for leave, as the case may be<sup>11</sup>;
- 1341 (c) copies of any information submitted with a reference<sup>12</sup> and of any observations submitted on it by the applicant<sup>13</sup>;
- 1342 (d) copies of any evidence and expert evidence relied on by the respondent in making a decision under the Education (Prohibition on Teaching or Working with Children) Regulations 2003<sup>14</sup>.

The Secretary to the Tribunal must send to the applicant without delay a copy of the response and the information and documents provided with it (subject, in the case of any material provided in accordance with head (d) above, to any direction of the President of the Tribunal or the nominated chairman with regard to withholding a medical report from disclosure)<sup>15</sup>.

1     Ie under the Protection of Children and Vulnerable Adults and Care Standards Regulations 2002, SI 2002/816, reg 4, Sch 4 para 1 or 2: see para 713 ante.

2     For the meaning of 'the respondent' see para 715 note 5 ante.

3     As to applications see para 713 ante.

4     For the meaning of 'working day' see para 713 note 22 ante.

5     Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4, Sch 4 para 4(1).

6     Ibid Sch 4 para 4(2).

7     Ibid Sch 4 para 4(3)(a).

8     Ibid Sch 4 para 4(3)(b).

9     Ibid Sch 4 para 4(3)(c). For the meaning of 'document' see para 713 note 18 ante.

10    Ibid Sch 4 para 4(3)(c)(i).

11    Ibid Sch 4 para 4(3)(c)(ii).

12 le under the Protection of Children Act 1999 s 2 (as amended; prospectively repealed), s 2A (as added and amended; prospectively repealed), s 2B (as added and amended; prospectively repealed), or s 2D (as added; prospectively repealed): see para 651 et seq ante.

13 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 4(3)(c)(iii).

14 Ibid Sch 4 para 4(3)(c)(iv). As to the Education (Prohibition from Teaching or Working with Children) Regulations 2003, SI 2003/1184 (as amended) see EDUCATION vol 15(2) (2006 Reissue) paras 782-783.

15 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 4(4). The reference in the text to a direction to withhold a medical report is to a direction under reg 15: see para 730 post.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/717. Striking out applications.

### **717. Striking out applications.**

The President of the Tribunal may at any time strike out an appeal or application for leave<sup>1</sup> on the grounds that: (1) it is made otherwise than in accordance with the provisions concerning the initiating of appeals or those concerning applications for leave<sup>2</sup>; (2) it is outside the jurisdiction of the Tribunal or is otherwise misconceived<sup>3</sup>; or (3) it is frivolous or vexatious<sup>4</sup>; or (4) the President or the nominated chairman considers that the appeal or application has no reasonable prospect of success<sup>5</sup>. Before striking out an application, the President or nominated chairman must: (a) invite the parties<sup>6</sup> to make representations on the matter within such period as he may direct<sup>7</sup>; (b) if within the period specified in the direction the applicant so requests in writing, afford the parties an opportunity to make oral representations<sup>8</sup>; and (c) consider any representations the parties may make<sup>9</sup>.

Where the President or nominated chairman strikes out an appeal or application for leave, a costs order may be made<sup>10</sup>.

Where the President or nominated chairman has made a determination to strike out an appeal or application for leave, the applicant may apply for the determination to be set aside<sup>11</sup>. Where, in the case of such an application, the President or nominated chairman considers it appropriate, he may set aside the determination<sup>12</sup>, and may give such directions as he considers appropriate<sup>13</sup>. Before setting aside the determination, the President or nominated chairman may invite the parties to make representations on the matter within such period as he may direct<sup>14</sup>. Where the determination is set aside the Secretary to the Tribunal must alter the relevant entry in the records<sup>15</sup>. If the applicant dies before the case<sup>16</sup> or application for leave<sup>17</sup> is determined, the President or nominated chairman may strike out the case or application for leave in so far as it relates to that individual without making a costs order<sup>18</sup> or appoint such person as he thinks fit to proceed with the appeal in the place of the deceased applicant<sup>19</sup>.

1    le an appeal or application for leave mentioned in the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations, SI 2002/816, reg 4 (as amended): see para 713 ante.

2    Ibid reg 4A(1)(a) (reg 4A added by SI 2004/2073).

3    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations, SI 2002/816, reg 4A(1)(b) (as added: see note 2 supra).

4    Ibid reg 4A(1)(c) (as added: see note 2 supra).

5    Ibid reg 4A(1)(d) (reg 4A as added (see note 2 supra); and reg 4A(1)(d) added by SI 2007/1684).

6    'Parties' means the applicant and the respondent: Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations, SI 2002/816, reg 1(2). For the meaning of 'the respondent' see para 715 note 5 ante.

7    Ibid reg 4A(2)(a) (as added: see note 2 supra).

8    Ibid reg 4A(2)(b) (as added: see note 2 supra).

9    Ibid reg 4A(2)(c) (as added: see note 2 supra).

10 Ibid reg 4A(3) (as added: see note 2 supra). A costs order may be made under reg 24 (see para 736 post), which will apply as if references to 'the Tribunal' were instead references to 'the President or nominated chairman': reg 4A(3) (as so added).

11 Ibid reg 4A(4) (as added: see note 2 supra). An application to set aside the determination must be made not later than 10 working days after the date on which notice of the determination was sent to the applicant and must be in writing stating the grounds in full: reg 4A(5) (as so added).

12 When setting aside the determination, the President may set aside, where applicable, a costs order made pursuant to ibid reg 4A(3) (as added) (see the text and note 10 supra): reg 4A(6) (as added: see note 2 supra).

13 Ibid reg 4A(6) (as added: see note 2 supra). The directions referred to in the text are those in the exercise of the President's powers under Pt IV (regs 5-19) (as amended).

14 Ibid reg 4A(7) (as added: see note 2 supra).

15 Ibid reg 4A(8) (as added: see note 2 supra).

16 Ibid reg 1(2) (amended by SI 2003/626; SI 2003/1060; SI 2003/2043; SI 2007/1684) provides that 'case' means:

422 (1) an appeal under the Care Standards Act 2000 s 21 (see SOCIAL SERVICES AND COMMUNITY CARE);

423 (2) an appeal under the Children Act 1989 s 79M (as added and amended) or s 65A (as added) (see paras 978, 1092 post);

424 (3) an appeal under the Protection of Children Act 1999 s 4(1)(a), (b) (prospectively repealed) (see para 659 ante);

425 (4) a determination under s 4(2) (prospectively repealed) (see para 659 ante);

426 (5) an appeal under the Education (Prohibition from Teaching or Working with Children) Regulations 2003, SI 2003/1184 (see EDUCATION vol 15(2) (2006 Reissue) para 783);

427 (6) an appeal under the Care Standards Act 2000 s 86(1)(a), (b) (prospectively repealed) (protection of vulnerable adults);

428 (7) a determination under s 86(2) (prospectively repealed) (protection of vulnerable adults);

429 (8) an appeal under s 68 (see SOCIAL SERVICES AND COMMUNITY CARE);

430 (9) an appeal under: (a) the Childminding and Day Care (Suspension of Registration) (England) Regulations 2003, SI 2003/332 (see para 1088 post); (b) the Suspension of Day Care Providers and Child Minders (Wales) Regulations 2004, SI 2004/3282 (see para 1172 post); or (c) the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730 (see para 1134 post);

431 (10) an appeal under the School Standards and Framework Act 1998 Sch 26 para 10(1A) (as added) (see EDUCATION vol 15(2) (2006 Reissue) para 1298); or

432 (11) an appeal under the Education Act 2002 s 166, including an application for, or consideration by the Tribunal of the making of, an order under s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488).

17 'Application for leave' means an application to the Tribunal: (1) for leave to appeal under the Protection of Children Act 1999 s 4(1)(b) (prospectively repealed) (see para 659 ante) or the Care Standards Act 2000 s 86(1)(b) (prospectively repealed) (protection of vulnerable adults); or (2) for leave for a determination by the Tribunal under the Protection of Children Act 1999 s 4(2) (prospectively repealed) (see para 659 ante) or the Care Standards Act 2000 s 86(2) (prospectively repealed) (protection of vulnerable adults): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations, SI 2002/816, reg 1(2).

18 Ibid reg 31(a). As to costs orders see reg 24; and para 736 post.

19 Ibid reg 31(b).

## UPDATE

### 708-742 The Tribunal

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **717 Striking out applications**

NOTE 9--The power to strike out an appeal summarily should be exercised with appropriate caution, particularly where the ability to secure employment is affected by the decision in question: *Welsh Ministers v Care Standards Tribunal* [2008] EWHC 49 (Admin), [2008] 1 WLR 2097, [2008] All ER (D) 164 (Jan).

NOTES 16, 17--Appointed day for repeal of the Care Standards Act 2000 s 86 is 12 October 2009: SI 2009/2611.



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### **718. Grant or refusal of leave.**

The President of the Tribunal or the nominated chairman must grant or refuse leave in relation to an application for leave<sup>1</sup> without a hearing as he sees fit<sup>2</sup>. If the President or nominated chairman refuses leave the application must be dismissed<sup>3</sup>. However, the President or the nominated chairman must reconsider a decision to refuse leave if within 10 working days<sup>4</sup> after receipt of a notice of refusal of leave<sup>5</sup> the Secretary to the Tribunal receives a written request to do so from the applicant<sup>6</sup>. If in his request the applicant has asked to make representations about leave at a hearing, the Secretary to the Tribunal must fix a hearing for those representations to be heard<sup>7</sup>. The Secretary to the Tribunal must notify the respondent<sup>8</sup> of any hearing fixed for the purpose of considering whether to grant leave, and the applicant and the respondent may appear or be represented by any person at that hearing<sup>9</sup>. If the President or the nominated chairman again refuses leave after reconsideration, he must give his reasons for doing so in writing<sup>10</sup>, and the Secretary to the Tribunal must without delay send to the parties a copy of the President or nominated chairman's decision and if he has refused leave, of his reasons for doing so<sup>11</sup>.

1    Ie under the Protection of Children and Vulnerable Adults and Care Standards Regulations 2002, SI 2002/816, reg 4, Sch 4 para 3: see para 715 ante. For the meaning of 'application for leave' see para 717 note 17 ante.

2    Ibid Sch 4 para 6(1). This provision is expressed as being subject to Sch 4 para 7: see the text and notes 4-11 infra.

3    Ibid Sch 4 para 6(2). The Secretary to the Tribunal must without delay notify the parties in writing of the decision of the President or the nominated chairman, and if he has refused leave must notify them of his reasons for doing so, and must inform the applicant of his right to request a reconsideration of the decision under Sch 4 para 7 (see the text and notes 4-11 infra): Sch 4 para 6(3). For the meaning of 'parties' see para 717 note 6 ante.

4    For the meaning of 'working day' see para 713 note 22 ante.

5    Ie under the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 6(3): see note 3 supra.

6    Ibid Sch 4 para 7(1).

7    Ibid Sch 4 para 7(2).

8    For the meaning of 'the respondent' see para 715 note 5 ante.

9    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Sch 4 para 7(3).

10   Ibid Sch 4 para 7(4)(a).

11   Ibid Sch 4 para 7(4)(b).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/719. Further information to be sent by the applicant and respondent.

### **719. Further information to be sent by the applicant and respondent.**

As soon as the respondent has provided the information required by the Secretary to the Tribunal in response to the application<sup>1</sup>, or as soon as leave has been granted<sup>2</sup>, the Secretary to the Tribunal must write to each party<sup>3</sup> requesting that he send to the Secretary to the Tribunal within 20 working days after the date on which he receives the letter from the Secretary to the Tribunal<sup>4</sup>: (1) the name of any witness whose evidence he wishes the Tribunal to consider and whether he may wish the Tribunal to consider additional witness evidence from a witness whose name is not yet known, and the nature of that evidence<sup>5</sup>; (2) whether he wishes the President or nominated chairman to give any directions or exercise any of his powers of case management<sup>6</sup>; (3) whether he wishes there to be a preliminary hearing with regard to directions<sup>7</sup>; (4) a provisional estimate of the time the party considers will be required to present his case<sup>8</sup>; (5) the earliest date by which he considers he would be able to prepare his case for hearing<sup>9</sup>; and (6) in the case of the applicant, whether he wishes his case to be determined without a hearing<sup>10</sup>.

Once the Secretary to the Tribunal has received this information from both parties, he must without delay send a copy of the information supplied by the applicant to the respondent and that supplied by the respondent to the applicant<sup>11</sup>.

Either party, within five working days of receiving the further information, may ask the Secretary to the Tribunal in writing to amend or add any of the information<sup>12</sup>; and if the Secretary to the Tribunal receives any such further information he must, without delay, send a copy of it to the other party<sup>13</sup>.

<sup>1</sup> See as required pursuant to the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 4, Sch 4 para 4: see para 716 ante. As to applications see para 713 ante.

<sup>2</sup> See under *ibid* Sch 4 para 6 or 7: see para 718 ante.

<sup>3</sup> A 'party' means either the applicant or the respondent: *ibid* reg 1(2). For the meaning of 'the respondent' see para 715 note 5 ante.

<sup>4</sup> *Ibid* Sch 4 para 8(1).

<sup>5</sup> *Ibid* Sch 4 para 8(1)(a).

<sup>6</sup> *Ibid* Sch 4 para 8(1)(b) (amended by SI 2003/1060). The powers of case management are set out in the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, Pt IV (regs 5-19) (as amended): see para 723 et seq post.

<sup>7</sup> *Ibid* Sch 4 para 8(1)(c).

<sup>8</sup> *Ibid* Sch 4 para 8(1)(d).

<sup>9</sup> *Ibid* Sch 4 para 8(1)(e).

<sup>10</sup> *Ibid* Sch 4 para 8(1)(f).

<sup>11</sup> *Ibid* Sch 4 para 8(2).

<sup>12</sup> *Ibid* Sch 4 para 9(1). The information referred to in the text is that given under Sch 4 para 8(1): see the text and notes 1-10 *supra*.

13 Ibid Sch 4 para 9(2).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/720. Amendment of appeal, application for leave or response.

## **720. Amendment of appeal, application for leave or response.**

The applicant may amend the reasons he gives in support of the case<sup>1</sup> or application for leave<sup>2</sup> as the case may be, but only with the leave of the President or nominated chairman of the Tribunal (or at the hearing, with the leave of the Tribunal)<sup>3</sup>. The respondent<sup>4</sup> may amend the reasons he gives for opposing the applicant's case or application for leave, but only with the leave of the President or nominated chairman (or at the hearing, with the leave of the Tribunal)<sup>5</sup>. Where the President, the nominated chairman or Tribunal gives leave to either party<sup>6</sup> to amend the reasons given in support of his case, he may do so on such terms as he thinks fit (including the making of a costs order)<sup>7</sup>.

1 For the meaning of 'case' see para 717 note 16 ante.

2 For the meaning of 'application for leave' see para 717 note 17 ante.

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 32(1).

4 For the meaning of 'the respondent' see para 715 note 5 ante.

5 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 32(2).

6 For the meaning of 'party' see para 719 note 3 ante.

le subject to the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 24: see para 736 post.

7 Ibid reg 32(3). The making of a costs order is subject to reg 24: see para 736 post.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/721. Withdrawal of proceedings or opposition to proceedings.

## **721. Withdrawal of proceedings or opposition to proceedings.**

If the applicant at any time notifies the Secretary to the Tribunal in writing, or states at a hearing, that he no longer wishes to pursue the proceedings, the President or the nominated chairman (or at the hearing, the Tribunal) must dismiss the proceedings, and may<sup>1</sup> make a costs order<sup>2</sup>. If the respondent<sup>3</sup> notifies the Secretary to the Tribunal in writing, or states at a hearing, that he does not or no longer opposes the proceedings, the President (or at the hearing, the Tribunal) must without delay determine the case or, as the case may be, the application for leave in the applicant's favour<sup>4</sup> and may<sup>5</sup> make a costs order<sup>6</sup> but in all cases must consider making one<sup>7</sup>.

1    Ie subject to the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 24: see para 736 post. Where the President or the nominated chairman dismisses the proceedings or determines the case or application for leave in the applicant's favour, the references in reg 24 to 'the Tribunal' are to be read as if they were references to 'the President or the nominated chairman': reg 33(3) (added by SI 2004/2073).

2    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 33(1) (amended by SI 2004/2073). As to costs orders see para 736 post.

3    For the meaning of 'the respondent' see para 715 note 5 ante.

4    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 33(2)(a).

5    Ie subject to *ibid* reg 24: see para 736 post. See note 1 *supra*.

6    *Ibid* reg 33(2)(b) (amended by SI 2004/2073).

7    Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 33(2)(c). See note 1 *supra*.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/C. APPLICATIONS/722. Unless orders.

## **722. Unless orders.**

The President or the nominated chairman may at any time make an order to the effect that, unless the party to whom the order is addressed takes a step specified in the order within a period specified in the order, the case<sup>1</sup> may be determined in favour of the other party<sup>2</sup>. The Secretary to the Tribunal must give written notification of the order to the party to whom it is addressed and to the other party<sup>3</sup> and must inform him that if a party fails to comply with such an order addressed to him, the President or the nominated chairman may determine the case in favour of the other party<sup>4</sup>.

If, in the opinion of the President or the nominated chairman, the party to whom an 'unless order'<sup>5</sup> is addressed has acted unreasonably in failing to comply with an order addressed to him under these provisions, the President or nominated chairman may make a costs order<sup>6</sup> requiring him to make a payment to the other party to cover costs<sup>7</sup>.

Where the President or nominated chairman has determined the case in favour of the other party<sup>8</sup>, the party to whom the order was addressed may apply to the President or that nominated chairman (as the case may be) for that determination to be set aside<sup>9</sup>. The application must be made not later than 10 working days after the date upon which the notice of the determination was sent to the party to whom the order was addressed, and must be in writing stating the grounds in full<sup>10</sup>. The President or the nominated chairman may, if he considers it appropriate to do so, direct that the determination and any costs order<sup>11</sup> be set aside and may give directions in exercise of his powers of case management<sup>12</sup> as he considers appropriate<sup>13</sup>. Before making a direction setting aside the determination or any costs order, the President or nominated chairman may invite the parties to make representations on the matter within such period as he may direct<sup>14</sup>. Where the determination or any costs order is set aside, the Secretary to the Tribunal must alter the relevant entry in the records<sup>15</sup>.

1 For the meaning of 'case' see para 717 note 16 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 10(1).

3 Ibid reg 10(2).

4 Ibid reg 10(3).

5 Ie an order under ibid reg 10(1): see text to notes 1-2 supra.

6 Ie an order under ibid reg 24: see para 736 post.

7 Ibid reg 10(4) (added by SI 2004/2073). In such a case the references in the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 24 (see para 736 post) to 'the Tribunal' have effect as if they were references to 'the President or the nominated chairman': reg 10(4) (as so added).

8 Ie in accordance with ibid reg 10(3): see the text and note 4 supra.

9 Ibid reg 10(5) (added by SI 2004/2073).

10 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 10(6) (added by SI 2004/2073).

11 le made pursuant to the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 10(4) (as added): see text and notes 5-7 *supra*.

12 le under *ibid* Pt IV (regs 5-19) (as amended): see para 723 *et seq post*.

13 *Ibid* reg 10(7) (added by SI 2004/2073).

14 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 10(8) (added by SI 2004/2073).

15 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 10(9) (added by SI 2004/2073).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/723. Appointment of the Tribunal.

## **D. THE HEARING**

### **723. Appointment of the Tribunal.**

The President of the Tribunal must, at such time as he considers it appropriate to do so, nominate a chairman (who may be himself) and two members of the lay panel to determine a case<sup>1</sup>; and he must also, at such time as he considers it appropriate to do so, nominate a chairman (who may be himself) to determine an application for leave<sup>2</sup>. The President or the nominated chairman may determine any application made in relation to the case or any application for leave<sup>3</sup>.

The President may at any time before the hearing (or, if the case is to be determined without an oral hearing, before the case is determined) nominate from the appropriate panel another person in substitution for the chairman or other member previously nominated<sup>4</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 5(1). The President must nominate members of the lay panel who appear to him to have experience and qualifications relevant to the subject matter of the case: reg 5(5). For the meaning of 'case' see para 717 note 16 ante.

2 Ibid reg 5(2). For the meaning of 'application for leave' see para 717 note 17 ante.

3 Ibid reg 5(3).

4 Ibid reg 5(4).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/724. Fixing and notification of hearing.

#### **724. Fixing and notification of hearing.**

The Secretary to the Tribunal must, in consultation with the President or the nominated chairman, fix a date for the hearing of the case<sup>1</sup> unless the applicant has requested in writing that the case be determined without a hearing and the President or nominated chairman has not directed<sup>2</sup> that there be a hearing<sup>3</sup>. The date fixed for the hearing must be the earliest practicable date having regard to any directions which have been made by the President or nominated chairman with regard to the preparation of evidence but must be no sooner than 15 working days<sup>4</sup> after the latest date on which the President or nominated chairman has directed that the evidence of the parties<sup>5</sup> (including the statements of any witnesses or experts) are to be filed or exchanged<sup>6</sup>. The Secretary to the Tribunal must notify the parties in writing informing them of the time and place of the hearing no less than 20 working days before the date fixed for the hearing<sup>7</sup>. The Secretary to the Tribunal may, in consultation with the President or the nominated chairman, alter the place of the hearing; and, if he does, he must without delay inform the parties in writing of the alteration<sup>7</sup>. The President or the nominated chairman may adjourn the hearing either on the application of either party or on his own initiative<sup>8</sup> but must not do so unless satisfied that refusing the adjournment would prevent the just disposal of the case<sup>9</sup>. If the President or the nominated chairman adjourns the hearing, then the Secretary to the Tribunal must without delay inform the parties in writing of the date, time and place of the resumed hearing<sup>10</sup>.

1 For the meaning of 'case' see para 717 note 16 ante.

2 In accordance with the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6(3A) (as added): see para 725 post.

3 Ibid reg 7(1) (amended by SI 2004/2073). This regulation does not apply in relation to an application for an order under the Education Act 2002 s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(Z1) (added by SI 2003/2043).

4 For the meaning of 'parties' see para 717 note 6 ante.

5 For the meaning of 'working day' see para 713 note 22 ante.

6 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(2) (amended by SI 2003/626). See note 3 supra.

In the case of an appeal under the Childminding and Day Care (Suspension of Registration) (England) Regulations 2003, SI 2003/332 (see para 1088 post), the Suspension of Day Care Providers and Child Minders (Wales) Regulations 2004, SI 2004/3282 (see para 1172 post), or the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730 (see para 1134 post), the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(2A) (added by SI 2003/626) applies instead of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(2) (as amended), and reg 7(3A) (added by SI 2003/626) applies instead of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(3) (as amended) (see the text to note 6 infra).

6 Ibid reg 7(3) (amended by SI 2003/626). See notes 3, 6 supra.

7 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 7(4). See note 3 supra.

- 8 Ibid reg 7(5). See note 3 supra.
- 9 Ibid reg 7(6). See note 3 supra.
- 10 Ibid reg 7(7). See note 3 supra.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **724 Fixing and notification of hearing**

TEXT--Second reference to NOTE 7 should be to NOTE 8 and, accordingly, existing NOTES 8-10 should be renumbered as NOTES 9-11.

NOTES 4, 5--Should be renumbered as NOTES 5, 4.

NOTES 6-10--NOTES 6 (second reference), 7-10 should be renumbered as NOTES 7-11.

NOTE 6--SI 2007/730 replaced: Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/725. Directions.

## **725. Directions.**

If either party has requested that there be a preliminary hearing, or if the President or the nominated chairman considers that a preliminary hearing is necessary, the President or nominated chairman must fix a date for the preliminary hearing as soon as possible after the expiry of five working days<sup>1</sup> from the date on which each party received from the Secretary to the Tribunal the information the other has provided about witness requirements and other matters of case management pursuant to the requirements set out in the regulations<sup>2</sup>. At the preliminary hearing or, if a preliminary hearing is not to be held, as soon as possible after and in any event not later than 10 working days after the expiry of the five working days referred to above, the President or the nominated chairman: (1) must give directions as to the dates by which any document, witness statement or other material upon which any party is intending to rely is to be sent to the Tribunal, and, if the President or the nominated chairman considers it appropriate, to the other party<sup>3</sup>; (2) may give any other direction in respect of case management which he considers appropriate<sup>4</sup>; and (3) must, where the applicant has requested that the case be determined without an oral hearing, give a direction as to the date, which must not be less than 10 working days after the last date on which he has directed that any document, witness statement or other evidence be sent to the Tribunal, by which the parties must send any written representations regarding their appeal to the Tribunal<sup>5</sup> unless it appears to the President or the nominated chairman at any time that the appeal is of such a nature that it should be determined at an oral hearing, in which case he may, after considering representations from the parties, direct that such a hearing is to be held<sup>6</sup>.

The President or nominated chairman may direct that exchange of witness statements or other material is to be simultaneous or sequential, as he considers appropriate<sup>7</sup>. The Secretary to the Tribunal must notify the parties as soon as possible in writing of any directions given<sup>8</sup>; and must notify the parties as soon as possible and in any event not less than five working days before the hearing of the date, time and place of any preliminary hearing<sup>9</sup>.

The parties may be represented or assisted at any preliminary hearing by any person<sup>10</sup>.

The President or nominated chairman may at any time on the application of either party or on his own initiative vary a direction which he has given or give any further direction in exercise of his powers of case management as he considers appropriate<sup>11</sup>. Before making any further direction or varying a direction<sup>12</sup>, the President or the nominated chairman must: (a) where the variation or further direction which he proposes to give is at the request of either party, give the other party the opportunity to make representations<sup>13</sup>; or (b) where the variation or further direction which he proposes to give is on his own initiative, give both parties the opportunity to make written representations<sup>14</sup>. Before making any further direction or varying a direction, the President or nominated chairman may direct that there is to be a preliminary hearing in relation to the proposed variation or further direction if he considers it appropriate or if a preliminary hearing has been requested by either party<sup>15</sup>.

<sup>1</sup> For the meaning of 'working day' see para 713 note 22 ante.

<sup>2</sup> The Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6(1). The five working days referred to in the text are those referred to in Sch 4 paras 8, 9: see para 719 ante. This regulation does not apply in the case of an appeal under the Childminding and Day Care (Suspension of Registration) (England) Regulations 2003, SI 2003/332 (see para 1088 post), the Suspension of

Day Care Providers and Child Minders (Wales) Regulations 2004, SI 2004/3282 (see para 1172 post), or the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730 (see para 1134 post), or in relation to an application for an order under the Education Act 2002 s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6(21) (added by SI 2003/626; and amended by SI 2003/2043).

Provision is also made for directions under the Childminding and Day Care (Suspension of Registration) (England) Regulations 2003, SI 2003/332 (see para 1088 post), the Suspension of Day Care Providers and Child Minders (Wales) Regulations 2004, SI 2004/3282 (see para 1172 post), or the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730 (see para 1134 post): see the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6A (added by SI 2003/626; and amended by SI 2003/2043).

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6(2)(a). See note 2 *supra*.

4 *Ibid* reg 6(2)(b). See note 2 *supra*.

5 *Ibid* reg 6(2)(c). See note 2 *supra*.

6 *Ibid* reg 6(3A) (added by SI 2004/2073). See note 2 *supra*. Otherwise, the case must be determined without an oral hearing if the applicant has so requested: Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 6(3A) (as so added).

7 *Ibid* reg 6(3). See note 2 *supra*.

8 *Ibid* reg 6(4). See note 2 *supra*.

9 *Ibid* reg 6(5). See note 2 *supra*.

10 *Ibid* reg 6(6). See note 2 *supra*.

11 *Ibid* reg 9(1).

12 *Ibid* reg 9(2).

13 *Ibid* reg 9(2)(a)(i).

14 *Ibid* reg 9(2)(a)(ii).

15 *Ibid* reg 9(2)(b) (amended by SI 2003/2043). This does not apply in relation to an application for an order under the Education Act 2002 s 166(5): see EDUCATION vol 15(1) (2006 Reissue) para 488.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **725 Directions**

NOTE 2--SI 2007/730 replaced: Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

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## **726. Disclosure of information and documents.**

The President of the Tribunal or the nominated chairman may give directions requiring a party<sup>1</sup> to send to the Secretary to the Tribunal any document<sup>2</sup> or other material which he considers may assist the Tribunal in determining the case<sup>3</sup> and which that party is able to send, and the Secretary to the Tribunal must take such steps as the President or the nominated chairman may direct to supply copies of any information or document so obtained to the other party<sup>4</sup>.

The President or the nominated chairman may give directions granting to a party the right to inspect and take copies of any document or other material which it is in the power of the other party to disclose, and appointing the date, time and place at which any such inspection and copying is to be done<sup>5</sup>.

The President of the Tribunal or the nominated chairman may give a direction on the application of either party requiring a person who is not a party to the proceedings to disclose any document or other material to the party making the application if he is satisfied that: (1) the documents or other material sought are likely to support the applicant's case or adversely affect the case of the other party<sup>6</sup>; (2) it is within the power of the person subject to the direction to disclose any document or other material<sup>7</sup>; and (3) disclosure is necessary for the fair determination of the case<sup>8</sup>.

It is a condition of such supply of any document or material that a party must use it only for the purpose of the proceedings<sup>9</sup>, and before making such a direction the President must take into account the need to protect any matter which relates to intimate personal or financial circumstances, is commercially sensitive, or was communicated or obtained in confidence<sup>10</sup>. Moreover, the above provisions do not apply in relation to any document or other material which the party could not be compelled to produce in legal proceedings in a county court<sup>11</sup>.

The President or the nominated chairman may give a direction as to the number of copies of relevant material which each party must send to the Tribunal; and 'relevant material' means all documents, witness statements and other material on which the parties intend to rely or which they have been ordered by the President or the nominated chairman to send to the Secretary to the Tribunal under his powers of case management<sup>12</sup>. The President or the nominated chairman may, if he considers it appropriate to do so, direct the form and order in which relevant material is to be supplied to the Tribunal<sup>13</sup>.

1 For the meaning of 'party' see para 719 note 3 ante.

2 For the meaning of 'document' see para 713 note 18 ante.

3 For the meaning of 'case' see para 717 note 16 ante.

4 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 12(1)(a).

5 Ibid reg 12(1)(b).

6 Ibid reg 12(2)(a).

7 Ibid reg 12(2)(b).

8 Ibid reg 12(2)(c).

9 Ibid reg 12(3).

10 Ibid reg 12(5).

11 Ibid reg 12(4).

12 Ibid reg 11(1).

13 Ibid reg 11(2).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/727. Method of sending documents.

## **727. Method of sending documents.**

Any document<sup>1</sup> may be sent to the Secretary to the Tribunal by post, by fax, electronically or through a document exchange, unless the President of the Tribunal or the nominated chairman directs otherwise<sup>2</sup>. Any notice or document which the Secretary to the Tribunal is authorised or required<sup>3</sup> to send to a party<sup>4</sup> must be sent by first class post to the address given for the purpose by that party<sup>5</sup>, or by fax or electronically to a number or address given by that party for the purpose<sup>6</sup> or, where the party has given for the purpose an address which includes a numbered box number at a document exchange, by leaving the notice or document addressed to that numbered box at that document exchange or at a document exchange which transmits documents on every working day<sup>7</sup> to that exchange<sup>8</sup>. If a notice or document cannot be sent to a party in one of these ways, the President or the nominated chairman may dispense with service of it or direct that it be served on that party in such manner as he thinks appropriate<sup>9</sup>. Any notice or document sent by the Secretary to the Tribunal to a party<sup>10</sup> is taken to have been received:

- 1343 (1) if sent by post and not returned, on the second working day after it was posted<sup>11</sup>;
- 1344 (2) if sent by fax or electronically, unless the Secretary to the Tribunal has been notified that the transmission has been unsuccessful, on the next working day after it was sent<sup>12</sup>;
- 1345 (3) if left at a document exchange, on the second working day after it was left<sup>13</sup>; and
- 1346 (4) if served in accordance with a direction by the President or nominated chairman<sup>14</sup>, on the next working day after it was so served<sup>15</sup>.

1 For the meaning of 'document' see para 713 note 18 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 28(1).

3 *Ie* under the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended): reg 28(2).

4 For the meaning of 'party' see para 719 note 3 ante.

5 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 28(2)(a).

6 *Ibid* reg 28(2)(b).

7 For the meaning of 'working day' see para 713 note 22 ante.

8 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 28(2)(c).

9 *Ibid* reg 28(3).

10 *Ie* in accordance with the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended).



- 11 Ibid reg 28(4)(a).
- 12 Ibid reg 28(4)(b).
- 13 Ibid reg 28(4)(c).
- 14 Ie under ibid reg 28(3): see the text and note 9 supra.
- 15 Ibid reg 28(4)(d).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/728. Expert evidence.

## **728. Expert evidence.**

The President of the Tribunal or the nominated chairman may, if he thinks that any question arises in relation to the case<sup>1</sup> on which it would be desirable for the Tribunal to have the assistance of an expert, appoint a person having appropriate qualifications to inquire into and report on the matter<sup>2</sup>. The Secretary to the Tribunal must supply the parties<sup>3</sup> with a copy of any written report received from the expert in advance of the hearing (or, if the case is to be determined without an oral hearing, before the case is determined)<sup>4</sup>. If the President or nominated chairman sees fit, he may direct that the expert attend the hearing and give evidence<sup>5</sup>. The Tribunal must pay such reasonable fees as the President or nominated chairman may determine to any person appointed as an expert for these purposes<sup>6</sup>.

1 For the meaning of 'case' see para 717 note 16 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 13(1).

3 For the meaning of 'parties' see para 717 note 6 ante.

4 See the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 13(2).

5 Ibid reg 13(3).

6 See ibid reg 13(4).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/729. Evidence of witnesses.

## **729. Evidence of witnesses.**

The President of the Tribunal or the nominated chairman may direct that the parties<sup>1</sup> send to each other by a date specified in the direction a copy of a witness statement in respect of each witness on whose evidence he wishes to rely<sup>2</sup>. A witness statement must contain the words 'I believe that the facts stated in this witness statement are true', and be signed by the person who makes it<sup>3</sup>.

The President or the nominated chairman (before the hearing or, if the case<sup>4</sup> is to be determined without an oral hearing, before the case is determined) or the Tribunal may direct that a document<sup>5</sup> or the evidence of any witness other than the applicant is to be excluded from consideration<sup>6</sup> because:

- 1347 (1) it would be unfair in all the circumstances to consider it<sup>7</sup>;
- 1348 (2) the party wishing to rely on the document or evidence has failed to submit the document, or witness statement containing it, in compliance with any direction<sup>8</sup>; or
- 1349 (3) it would not assist the Tribunal in determining the case<sup>9</sup>.

However, instead of excluding evidence the President or the nominated chairman or the Tribunal may permit it to be considered on such terms as he or it thinks fit, including the making of a costs order<sup>10</sup>.

The President or nominated chairman may also direct that a witness (other than the applicant) must not give oral evidence<sup>11</sup>.

1 For the meaning of 'parties' see para 717 note 6 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 14(1).

3 Ibid reg 14(2).

4 For the meaning of 'case' see para 717 note 16 ante.

5 For the meaning of 'document' see para 713 note 18 ante.

6 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 14(3).

7 Ibid reg 14(3)(a).

8 Ibid reg 14(3)(b).

9 Ibid reg 14(3)(c).

10 See ibid reg 14(4). The making of a costs order is subject to reg 24: see para 736 post.

11 See ibid reg 14(5).

## **UPDATE**

## **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/730. Withholding medical report from disclosure in exceptional circumstances.

### **730. Withholding medical report from disclosure in exceptional circumstances.**

Where the respondent<sup>1</sup> wishes the Tribunal, in determining the case<sup>2</sup>, to consider a medical report and the President of the Tribunal or the nominated chairman is satisfied that disclosure to the applicant of all or any part of the contents of the report would be so harmful to his health or welfare that it would be wrong to disclose it to him, and that in all the circumstances it would not be unfair if the report or that part of it is considered by the Tribunal<sup>3</sup>, the President or nominated chairman may direct that the report may be considered by the Tribunal, and all or any part of its contents must not be disclosed to the applicant<sup>4</sup>. The President or the nominated chairman may appoint a person having appropriate skills or experience to assess whether disclosure of the report to the applicant would be harmful to his health or welfare and report on the matter to the President or the nominated chairman<sup>5</sup>.

1 For the meaning of 'the respondent' see para 715 note 5 ante.

2 For the meaning of 'case' see para 717 note 16 ante.

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 15(1).

4 Ibid reg 15(3).

5 Ibid reg 15(2).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/731. Child and vulnerable adult witnesses.

### **731. Child and vulnerable adult witnesses.**

A child<sup>1</sup> may only give evidence in person where the President of the Tribunal or the nominated chairman has given the parties<sup>2</sup> an opportunity to make written representations before the hearing or representations at the hearing<sup>3</sup>, and having regard to all the available evidence, and the representations of the parties, the President or the nominated chairman considers that the welfare of the child will not be prejudiced by so doing<sup>4</sup>. If he directs that a child is to give evidence in person, the President or the nominated chairman must secure that any arrangements he considers appropriate (such as the use of a video link) are made to safeguard the welfare of the child<sup>5</sup>, and must appoint for the purpose of the hearing a person with appropriate skills or experience in facilitating the giving of evidence by children<sup>6</sup>. The President or the nominated chairman must pay such fees as he may determine to any person so appointed<sup>7</sup>.

Similar provisions apply in respect of vulnerable adult witnesses<sup>8</sup>.

1 For the meaning of 'child' see para 648 note 2 ante.

2 For the meaning of 'parties' see para 717 note 6 ante.

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 17(1)(a).

4 Ibid reg 17(1)(b).

5 Ibid reg 17(2)(a).

6 Ibid reg 17(2)(b).

7 Ibid reg 17(6).

8 See ibid reg 17(3)-(5); and SOCIAL SERVICES AND COMMUNITY CARE.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/732. Summoning of witnesses.

### **732. Summoning of witnesses.**

The President of the Tribunal or the nominated chairman may, on the application of either party or on his own initiative, issue a summons requiring any person to attend as a witness at the hearing at the date, time and place set out in the summons<sup>1</sup>, and to answer any questions or produce any documents<sup>2</sup> or other material in his possession or under his control which relate to any matter in question in the case<sup>3</sup>. The summons must explain that it is an offence<sup>4</sup> to fail, without reasonable excuse, to comply with it<sup>5</sup>, and must also explain the right to apply to have it varied or set aside<sup>6</sup>. A person so summoned may apply in writing to the Secretary to the Tribunal for the summons to be varied or set aside by the President or the nominated chairman<sup>7</sup>, and the President or the nominated chairman may do so if he sees fit<sup>8</sup>. The Secretary to the Tribunal must notify the person summoned and the parties<sup>9</sup> in writing of the decision<sup>10</sup>.

However, no person may be required to attend, answer questions or produce any document or other material in obedience to a summons unless he has been given at least five working days<sup>11</sup> notice of the hearing or has consented to a shorter notice period<sup>12</sup>, and the necessary expenses of his attendance are paid or tendered to him by the party who requested his attendance or by the Tribunal, as the President or the nominated chairman directs<sup>13</sup>; nor may any person be required to give any evidence or produce any document or other material that he could not be required to produce in legal proceedings in a county court<sup>14</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(1)(a).

2 For the meaning of 'document' see para 713 note 18 ante.

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(1)(b).

4 ie under the Protection of Children Act 1999 s 9(5)(c): see para 712 ante.

Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(2)(a).

6 Ibid reg 16(2)(b).

7 Ibid reg 16(3).

8 Ibid reg 16(3)(a).

9 For the meaning of 'parties' see para 717 note 6 ante.

10 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(3)(b).

11 For the meaning of 'working day' see para 713 note 22 ante.

12 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(4)(a) (amended by SI 2003/626).

13 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 16(4)(b).

14 See *ibid* reg 16(5).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/733. Restricted reporting orders.

### **733. Restricted reporting orders.**

If it appears appropriate to do so, the President of the Tribunal or the nominated chairman (or, at the hearing, the Tribunal) may make a restricted reporting order<sup>1</sup>. A restricted reporting order is an order prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme<sup>2</sup> for reception in England and Wales, of any matter likely to lead members of the public to identify the applicant, any child, any vulnerable adult or any other person who the President or the nominated chairman or the Tribunal considers should not be identified<sup>3</sup>. A restricted reporting order may be made in respect of a limited period and may be varied or revoked by the President or the nominated chairman before the hearing (or by the Tribunal at the hearing)<sup>4</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 18(1).

2 'Relevant programme' means a programme included in a programme service within the meaning of the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 593); Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 1(2).

3 Ibid reg 18(2). For the meaning of 'child' see para 648 note 2 ante.

4 Ibid reg 18(3).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/734. Exclusion of press and public.

### **734. Exclusion of press and public.**

The President of the Tribunal or the nominated chairman (or, at the hearing, the Tribunal) may direct that any specified member of the public or members of the public generally or members of the press and members of the public be excluded from all or part of the hearing where either party has requested in writing that the hearing or any part of it should be conducted in private or on his (or its) own initiative<sup>1</sup>, where the President or the nominated chairman (or, at the hearing, the Tribunal) is satisfied that it is necessary in order to: (1) safeguard the welfare of any child or vulnerable adult<sup>2</sup>; (2) protect someone's private life<sup>3</sup>; or (3) avoid the risk of injustice in any legal proceedings<sup>4</sup>.

The hearing must be in public except where such a direction has been made that the press and public or members of the press and members of the public must be excluded<sup>5</sup>. Whether or not the hearing is held in public, a member of the Council on Tribunals, the President, the clerk<sup>6</sup> and any person permitted by the President or the nominated chairman to be present in order to assist the Tribunal are entitled to attend the hearing<sup>7</sup>. Whether or not the hearing is held in public, a member of the Council on Tribunals, and the President, may remain present during the Tribunal's deliberations, but must not take part in the deliberations<sup>8</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 19(1).

2 Ibid reg 19(2)(a). For the meaning of 'child' see para 648 note 2 ante.

3 Ibid reg 19(2)(b).

4 Ibid reg 19(2)(c).

5 Ibid reg 21(1).

6 'The clerk' means, in relation to a hearing before the Tribunal, the person appointed by the Secretary to the Tribunal to act as clerk to the Tribunal: *ibid* reg 1(2).

7 Ibid reg 21(2).

8 Ibid reg 21(3).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

### **734 Exclusion of press and public**

TEXT AND NOTES 7, 8--The Council on Tribunals is abolished and replaced by the Administrative Justice and Tribunals Council: see Tribunals, Courts and Enforcement Act 2007 ss 44, 45, Sch 7 (Sch 7 partly in force: SI 2007/2709). See further ADMINISTRATIVE LAW.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/735. Procedure, evidence and the decision at the hearing.

### **735. Procedure, evidence and the decision at the hearing.**

The Tribunal may regulate its own procedure<sup>1</sup>. At the beginning of the hearing the chairman must explain the order of proceedings which the Tribunal proposes to adopt<sup>2</sup>. The parties<sup>3</sup> may be represented or assisted at the hearing by any person<sup>4</sup>. If either party fails to attend or be represented at the hearing, the Tribunal may hear and determine the case in that party's absence<sup>5</sup>.

The Tribunal may consider any evidence, whether or not it would be admissible in a court of law<sup>6</sup>. The applicant has the right to give evidence at the hearing in person, and any other witness may do so unless the President or nominated chairman has directed otherwise<sup>7</sup>. No child<sup>8</sup> may be asked any question except by the Tribunal or by a skilled or experienced person<sup>9</sup>. The Tribunal may require any witness to give evidence on oath or affirmation which may be administered for the purpose by the chairman or the clerk<sup>10</sup>.

The Tribunal's decision may be taken by majority and the decision must record whether it was unanimous or taken by a majority<sup>11</sup>. The decision may be made and announced at the end of the hearing or reserved, and in any event, whether there has been a hearing or not, the decision must be recorded without delay in a document<sup>12</sup> signed and dated by the chairman (or if as a result of his death or incapacity he is unable to sign, or if he ceases to be a member of the chairmen's panel, by another member of the Tribunal)<sup>13</sup>. The document must also state the reasons for the decision<sup>14</sup>, and what, if any, order the Tribunal has made as a result of its decision<sup>15</sup>. The Secretary to the Tribunal must, as soon as reasonably possible, send to each party<sup>16</sup> a copy of the document and a notice explaining to the parties any right of appeal which they may have against the Tribunal's decision and the right to apply for a review of the Tribunal's decision<sup>17</sup>. Except where a decision is announced at the end of the hearing, the decision is treated as having been made on the day on which a copy of the document is sent to the applicant<sup>18</sup>. The decision must be entered in the records<sup>19</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 20(1).

2 Ibid reg 20(2).

3 For the meaning of 'parties' see para 717 note 6 ante.

4 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 20(3).

5 Ibid reg 20(4).

6 Ibid reg 22(1).

7 Ibid reg 22(2).

8 For the meaning of 'child' see para 648 note 2 ante.

9 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 22(3). The reference in the text to a skilled or experienced person is to one appointed by the President or the nominated chairman under reg 17(2): see para 731 ante. Similar provisions apply in relation to vulnerable adults: reg 22(4).

- 10 Ibid reg 22(5). For the meaning of 'the clerk' see para 734 note 6 ante.
- 11 Ibid reg 23(1).
- 12 For the meaning of 'document' see para 713 note 18 ante.
- 13 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 23(2).
- 14 Ibid reg 23(3)(a).
- 15 Ibid reg 23(3)(b).
- 16 For the meaning of 'party' see para 719 note 3 ante.
- 17 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 23(4). The requirement for service of a notice does not apply where the decision relates to the making of an order under the Education Act 2002 s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 23(4) (amended by SI 2003/2043). Where the appeal was against an order made by a justice of the peace under the Care Standards Act 2000 s 20 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE), the Children Act 1989 s 79K (as added) (see para 1090 post), or the Childcare Act 2006 s 72(2) (see para 1153 post), the Secretary to the Tribunal must as soon as reasonably practicable send a copy of the document containing the decision of the Tribunal to the justice of the peace who made the order: Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 23(5) (amended by SI 2007/1684).
- 18 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 23(6).
- 19 Ibid reg 23(7). For the meaning of 'records' see para 715 note 3 ante.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/736. Costs.

### **736. Costs.**

If in the opinion of the Tribunal a party<sup>1</sup> has acted unreasonably in bringing or conducting the proceedings, it may make a costs order requiring that party ('the paying party') to make a payment to the other party ('the receiving party') to cover costs incurred by that party<sup>4</sup>. Before making a costs order against a party, the Tribunal must invite the receiving party to provide to the Tribunal a schedule of costs incurred by him in respect of the proceedings<sup>5</sup> and must invite representations from the paying party and consider any representations he makes, consider whether he is able to comply with such an order and consider any relevant written information which he has provided<sup>6</sup>. When making a costs order, the Tribunal must:

- 1350 (1) order the payment of any sum which the parties<sup>7</sup> have agreed should be paid<sup>8</sup>;
- 1351 (2) order the payment of any sum which it considers appropriate having considered any representations the parties may make<sup>9</sup>; or
- 1352 (3) order the payment of the whole or part of the costs incurred by the receiving party in connection with the proceedings as assessed<sup>10</sup>.

Any costs required by an order to be assessed may be assessed in the county court according to such rules applicable to proceedings in the county court as are directed in the order<sup>11</sup>. A costs order may, by leave of a county court, be enforced in the same manner as a judgment or order of that court to the same effect<sup>12</sup>.

1 For the meaning of 'party' see para 719 note 3 ante.

4 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 24(1). Regulation 24(1) is expressed to be subject to reg 31 (death of applicant): see para 717 ante.

5 Ibid reg 24(2)(a).

6 Ibid reg 24(2)(b).

7 For the meaning of 'parties' see para 717 note 6 ante.

8 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 24(3)(a).

9 Ibid reg 24(3)(b).

10 Ibid reg 24(3)(c).

11 Ibid reg 24(4).

12 Ibid reg 24(5).

### **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/D. THE HEARING/737. Publication of Tribunal decisions.

### **737. Publication of Tribunal decisions.**

The President must make such arrangements as he considers appropriate for the publication of Tribunal decisions<sup>1</sup>. Decisions may be published electronically<sup>2</sup>. The decision may be published in an edited form, or subject to any deletions, if the President or the nominated chairman considers it appears appropriate bearing in mind:

- 1353 (1) the need to safeguard the welfare of any child or vulnerable adult<sup>3</sup>;
- 1354 (2) the need to protect the private life of any person<sup>4</sup>;
- 1355 (3) any representations on the matter which either party has provided in writing<sup>5</sup>;
- 1356 (4) the effect of any subsisting restricted reporting order<sup>6</sup>; and
- 1357 (5) the effect of any direction to withhold a medical report from disclosure<sup>7</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 27(1).

2 Ibid reg 27(2).

3 Ibid reg 27(3)(a). For the meaning of 'child' see para 648 note 3 ante.

4 Ibid reg 27(3)(b).

5 Ibid reg 27(3)(c).

6 Ibid reg 27(3)(d).

7 Ibid reg 27(3)(e). As to directions to withhold a medical report from disclosure see reg 15; and para 730 ante.

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/E. REVIEW/738. Review of the Tribunal's decision.

## ***E. REVIEW***

### **738. Review of the Tribunal's decision.**

A party<sup>1</sup> may apply to the President for the Tribunal's decision to be reviewed on the grounds that:

- 1358 (1) it was wrongly made as a result of an error on the part of the Tribunal staff<sup>2</sup>;
- 1359 (2) a party, who was entitled to be heard at a hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear<sup>3</sup>; or
- 1360 (3) there was an obvious error in the decision<sup>4</sup>.

Such an application must be made not later than 10 working days<sup>5</sup> after the date on which the decision was sent to the party applying for the decision to be reviewed<sup>6</sup>, and must be in writing stating the grounds in full<sup>7</sup>. Such an application may be refused by the President of the Tribunal, or by the chairman of the Tribunal which decided the case, if in his opinion it has no reasonable prospect of success<sup>8</sup>. Unless such an application is refused, it must be determined, after the parties<sup>9</sup> have had an opportunity to be heard, by the Tribunal which decided the case or, where that is not practicable, by another Tribunal appointed by the President<sup>10</sup>. The Tribunal may on its own initiative propose to review its decision on any of the grounds referred to in heads (1) to (3) above, in which case the Secretary to the Tribunal must serve notice on the parties not later than 10 working days after the date on which the decision was sent to them<sup>11</sup>, and the parties must have an opportunity to be heard<sup>12</sup>. If, on the application of a party or on its own initiative, the Tribunal is satisfied as to any of the grounds referred to in heads (1) to (3) above, it must order that the whole or a specified part of the decision be reviewed<sup>13</sup>, and it may give directions to be complied with before or after the hearing of the review<sup>14</sup>. The power to give such directions includes a power to give a direction requiring a party to provide such particulars, evidence or statements as may reasonably be required for the determination of the review<sup>15</sup>.

An appeal lies to the High Court on a point of law from a decision of the Tribunal<sup>16</sup>.

1 For the meaning of 'party' see para 719 note 3 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 25(1)(a). This regulation does not apply in relation to an application for an order under the Education Act 2002 s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 25(Z1) (added by SI 2003/2043).

3 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 25(1)(b). See note 2 supra.

4 Ibid reg 25(1)(c). See note 2 supra.

5 For the meaning of 'working day' see para 713 note 22 ante.

6 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 25(2)(a). See note 2 supra.

- 7 Ibid reg 25(2)(b). See note 2 supra.
- 8 Ibid reg 25(3). See note 2 supra.
- 9 For the meaning of 'parties' see para 717 note 6 ante.
- 10 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 25(4). See note 2 supra.
- 11 Ibid reg 25(5)(a). See note 2 supra.
- 12 Ibid reg 25(5)(b). See note 2 supra.
- 13 Ibid reg 25(6)(a). See note 2 supra.
- 14 Ibid reg 25(6)(b). See note 2 supra.
- 15 Ibid reg 25(7). See note 2 supra.
- 16 Protection of Children Act 1999 s 9(6).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/E. REVIEW/739. Powers of the Tribunal on review.

### **739. Powers of the Tribunal on review.**

The Tribunal may, having reviewed all or part of a decision:

- 1361 (1) set aside or vary the decision by certificate signed by the chairman (or if as a result of his death or incapacity he is unable to sign, or if he ceases to be a member of the chairmen's panel, by another member of the Tribunal)<sup>4</sup>; and
- 1362 (2) substitute such other decision as it thinks fit or order a rehearing before the same or a differently constituted Tribunal<sup>2</sup>.

If any decision is set aside or varied (whether as a result of a review or by order of the High Court), the Secretary to the Tribunal must alter the relevant entry in the records<sup>3</sup> to conform to the chairman's certificate or the order of the High Court and must notify the parties<sup>4</sup> accordingly<sup>5</sup>.

Any decision of the Tribunal<sup>6</sup> may be taken by a majority and the decision must record whether it was unanimous or taken by a majority<sup>7</sup>.

1 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 26(1)(a). This regulation does not apply in relation to an application for an order under the Education Act 2002 s 166(5) (see EDUCATION vol 15(1) (2006 Reissue) para 488): Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 26(Z1) (added by SI 2003/2043).

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 26(1)(b).

3 For the meaning of 'records' see para 715 note 3 ante.

4 For the meaning of 'parties' see para 717 note 6 ante.

5 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 26(2).

6 *Ibid* reg 26 (as amended).

7 *Ibid* reg 26(3).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/F. MISCELLANEOUS/740. Irregularities.

## **F. MISCELLANEOUS**

### **740. Irregularities.**

An irregularity resulting from failure to comply with any provision of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002<sup>1</sup> or any direction given in accordance with them before the Tribunal has reached its decision does not of itself render the proceedings void<sup>2</sup>. Where any irregularity comes to the attention of the President of the Tribunal or the nominated chairman (before the hearing) or the Tribunal, he or it may and, if it appears that any person may have been prejudiced by the irregularity, must, before reaching a decision, give such directions as he or it thinks just to cure or waive the irregularity<sup>3</sup>. Clerical mistakes in any document<sup>4</sup> recording the decision of the Tribunal or a direction or decision of the President or the nominated chairman, or errors arising in such documents from accidental slips or omissions, may at any time be corrected by the chairman or the President or the nominated chairman (as the case may be) by means of certificate signed by him<sup>5</sup>. The Secretary to the Tribunal must as soon as practicable send the parties<sup>6</sup> a copy of any corrected document together with reasons for the decision to correct the document<sup>7</sup>.

<sup>1</sup> See the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended).

<sup>2</sup> Ibid reg 29(1).

<sup>3</sup> Ibid reg 29(2).

<sup>4</sup> For the meaning of 'document' see para 713 note 18 ante.

<sup>5</sup> Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 29(3).

<sup>6</sup> For the meaning of 'parties' see para 717 note 6 ante.

<sup>7</sup> Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 29(4).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/F. MISCELLANEOUS/741. Proof of documents and certification of decisions of the Tribunal.

#### **741. Proof of documents and certification of decisions of the Tribunal.**

A document<sup>1</sup> purporting to be issued by the Secretary to the Tribunal is taken to have been so issued, unless the contrary is proved<sup>2</sup>.

A document purporting to be certified by the Secretary to the Tribunal to be a true copy of a document containing: (1) a decision of the Tribunal; or (2) an order of the President or the nominated chairman or the Tribunal, is sufficient evidence of the matters contained in it, unless the contrary is proved<sup>3</sup>.

1 For the meaning of 'document' see para 713 note 18 ante.

2 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 34(1).

3 Ibid reg 34(2).

#### **UPDATE**

#### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/8. PROTECTION OF CHILDREN/(3) RESTRICTIONS ON WORKING WITH CHILDREN/(iv) The Tribunal/F. MISCELLANEOUS/742. Time.

## **742. Time.**

The President of the Tribunal or the nominated chairman may, having consulted with the parties<sup>1</sup> in the case<sup>2</sup>, extend any time limit<sup>3</sup> if in the circumstances it would be unreasonable to expect it to be, or to have been, complied with, and it would be unfair not to extend it<sup>4</sup>. The President or the nominated chairman may reduce any time limit if he considers it reasonable to do so and the parties in the case agree to the reduction<sup>5</sup>. Where the time prescribed by the regulations, or specified in any direction given by the President or the nominated chairman, for taking any step expires on a day which is not a working day<sup>6</sup>, the step must be treated as having been done in time if it is done on the next working day<sup>7</sup>.

1 For the meaning of 'parties' see para 717 note 6 ante.

2 For the meaning of 'case' see para 717 note 16 ante.

3 Ie any time limit mentioned in the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816 (as amended).

4 Ibid reg 35(1) (amended by SI 2004/2073).

5 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 35(1A) (added by SI 2004/2073).

6 For the meaning of 'working day' see para 713 note 22 ante

7 Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 35(2).

## **UPDATE**

### **708-742 The Tribunal**

The functions of the former Care Standards Tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (1) INTRODUCTION/743. Regulation by statute; deregulation of youth employment.

## **9. EMPLOYMENT OF CHILDREN**

### **(1) INTRODUCTION**

#### **743. Regulation by statute; deregulation of youth employment.**

Legislation has long regulated the employment of children<sup>1</sup> and young persons<sup>2</sup>, not just as to safety but also as to tenure of employment and the prohibition or control of the engagement of such persons in certain types of employment. However, the Employment Act 1989 repealed the principal legislative provisions restricting the employment of young persons<sup>3</sup>, amended other provisions which provided for differential treatment of young persons<sup>4</sup>, and empowered the Secretary of State by order to repeal or amend any statutory provision relating to the employment of children and young persons<sup>5</sup>. The law relating to the welfare of young persons in the workplace is now contained in the health and safety at work legislation and is considered elsewhere in this work<sup>6</sup>. The law covered in this part of this title is restricted to the provisions governing the employment of children and young persons<sup>7</sup>.

1 'Child', for the purposes of any enactment relating to the prohibition or regulation of the employment of children or young persons, means any person who is not over compulsory school age: Education Act 1996 s 558. For the meaning of 'compulsory school age' see para 744 note 2 post.

2 For the purposes of the Education Act 1996, 'young person' means a person over compulsory school age but under 18: s 579(1).

3 Employment Act 1989 ss 10(1), 29(4), Sch 3 Pts I, II, Sch 7 (Sch 3 Pts I, II repealed by the Statute Law (Repeals) Act 2004). The principal repeals were those of the whole of the Young Persons (Employment) Act 1938, the provisions in the Employment of Women, Young Persons and Children Act 1920 relating to employment of young persons at night, the Children and Young Persons Act 1933 s 19 (power to regulate young persons' employment by byelaws) and the various provisions governing the hours of work, holidays, etc of young persons in the Shops Act 1950, the Mines and Quarries Act 1954 and the Factories Act 1961.

4 Employment Act 1989 s 10(2), Sch 3 Pt III.

5 See *ibid* s 10(3). Such an order may not in general affect any statutory provision relating to the employment of persons under school leaving age: see s 10(4). In exercise of this power the following orders have been made: the Employment Act 1989 (Amendments and Revocations) Order 1989, SI 1989/2311; and the Railway Employment Exemption Regulations 1962 (Revocation) Order 1990, SI 1990/190. As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

6 See eg:

433 (1) the Management of Health and Safety at Work Regulations 1999, SI 1999/3242, reg 19 (as amended) (protection of young persons); and HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 430;

434 (2) the Control of Lead at Work Regulations 2002, SI 2002/2676, reg 4(2), Sch 1 (activities in which the employment of young persons and women of reproductive capacity is prohibited); and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 641;

435 (3) the Factories Act 1961 s 119 (as amended) (certificate of fitness for work); and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 847; and

- 436 (4) the Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Employment of Young Persons) Regulations 1998, SI 1998/2411 (as amended); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 504; SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1137.

In addition, there is a statutory power for local education authorities to prohibit or restrict the employment of children in circumstances where such employment is prejudicial to their health or where it renders them unfit to obtain the full benefit of education provided for them, but this is considered elsewhere in this work: see the Education Act 1996 s 559 (as amended); and EDUCATION vol 15(1) (2006 Reissue) para 558.

7 The Employment of Children Act 1973 was passed to rationalise the existing provisions for the regulation of such employment; but, at the date at which this volume states the law, it had not been brought into force. The legislative provisions therefore continue to be contained primarily in the Employment of Women, Young Persons and Children Act 1920 (see para 745 post), the Children and Young Persons Act 1933 Pt II (ss 18-30) (as amended) (see para 746 et seq post), the Children and Young Persons Act 1963 Pt II (ss 34-44) (as amended) (see para 751 et seq post), and the Education Act 1996 s 560 (as amended) (see para 744 post).

## **UPDATE**

### **743 Regulation by statute; deregulation of youth employment**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--Employment of Children Act 1973 repealed: Statute Law (Repeals) Act 2008.



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#### **744. Work experience as part of education.**

The enactments<sup>1</sup> relating to the prohibition or regulation of the employment of children do not apply to the employment of a child in his last two years of compulsory schooling<sup>2</sup> where the employment is in pursuance of arrangements made by the local education authority<sup>3</sup> or by the governing body of a school on behalf of such an authority, with a view to providing him with work experience as part of his education<sup>4</sup>. This does not, however, permit the employment of any person in any way contrary to an enactment which in terms applies to persons of less than, or not over, a specified age expressed as a number of years<sup>5</sup>, or to certain enactments<sup>6</sup> prohibiting the employment of children in any ship<sup>7</sup>.

No such arrangements may be made for a child to be employed in any way which would be contrary to an enactment prohibiting or regulating the employment of young persons<sup>8</sup> if he were a young person and not a child<sup>9</sup>. Where a child is employed in pursuance of arrangements so made, so much of any enactment as regulates the employment of young persons (whether by excluding them from any description of work, prescribing the conditions under which they may be permitted to do it or in any other way), and would apply in relation to him if he were of an age to be treated as a young person for the purposes of that enactment, applies in relation to him, in and in respect of the employment arranged for him, in all respects as if he were of an age to be so treated<sup>10</sup>.

1 'Enactment' includes any byelaw, regulation or other provision having effect under an enactment: Education Act 1996 s 560(7).

2 A child is taken to be in his last two years of compulsory schooling as from the beginning of the last two school years at his school during the whole or part of which he is of compulsory school age: *ibid* s 560(2) (substituted by the School Standards and Framework Act 1998 s 112(2)). For these purposes, 'child' means a person who is not over compulsory school age: Education Act 1996 s 579(1).

A person begins to be of compulsory school age when he attains the age of five, if he attains that age on a day prescribed by order of the Secretary of State, and otherwise at the beginning of a day so prescribed next following his attaining that age: s 8(2), (4)(a) (substituted by the Education Act 1997 s 52(1)-(3)). As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

A person ceases to be of compulsory school age at the end of the day which is the school leaving date for any calendar year (as determined by order of the Secretary of State): (1) if he attains the age of 16 after that day but before the beginning of the school year next following; (2) if he attains that age on that day; or (3) (unless head (1) *supra* applies) if that day is the school leaving date next following his attaining that age: Education Act 1996 s 8(1), (3), (4)(b) (s 8(4)(b) substituted by the Education Act 1997 s 52(1), (3)).

See further EDUCATION vol 15(1) (2006 Reissue) para 15.

3 For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20.

4 *Ibid* s 560(1) (substituted by the School Standards and Framework Act 1998 s 112(2)).

5 Education Act 1996 s 560(3)(a).

6 *Ie* the Employment of Women, Young Persons and Children Act 1920 s 1(2) and the Merchant Shipping Act 1995 s 55(1) (as amended): see para 745 post.

7 Education Act 1996 s 560(3)(b).

8 *Ie* within the meaning of that enactment: *ibid* s 560(4).

9 Ibid s 560(4).

10 Ibid s 560(5).

## **UPDATE**

### **744-745 Work experience as part of education, Employment in industrial undertakings and ships**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### **744 Work experience as part of education**

TEXT AND NOTES--A local education authority may secure the provision of work experience for persons in its area who are (1) over compulsory school age but under 19; or (2) aged 19 or over but under 25 and subject to a learning difficulty assessment: Education Act 1996 s 560A(1) (s 560A added by Apprenticeships, Skills, Children and Learning Act 2009 s 47). A local education authority must also encourage participation in work experience by persons within heads (1) or (2) and encourage employers to participate in the provision of work experience for such persons: Education Act 1996 s 560A(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (1) INTRODUCTION/745. Employment in industrial undertakings and ships.

#### **745. Employment in industrial undertakings and ships.**

No child<sup>1</sup> may be employed in any industrial undertaking<sup>2</sup>, other than one in which only members of the same family are employed<sup>3</sup>. Where persons under the age of 16 years are employed in any industrial undertaking, a register<sup>4</sup> of all persons under that age who are so employed, and of the dates of their birth, must be kept and must at all times be open to inspection<sup>5</sup>.

A person under 16 years of age may not be employed in any sea-going United Kingdom ship<sup>6</sup>. A person under school leaving age (but not under 16 years)<sup>7</sup> may not be employed in any United Kingdom ship except as permitted by regulations<sup>8</sup> prescribing:

- 1363 (1) the circumstances in which and conditions subject to which such a person who has attained such age as may be specified may be employed in a ship which is not a sea-going United Kingdom ship in such capacities as may be so specified<sup>9</sup>;
- 1364 (2) the circumstances and capacities in which persons over school leaving age but under the age of 18 or such lower age as may be specified must not be employed in a United Kingdom ship which is not a sea-going United Kingdom ship or may be so employed only subject to such conditions as may be specified<sup>10</sup>; and
- 1365 (3) the circumstances and capacities in which persons of at least the age of 16 but under the age of 18 or such lower age as may be specified must not be employed in a sea-going United Kingdom ship or may be so employed subject to such conditions as may be specified<sup>11</sup>.

If any person is employed in a ship in contravention of this provision or if any condition subject to which a person may be employed under regulations made under it is not complied with, the owner or master is liable on summary conviction to a fine<sup>12</sup>.

1 For the meaning of 'child' see para 743 note 1 ante.

2 'Industrial undertaking' includes particularly: (1) mines, quarries and other works for the extraction of minerals from the earth; (2) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including shipbuilding, and the generation, transformation, and transmission of electricity and motive power of any kind; (3) construction, reconstruction, maintenance, repair, alteration or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gaswork, waterwork, or other work of construction, as well as the preparation for or laying the foundations of any such work or structure; and (4) transport of passengers or goods by road or rail or inland waterway, including the handling of goods at docks, quays, wharves and warehouses, but excluding transport by hand: Employment of Women, Young Persons, and Children Act 1920 s 4, Schedule Pt I art 1 (s 4 amended by the Statute Law (Repeals) Act 1978; and the Employment Act 1989 s 29(3), Sch 6 para 2).

3 Employment of Women, Young Persons, and Children Act 1920 ss 1(1), 3(2). These provisions implement the International Labour Convention No 5 (Minimum Age for Admission of Children to Industrial Employment) (Washington, 28 November 1919; Cmd 627) Pt I art 2. Article 2 refers to 'children under 14' (cf the wording of the Employment of Women, Young Persons, and Children Act 1920, which refers simply to 'child'); and the International Labour Convention No 5 (Minimum Age for Admission of Children to Industrial Employment) art 3 states that art 2 does not apply to work done by children in technical schools provided that such work is approved and supervised by a public authority.

Employment of a child in contravention of these provisions (save in the employments listed in note 4 *infra*) is an offence to which the Children and Young Persons Act 1933 ss 21(1), (2), 28(1), (3) (ss 21(1), 28(1), (3) as amended) (see paras 749-750 *post*) apply: Employment of Women, Young Persons, and Children Act 1920 s 1(6)(a)(i) (amended by the Employment Act 1989 Sch 6 para 1).

4 The Employment of Women, Young Persons, and Children Act 1920 s 1 (as amended), in so far as relating to employment in mines and quarries within the meaning of the Mines and Quarries Act 1954, has effect as if it formed part of that Act and the Factories Act 1961, and the provisions of those Acts relating to registers to be kept thereunder apply to the registers required to be kept under the Employment of Women, Young Persons, and Children Act 1920: s 1(6) (read with the Mines and Quarries Act 1954 s 188, Sch 4; the Factories Act 1937 s 159(3) (repealed); and the Factories Act 1961 s 183, Sch 6 para 1). For the meaning of 'mine' in the Mines and Quarries Act 1954 see s 180 (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 5.

5 Employment of Women, Young Persons, and Children Act 1920 s 1(4) (substituted by the Employment Act 1989 s 10(2), Sch 3 Pt III para 1). If any person being the employer of a person under the age of 16 years fails to keep such a register so required to be kept by him, or refuses or neglects when required to produce it for inspection by an officer of a local authority, he is liable on summary conviction to a fine not exceeding level 2 on the standard scale: Employment of Women, Young Persons, and Children Act 1920 s 1(6)(c) (amended by the Employment Act 1989 Sch 6 para 1; and by virtue of the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see para 132 note 2 *ante*.

6 Merchant Shipping Act 1995 s 55(1A) (added by the Merchant Shipping (Hours of Work) Regulations 2002, SI 2002/2125, reg 21, Sch 2 para 1(b)). As to the meaning of 'ship' see the Merchant Shipping Act 1995 s 313(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 229. A ship is a 'United Kingdom ship' for these purposes if it is registered in the United Kingdom under Pt II (ss 8-23): s 1(3).

7 A person is over school-leaving age for this purpose if he has, and under school-leaving age if he has not, attained the age which is the upper limit of compulsory school age under the enactments relating to education in the part of the United Kingdom in which he entered into the agreement under which he is so employed or, if he entered into that agreement outside the United Kingdom or is employed otherwise than under that agreement, under the enactments relating to education in England and Wales: *ibid* s 55(5). For the meaning of 'compulsory school age' see para 744 note 2 *post*.

8 *Ibid* s 55(1) (amended by the Merchant Shipping (Hours of Work) Regulations 2002, SI 2002/2125, Sch 2 para 1(a)). Regulations made for these purposes may make different provision for different employments and different descriptions of ship and any other different circumstances: Merchant Shipping Act 1995 s 55(3). As to the regulations made in exercise of this power see the Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Employment of Young Persons) Regulations 1998, SI 1998/2411 (amended by SI 2002/2125; SI 2002/3135). See further SHIPPING AND MARITIME LAW vol 93 (2008) PARA 504; SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1137.

9 Merchant Shipping Act 1995 s 55(2)(a) (amended by the Merchant Shipping (Hours of Work) Regulations 2002, SI 2002/2125, Sch 2 para 1(c)(i)).

10 Merchant Shipping Act 1995 s 55(2)(b) (amended by the Merchant Shipping (Hours of Work) Regulations 2002, SI 2002/2125, Sch 2 para 1(c)(ii)).

11 Merchant Shipping Act 1995 s 55(2)(c) (added by Merchant Shipping (Hours of Work) Regulations 2002, SI 2002/2125, Sch 2 para 1(c)(iii)).

12 Merchant Shipping Act 1995 s 55(4). The fine must not exceed level 3 on the standard scale: see s 55(4).

## UPDATE

### **744-745 Work experience as part of education, Employment in industrial undertakings and ships**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (2) GENERAL RESTRICTIONS/746. General restrictions on the employment of children.

## **(2) GENERAL RESTRICTIONS**

### **746. General restrictions on the employment of children.**

In general<sup>1</sup>, no child<sup>2</sup> may be employed<sup>3</sup>:

- 1366 (1) so long as he is under the age of 14 years<sup>4</sup>; or
- 1367 (2) to do any work other than light work<sup>5</sup>; or
- 1368 (3) before the close of school hours on any day on which he is required to attend school<sup>6</sup>; or
- 1369 (4) before 7 am or after 7 pm on any day<sup>7</sup>; or
- 1370 (5) for more than two hours on any day on which he is required to attend school<sup>8</sup>; or
- 1371 (6) for more than 12 hours in any week in which he is required to attend school<sup>9</sup>; or
- 1372 (7) for more than two hours on any Sunday<sup>10</sup>; or
- 1373 (8) for more than eight hours or, if he is under the age of 15 years, for more than five hours on any day on which he is not required to attend school and which is not a Sunday<sup>11</sup>; or
- 1374 (9) for more than 35 hours or, if he is under the age of 15 years, for more than 25 hours in any week in which he is not required to attend school<sup>12</sup>; or
- 1375 (10) for more than four hours in any day without a rest break of one hour<sup>13</sup>; or
- 1376 (11) at any time in a year unless at that time he has had, or could still have, during a period in the year in which he is not required to attend school, at least two consecutive weeks without employment<sup>14</sup>.

These restrictions, and those as to employment in entertainments<sup>15</sup> and employment in entertainment abroad<sup>16</sup>, are additional to the statutory provisions controlling the employment of young persons in factories, workshops, mines and quarries<sup>17</sup> and for giving effect to any international Convention<sup>18</sup> regulating employment<sup>19</sup>.

An employer who contravenes these restrictions commits an offence punishable by a fine<sup>20</sup>.

1 This is subject to any byelaws (see para 747 post) and to the exception that a child may under licence, or without a licence in a case where by virtue of the Children and Young Persons Act 1963 s 37(3) (as amended) no licence is required, take part in a performance where such employment would otherwise be prohibited by the provisions described in the text and notes 2-20 infra: Children and Young Persons Act 1933 s 18(3) (substituted by the Children and Young Persons Act 1963 s 64(1), Sch 3 para 4; and amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(5)). As from a day to be appointed, this provision is further amended so as to refer to regulations instead of byelaws: see the Children and Young Persons Act 1933 s 18(3) (as so substituted and amended; and further amended by the Employment of Children Act 1973 s 1(3), Sch 1 para 1). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed, regulations of the Secretary of State under the Children and Young Persons Act 1933 s 18 (as amended) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 18(4) (prospectively added by the Employment of Children Act 1973 s 1(3), Sch 1 para 1). At the date at which this volume states the law no such day had been appointed. As to employment in entertainment, and the necessity and grant of licences therefor, see para 751 et seq post.

2 For these purposes, 'child' means a person who is not, for the purposes of the Education Act 1996 s 8 (see para 744 note 2 ante; and EDUCATION vol 15(1) (2006 Reissue) para 15), over compulsory school age: Children

and Young Persons Act 1933 s 30(1) (renumbered and amended by the Employment Act 1989 s 10(2), Sch 3 Pt III para 8; amended by the Education Act 1996 s 582(1), Sch 37 para 133).

3 A person who assists in a trade or occupation carried on for profit is deemed to be employed notwithstanding that he receives no reward for his labour, but a chorister taking part in a religious service or in a choir practice for a religious service is not deemed to be employed, whether or not he receives any reward: Children and Young Persons Act 1933 s 30(1) (as renumbered: see note 2 supra). 'Employment' must be interpreted in a wide sense, so as to give a wide protection to children; it is not confined to cases of employer and employee, but includes the relation of principal and agent: *Morgan v Parr* [1921] 2 KB 379; *Sweet v Williams* (1922) 128 LT 379, DC. See also para 749 note 3 post. If a child is employed in contravention of these provisions his employment is illegal: *Pounteney v Turton* (1917) 34 TLR 103, CA.

4 Children and Young Persons Act 1933 s 18(1)(a) (substituted by the Children Act 1972 s 1(2); and amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(a)).

5 Children and Young Persons Act 1933 s 18(1)(aa) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(b)). 'Light work' means work which, on account of the inherent nature of the tasks which it involves and the particular conditions under which they are performed is not likely to be harmful to the safety, health or development of children and is not such as to be harmful to their attendance at school or to their participation in work experience in accordance with the Education Act 1996 s 560 (as amended) (see EDUCATION vol 15(1) (2006 Reissue) para 558), or their capacity to benefit from the instruction received or, as the case may be, the experience gained: Children and Young Persons Act 1933 s 18(2A) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(4)).

6 Children and Young Persons Act 1933 s 18(1)(b). As to the requirements for school attendance and the offence of failing to secure attendance see the Education Act 1996 s 444 (as amended), s 444ZA (as added), s 444A (as added) and s 444B (as added); and EDUCATION vol 15(1) (2006 Reissue) para 521.

7 Children and Young Persons Act 1933 s 18(1)(c) (substituted by the Children and Young Persons Act 1963 s 34).

8 Children and Young Persons Act 1933 s 18(1)(d).

9 Ibid s 18(1)(da) (added by the Children (Protection at Work) (No 2) Regulations 2000, SI 2000/2548, reg 2(1)).

10 Children and Young Persons Act 1933 s 18(1)(e).

11 Ibid s 18(1)(g) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(d)).

12 Children and Young Persons Act 1933 s 18(1)(h) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(d)). 'Week' means any period of seven consecutive days: Children and Young Persons Act 1933 s 18(2A) (as added: see note 5 supra).

13 Ibid s 18(1)(i) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(d)).

14 Children and Young Persons Act 1933 s 18(1)(j) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(2)(d)). 'Year', except in expressions of age, means a period of 12 months beginning with 1 January: Children and Young Persons Act 1933 s 18(2A) (as added: see note 5 supra).

15 See para 751 et seq post.

16 See para 776 et seq post.

17 These provisions are now largely repealed: see paras 743, 745 ante.

18 The Employment of Women, Young Persons, and Children Act 1920, which restricts the employment of young persons and children in industrial undertakings (see para 745 ante), was passed to give effect to certain Conventions of the International Labour Organisation: see para 745 note 3 ante.

19 Children and Young Persons Act 1933 s 29(4).

20 See para 749 post. The fine must not exceed level 3 on the standard scale: see para 749 post. As to the standard scale see para 132 note 2 ante.

## UPDATE

### 745-755 Employment in industrial undertakings and ships ... Licences

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (2) GENERAL RESTRICTIONS/747. Byelaws and regulations as to the employment of children.

#### **747. Byelaws and regulations as to the employment of children.**

A local authority<sup>1</sup> may make byelaws<sup>2</sup> with respect to the employment of children<sup>3</sup>, and any such byelaws may distinguish between children of different ages and sexes and between different localities, trade, occupations and circumstances<sup>4</sup>. Byelaws so made may prohibit absolutely the employment of children in any specified occupation<sup>5</sup>, and may prescribe:

- 1377 (1) the age below which children are not to be employed<sup>6</sup>;
- 1378 (2) the number of hours in each day or week for which, and the times of day at which, they may be employed<sup>7</sup>;
- 1379 (3) the intervals to be allowed for meals and rest<sup>8</sup>;
- 1380 (4) the holidays or half holidays to be allowed<sup>9</sup>; and
- 1381 (5) any other conditions to be observed in relation to the employment<sup>10</sup>.

No such byelaws may, however, modify the general statutory restrictions<sup>11</sup>, except that they may authorise:

- 1382 (a) the employment on an occasional basis of children aged 13 by their parents<sup>12</sup> or guardians<sup>13</sup> in light agricultural or horticultural work, notwithstanding the general prohibition of employment of children under the age of 14<sup>14</sup>;
- 1383 (b) the employment of children aged 13 in categories of light work specified in the byelaw<sup>15</sup>; or
- 1384 (c) the employment of children for not more than one hour before the commencement of school hours on any day when they are required to attend school, notwithstanding the general prohibition of employment before the close of school hours<sup>16</sup>.

As from a day to be appointed<sup>17</sup> the power to make byelaws in this matter is replaced by a corresponding power of the Secretary of State to make regulations<sup>18</sup>, under which he will also be able: (i) to prohibit the employment of children otherwise than under and in accordance with a permit to be issued by the local education authority on application made in accordance with the regulations, and to impose on children and others requirements in connection with permits<sup>19</sup>; (ii) to require employers to furnish particulars with respect to children employed, or proposed to be employed, by them and to keep and produce records<sup>20</sup>.

An employer who contravenes these restrictions commits an offence punishable by a fine<sup>21</sup>.

1 Subject to modifications as to the City of London, the local authority for the purposes of the Children and Young Persons Act 1933 Pt II (ss 18-30) (as amended) is the local education authority: s 96(1) (amended by the Education Act 1944 s 121, Sch 9 Pt I; and the Children Act 1948 s 60(2), Sch 3). As to the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20. In the City of London, the local authority in respect of street trading and employment is the Common Council of the City of London: see the Children and Young Persons Act 1933 s 97 (amended by the Education Act 1944 s 121, Sch 9; the Children Act 1948 s 60(2), Sch 3; the London Government Act 1963 ss 30(8), 93(1), Sch 18 Pt II; and modified by the Education Act 1996 s 582(3), Sch 39 para 4). As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) para 51 et seq.

Expenses incurred by a local authority in connection with powers and duties which are, under the Children and Young Persons Act 1933, exercised and performed by it as local education authorities are to be defrayed as expenses under the enactments relating to education: s 96(3) (amended by the Education Act 1944 s 120, Sch

8 Pt I; and the Education Act 1996 s 582(1), Sch 37 para 1(a)). As to other local authority expenses, in relation to England, see s 96(4) (amended by the Education Act 1944 ss 120, 121, Sch 8 Pt I, Sch 9 Pt I; the National Assistance Act 1948 s 62, Sch 7 Pt III; and the Education Act 1996 s 582(1), Sch 37 para 1(a)); and the Children and Young Persons Act 1933 s 96(4A) (added by the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 1(3)).

A local authority may refer to a committee appointed for the purposes of the Children and Young Persons Act 1933, or to any committee appointed for the purposes of any other Act, any matter relating to the exercise by the authority of any of its powers under the Children and Young Persons Act 1933 and may delegate any of those powers, other than any power to borrow money, to any such committee: s 96(7) (amended by the Children Act 2004 s 64, Sch 5 Pt 4).

A local authority, or a committee to whom any powers of a local authority under the Children and Young Persons Act 1933 have been delegated, may by resolution empower the clerk or the chief education officer of the authority to exercise in the name of the authority in any case which appears to him to be one of urgency any powers of the authority or, as the case may be, of the committee with respect to the institution of proceedings under that Act: s 96(8). As from 1 January 2008 or, in relation to any authority which appoints a director of children's services before that day, from the day of his appointment, this provision is amended to so empower the director of children's services (in the case of an authority in England) or the chief education officer (in the case of an authority in Wales) in place of the clerk or the chief education officer of the authority: s 96(8) (prospectively amended by the Children Act 2004 s 18(9), (10), Sch 2 para 1); Children Act 2004 (Director of Children's Services) Appointed Day Order 2007, SI 2007/1792, art 2.

2 Byelaws do not have effect until confirmed by the Secretary of State, and must not be confirmed until at least 30 days after publication by the local authority in such manner as is directed by the Secretary of State: Children and Young Persons Act 1933 s 27(1). Before confirming any byelaw the Secretary of State must consider such objections thereto as may be addressed to him by persons affected or likely to be affected thereby, and may order a local inquiry to be held; where such an inquiry is held, the person holding it must receive such remuneration as the Secretary of State determines, and that remuneration and the expenses of the inquiry must be paid by the local authority: s 27(2). As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

3 For the meaning of 'child' see para 746 note 2 ante.

4 Children and Young Persons Act 1933 s 18(2). This provision is prospectively amended: see the text and notes 17-20 infra.

5 Ibid s 18(2)(b).

6 Ibid s 18(2)(c)(i).

7 Ibid s 18(2)(c)(ii). For the meaning of 'week' see para 746 note 12 ante. A byelaw which provides that a child is not to be employed on school days except between 5.00 pm and 6.30 pm is *prima facie* reasonable: *Roberts v Williams* (1922) 127 LT 363.

8 Children and Young Persons Act 1933 s 18(2)(c)(iii).

9 Ibid s 18(2)(c)(iv).

10 Ibid s 18(2)(c)(v).

11 Ibid s 18(2). As to the statutory restrictions see para 746 ante.

12 As to the meaning of 'parent' see para 248 note 1 ante.

13 'Guardian', in relation to a child or young person, includes any person who, in the opinion of the court having cognisance of any case in relation to the child or young person or in which the child or young person is concerned, has for the time being the care of the child or young person: Children and Young Persons Act 1933 s 107(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 7(a)).

14 Children and Young Persons Act 1933 s 18(2)(a)(i) (substituted by the Children Act 1972 s 1(2); and amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(3)(a); and the Children (Protection at Work) Regulations 2000, SI 2000/1333, reg 2(1)). For the meaning of 'light work' see para 746 note 5 ante.

15 Children and Young Persons Act 1933 s 18(2)(a)(ia) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 2(3)(b)).

16 Children and Young Persons Act 1933 s 18(2)(a)(ii). As to the requirements for school attendance and the offence of failing to secure attendance see the Education Act 1996 s 444 (as amended), s 444ZA (as added), s 444A (as added), s 444B (as added); and EDUCATION vol 15(1) (2006 Reissue) para 521. For the powers of a local education authority to prohibit or restrict the employment of children where it is expedient in their interest see s 559 (as amended); and EDUCATION vol 15(1) (2006 Reissue) para 558.

17 As from a day to be appointed, the Children and Young Persons Act 1933 s 18(1), (2) is amended, and s 18(2)(d), (e), (4) is added, by the Employment of Children Act 1973 s 1(2), (3), Sch 1 Pt I para 1, Pt II. At the date at which this volume states the law, no such day had been appointed.

18 Children and Young Persons Act 1933 s 18(1), (2) (as amended: see note 17 supra). Regulations under this power are to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 18(4) (as added: see note 17 supra). See para 743 text and note 7 ante. An order or other act of the Secretary of State under the Children and Young Persons Act 1933 may be signified under the hand of the Secretary of State or an Under-Secretary of State or an Assistant Under-Secretary: s 106(1) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(4), Sch 12 Pt I).

19 Children and Young Persons Act 1933 s 18(2)(d) (as added: see note 17 supra).

20 Ibid s 18(2)(e) (as added: see note 17 supra).

21 See para 749 post. The fine must not exceed level 3 on the standard scale: see para 749 post. As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (2) GENERAL RESTRICTIONS/748. Street trading.

#### **748. Street trading.**

No child<sup>1</sup> may engage, or be employed<sup>2</sup>, in street trading<sup>3</sup>. However, a local authority<sup>4</sup> may make byelaws authorising children who have attained the age of 14 years to be employed by their parents<sup>5</sup> in street trading to such extent as may be specified in the byelaws, which may also regulate street trading by persons so authorised to be employed in such trading<sup>6</sup>. Such byelaws must contain provisions determining the days and hours during which, and the places at which, such persons may engage or be employed in street trading<sup>7</sup>, may distinguish between persons of different ages and sexes and between different localities<sup>8</sup>, and may contain provisions:

- 1385 (1) forbidding any such person to engage or be employed in street trading unless he holds a licence granted by the authority, and regulating the conditions on which such licences may be granted, suspended and revoked<sup>9</sup>;
- 1386 (2) requiring such persons so engaged or employed to wear badges<sup>10</sup>;
- 1387 (3) regulating in any other respect the conduct of such persons while so engaged or employed<sup>11</sup>.

A child who engages in street trading in contravention of the statutory provisions outlined above or of byelaws made thereunder is liable on summary conviction to a fine<sup>12</sup>. An employer who contravenes these restrictions commits an offence punishable by a fine<sup>13</sup>.

1 For the meaning of 'child' see para 746 note 2 ante.

2 For the meaning of 'employed' see para 746 note 3 ante.

3 Children and Young Persons Act 1933 s 20(1) (substituted by the Employment Act 1989 s 10(2), Sch 3 Pt III para 2). 'Street trading' includes the hawking of newspapers, matches, flowers and other articles, playing, singing or performing for profit, shoe-blackening and other similar occupations carried on in streets or public places: Children and Young Persons Act 1933 s 30(1) (renumbered by the Employment Act 1989 Sch 3 Pt III para 8). It does not include legitimate business between a shop and its customers involving a sale or delivery at a customer's house (*Stratford Co-operative Society Ltd v East Ham Corpn* [1915] 2 KB 70, DC) but it does include trading at a stall in a street where a market is held (*Vann v Eatough* (1935) 52 TLR 14, DC). Under different legislation it was held that to photograph a person in the street and there sell a photograph which was not yet in existence and which was later delivered by post is not street trading: *Newman v Lipman* [1951] 1 KB 333, [1950] 2 All ER 832, DC. 'Street' includes any highway and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; 'public place' includes any public park, garden, sea beach or railway station, and any ground to which the public for the time being has or is permitted to have access, whether on payment or otherwise: Children and Young Persons Act 1933 s 107(1). Nothing in s 20 (as amended) or in byelaws made thereunder restricts the engagement or employment of any person in the carrying on in any place of a retail trade or business on any occasion on which it is customary for retail trades or businesses to be carried on there ('retail trade or business' for these purposes having the meaning set out in the Shops Act 1950 s 74(1) (repealed by the Deregulation and Contracting Out Act 1994 s 81(1) Sch 17) which, at the time of that repeal, stated that 'retail trade or business' includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, the business of lending books or periodicals when carried on for purposes of gain, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement'): Children and Young Persons Act 1963 s 35(2).

4 For the meaning of 'local authority' see para 747 note 1 ante.

5 As to the meaning of 'parent' see para 248 note 1 ante.

6 Children and Young Persons Act 1933 s 20(2) (amended by the Employment Act 1989 Sch 3 Pt III para 2).

- 7 Children and Young Persons Act 1933 s 20(3) (added by the Children (Protection at Work) Regulations 2000, SI 2000/1333, reg 2(2)(b)).
- 8 Children and Young Persons Act 1933 s 20(2).
- 9 Ibid s 20(2)(a).
- 10 Ibid s 20(2)(c). See *Stratford Co-operative Society Ltd v East Ham Corp* [1915] 2 KB 70, DC.
- 11 Children and Young Persons Act 1933 s 20(2)(d).
- 12 Ibid s 21(3) (amended by the Employment Act 1989 s 10(2), Sch 3 Pt III para 3; and by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 1 on the standard scale: see the Children and Young Persons Act 1933 s 21(3) (as so amended). As to the standard scale see para 132 note 2 ante.
- 13 See para 749 post. The fine must not exceed level 3 on the standard scale: see para 749 post.

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (2) GENERAL RESTRICTIONS/749. Employers' liability.

### **749. Employers' liability.**

If a person is employed in contravention of any of the general restrictions on the employment of children<sup>1</sup> or of any byelaws<sup>2</sup> made under them, the employer<sup>3</sup> and any person (other than the person employed) to whose act or default the contravention is attributable is liable on summary conviction to a fine<sup>4</sup>. If proceedings are brought against the employer, then, upon information duly laid by him and on giving three days' notice to the prosecution, he is entitled to have any person (other than the person employed) to whose act or default he alleges that the contravention was due brought before the court as a party to the proceedings<sup>5</sup>, and if, after the contravention has been proved, the employer proves to the satisfaction of the court that the contravention was due to that other person's act or default, that person may be convicted of the offence<sup>6</sup>; and if the employer further proves to the satisfaction of the court that he has used all due diligence to secure compliance with the provisions, he must be acquitted<sup>7</sup>. Where an employer makes use of this procedure, he (if he gives evidence), and any witnesses called by him in support of his charge against the other person, may be cross-examined by the prosecution, who may call rebutting evidence<sup>8</sup>, and the court may order costs to be paid by any party to any other party<sup>9</sup>.

<sup>1</sup> See the provisions of the Children and Young Persons Act 1933 ss 18, 20 (as amended): see paras 746-748 ante. For the meaning of 'child' see para 746 note 2 ante.

<sup>2</sup> As from a day to be appointed this applies to regulations made under *ibid* s 18(1), (2) (as amended) (see para 747 text and notes 17-20 ante): s 21(1) (prospectively amended by the Employment of Children Act 1973 s 1(3), Sch 1 Pt I para 2). At the date at which this volume states the law, no such day had been appointed.

<sup>3</sup> An employer is not necessarily the employer of a person engaged by an employee to assist the employee in carrying out his work, unless the employee purports to act as the employer's agent in engaging that person: *Robinson v Hill* [1910] 1 KB 94, DC (baker's vanman engaging child to help with deliveries). There must purport to exist a contract of employment between the employer and the person engaged: *Robinson v Hill* *supra* at 98. An employer who forbids his employee to engage help does not commit an offence if, without the employer's knowledge, the employee engages a child to help: *Portsea Island Mutual Co-operative Society Ltd v Leyland* (1978) 122 Sol Jo 486, DC (milk roundsman). See further para 746 note 3 ante.

<sup>4</sup> Children and Young Persons Act 1933 s 21(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 3 on the standard scale: see the Children and Young Persons Act 1933 s 21(1) (as so amended). As to the standard scale see para 132 note 2 ante.

Proceedings for any offence under Pt II (ss 18-30) (as amended) may be instituted by a local education authority: s 98 (substituted by the Children Act 1948 s 60(2), Sch 3; and modified by the Education Act 1996 s 582(3), Sch 39, para 4). As to the institution of such proceedings by the local councils see the Children and Young Persons Act 1963 s 56(1), (1A) (s 56(1A) added by the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 4). The Children and Young Persons Act 1963 provides that so much of the Local Government Act 1933 s 85(5) (repealed) as restricts the matters that may be referred to or dealt with by committees established under s 85 (repealed) does not apply in relation to any functions exercisable by a council under the Children and Young Persons Act 1963 s 56 (as amended): s 56(2) (amended by the Local Authority Social Services Act 1970 s 14, Sch 2 para 10; and the Children Act 2004 s 64, Sch 5, Pt 4). As to the establishment of committees by local authorities see now the Local Government Act 1972 ss 101, 102 (both as amended); and LOCAL GOVERNMENT vol 69 (2009) PARAS 370-371.

In any proceedings under the Children and Young Persons Act 1933, a copy of an entry in the wages book of any employer of labour, or if no wages book be kept a written statement signed by the employer or by any responsible person in his employ, is evidence that the wages therein entered or stated as having been paid to any person, have in fact been so paid: s 100.

5 Ibid s 21(1) proviso. A person so charged is not obliged to make use of this special procedure, if he can prove that not he, but some other person, eg one of his employees, is the employer: *Robinson v Hill* [1910] 1 KB 94, DC. The proviso does not apply where a person is charged with contravening the Children and Young Persons Act 1933 s 18(1)(j) (as added) (see para 746 text and note 14 ante), but it is a defence for a person so charged to prove that he used all due diligence to secure that that provision should be complied with: s 21(2A) (added by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 3).

6 Children and Young Persons Act 1933 s 21(1) proviso. See note 5 supra.

7 Ibid s 21(1) proviso. See note 5 supra.

8 Ibid s 21(2)(a).

9 Ibid s 21(2)(b).

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (2) GENERAL RESTRICTIONS/750. Powers of entry.

### **750. Powers of entry.**

If it is made to appear to a justice of the peace by a local authority<sup>1</sup>, or by any constable, that there is reasonable cause to believe that the provisions of the Children and Young Persons Act 1933 relating to employment<sup>2</sup>, other than employment abroad<sup>3</sup>, or the provisions of any byelaw<sup>4</sup> made under them, are being contravened with respect to any person, the justice may by order under his hand addressed to an officer of the local authority, or a constable, empower that officer or constable to enter, at any reasonable time within 48 hours of the making of the order, any place in or in connection with which the person in question is, or is believed to be, employed, or, as the case may be, in which he is, or is believed to be, taking part in a performance, being trained, taking part in a sport, or working as a model, and to make inquiries therein with respect to that person<sup>5</sup>. Any person who obstructs an officer or constable while so engaged, or who refuses to answer or answers falsely any authorised inquiry, is liable on summary conviction to a fine<sup>6</sup>.

1 For the meaning of 'local authority' see para 747 note 1 ante.

2 I.e. the provisions of the Children and Young Persons Act 1933 Pt II (ss 18-30) (as amended): see para 746 et seq ante.

3 See paras 776-779 post.

4 As from a day to be appointed this provision is amended to refer to any regulation made under the Children and Young Persons Act 1933 s 18(1), (2) (as amended) (see para 747 text and notes 17-20 ante): s 28(1) (prospectively amended by the Employment of Children Act 1973 s 1(3), Sch 1 Pt I para 3). At the date at which this volume states the law, no such day had been appointed.

5 Children and Young Persons Act 1933 s 28(1) (amended by the Children and Young Persons Act 1963 s 64(1), Sch 3 para 9; and the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 7(a)).

6 Children and Young Persons Act 1933 s 28(3) (amended by the Criminal Law Act 1977 s 31(6); and by virtue of the Criminal Justice Act 1982 s 46). The fine must not exceed level 2 on the standard scale: see the Children and Young Persons Act 1933 s 28(3) (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 749 note 4 ante.

### **UPDATE**

#### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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### **(3) EMPLOYMENT IN ENTERTAINMENT**

#### **(i) Employment in Entertainment in the United Kingdom**

##### **A. LICENSING OF PERFORMANCES**

##### **751. Requirement for a licence for a child to take part in certain performances.**

A child<sup>1</sup> may not:

- 1388 (1) take part in certain performances<sup>2</sup>; or
- 1389 (2) otherwise take part in a sport, or work as a model, where payment in respect of his doing so, other than for defraying expenses, is made to him or to another person<sup>3</sup>,

except under the authority of a licence granted by the local authority<sup>4</sup> for the area in which he resides or, if he does not reside in Great Britain, by the local authority for the area in which the applicant or one of the applicants for the licence resides or has his place of business<sup>5</sup>.

The performances concerned are:

- 1390 (a) any performance in connection with which a charge is made, whether for admission or otherwise<sup>6</sup>;
- 1391 (b) any performance in premises which, by virtue of an authorisation, may be used for the supply of alcohol<sup>7</sup>, or licensed premises or in premises in respect of which a club is registered<sup>8</sup>;
- 1392 (c) any broadcast performance<sup>9</sup>;
- 1393 (d) any other such performance included in a programme service<sup>10</sup>;
- 1394 (e) any performance recorded (by whatever means) with a view to its use in a broadcast or such a service or in a film intended for public exhibition<sup>11</sup>.

A child is treated as taking part in a performance if he takes the place of a performer in any rehearsal or in any preparation for the recording of the performance<sup>12</sup>.

No licence is, however, required if no payment in respect of his taking part in the performance, other than for defraying expenses, is made to him or to another person<sup>13</sup>, and:

- 1395 (i) in the previous six months the child has not taken part in other performances to which the provisions apply on more than three days<sup>14</sup>; or
- 1396 (ii) the performance is given under arrangements made by a school<sup>15</sup> or by a body of persons approved for these purposes by the Secretary of State or by the local authority for the area in which the performance takes place<sup>16</sup>.

The Secretary of State may make regulations prescribing the conditions to be observed with respect to the hours of work, rest and meals of children taking part in performances mentioned in head (i) above<sup>17</sup>.

Local authority officers and constables have certain powers of entry in respect of places where performances take place in pursuance of a licence<sup>18</sup>.

1 For the meaning of 'child' see para 743 note 1 ante.

2 Children and Young Persons Act 1963 s 37(1)(a) (substituted by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12). The performances in question are set out in the Children and Young Persons Act 1963 s 37(2) (as amended): see heads (a)-(e) in the text.

3 Ibid s 37(1)(b) (substituted by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12).

4 For the meaning of 'local authority' see para 747 note 1 ante; definition applied by the Children and Young Persons Act 1963 s 44(1).

5 Ibid s 37(1). As to licences see further para 755 et seq post.

6 Ibid s 37(2)(a).

7 Ibid s 37(2)(b)(i) (s 37(2)(b) substituted by the Licensing Act 2003 s 198(1), Sch 6 para 32). For the meaning of 'authorisation' for these purposes see the Licensing Act 2003 s 136; and LICENSING AND GAMBLING vol 67 (2008) PARA 132. For the meaning of 'supply of alcohol' see s 14; and LICENSING AND GAMBLING vol 67 (2008) PARA 53.

8 Children and Young Persons Act 1963 s 37(2)(b)(ii) (as substituted: see note 7 supra). The premises referred to are those licensed under the Licensing (Scotland) Act 1976, or in respect of which a club is registered under that Act. As from 1 September 2009 this provision will refer only to premises licensed within the meaning of the Licensing (Scotland) Act 2005: Children and Young Persons Act 1963 s 37(2)(b)(ii) (as so substituted; prospectively amended by the Licensing (Scotland) Act 2005 s 144, Sch 6 para 1); Licensing (Scotland) Act 2005 (Commencement No 4) Order 2007, SSI 2007/472, art 3.

9 Children and Young Persons Act 1963 s 37(2)(c).

10 Ibid s 37(2)(d) (substituted by the Broadcasting Act 1990 s 203(1), Sch 20 para 6). 'Programme service' for these purposes means a programme service within the meaning of the Broadcasting Act 1990 s 201 (as amended) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 352); Children and Young Persons Act 1963 s 37(2)(d) (as so substituted).

11 Ibid s 37(2)(e) (substituted by the Cable and Broadcasting Act 1984 s 57(1), Sch 5 para 12).

12 Children and Young Persons Act 1963 s 37(2).

13 Ibid s 37(3) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12).

14 Children and Young Persons Act 1963 s 37(3)(a) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12). See the Children (Performances) Regulations 1968, SI 1968/1728, Pt VI (regs 32-41) for provisions relating to the performances for which a licence is not required under the Children and Young Persons Act 1963 s 37(3)(a) (as amended). These include provisions stipulating the maximum number and length of performances daily (see the Children (Performances) Regulations 1968, SI 1968/1728, reg 33; and para 752 post), the earliest and latest hours at the place of performance (see reg 34; and para 752 post), broadcast and recorded performances for which a licence is not required (see reg 35; and para 753 post), the limitation on daily performances (see reg 36; and para 753 post), the hours for which children of various ages are permitted to be present at the place of performance (see regs 37-40 (as amended); and para 753 post), and the restrictions on employment for such children (see reg 41; and paras 752-753 post).

15 Ie a 'school' within the meaning of the Education Act 1996: see EDUCATION vol 15(1) (2006 Reissue) para 81.

16 Children and Young Persons Act 1963 s 37(3)(b) (amended by the Education Act 1996 s 582(1), Sch 37 Pt I para 10; and the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12).

17 Children and Young Persons Act 1963 s 37(3).

18 See para 775 post.

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **751 Requirement for a licence for a child to take part in certain performances**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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**752. Restrictions and conditions on performances other than broadcast or recorded performances for which a licence is not required.**

A child<sup>1</sup> must not take part in a performance<sup>2</sup> other than a broadcast or recorded performance for which a licence is not required<sup>3</sup> the duration of which exceeds three and a half hours<sup>4</sup>, nor must he take part if the duration of his appearances in the performance exceeds two and a half hours<sup>5</sup>. A child must not take part in more than one performance on any day<sup>6</sup> unless he performs the same part in the performances or rehearsals, except where he takes the place of another performer in the same performance, and the performances or rehearsals are of the same nature<sup>7</sup>.

On any day on which a child is required to attend school after the morning session he must not take part in more than one performance<sup>8</sup>. On any other day he must not take part in more than two performances<sup>9</sup>. A child must not take part in more than one performance on any day unless there is an interval of not less than one and a half hours between the end of his part in the first performance and the beginning of his part in the second<sup>10</sup>. On not more than two days in any week<sup>11</sup> a child may take part in more than one performance on any day if there is an interval of not less than 45 minutes between the end of his part in the first performance and the beginning of his part in the second<sup>12</sup>, and he is not present at the place of performance on such a day for more than six hours<sup>13</sup>.

Provided that he does not take part in more than one performance unless there is an interval of not less than one and a half hours between the end of his part in one performance and the beginning of his part in the next<sup>14</sup>, and the duration of his appearance in a performance does not exceed 30 minutes<sup>15</sup>, where a child takes part in a performance in a circus<sup>16</sup>, on any day on which he is required to attend school after the morning session he may take part in not more than two performances<sup>17</sup>. On any other day he may take part in not more than three performances<sup>18</sup>.

A child must not be present at a place of performance after whichever is the earlier of the following times: (1) ten in the evening if he has not attained the age of 13 years, or half past ten if he has; or (2) 30 minutes after the end of his part in the performance or the last performance<sup>19</sup>. However, if in order to enable a child to take part in a performance the child's presence at the place of performance is required after the latest such permitted time, he may be present at the place of performance not later than eleven in the evening on not more than three evenings in a week, provided that he is not so present on more than eight evenings in a period of four consecutive weeks<sup>20</sup>. A child must not be present at a place of performance before ten in the morning, and on the day immediately following a day on which a child has taken part in a performance he must not take part in a performance until after the expiration of not less than 14 hours from the end of his part in the performance in which he last performed on the preceding day<sup>21</sup>. These provisions<sup>22</sup> do not apply with respect to a place of performance or rehearsal where the child lives or receives education in that place<sup>23</sup>.

On the day, or on the day immediately following the day, on which a child takes part in a performance, he must not be employed in any other form of employment<sup>24</sup>. On the day on which a child takes part in a performance for which a licence has been granted, he must not take part in a performance for which a licence is not required<sup>25</sup>.

1 For the meaning of 'child' see para 743 note 1 ante.

2 'Performance' means a performance to which the Children and Young Persons Act 1963 s 37(2) applies: Children (Performances) Regulations 1968, SI 1968/1728, reg 42(1) (amended by SI 1998/1678).

3 le any performance for which a licence is not required by reason of the Children and Young Persons Act 1963 s 37(3)(a) (as amended) (see para 751 ante), being a performance other than a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 32.

4 Ibid reg 33(1).

5 Ibid reg 33(2).

6 'Day' means a period of 24 hours beginning and ending at midnight: ibid reg 42(1).

7 Ibid reg 33(3).

8 Ibid reg 33(4).

9 Ibid reg 33(5).

10 Ibid reg 33(6)(a).

11 'Week' means a period of seven days beginning with the day on which the first performance for which the licence is granted takes place or any seventh day thereafter: ibid reg 42(1).

12 Ibid reg 33(6)(b)(i).

13 Ibid reg 33(6)(b)(ii).

14 Ibid reg 33(7)(i).

15 Ibid reg 33(7)(ii).

16 Ibid reg 33(7). This is notwithstanding reg 33(4)-(6) (see the text to notes 8-13 supra) and subject to reg 33(3) (see the text to note 7 supra): reg 33(7).

17 Ibid reg 33(7)(a).

18 Ibid reg 33(7)(b).

19 Ibid reg 34(1).

20 Ibid reg 34(2).

21 Ibid reg 34(3).

22 le reg 34(1)-(3) (see the text to notes 19-21 supra).

23 Ibid reg 34(4).

24 Ibid reg 41(1).

25 Ibid reg 41(2).

## UPDATE

### 745-755 Employment in industrial undertakings and ships ... Licences

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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**753. Restrictions and conditions on broadcast or recorded performances for which a licence is not required.**

With regard to broadcast and recorded performances<sup>1</sup> for which a licence is not required<sup>2</sup> on any day<sup>3</sup> a child<sup>4</sup> may take part only in performances which are of the same nature and in which he performs the same part or takes the place of another performer in the same performance<sup>5</sup>.

A child who has attained the age of nine years must not be present at a place of performance for more than nine and a half hours a day<sup>6</sup>, or before seven in the morning or after seven in the evening<sup>7</sup>. Such a child must not take part in a performance on any day for a continuous period of more than one hour without an interval for rest, or for a total period of more than four hours<sup>8</sup>. Nor must he be present at a place of performance for more than four consecutive hours without there being two or more intervals of which one must be for the purpose of a meal and must be of not less than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>9</sup>.

A child who has attained the age of five years but has not attained the age of nine years must not be present at a place of performance for more than seven and a half hours a day<sup>10</sup>, or before nine in the morning or after half past four in the afternoon<sup>11</sup>. Such a child must not take part in a performance on any day for a continuous period of more than 45 minutes without an interval for rest, or for a total period of more than three hours<sup>12</sup>. Nor must he be present at a place of performance for more than three and a half consecutive hours without there being two or more intervals of which one must be for the purpose of a meal and must be of not less than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>13</sup>.

A child who has attained the age of two years but has not attained the age of five years, must not be present at a place of performance for more than five hours a day<sup>14</sup>, or before half past nine in the morning or after half past four in the afternoon<sup>15</sup>. Such a child must not take part in a performance on any day for a continuous period of more than 30 minutes without an interval for rest<sup>16</sup>, or for a total period of more than two hours<sup>17</sup>. Any time during which such a child is present at a place of performance, but is not taking part in a performance or rehearsal, must be used for the purposes of meals, rest and recreation<sup>18</sup>.

A child who has not attained the age of two years must not be present at a place of performance for more than three hours a day, or before half past nine in the morning or after four in the afternoon<sup>19</sup>. Such a child must not take part in a performance on any day for a continuous period of more than 20 minutes without an interval for rest, or for a total period of more than one hour<sup>20</sup>. Any time during which such a child is present at a place of performance, but is not taking part in a performance, must be used for the purposes of meals, rest and recreation<sup>21</sup>.

On the day, or on the day immediately following the day, on which a child takes part in a performance, he must not be employed in any other form of employment<sup>22</sup>. On the day on which a child takes part in a performance for which a licence has been granted, he must not take part in a performance for which a licence is not required<sup>23</sup>.

- 1 For the meaning of 'performance' see para 752 note 2 ante.
- 2 le a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition for which a licence is not required by reason of the Children and Young Persons Act 1963 s 37(3)(a) (as amended) (see para 751 ante): Children (Performances) Regulations 1968, SI 1968/1728, reg 35.
- 3 For the meaning of 'child' see para 743 note 1 ante.
- 4 For the meaning of 'day' see para 752 note 6 ante.
- 5 Children (Performances) Regulations 1968, SI 1968/1728, reg 36.
- 6 Ibid reg 37(1)(a) (amended by SI 2000/2384; SI 2007/736).
- 7 Children (Performances) Regulations 1968, SI 1968/1728, reg 37(1)(b) (substituted by SI 2000/2384; SI 2007/736).
- 8 Children (Performances) Regulations 1968, SI 1968/1728, reg 37(2) (amended by SI 2000/2384; SI 2007/736).
- 9 Children (Performances) Regulations 1968, SI 1968/1728, reg 37(3).
- 10 Ibid reg 38(1)(a) (amended by SI 2000/2384; SI 2007/736).
- 11 Children (Performances) Regulations 1968, SI 1968/1728, reg 38(1)(b) (amended by SI 2000/2384; SI 2007/736).
- 12 Children (Performances) Regulations 1968, SI 1968/1728, reg 38(2).
- 13 Ibid reg 38(3).
- 14 Ibid reg 39(1)(a).
- 15 Ibid reg 39(1)(b).
- 16 Ibid reg 39(2)(a).
- 17 Ibid reg 39(2)(b).
- 18 Ibid reg 39(3).
- 19 Ibid reg 40(1).
- 20 Ibid reg 40(2).
- 21 Ibid reg 40(3).
- 22 Ibid reg 41(1).
- 23 Ibid reg 41(2).

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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#### **754. Performances by children under 14.**

There are restrictions on the grant of licences<sup>1</sup> in respect of performances by children under the age of 14<sup>2</sup>. Such a licence may not be granted in relation to certain types of performance<sup>3</sup> unless:

- 1397 (1) the licence is for acting and the application is accompanied by a declaration that the child's part cannot be taken except by a child of about his age<sup>4</sup>; or
- 1398 (2) the licence is for dancing in a ballet which does not form part of an entertainment of which anything other than ballet or opera also forms part, and the application is accompanied by a declaration that the child's part cannot be taken except by a child of about his age<sup>5</sup>; or
- 1399 (3) the nature of his part in the performance is wholly or mainly musical and either the nature of the performance is also wholly or mainly musical or the performance consists only of opera and ballet<sup>6</sup>.

1 I.e. licences under the Children and Young Persons Act 1963 s 37 (as amended): see para 751 ante.

2 See *ibid* s 38(1) (amended by the Education Act 1996 s 582(1), Sch 37 para 11(a)); and see the text and notes 3-6 *infra*. For the meaning of 'child' see para 743 note 1 ante.

3 I.e. performances to which the Children and Young Persons Act 1963 s 37(2) (as amended) (see para 751 heads (a)-(e) ante) applies: s 38(1) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 13).

4 Children and Young Persons Act 1963 s 38(1)(a).

5 *Ibid* s 38(1)(b).

6 *Ibid* s 38(1)(c).

#### **UPDATE**

#### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 755. Licences.

The power to grant licences<sup>1</sup> is exercisable subject to any restrictions and conditions prescribed by regulations made by the Secretary of State by statutory instrument<sup>2</sup>. A local authority<sup>3</sup> must not grant a licence for a child<sup>4</sup> to do anything unless satisfied that the child is fit to do it, that proper provision has been made to secure his health and kind treatment, and that, having regard to such provision (if any) as has been or will be made therefor, his education will not suffer; but if the authority is so satisfied, it must not refuse the licence<sup>5</sup>. An application for a licence must be in writing in the prescribed form or in a form to the like effect and must be signed by the applicant and a parent<sup>6</sup> of the child and accompanied by specified documents, including two prints of a photograph of the child<sup>7</sup>. The applicant must be the person responsible for the production of the performance in which the child is to take part or<sup>8</sup> the person who is responsible for the organisation of the sporting event or, as the case may be, who proposes to engage the child as a model<sup>9</sup>. There are restrictions on the grant of licences for troupe work<sup>10</sup>. Before a licence is granted in respect of a performance by a child he must be certified medically fit<sup>11</sup>. Licensing authorities have power to make such inquiries as they consider necessary to enable them to be satisfied that they should grant a licence<sup>12</sup>.

A licence granted to an applicant must be in the prescribed form or in a form to the like effect<sup>13</sup>. In addition to the matters prescribed by regulations<sup>14</sup>, the licence must specify the time, if any, during which the child may be absent from school for the purposes authorised by the licence, a child so absent being deemed to be absent with leave granted by a person authorised in that behalf by the managers, governors or proprietor of the school<sup>15</sup>. The licensing authority must send a copy of the licence to the parent who signed the application form<sup>16</sup>. Where an authority grants a licence authorising a child to do something in the area of another local authority it must send prescribed particulars<sup>17</sup> to that other authority<sup>18</sup>.

The holder of a licence must on request produce the licence at all reasonable hours at the place of performance or, as the case may be, the place where the activity to which the licence relates takes place, to an authorised officer of the local authority or to a constable<sup>19</sup>.

1    Ie licences under the Children and Young Persons Act 1963 s 37 (as amended): see para 751 ante.

2    Ibid s 37(4). Any statutory instrument so made is subject to annulment in pursuance of a resolution of either House of Parliament: s 37(8). As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

Regulations may make different provision for different circumstances and may prescribe, among the conditions subject to which a licence is to be granted, conditions requiring the approval of a local authority and may provide for that approval to be given subject to conditions imposed by the authority: Children and Young Persons Act 1963 s 37(5). Without prejudice to the generality of s 37(5), regulations may also prescribe among the conditions subject to which a licence may be granted a condition requiring sums earned by the child in respect of whom the licence is granted in any activity to which the licence relates to be paid into a county court or dealt with in a manner approved by the local authority: s 37(6) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12(1), (6)).

Regulations have been made prescribing the method of application for a licence, etc (see the Children (Performances) Regulations 1968, SI 1968/1728, Pt I (regs 1-5); and the text and notes 8, 9, 12-18 infra), imposing restrictions on the grant of licences (see Pt II (regs 7, 8); and the text and notes 10, 11 infra), and providing restrictions and conditions applying to licences (see Pts III-V (as amended)). Pt III (as amended) applies to all licences and relates to education (see reg 10 (as amended); and para 757 post), earnings (see reg 11 (as amended); and para 760 post), matrons (see reg 12 (as amended); and para 758 post), lodgings (see reg

13 (as amended); and para 758 post), place of rehearsal and performance (see reg 14 (as amended); and para 759 post), arrangements for getting home (see reg 15 (as amended); and para 759 post), breaks in performances (see reg 16; and para 759 post), further medical examinations (see reg 17; and paras 756, 760 post), restrictions on other employment (see reg 18; and para 760 post), the production of licences (see reg 19 (amended by SI 1998/1678)) and, in relation to Wales, child protection policies (see the Children (Performances) Regulations 1968, SI 1968/1728, reg 19A (added by SI 2007/736)). The Children (Performances) Regulations 1968, SI 1968/1728, Pt IV relates to performances other than broadcast or recorded performances and covers licences, the maximum number of rehearsal and performance days per week (see reg 21; and para 761 post), the maximum number and length of rehearsals and performances daily (see reg 22; and para 762 post), and the earliest and latest hours of attendance for rehearsals and performances (see reg 23; and para 762 post). Part V (as amended) relates to broadcast and recorded performances and covers licences, the maximum number of rehearsal and performance days per week (see reg 25; and para 761 post), limitations on daily performances (see reg 26; and para 763 post), provisions for children aged nine or over (see reg 27 (as amended); and para 764 post), provisions for children aged five to eight (see reg 28 (as amended); and para 765 post), provisions for children under five (see reg 29; and para 766 post), night work (see reg 30; and para 767 post) and exceptions to regs 27-29 (see reg 31; and para 768 post). 'Licence' for the purposes of this regulation means a licence authorising a child to do anything for which, by virtue of the Children and Young Person's Act 1963 s 37(1) (see para 751 ante), a licence is required: Children (Performances) Regulations 1968, SI 1968/1728, reg 42(1) (substituted by SI 1998/1678).

3 For the meaning of 'local authority' see para 747 note 1 ante; definition applied by the Children and Young Persons Act 1963 s 44(1).

4 For the meaning of 'child' see para 743 note 1 ante.

5 Children and Young Persons Act 1963 s 37(4) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 12(1), (5)).

6 'Parent' includes a guardian or other person who has for the time being the charge of or control over the child: Children (Performances) Regulations 1968, SI 1968/1728, reg 42(1).

7 See *ibid* reg 1(1) (amended by SI 1998/1678); and the Children (Performances) Regulations 1968, SI 1968/1728, Sch 1 (amended by SI 1998/1678; SI 2007/736). The application may be refused if it is not received by the authority at least 21 days before the first performance or the first occasion for which it is required takes place: Children (Performances) Regulations 1968, SI 1968/1728, reg 1(3) (amended by SI 1998/1678).

8 *Ie* in the case of an activity, which means participation in a sport or work as a model specified in the Children and Young Person's Act 1963 s 37(1)(b) (see para 751 ante): Children (Performances) Regulations 1968, SI 1968/1728, reg 42(1) (added by SI 1998/1678).

9 Children (Performances) Regulations 1968, SI 1968/1728, reg 1(2) (substituted by SI 1998/1678).

10 See the Children (Performances) Regulations 1968, SI 1968/1728, reg 7 (as amended); and para 756 post.

11 See *ibid* reg 8; and para 756 post.

12 See *ibid* reg 2(1) (amended by SI 1998/1678; SI 2007/736). In particular a licensing authority may request a report from the child's head teacher (in relation to Wales, a head teacher's report is obligatory: see the Children (Performances) Regulations 1968, SI 1968/1728, reg 8A (as added); and para 756 post), may request a medical examination, and may interview the applicant, the child and his parents and the proposed matron and private teacher, if any: Children (Performances) Regulations 1968, SI 1968/1728, reg 2(1) (as so amended). It may also make such inquiries as it considers necessary to enable it to consider, if a licence should be granted, whether it should be granted subject to a condition relating to the manner in which the child's earnings should be dealt with: reg 2(2) (amended by SI 1998/1678).

13 Children (Performances) Regulations 1968, SI 1968/1728, reg 3(1), Sch 2 (amended by SI 1998/1678). In the case of a licence for a performance, the licence must specify the names, dates, places and nature of the performances except that in the case of a licence granted for radio, television or film performances the licence may, if the applicant so requests in the application form, in lieu of specifying the dates, specify the number of days on which the child may perform and the period, not exceeding six months, in which the performances may take place: Children (Performances) Regulations 1968, SI 1968/1728, reg 3(2) (amended by SI 1998/1678). In the case of a licence for an activity, the licence must specify the nature of the activity, the place at which it is to take place and either the dates on which it is to take place or the number of days on which a child may participate and the period, not exceeding six months, in which the activity may take place: Children (Performances) Regulations 1968, SI 1968/1728, reg 3(2A) (added by SI 1998/1678).

14 See note 2 *supra*.

15 Children and Young Persons Act 1963 s 37(7).

16 Children (Performances) Regulations 1968, SI 1968/1728, reg 3(4). 'Licensing authority' means a local education authority to whom an application for a licence is made or by whom a licence is granted: reg 42(1).

17 le a copy of the application form and the licence and such other information, if any, relating to the child as it thinks appropriate: *ibid* reg 4 (amended by SI 1998/1678). Regulations under the Children and Young Persons Act 1963 s 39(3) (as amended) are subject to annulment in pursuance of a resolution of either House of Parliament: s 39(7).

18 *Ibid* s 39(3) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 14(1), (3)).

19 Children (Performances) Regulations 1968, SI 1968/1728, reg 19 (amended by SI 1998/1678). For the purposes of these regulations, 'local authority' means a local education authority in whose area a performance takes place: reg 42(1).

## **UPDATE**

### **745-755 Employment in industrial undertakings and ships ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **756. Restrictions on the grant of licences.**

A licensing authority<sup>1</sup> must not grant a licence<sup>2</sup> in respect of a performance<sup>3</sup> in respect of a child<sup>4</sup> who has attained the age of 13 years if the child<sup>5</sup>, by reason of taking part in any performance for which the licence is requested, will have to live elsewhere than at the place where he would otherwise live<sup>6</sup>, and has during the three months preceding the performance for which the licence is requested (or, if the licence is requested for more than one performance, the first performance) lived elsewhere than at the place where he would otherwise have lived by reason of taking part in a performance<sup>7</sup>. However, these provisions do not apply where:

- 1400 (1) the licence is for acting and the part the child is to act cannot be taken except by a child of about his age<sup>8</sup>; or
- 1401 (2) the licence is for dancing in a ballet which does not form part of an entertainment of which anything other than ballet or opera also forms part and the part the child is to dance cannot be taken except by a child of about his age<sup>9</sup>; or
- 1402 (3) the nature of the child's part in the performance is wholly or mainly musical and either the nature of the performance is also wholly or mainly musical or the performance consists only of opera and ballet<sup>10</sup>.

Nor must a licensing authority grant a licence for performances for film or television, for broadcast performances<sup>11</sup>, or for other performances if the child would perform on the maximum permitted number of days<sup>12</sup> in a week<sup>13</sup>, and for a period exceeding one week<sup>14</sup>, unless the school medical officer<sup>15</sup>, or other medically qualified person approved by it, has examined the child<sup>16</sup> and has certified that he is fit to take part in the performances for which the licence is requested and that his health will not suffer by reason of taking part in such performances<sup>17</sup>.

In relation to Wales, a licensing authority must not grant a licence in respect of a child who attends school without first obtaining a report from the head teacher of that school<sup>18</sup>.

1 For the meaning of 'licensing authority' see para 755 note 16 ante.

2 For the meaning of 'licence' see para 755 note 2 ante.

3 For the meaning of 'performance' see para 752 note 2 ante.

4 For the meaning of 'child' see para 743 note 1 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 7(1) (amended by SI 1998/1678). On the extension of the compulsory school age to 16 years, that is to say on the coming into force of an Order in Council under the Education Act 1944 s 35 (repealed) this provision will have effect as if for '13' there were substituted '14': Children (Performances) Regulations 1968, SI 1968/1728, reg 7(3).

6 Ibid reg 7(1)(a).

7 Ibid reg 7(1)(b).

8 Ibid reg 7(2)(a).

9 Ibid reg 7(2)(b).

10 Ibid reg 7(2)(c).

11 Ie other than performances for television, with respect to which the applicant for the purposes of ibid reg 3(2) requests in the application form that the child may perform on more than six days in a period not exceeding six months: reg 8(1)(b).

12 For the meaning of 'day' see para 752 note 6 ante.

13 Ie the maximum number of days permitted under the Children (Performances) Regulations 1968, SI 1968/1728, Pt IV (regs 20-23) or Pt V (regs 24-31) (as amended): see para 761 et seq post. For the meaning of 'week' see para 752 note 11 ante.

14 Ibid reg 8(1)(a)-(c).

15 'School medical officer' means the duly qualified medical practitioner employed or engaged by the licensing authority, whether regularly or for the purposes of any particular case, to carry out medical examinations of pupils: ibid reg 42(1).

16 Where a child has been so examined he need not be medically examined in order that a further licence may be granted in respect of a performance taking place within a period of six months from the date of the said medical examination unless it appears desirable to the licensing authority that he should be medically examined: ibid reg 8(2).

17 Ibid reg 8(1). Where a child has been medically examined under this provision, that child must be medically examined during the seven days immediately following the day of the last performance to which the licence relates unless the licensing authority is satisfied, having regard to the date of the last medical examination of the child and the number and nature of performances in which the child has taken part, that no such medical examination is necessary: reg 17(2). As to further medical examinations see para 760 post.

18 Ibid reg 8A (added by SI 2007/736).

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### **757. Licence restrictions and conditions: education.**

A licensing authority<sup>1</sup> must not grant a licence<sup>2</sup> unless it is satisfied that the child's<sup>3</sup> education will not suffer by reason of taking part in the performances<sup>4</sup> or activities for which the licence is requested and has approved the arrangements (if any) for the education of the child during the currency of the licence<sup>5</sup>. The holder of the licence must ensure that the arrangements for the child's education during the currency of the licence, approved by the licensing authority, are carried out<sup>6</sup>.

The licensing authority must not approve any arrangements for the education of a child by a private teacher unless it is satisfied that the course of study proposed for the child is satisfactory<sup>7</sup> and will be properly taught<sup>8</sup>; that the private teacher is a suitable person to teach the child in question<sup>9</sup>; and that he will not teach more than five other children at the same time, or, if the other children being taught at the same time have reached a similar standard in the subject to the child in question, eleven<sup>10</sup>.

Nor must the licensing authority approve any arrangements for the education of a child by a private teacher unless it is satisfied that the child will, during the currency of the licence, receive education for periods<sup>11</sup> which, when aggregated, total not less than three hours on each day<sup>12</sup> on which the child would be required to attend school if he were a pupil attending a school maintained by the local authority<sup>13</sup>. Where the performances to which the licence relates are to be recorded (by whatever means) with a view to their use in a broadcast or in a film intended for public exhibition, or the performance entails any period of recording exceeding one week<sup>14</sup>, then this requirement must be deemed to be satisfied if the licensing authority is satisfied that the child will receive education:

- 1403 (1) for not less than six hours a week<sup>15</sup>;
- 1404 (2) during each complete period of four weeks (or, if there is a period of less than four weeks, during that period) for periods not less than the aggregate periods of six hours a week in respect of the period<sup>16</sup>;
- 1405 (3) on days other than days on which the child would not be required to attend school if he were a pupil attending a school maintained by the local authority<sup>17</sup>; and
- 1406 (4) for not more than five hours on any such day<sup>18</sup>.

Any licence under which a child is to be taught by a private teacher is subject to the condition that the local authority approve the schoolroom or other place where the child is to receive education, and the local authority may give its approval subject to such conditions as it considers necessary to ensure that the place is suitable for the child's education<sup>19</sup>.

1 For the meaning of 'licensing authority' see para 755 note 16 ante.

2 For the meaning of 'licence' see para 755 note 2 ante.

3 For the meaning of 'child' see para 743 note 1 ante.

4 For the meaning of 'performance' see para 752 note 2 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 10(1) (amended by SI 1998/1728). The restrictions and conditions specified in this paragraph apply in the case of every licence: Children (Performances) Regulations 1968, SI 1968/1728, reg 9.

6 Ibid reg 10(2).

7 Ibid reg 10(3)(a).

8 Ibid reg 10(3)(b).

9 Ibid reg 10(3)(c).

10 Ibid reg 10(3)(d).

11 In calculating any period of education for these purposes there must be disregarded: (1) any period which, in the case of a child taking part in a performance to be recorded (by whatever means) with a view to its use in a broadcast or film intended for public exhibition, takes place other than during the hours when he is permitted to be present at a place of performance or rehearsal under *ibid* regs 27-29 (see paras 764-766 *post*), or, in any other case, takes place other than between the hours of nine in the morning and four in the afternoon; and (2) any period which is less than 30 minutes: reg 10(4)(d).

12 For the meaning of 'day' see para 752 note 6 *ante*.

13 Children (Performances) Regulations 1968, SI 1968/1728, reg 10(4)(a). For the meaning of 'local authority' see para 755 note 19 *ante*.

14 Ibid reg 10(4)(c) (amended by SI 1998/1678; SI 2007/736). For the meaning of 'week' see para 752 note 11 *ante*.

15 Children (Performances) Regulations 1968, SI 1968/1728, reg 10(4)(b)(i).

16 Ibid reg 10(4)(b)(ii) (amended by SI 1998/1678; SI 2007/736).

17 Children (Performances) Regulations 1968, SI 1968/1728, reg 10(4)(b)(iii).

18 Ibid reg 10(4)(b)(iv).

19 Ibid reg 10(5).



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### **758. Licence restrictions and conditions: matron and lodgings.**

A person (who may be a man or a woman) approved by the licensing authority<sup>1</sup> (a 'matron') must be in charge of the child<sup>2</sup> at all times during the period beginning with the first and ending with the last performance<sup>3</sup> or, as the case may be, occasion to which the licence<sup>4</sup> relates except while the child is in the charge of a parent<sup>5</sup> or teacher<sup>6</sup>. The licensing authority must not approve a matron unless it is satisfied that the person is suitable and competent to exercise proper care and control of a child of the age and sex of the child in question and that the person will not be prevented from carrying out duties towards the child by other activities or duties towards other children<sup>7</sup>. Without prejudice to the foregoing, the licensing authority must not approve a matron if the person is to be in charge of more than 11 other children during the time when the person would be in charge of the child in question if approval were given<sup>8</sup>, nor may the licensing authority approve as matron the private teacher of the child in question if the person is to be in charge of more than two other children during the time when the person would be in charge of the child if approval were given<sup>9</sup>. A matron will have the care and control of the child with a view to securing his health, comfort, kind treatment and moral welfare<sup>10</sup>. Where a child suffers any injury or illness while in the charge of a matron or teacher, the holder of the licence must ensure that the parent of the child named in the application form and the local authority<sup>11</sup> are notified immediately of such injury or illness<sup>12</sup>.

Where by reason of taking part in a performance or activity<sup>13</sup> to which a licence relates a child has to live elsewhere than at the place where he would otherwise live, that child must live only in premises which have been approved by the local authority as suitable for occupation by him<sup>14</sup>. The local authority's approval may be subject to any of the following conditions:

- 1407 (1) transport for the child from the said premises to the place of performance or rehearsal or, as the case may be, to the place where the activity to which the licence relates is to take place, is provided<sup>15</sup>;
- 1408 (2) suitable arrangements are made for meals for the child<sup>16</sup>;
- 1409 (3) any other condition conducive to the welfare of the child in connection with the premises in which the child will live<sup>17</sup>.

1 For the meaning of 'licensing authority' see para 755 note 16 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 For the meaning of 'performance' see para 752 note 2 ante.

4 For the meaning of 'licence' see para 755 note 2 ante.

5 For the meaning of 'parent' see para 755 note 6 ante.

6 Children (Performances) Regulations 1968, SI 1968/1728, reg 12(1) (amended by SI 1998/1678). The restrictions and conditions specified in this paragraph apply in the case of every licence: Children (Performances) Regulations 1968, SI 1968/1728, reg 9.

7 Ibid reg 12(2). In relation to Wales, the licensing authority must, in addition, not approve a matron unless it is satisfied that it has provided the matron with information as to the legal responsibilities of a matron and the law on performances by children; and the matron has undertaken child protection training to the level

recommended by the local safeguarding children board where such recommendation has been made: reg 12(1A) (added by SI 2007/736).

8 Children (Performances) Regulations 1968, SI 1968/1728, reg 12(3).

9 Ibid reg 12(4).

10 Ibid reg 12(5).

11 For the meaning of 'local authority' see para 755 note 19 ante.

12 Children (Performances) Regulations 1968, SI 1968/1728, reg 12(6). In relation to Wales, where the licensing authority thinks fit it may grant a licence subject to a condition requiring the holder of the licence to provide the matron with a current copy of the script for the production concerned; any such condition must be set out in the licence: reg 12(7) (added by SI 2007/736).

13 For the meaning of 'activity' see para 755 note 8 ante.

14 Children (Performances) Regulations 1968, SI 1968/1728, reg 13(1) (amended by SI 1998/1678).

15 Children (Performances) Regulations 1968, SI 1968/1728, reg 13(2)(a) (amended by SI 1998/1678).

16 Children (Performances) Regulations 1968, SI 1968/1728, reg 13(2)(b).

17 Ibid reg 13(2)(c).

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### **759. Licence restrictions and conditions: performances and rehearsals.**

A child<sup>1</sup> must not take part in a performance<sup>2</sup>, rehearsal<sup>3</sup> or activity<sup>4</sup> for which a licence<sup>5</sup> is required unless the place where he is to perform, rehearse or take part in any such activity has been approved by the local authority<sup>6</sup>. The local authority must not approve the place of performance, rehearsal or activity unless it is satisfied that, having regard to the age of the child and the nature, time and duration of the performance, rehearsal or activity<sup>7</sup>:

- 1410 (1) suitable arrangements have been made for meals for the child, for the child to dress for the performance, rehearsal or activity, and for the child's rest and recreation, when not taking part in a performance, rehearsal or activity<sup>8</sup>;
- 1411 (2) the place is provided with suitable and sufficient sanitary conveniences and washing facilities<sup>9</sup>; and
- 1412 (3) the child will be adequately protected against inclement weather<sup>10</sup>,

and its approval may be given subject to such conditions as it considers necessary<sup>11</sup>.

Arrangements for a child who has attained the age of five years to dress for a performance, rehearsal or activity is not to be deemed to be suitable unless the child can dress only with children of his own sex<sup>12</sup>.

The holder of the licence must ensure that suitable arrangements (having regard to the child's age) are made for the child to get to his home or other destination after the last performance or rehearsal or the conclusion of any activity on any day<sup>13</sup>.

A child who takes part in performances (other than performances in a circus) or rehearsals on the maximum permitted number of days in a week<sup>14</sup> for a period of eight consecutive weeks, must not take part in any performance or rehearsal or be employed in any other form of employment during the 14 days next ensuing<sup>15</sup>. This does not apply if the number of days specified in the licence on which the child may perform is less than 60<sup>16</sup>.

1 For the meaning of 'child' see para 743 note 1 ante.

2 For the meaning of 'performance' see para 752 note 2 ante.

3 'Rehearsal' means any rehearsal for, or preparation for the recording of, a performance to which a licence relates, being a rehearsal which takes place on the day of performance or during the period beginning with the first and ending with the last performance to which the licence relates: Children (Performances) Regulations 1968, SI 1968/1728, reg 42(1).

4 For the meaning of 'activity' see para 755 note 8 ante.

5 For the meaning of 'licence' see para 755 note 2 ante.

6 Children (Performances) Regulations 1968, SI 1968/1728, reg 14(1) (substituted by SI 1998/1678). The restrictions and conditions specified in this paragraph apply in the case of every licence: Children (Performances) Regulations 1968, SI 1968/1728, reg 9. For the meaning of 'local authority' see para 755 note 19 ante.

7 Ibid reg 14(2) (amended by SI 1998/1678).

- 8 Children (Performances) Regulations 1968, SI 1968/1728, reg 14(2)(a) (amended by SI 1998/1678).
- 9 Children (Performances) Regulations 1968, SI 1968/1728, reg 14(2)(b).
- 10 Ibid reg 14(2)(c).
- 11 Ibid reg 14(2).
- 12 Ibid reg 14(3) (amended by SI 1998/1678).
- 13 Children (Performances) Regulations 1968, SI 1968/1728, reg 15 (amended by SI 1998/1678). For the meaning of 'day' see para 752 note 6 ante.
- 14 The maximum number of days permitted under the Children (Performances) Regulations 1968, SI 1968/1728, Pt IV (regs 20-23) or Pt V (regs 24-31) (as amended): see para 761 et seq post. For the meaning of 'week' see para 752 note 11 ante.
- 15 Ibid reg 16(1).
- 16 Ibid reg 16(2).

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**760. Licence restrictions and conditions: further medical examinations, earnings and employment.**

Where a licence<sup>1</sup> specifies the dates of performances<sup>2</sup> and these fall on days<sup>3</sup> in four consecutive weeks<sup>4</sup> or more, or where a licence specifies the period in which performances may take place and such period is one month or more, the holder of the licence must ensure that the child<sup>5</sup> is medically examined<sup>6</sup> within 48 hours after the end of each such period of four weeks or each month, as the case may be, in order to ascertain whether he is fit to take part in any further performances for which the licence has been granted and whether his health will suffer by reason of taking part in such performances<sup>7</sup>. The holder of the licence must obtain from the person making the medical examination a report stating whether in his opinion the child is fit to take part in any further performances for which the licence has been granted and whether his health will suffer by reason of taking part in such performances<sup>8</sup>. If the report states that the child is not fit or that his health would suffer as aforesaid, he must not take part in any further performance until the person making the medical examination has certified that the child is fit to take part and that his health will not suffer thereby<sup>9</sup>.

Where the licensing authority thinks fit, it may grant a licence subject to a condition<sup>10</sup> requiring the holder of the licence to ensure that the sums earned by the child in respect of whom the licence is granted in taking part in a performance or activity to which the licence relates, or such part of those sums as may be required by the condition, is to be dealt with in a manner approved by the licensing authority<sup>11</sup>.

On the day, or on the day immediately following the day, on which a child takes part in a performance, he must not be employed in any other form of employment<sup>12</sup>. On the day on which a child takes part in a performance for which a licence has been granted, he must not take part in a performance for which a licence is not required<sup>13</sup>.

1 For the meaning of 'licence' see para 755 note 2 ante.

2 For the meaning of 'performance' see para 752 note 2 ante.

3 For the meaning of 'day' see para 752 note 6 ante.

4 For the meaning of 'week' see para 752 note 11 ante.

5 For the meaning of 'child' see para 743 note 1 ante.

6 Where such a medical examination is required, it must be carried out by the school medical officer of the licensing authority or of the local authority or another medically qualified person approved by either of those authorities; and a copy of the medical report must be sent to the licensing authority: Children (Performances) Regulations 1968, SI 1968/1728, reg 17(3). For the meaning of 'school medical officer' see para 756 note 15 ante; for the meaning of 'licensing authority' see para 755 note 16 ante; and for the meaning of 'activity' see para 755 note 8 ante.

7 Ibid reg 17(1)(a). As to the necessity for a medical examination as a precursor to the grant of a licence see para 756 ante.

The restrictions and conditions specified in this paragraph apply in the case of every licence: reg 9.

8 Ibid reg 17(1)(b).

- 9 Ibid reg 17(1)(c).
- 10 Any such condition must be set out in the licence: *ibid* reg 11(2).
- 11 Ibid reg 11(1) (amended by SI 1998/1678).
- 12 Children (Performances) Regulations 1968, SI 1968/1728, reg 18(1).
- 13 Ibid reg 18(2). As to performances for which a licence is not required see the Children and Young Persons Act 1963 s 37(3); and para 751 ante.

## **UPDATE**

### **760 Licence restrictions and conditions: further medical examinations, earnings and employment**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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**761. Licence restrictions and conditions: maximum number of days in a week on which a child may take part in performances.**

Where in any period of seven days<sup>1</sup> a child<sup>2</sup> takes part in broadcast or recorded performances<sup>3</sup>, or in a combination of those performances and others, he must not take part in any such performances or rehearsals<sup>4</sup> on more than five days in that period<sup>5</sup>.

However, where a child takes part solely in performances other than broadcast or recorded performances<sup>6</sup>, he must not take part in such performances on more than six consecutive days<sup>7</sup>.

1 For the meaning of 'day' see para 752 note 6 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 I.e. a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition for which a licence is required: Children (Performances) Regulations 1968, SI 1968/1728, reg 24. For the meaning of 'performance' see para 752 note 2 ante.

4 For the meaning of 'rehearsal' see para 759 note 3 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 25.

6 I.e. a performance for which a licence is required other than a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: *ibid* reg 20.

7 *Ibid* reg 21.

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**762. Licence restrictions and conditions: performances other than broadcast or recorded performances.**

A child<sup>1</sup> must not take part in a performance<sup>2</sup> or rehearsal<sup>3</sup> other than a broadcast or recorded performance<sup>4</sup> the duration of which exceeds three and a half hours<sup>5</sup>, nor must he take part if the duration of his appearances in the performance or rehearsal exceeds two and a half hours<sup>6</sup>. A child must not take part in more than one performance or rehearsal on any day<sup>7</sup> unless he performs the same part in the performances or rehearsals, except where he takes the place of another performer in the same performance, and the performances or rehearsals are of the same nature<sup>8</sup>.

On any day on which a child is required to attend school after the morning session he must not take part in more than one performance or rehearsal<sup>9</sup>. On any other day he must not take part in more than two performances or rehearsals or more than one performance and one rehearsal<sup>10</sup>. A child must not take part in more than one performance or rehearsal on any day unless there is an interval of not less than one and a half hours between the end of his part in the first performance or rehearsal and the beginning of his part in the second performance or rehearsal<sup>11</sup>. On not more than two days in any week<sup>12</sup> a child may take part in more than one performance or rehearsal on any day if there is an interval of not less than 45 minutes between the end of his part in the first performance or rehearsal and the beginning of his part in the second performance or rehearsal<sup>13</sup>; and he is not present at the place of performance or rehearsal on such a day for more than six hours<sup>14</sup>.

Provided that he does not take part in more than one performance or rehearsal unless there is an interval of not less than one and a half hours between the end of his part in one performance or rehearsal and the beginning of his part in the next performance or rehearsal<sup>15</sup>, and the duration of his appearance in a performance or rehearsal does not exceed 30 minutes<sup>16</sup>, where a child takes part in a performance in a circus<sup>17</sup>, on any day on which he is required to attend school after the morning session he may take part in not more than two performances or rehearsals or not more than one performance and one rehearsal<sup>18</sup>. On any other day he may take part in not more than three performances or rehearsals<sup>19</sup>.

A child must not be present at a place of performance or rehearsal after whichever is the earlier of the following times: (1) ten in the evening if he has not attained the age of 13 years, or half past ten if he has; or (2) 30 minutes after the end of his part in the performance or rehearsal or the last performance or rehearsal<sup>20</sup>. However, if in order to enable a child to take part in a performance the child's presence at the place of performance is required after the latest such permitted time, he may be present at the place of performance not later than eleven in the evening on not more than three evenings in a week, provided that he is not so present on more than eight evenings in a period of four consecutive weeks<sup>21</sup>. A child must not be present at a place of performance or rehearsal before ten in the morning, and on the day immediately following a day on which a child has taken part in a performance or rehearsal he must not take part in a performance or rehearsal until after the expiration of not less than 14 hours from the end of his part in the performance or rehearsal in which he last performed on the preceding day<sup>22</sup>. These provisions<sup>23</sup> do not apply with respect to a place of performance or rehearsal where the child lives or receives education in that place<sup>24</sup>.



- 1 For the meaning of 'child' see para 743 note 1 ante.
- 2 For the meaning of 'performance' see para 752 note 2 ante.
- 3 For the meaning of 'rehearsal' see para 759 note 3 ante.
- 4 The restrictions and conditions described in this paragraph apply to every licence authorising a child to take part in a performance other than a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 20.
- 5 Ibid reg 22(1).
- 6 Ibid reg 22(2).
- 7 For the meaning of 'day' see para 752 note 6 ante.
- 8 Children (Performances) Regulations 1968, SI 1968/1728, reg 22(3).
- 9 Ibid reg 22(4).
- 10 Ibid reg 22(5).
- 11 Ibid reg 22(6)(a).
- 12 For the meaning of 'week' see para 752 note 11 ante.
- 13 Children (Performances) Regulations 1968, SI 1968/1728, reg 22(6)(b)(i).
- 14 Ibid reg 22(6)(b)(ii).
- 15 Ibid reg 22(7)(i).
- 16 Ibid reg 22(7)(ii).
- 17 Ibid reg 22(7). This is notwithstanding reg 22(4)-(6) (see the text to notes 9-14 supra) and subject to reg 22(3) (see the text to note 8 supra): 22(7).
- 18 Ibid reg 22(7)(a).
- 19 Ibid reg 22(7)(b).
- 20 Ibid reg 23(1).
- 21 Ibid reg 23(2).
- 22 Ibid reg 23(3).
- 23 Ie reg 23(1)-(3): see the text to notes 20-22 supra.
- 24 Ibid reg 23(4).

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**763. Licence restrictions and conditions: broadcast or recorded performances: limitations on daily performances.**

With regard to broadcast and recorded performances<sup>1</sup>, on any day<sup>2</sup> a child<sup>3</sup> may take part only in performances or rehearsals<sup>4</sup> which are of the same nature and in which he performs the same part or takes the place of another performer in the same performance<sup>5</sup>.

1 The restrictions and conditions described in this paragraph apply to every licence authorising a child to take part in a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 24. For the meaning of 'performance' see para 752 note 2 ante.

2 For the meaning of 'day' see para 752 note 6 ante.

3 For the meaning of 'child' see para 743 note 1 ante.

4 For the meaning of 'rehearsal' see para 759 note 3 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 26.

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**764. Licence restrictions and conditions: broadcast or recorded performances: children aged nine or more.**

With regard to broadcast and recorded performances<sup>1</sup>, a child<sup>2</sup> who has attained the age of nine years must not be present at a place of performance or rehearsal<sup>3</sup> for more than nine and a half hours a day<sup>4</sup>; or before seven in the morning or after seven in the evening<sup>5</sup>. However, where the holder of the licence<sup>6</sup> is the British Broadcasting Corporation, a programme contractor<sup>7</sup>, or a body supplying programmes to such a programme contractor<sup>8</sup>, a child who has attained the age of 13 years may<sup>9</sup> be present in any week<sup>10</sup> at a place of performance or rehearsal either between the hours of seven in the morning and seven in the evening or between the hours of ten in the morning and ten in the evening<sup>11</sup>:

- 1413 (1) for not more than 12 hours on any one day<sup>12</sup>; or
- 1414 (2) for not more than ten hours a day on any two days<sup>13</sup>; or
- 1415 (3) for not more than nine and a half hours a day on any three days<sup>14</sup>,

if he is not present at a place of performance or rehearsal on any other day in that week and has not been present at a place of performance or rehearsal after seven in the evening on more than 20 days during the preceding 12 months<sup>15</sup>.

Such a child may also be present on one day in any week at a place of performance or rehearsal for not more than 12 hours either between the hours of seven in the morning and seven in the evening or between the hours of ten in the morning and ten in the evening, provided that<sup>16</sup>:

- 1416 (a) he is not present at the place of performance or rehearsal for more than four hours on any other day in that week<sup>17</sup>;
- 1417 (b) he does not take part in a performance or rehearsal for a total period of more than two hours on any other day in that week<sup>18</sup>;
- 1418 (c) he does not take part in a performance or rehearsal on the day immediately following the day on which he has been present at the place of performance or rehearsal after seven in the evening in accordance with these provisions<sup>19</sup>; and
- 1419 (d) he has not been present at a place of performance or rehearsal after seven in the evening in accordance with these provisions on any day during the six preceding days<sup>20</sup>.

A child who has attained the age of nine years must not take part in a performance or rehearsal on any day for a continuous period of more than one hour without an interval for rest, or for a total period of more than four hours<sup>21</sup>. Nor may he be present at a place of performance or rehearsal:

- 1420 (i) for more than four consecutive hours without there being two or more intervals of which one must be for the purpose of a meal and must be of not less

- than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>22</sup>; or
- 1421 (ii) for more than eight consecutive hours without there being three or more intervals of which two must be for the purposes of meals and must each be of not less than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>23</sup>.

In calculating the number of hours on any day during which a child is present at a place of performance or rehearsal, there must, in the case of a child for whom arrangements for his education by a private teacher have been approved by the licensing authority<sup>24</sup>, be included any periods of education<sup>25</sup>, whether or not they take place at the place of performance or rehearsal<sup>26</sup>.

1 The restrictions and conditions described in this paragraph apply to every licence authorising a child to take part in a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 24. For the meaning of 'performance' see para 752 note 2 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(1)(a) (amended by SI 2000/2384; SI 2007/736).

4 For the meaning of 'rehearsal' see para 759 note 3 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(1)(b) (substituted by SI 2000/2384; SI 2007/736). For the meaning of 'day' see para 752 note 6 ante.

6 For the meaning of 'licence' see para 755 note 2 ante.

7 Ie within the meaning of the Television Act 1964 s 1(5) (repealed).

8 The regulation also refers to the Independent Television Authority, many of the functions of which are now exercised by OFCOM: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 328. In relation to Wales, the licence holder must be the British Broadcasting Corporation, the Channel 3 licence holder, a broadcaster or independent production company: Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2) (amended by SI 2007/736). As to the British Broadcasting Corporation see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 306 et seq. As to Channel 3 see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 353 et seq. As to OFCOM see TELECOMMUNICATIONS vol 97 (2010) PARA 2 et seq.

9 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2).

10 For the meaning of 'week' see para 752 note 11 ante.

11 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2)(a) (amended by SI 2000/2384; SI 2007/736).

12 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2)(a)(i).

13 Ibid reg 27(2)(a)(ii)

14 Ibid reg 27(2)(a)(iii) (amended by SI 2000/2384; SI 2007/736).

15 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2)(a).

16 Ibid reg 27(2)(b) (amended by SI 2000/2384; SI 2007/736).

17 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(2)(b)(i).

18 Ibid reg 27(2)(b)(ii).

19 Ibid reg 27(2)(b)(iii).

- 20 Ibid reg 27(2)(b)(iv).
- 21 Ibid reg 27(3) (amended by SI 2000/2384; SI 2007/736).
- 22 Children (Performances) Regulations 1968, SI 1968/1728, reg 27(4)(a).
- 23 Ibid reg 27(4)(b) (amended by SI 2000/2384; SI 2007/736).
- 24 For the meaning of 'licensing authority' see para 755 note 16 ante.
- 25 The periods of education taken into account for the purpose of complying with the requirements of the Children (Performances) Regulations 1968, SI 1968/1728, reg 10(4) (see para 757 ante).
- 26 Ibid reg 27(5).

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**765. Licence restrictions and conditions: broadcast or recorded performances: children aged five to eight.**

With regard to broadcast and recorded performances<sup>1</sup> a child<sup>2</sup> who has attained the age of five years but has not attained the age of nine years must not be present at a place of performance or rehearsal for more than seven and a half hours a day<sup>3</sup>, or before nine in the morning or after half past four in the afternoon<sup>4</sup>. Nor must he take part in a performance or rehearsal<sup>5</sup> on any day for a continuous period of more than 45 minutes without an interval for rest, or for a total period of more than three hours<sup>6</sup>.

Such a child must not be present at a place of performance or rehearsal for:

- 1422 (1) more than three and a half consecutive hours without there being two or more intervals of which one must be for the purpose of a meal and must be of not less than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>7</sup>;
- 1423 (2) more than eight consecutive hours without there being three or more intervals of which two must be for the purposes of meals and must each be of not less than one hour and the other or others must be for the purpose of rest and must not be less than 15 minutes<sup>8</sup>.

In calculating the number of hours on any day during which a child is present at a place of performance or rehearsal, there must, in the case of a child for whom arrangements for his education by a private teacher have been approved by the licensing authority<sup>9</sup>, be included any periods of education<sup>10</sup>, whether or not they take place at the place of performance or rehearsal<sup>11</sup>.

1 The restrictions and conditions described in this paragraph apply to every licence authorising a child to take part in a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 24. For the meaning of 'performance' see para 752 note 2 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 Children (Performances) Regulations 1968, SI 1968/1728, reg 28(1)(a) (amended by SI 2000/2384; SI 2007/736). For the meaning of 'day' see para 752 note 6 ante.

4 Children (Performances) Regulations 1968, SI 1968/1728, reg 28(1)(b) (amended by SI 2000/2384; SI 2007/736).

5 For the meaning of 'rehearsal' see para 759 note 3 ante.

6 Children (Performances) Regulations 1968, SI 1968/1728, reg 28(3).

7 Ibid reg 28(4)(a) (amended by SI 2000/2384; SI 2007/736).

8 Children (Performances) Regulations 1968, SI 1968/1728, reg 28(4)(b) (amended by SI 2000/2384; SI 2007/736).

9 For the meaning of 'licensing authority' see para 755 note 16 ante.

10     le periods of education taken into account for the purpose of complying with the requirements of the Children (Performances) Regulations 1968, SI 1968/1728, reg 10(4) (see para 757 ante).

11     Ibid reg 28(5).

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**766. Licence restrictions and conditions: broadcast or recorded performances: children under five.**

With regard to broadcast and recorded performances<sup>1</sup>, a child<sup>2</sup> who has not attained the age of five years must not be present at a place of performance or rehearsal for more than five hours a day<sup>3</sup>, or before half past nine in the morning or after half past four in the afternoon<sup>4</sup>. Such a child must not take part in a performance or rehearsal<sup>5</sup> on any day for a continuous period of more than 30 minutes without an interval for rest<sup>6</sup>, or for a total period of more than two hours<sup>7</sup>. Any time during which such a child is present at a place of performance or rehearsal, but is not taking part in a performance or rehearsal, must be used for the purposes of meals, rest and recreation<sup>8</sup>.

1 The restrictions and conditions described in this paragraph apply to every licence authorising a child to take part in a broadcast performance or a performance to be recorded (by whatever means) with a view to its use in a broadcast or in a film intended for public exhibition: Children (Performances) Regulations 1968, SI 1968/1728, reg 24. For the meaning of 'performance' see para 752 note 2 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 Children (Performances) Regulations 1968, SI 1968/1728, reg 29(1)(a). For the meaning of 'day' see para 752 note 6 ante.

4 Ibid reg 29(1)(b).

5 For the meaning of 'rehearsal' see para 759 note 3 ante.

6 Children (Performances) Regulations 1968, SI 1968/1728, reg 29(2)(a).

7 Ibid reg 29(2)(b).

8 Ibid reg 29(3).



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**767. Licence restrictions and conditions: broadcast or recorded performances: nightwork.**

Notwithstanding the provisions with regard to broadcast or recorded performances for which a licence is required<sup>1</sup>, where the local authority<sup>2</sup> is satisfied that a scene must be recorded out of doors and after the latest permitted hour<sup>3</sup>, it may permit a child<sup>4</sup> to take part in a performance<sup>5</sup> after the last permitted hour, but it must only permit the child to take part in a performance after midnight and before the earliest permitted hour<sup>6</sup> if it is satisfied that it is impracticable for the recording of the performance to be completed before midnight<sup>7</sup>. Where the local authority permits a child to take part in a performance after the latest permitted hour, the following restrictions and conditions apply:

- 1424 (1) the number of hours during which the child takes part in a performance after the latest permitted hour must be included in computing the maximum number of hours during which he may take part in a performance or rehearsal on any one day<sup>8</sup>;
- 1425 (2) the child must not take part in any other performance or rehearsal until not less than 16 hours have elapsed since the end of his part in the performance<sup>9</sup>;
- 1426 (3) where the child takes part in a performance after the latest permitted hour on two successive days, the local authority must not permit him to take part in any further performance after the latest permitted hour during the seven days immediately following the said two days<sup>10</sup>.

1    Ie the Children (Performances) Regulations 1968, SI 1968/1728, regs 27-29: see paras 764-766 ante.

2    For the meaning of 'local authority' see para 755 note 19 ante.

3    'Latest permitted hour' in relation to a particular child means the latest hour at which that child may be present at the place of performance or rehearsal under the Children (Performances) Regulations 1968, SI 1968/1728, regs 27-29 (see paras 764-766 ante): reg 30(3).

4    For the meaning of 'child' see para 743 note 1 ante.

5    For the meaning of 'performance' see para 752 note 2 ante.

6    'Earliest permitted hour' in relation to a particular child means the latest hour at which that child may be present at the place of performance or rehearsal under the Children (Performances) Regulations 1968, SI 1968/1728, regs 27-29 (see paras 764-766 ante): reg 30(3).

7    Ibid reg 30(1).

8    Ibid reg 30(2)(a). The maximum number of hours means those permitted under regs 27-29 (see paras 764-766 ante): reg 30(2)(a). 'Day' means a period of 24 hours beginning and ending at midnight; and, for the purposes of reg 30(2)(a), any performance taking place after midnight and before the earliest permitted hour is to be deemed to have taken place before midnight: reg 42(1).

9    Ibid reg 30(2)(b).

10   Ibid reg 30(2)(c).

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#### **768. Restrictions and conditions: broadcast or recorded performances: exceptions.**

The matron<sup>1</sup> in charge of a child<sup>2</sup> may allow that child to take part in a performance for a period not exceeding 30 minutes immediately following the latest permitted hour<sup>3</sup> if the total number of hours during which the child takes part in a performance<sup>4</sup>, including the said period of 30 minutes, does not exceed the maximum number of permitted hours<sup>5</sup> and it appears to the matron that the welfare of the child will not be prejudiced<sup>6</sup>, and that the conditions necessitating the child taking part in a performance after the latest permitted hour arose in circumstances outside the control of the holder of the licence<sup>7</sup>.

If a child takes part in a performance after the latest permitted hour, the holder of the licence must ensure that the matron notifies the local authority<sup>8</sup> not later than the day<sup>9</sup> immediately following the day on which that child takes part in the performance<sup>10</sup>.

The matron in charge of a child may allow one of the intervals to be set aside for the purposes of meals<sup>11</sup> to be reduced where the child is taking part in a performance or rehearsal out of doors, provided that the duration of that interval is not less than 30 minutes, and the maximum number of hours during which he may take part in a performance or rehearsal<sup>12</sup> is not exceeded<sup>13</sup>.

1 As to the matron see para 758 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 'Latest permitted hour' in relation to a particular child means the latest hour at which that child may be present at a place of performance or rehearsal under the Children (Performances) Regulations 1968, SI 1968/1728, reg 27 or reg 29 (see paras 764, 766 ante): reg 31(1)(c).

4 For the meaning of 'performance' see para 752 note 2 ante.

5 Children (Performances) Regulations 1968, SI 1968/1728, reg 31(a)(i). The maximum number of hours means those permitted under regs 27-29 (see paras 764-766 ante): reg 31(a)(i).

6 Ibid reg 31(a)(ii).

7 Ibid reg 31(a)(iii).

8 For the meaning of 'local authority' see para 755 note 19 ante.

9 For the meaning of 'day' see para 752 note 6 ante.

10 Children (Performances) Regulations 1968, SI 1968/1728, reg 31(b).

11 Ie under ibid reg 27 or reg 28 as the case may be: see paras 764-765 ante.

12 Ie under ibid reg 27 or reg 28: see paras 764-765 ante.

13 Ibid reg 31(2).

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### **769. Refusal, variation and revocation of licences.**

Where a local authority<sup>1</sup> refuses an application for a licence<sup>2</sup> it must state its grounds for doing so in writing to the applicant<sup>3</sup>, who may appeal to a magistrates' court against the refusal and against any condition subject to which the licence is granted, not being a condition which the local authority is required to impose<sup>4</sup>.

On the holder's application a licence may be varied by the authority by whom it was granted or by any local authority for the area in which any activity to which it relates takes place<sup>5</sup>.

The licensing authority and any local authority for the area in which any activity to which the licence relates takes place may vary or revoke the licence if any condition subject to which it was granted is not observed or it is not satisfied as to certain matters<sup>6</sup>, but, before doing so, it must give to the licence holder such notice, if any, of its intention as is practicable<sup>7</sup>.

Where a local authority varies or revokes a licence which was granted by, or relates to an activity in the area of, another local authority, it must inform that other authority<sup>8</sup>. A local authority proposing to vary or revoke a licence granted by another local authority must, if practicable, consult that other authority<sup>9</sup>.

Where a local authority revokes or (otherwise than on the licence holder's application) varies a licence, it must state its grounds for doing so in writing to the licence holder, and he may appeal to a magistrates' court against the revocation or variation, and against any condition subject to which any approval is given, not being a condition which the local authority is required to impose<sup>10</sup>.

<sup>1</sup> For the meaning of 'local authority' see para 747 note 1 ante; definition applied by the Children and Young Persons Act 1963 s 44(1).

<sup>2</sup> I.e a licence under *ibid* s 37 (as amended): see paras 751, 755 ante.

<sup>3</sup> As to who is the applicant see para 755 text and note 7 ante.

<sup>4</sup> Children and Young Persons Act 1963 s 39(6).

<sup>5</sup> *Ibid* s 39(1) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 14(1), (2)).

<sup>6</sup> I.e the child's fitness to do the activity and the provision for his health, kind treatment and education: see the Children and Young Persons Act 1963 s 37(4) (as amended); and para 755 ante.

<sup>7</sup> *Ibid* s 39(2) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 14(1), (2)).

<sup>8</sup> Children and Young Persons Act 1963 s 39(3) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 14(1), (3)).

<sup>9</sup> Children and Young Persons Act 1963 s 39(4).

<sup>10</sup> *Ibid* s 39(6).

### **UPDATE**

**769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/A. LICENSING OF PERFORMANCES/770. Records of licences.

## **770. Records of licences.**

The holder of a licence<sup>1</sup> must keep prescribed records<sup>2</sup> and must on request produce them to an officer of the authority which granted the licence at any time not later than six months after the occasion or last occasion to which it relates<sup>3</sup>.

Failure to keep or produce such records is an offence<sup>4</sup>.

<sup>1</sup> I.e. a licence under the Children and Young Persons Act 1963 s 37 (as amended): see paras 751, 755 ante.

<sup>2</sup> I.e. such records as the Secretary of State may by regulations made by statutory instrument prescribe: *ibid* s 39(5). Such regulations are subject to annulment in pursuance of a resolution of either House of Parliament: s 39(7). As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

The following records must be kept:

- 437 (1) the licence (Children (Performances) Regulations 1968, SI 1968/1728, reg 5, Sch 3 paras 1, 8 (amended by SI 1998/1678));
- 438 (2) particulars in respect of the date of each activity to which the licence relates (Children (Performances) Regulations 1968, SI 1968/1728, Sch 3 paras 2(a), 8 (amended by SI 1998/1678));
- 439 (3) the date, duration and subject matter of any lessons given to the child (Children (Performances) Regulations 1968, SI 1968/1728, Sch 3 paras 3, 8 (amended by SI 1998/1678)); and
- 440 (4) particulars in respect of the amounts earned by the child by reason of taking part in the activity and the names, addresses and descriptions of all persons to whom such sums were paid or the manner in which such sums were otherwise dealt with (Children (Performances) Regulations 1968, SI 1968/1728, Sch 3 paras 7, 8 (amended by SI 1998/1678)).

Additionally, in relation to licences granted in respect of performances, records must be maintained:

- 441 (a) of the times of arrival, departure, the performance or rehearsal itself, rest and meal intervals and any authorised night work (Children (Performances) Regulations 1968, SI 1968/1728, Sch 3 para 2(b)-(g));
- 442 (b) any injuries and illnesses suffered by the child at the place of performance (including the date of occurrence and whether the child was thereby prevented from being at the place of performance) (Sch 3 para 4);
- 443 (c) the dates on which any medical examinations of the child were carried out (Sch 3 para 5); and
- 444 (d) the dates of statutory breaks in performances (Sch 3 para 6).

The records must be retained by the licence holder for six months after the occasion or last occasion to which the licence relates: reg 5 (amended by SI 1998/1678).

<sup>3</sup> Children and Young Persons Act 1963 s 39(5) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 14(1), (4)).

<sup>4</sup> See the Children and Young Persons Act 1963 s 40(2) (as amended); and para 771 post.

## **UPDATE**

**769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**770-771 Records of licences, Offences in relation to child performances**

Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/A. LICENSING OF PERFORMANCES/771. Offences in relation to child performances.

### **771. Offences in relation to child performances.**

If any person:

1427 (1) causes or procures any child<sup>1</sup> or, being his parent<sup>2</sup> or guardian<sup>3</sup>, allows him to do anything in contravention of the statutory provisions<sup>4</sup> restricting child performances or activities<sup>5</sup>; or

1428 (2) fails to observe any condition subject to which a licence<sup>6</sup> is granted, or any prescribed<sup>7</sup> condition<sup>8</sup>; or

1429 (3) knowingly or recklessly makes any false statement in or in connection with an application for a licence<sup>9</sup>,

he is liable on summary conviction to a penalty<sup>10</sup>. If any person fails to keep or produce any record which he is required to keep or produce<sup>11</sup>, he is liable on summary conviction to a penalty<sup>12</sup>.

The court by which the holder or one of the holders of a licence is convicted of one of the above offences may also revoke the licence<sup>13</sup>.

In any proceedings for an offence alleged to have been committed by causing, procuring or allowing a child to take part in a performance without a licence it is a defence to prove that the accused believed that the child had not taken part in relevant performances during the preceding six months on more than three days<sup>14</sup> and that he had reasonable grounds for that belief<sup>15</sup>.

1 For the meaning of 'child' see para 746 note 2 ante.

2 As to the meaning of 'parent' see para 248 note 1 ante.

3 For the meaning of 'guardian' see para 747 note 13 ante; definition applied by the Children and Young Persons Act 1963 s 44(1).

4 I.e. the provisions of *ibid* s 37 (as amended): see paras 751, 755 ante.

5 *Ibid* s 40(1)(a) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 15).

6 I.e. a licence under the Children and Young Persons Act 1963 s 37 (as amended): see paras 751, 755 ante.

7 I.e. prescribed under *ibid* s 37(3) (as amended): see para 751 ante.

8 *Ibid* s 40(1)(b).

9 *Ibid* s 40(1)(c).

10 *Ibid* s 40(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The penalty is a fine not exceeding level 3 on the standard scale or imprisonment for a term not exceeding three months or both: see the Children and Young Persons Act 1963 s 40(1) (as so amended). As from a day to be appointed this provision is amended so as to remove the reference to imprisonment: see s 40(1) (as so amended; prospectively amended by virtue of the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. As to the standard scale see para 132 note 2 ante. For powers of entry see para 772 post.

11 See the Children and Young Persons Act 1963 s 39(5) (as amended); and para 770 ante.

12 Ibid s 40(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The penalty is a fine not exceeding level 3 on the standard scale or imprisonment for a term not exceeding three months or both: see the Children and Young Persons Act 1963 s 40(2) (as so amended). As from a day to be appointed this provision is amended so as to remove the reference to imprisonment: see s 40(2) (as so amended; prospectively amended by virtue of the Criminal Justice Act 2003 Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed.

13 Children and Young Persons Act 1963 s 40(3).

14 See *ibid* s 37(3)(a) (as amended); and para 751 ante.

15 Ibid s 40(4).

## **UPDATE**

### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see *LOCAL GOVERNMENT* vol 69 (2009) PARA 733.

### **770-771 Records of licences, Offences in relation to child performances**

Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see *ADMINISTRATIVE LAW* vol 1(1) (2001 Reissue) PARA 196A.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/A. LICENSING OF PERFORMANCES/772. Powers of entry.

## **772. Powers of entry.**

Any authorised officer of the local authority<sup>1</sup> or any constable may at any time enter any place used as a broadcasting studio<sup>2</sup> or film studio or used for the recording of a performance with a view to its use in a programme service<sup>3</sup> or in a film intended for public exhibition and make inquiries there as to any children<sup>4</sup> taking part in performances in relation to which a child is required to be licensed<sup>5</sup>. Furthermore, any such officer or constable may at any time during the currency of a licence granted in respect of such performances enter any place where the person to whom the licence relates is authorised by the licence to do anything, and may make inquiries there with respect to that person<sup>6</sup>.

1 For the meaning of 'local authority' see para 747 note 1 ante.

2 I.e. a studio used in connection with the provision of a programme service: Children and Young Persons Act 1933 s 28(4) (added by the Broadcasting Act 1990 s 203(1), Sch 20 para 3(1)(b)). 'Programme service' for these purposes means a programme service within the meaning of the Broadcasting Act 1990 s 201 (as amended) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 352); Children and Young Persons Act 1933 s 28(4) (as so added).

3 See note 2 supra.

4 For the meaning of 'child' see para 746 note 2 ante.

5 Children and Young Persons Act 1933 s 28(2)(a) (substituted by the Children and Young Persons Act 1963 s 43; and amended by the Broadcasting Act 1990 Sch 20 para 3(1)(a); and the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 7(b)). The performances in question are those specified in the Children and Young Persons Act 1963 s 37(2) (as amended): see para 751 ante.

6 Children and Young Persons Act 1933 s 28(2)(b) (substituted by the Children and Young Persons Act 1963 s 43; and amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 7(c)).

## **UPDATE**

### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/B. DANGEROUS PERFORMANCES/773. Dangerous performances.

## **B. DANGEROUS PERFORMANCES**

### **773. Dangerous performances.**

No person under the age of 16 years, and no child<sup>1</sup> aged 16 years, may take part in any performance to which certain provisions restricting performances by such persons apply<sup>2</sup>, and in which his life or limbs are endangered<sup>3</sup>; and any person who causes or procures or, being his parent<sup>4</sup> or guardian<sup>5</sup>, allows<sup>6</sup> such a person or child to take part in such a performance is liable on summary conviction to a fine<sup>7</sup>.

No proceedings may be instituted except by or with the authority of a chief officer of police<sup>8</sup>.

1 For the meaning of 'child' see para 746 note 2 ante.

2 I.e. the provisions of the Children and Young Persons Act 1963 s 37(2) (as amended): see para 751 ante.

3 Children and Young Persons Act 1933 s 23 (amended by the Children and Young Persons Act 1963 s 64(1), Sch 3 para 5; the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 4; and the Children (Protection at Work) Regulations 2000, SI 2000/1333, reg 2(3)(a)).

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'guardian' see para 747 note 13 ante.

6 A man cannot be said to allow that of which he is unaware or that which he cannot prevent: *Crabtree v Fern Spinning Co Ltd* (1901) 85 LT 549 at 552 per Darling J.

7 Children and Young Persons Act 1933 s 23 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46; and by the Children (Protection at Work) Regulations 2000, SI 2000/1333, reg 2(3)(b)). The fine must not exceed level 3 on the standard scale: see the Children and Young Persons Act 1933 s 23 (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 749 note 4 ante.

In this offence, as in all other offences under the Children and Young Persons Act 1933 or any of the offences mentioned in Sch 1 except as provided therein, if the court considers that the person in question was at the relevant date of the age alleged by the prosecution, the burden of proving the contrary is on the party charged: s 99(2), Sch 1 (amended by the Sexual Offences Act 1956 ss 48, 51, Schs 3, 4; and the Criminal Justice Act 1988 s 170, Sch 15 para 8, Sch 16). See para 1243 post.

8 Children and Young Persons Act 1933 s 23 proviso. As to chief officers of police see POLICE vol 36(1) (2007 Reissue) para 178 et seq.

## **UPDATE**

### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/B. DANGEROUS PERFORMANCES/774. Training for dangerous performances.

#### **774. Training for dangerous performances.**

No child<sup>1</sup> under the age of 12 may be trained to take part in performances of a dangerous nature<sup>2</sup>, and no child who has attained that age may be so trained except under and in accordance with the terms of a licence<sup>3</sup>. Every person who causes or procures or, being a parent<sup>4</sup> or guardian<sup>5</sup>, allows<sup>6</sup> a person to be trained in contravention of these provisions is liable on summary conviction to a fine<sup>7</sup>.

A local authority<sup>8</sup> may grant a licence for a child who has attained the age of 12 to be trained to take part in performances of a dangerous nature<sup>9</sup>. A licence must specify the place or places at which the person is to be trained and must embody such conditions as in the authority's opinion are necessary for his protection, but an authority may not refuse a licence if it is satisfied that the person is fit and willing to be trained and that proper provision has been made to secure his health and kind treatment<sup>10</sup>.

A licence may be revoked or varied by the authority which granted it if any of the conditions embodied therein are not complied with or if it appears to the authority that the person to whom the licence relates is no longer fit and willing to be trained or that proper provision is no longer being made to secure his health and kind treatment<sup>11</sup>.

Where an authority refuses an application for a licence or revokes or varies a licence it must state its grounds for doing so in writing to the applicant or holder, who may appeal to a magistrates' court against the refusal, revocation or variation<sup>12</sup>.

Local authority officers and constables have certain powers of entry in respect of places where training for dangerous performances takes place in pursuance of a licence<sup>13</sup>.

1 For the meaning of 'child' see para 746 note 2 ante.

2 Children and Young Persons Act 1933 s 24(1) (amended by the Employment Act 1989 s 10(2), Sch 3 para 5). 'Performance of a dangerous nature' includes all acrobatic performances and all performances as a contortionist: Children and Young Persons Act 1933 s 30(1) (renumbered by the Employment Act 1989 Sch 3 para 8).

3 Children and Young Persons Act 1933 s 24(1) (as amended: see note 2 supra). As to licences see para 751 et seq ante.

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'guardian' see para 747 note 13 ante.

6 See para 773 note 6 ante.

7 Children and Young Persons Act 1933 s 24(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 3 on the standard scale: see the Children and Young Persons Act 1933 s 24(1) (as so amended). As to the standard scale see para 132 note 2 ante. As to the authorities empowered to bring proceedings in respect of this offence see para 749 note 4 ante.

8 For the meaning of 'local authority' see para 747 note 1 ante. The local authority in question is that for the area or one of the areas in which the training is to take place: Children and Young Persons Act 1963 s 41(1) (amended by the Employment Act 1989 s 29(3), Sch 6 para 7).

9 Children and Young Persons Act 1933 s 24(2) (amended by the Children and Young Persons Act 1963 s 64(1), Sch 3 para 6(1); and the Employment Act 1989 Sch 3 para 5); Children and Young Persons Act 1963 s 41(1) (as amended: see note 8 supra).

10 Children and Young Persons Act 1933 s 24(4) (amended by the Children and Young Persons Act 1963 Sch 3 para 6(1)).

11 Children and Young Persons Act 1963 s 41(2).

12 Ibid s 41(3).

13 See para 775 post.

## **UPDATE**

### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(i) Employment in Entertainment in the United Kingdom/B. DANGEROUS PERFORMANCES/775. Powers of entry.

### **775. Powers of entry.**

Any authorised officer of the local authority<sup>1</sup> or any constable may at any time during the currency of a licence granted in respect of training for dangerous performances<sup>2</sup> enter any place where the person to whom the licence relates is authorised by the licence to do anything or to be trained, and may make inquiries there with respect to that person<sup>3</sup>.

1 For the meaning of 'local authority' see para 747 note 1 ante.

2 I.e. a licence granted under the Children and Young Persons Act 1933 s 24(1) (as amended); see para 774 ante.

3 Ibid s 28(2)(b) (substituted by the Children and Young Persons Act 1963 s 43; and amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 7(c)).

### **UPDATE**

#### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(ii) Employment in Entertainment Abroad/776. Children going abroad to perform.

## **(ii) Employment in Entertainment Abroad**

### **776. Children going abroad to perform.**

It is unlawful for any person to allow<sup>1</sup> any child<sup>2</sup> for whom he has responsibility, or for any person to cause or procure any child, to go abroad<sup>3</sup>:

1430 (1) for the purpose of singing, playing, performing or being exhibited<sup>4</sup> for profit; or

1431 (2) for the purpose of taking part in a sport, or working as a model, where payment in respect of his doing so, other than for defraying expenses, is made to him or to another person,

unless a licence has been granted for him to go abroad for that purpose<sup>5</sup>.

This restriction does not apply, however, if the child is only temporarily resident in the United Kingdom<sup>6</sup>.

1 See para 773 note 6 ante.

2 For the meaning of 'child' see para 743 note 1 ante.

3 'Abroad' means outside Great Britain and Ireland: Children and Young Persons Act 1933 s 30(1) (renumbered by the Employment Act 1989 s 10(2), Sch 3 Pt III para 8). This definition, and the provision to which it relates (see the text and note 5 infra), are derived from the Children (Employment Abroad) Act 1913 s 1, which referred to 'go out of the United Kingdom' (whereas the current provisions refer to 'go abroad'). In 1913, the United Kingdom comprised Great Britain and Ireland. The current provisions form part of a consolidating Act; *quaere* whether 'Ireland' for these purposes includes both Northern Ireland and the Republic of Ireland.

For the meaning of 'Great Britain' see para 102 note 7 ante. For the meaning of 'United Kingdom' generally see para 102 note 7 ante.

4 'Singing, playing, performing or being exhibited' includes taking part in any such performance as is mentioned in the Children and Young Persons Act 1963 s 37(2)(c) or (d) (as amended) (see para 751 ante): s 42(1).

5 Children and Young Persons Act 1933 s 25(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 7, Sch 5; the Employment Act 1989 s 10(2), Sch 3 para 6; the Children Act 1989 s 108(5), Sch 13 paras 2, 3; and the Children (Protection at Work) Regulations 1998, SI 1998/276, regs 1, 5(a), (b)). As to licences see para 777 post.

6 Children and Young Persons Act 1933 s 25(1) proviso (amended by the Children and Young Persons Act 1963 Sch 3 para 7; and the Employment Act 1989 Sch 3 para 6).

## **UPDATE**

### **769-777 Refusal, variation and revocation of licences ... Licences**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/9. EMPLOYMENT OF CHILDREN/ (3) EMPLOYMENT IN ENTERTAINMENT/(ii) Employment in Entertainment Abroad/777. Licences.

### **777. Licences.**

A justice of the peace may grant a licence in the prescribed form<sup>1</sup>, subject to such restrictions and conditions as he thinks fit, for a child<sup>2</sup> who has attained the age of 14 to go abroad<sup>3</sup> for any specified purpose<sup>4</sup>. A licence may also be granted, in relation to the purpose of singing, playing, performing or being exhibited<sup>5</sup> for profit, in respect of a person notwithstanding that he is under the age of 14, if<sup>6</sup>:

- 1432 (1) the engagement which he is to fulfil is for acting and the application for the licence is accompanied by a declaration that the part cannot be taken except by a person of about his age<sup>7</sup>; or
- 1433 (2) the engagement is for dancing in a ballet which does not form part of an entertainment of which anything other than ballet or opera also forms part and the application is accompanied by such a declaration<sup>8</sup>; or
- 1434 (3) the engagement is for taking part in a performance the nature of which is wholly or mainly musical or which consists only of opera and ballet and the nature of his part in the performance is wholly or mainly musical<sup>9</sup>.

Before granting a licence, the justice must be satisfied<sup>10</sup>:

- 1435 (a) that the application for it is made by or with the consent of the parent<sup>11</sup> or guardian<sup>12</sup> of the child<sup>13</sup>;
- 1436 (b) that the child is going abroad to fulfil a particular engagement<sup>14</sup>;
- 1437 (c) that he is fit for the purpose and that proper provision has been made to secure his health, kind treatment and adequate supervision while abroad, and his return from abroad at the expiration or revocation of the licence<sup>15</sup>; and
- 1438 (d) that there has been furnished to the child a copy of the contract of employment or other document showing the terms and conditions of employment drawn up in a language understood by him<sup>16</sup>.

The applicant must give notice of an intended application for a licence and a copy of the contract of employment or other document showing the terms and conditions of employment to the chief officer of police<sup>17</sup> for the district where the child resides at least seven days before the application<sup>18</sup>. The chief officer of police must send that copy to a justice of the peace and may make a written report on the case to him or may appear, or instruct some person to appear, before him and show cause why the licence should not be granted<sup>19</sup>.

1 For the prescribed form see the Children (Performances) Regulations 1968, SI 1968/1728, reg 41A, Sch 4 Pt I (added by SI 1998/1678).

2 For the meaning of 'child' see para 743 note 1 ante.

3 For the meaning of 'abroad' see para 776 note 3 ante.

4 Children and Young Persons Act 1933 s 25(2) (amended by the Employment Act 1989 s 10(2), Sch 3 para 6; and the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(c), (d)). The purposes referred to



in the text are those specified in the Children and Young Persons Act 1933 s 25(1) (see para 776 ante): s 25(2) (as so amended).

5     le in relation to a purpose referred to in *ibid* s 25(1)(a): see para 776 ante. As to the meaning of 'singing, playing, performing or being exhibited' see para 776 note 4 ante.

6     Children and Young Persons Act 1963 s 42(2) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 16(1), (3)).

7     Children and Young Persons Act 1963 s 42(2)(a).

8     *Ibid* s 42(2)(b).

9     *Ibid* s 42(2)(c).

10    Children and Young Persons Act 1933 s 25(2) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(d)).

11    As to the meaning of 'parent' see para 248 note 1 ante.

12    For the meaning of 'guardian' see para 747 note 13 ante.

13    Children and Young Persons Act 1933 s 25(2)(a). The Children and Young Persons Act 1963 s 42 (as amended) (see the text and notes 5-9 *supra*) provides that in the circumstances there mentioned a licence may be granted under the Children and Young Persons Act 1933 s 25 (as amended), notwithstanding that the child is under 14; it follows that the matters as to which the justice must be satisfied (ie s 25(2)(a)-(d): see heads (a)-(d) in the text) apply whether a child is under or has attained that age.

14    *Ibid* s 25(2)(b).

15    *Ibid* s 25(2)(c). If it is proved to the justice's satisfaction that by reason of exceptional circumstances it is not in the young person's interest to require him to return from abroad when the licence expires, he may by order release all persons concerned from any obligation to cause the young person to return from abroad: s 25(7) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(f)).

16    Children and Young Persons Act 1933 s 25(2)(d).

17    As to chief officers of police see *POLICE* vol 36(1) (2007 Reissue) para 178 et seq.

18    Children and Young Persons Act 1933 s 25(3) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(e)). If the notice has not been properly given, a licence may not be granted: Children and Young Persons Act 1933 s 25(3) (as so amended). If the notice is given less than seven days before the application, the justice may, however, grant a licence if satisfied that the officer to whom the notice was given has made sufficient inquiry into the facts of the case and does not desire to oppose the application: s 25(3) proviso (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(e)).

19    Children and Young Persons Act 1933 s 25(3) (as amended: see note 18 *supra*).

## UPDATE

### 769-777 Refusal, variation and revocation of licences ... Licences

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see *LOCAL GOVERNMENT* vol 69 (2009) PARA 733.

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### **778. Renewal, variation and revocation of licences.**

A licence to go abroad to take part in entertainments may not be granted<sup>1</sup> for a period exceeding three months, but may be renewed from time to time for a like period if the justice of the peace<sup>2</sup> is satisfied by the report of a British consular officer or other trustworthy person that the conditions of the licence are being complied with<sup>3</sup>, and is satisfied that the application for renewal is made by or with the consent of the parent<sup>4</sup> or guardian<sup>5</sup> of the child<sup>6</sup>. A justice of the peace may vary a licence<sup>7</sup> or may at any time revoke a licence for any cause which in his discretion he considers sufficient<sup>8</sup>.

Upon any application for the grant, renewal or variation of a licence, the justice must, unless he is satisfied that the circumstances render it unnecessary, require the applicant to give such security as the justice thinks fit, either by recognisance (with or without sureties) or otherwise, for the observance of the restrictions and conditions of the licence or of the licence as varied<sup>9</sup>.

Prescribed particulars<sup>10</sup> must be sent by the justice to the Secretary of State for transmission to the proper consular officer for registration, and for the performance of such other duties in relation to them as the Secretary of State may direct<sup>11</sup>.

1 As to the grant of licences see para 777 ante.

2 Children and Young Persons Act 1933 s 25(4) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(d)).

3 Children and Young Persons Act 1933 s 25(4)(a). As to the admissibility in evidence of such reports see para 779 text to note 11 post.

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'guardian' see para 747 note 13 ante.

6 Children and Young Persons Act 1933 s 25(4)(b). See also note 8 infra.

7 Ibid s 25(5) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(d)).

8 Children and Young Persons Act 1933 s 25(5)(a). Upon a renewal or variation, the child need not be required to attend before the justice: s 25(5)(b).

9 Ibid s 25(6) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(d)). The recognisance may be enforced in like manner as a recognisance for the doing of some matter or thing required to be done in a proceeding before a relevant court is enforceable: Children and Young Persons Act 1933 s 25(6) (amended by the Courts Act 2003 s 109(1), Sch 8 para 73(1), (2)). The 'relevant court' means, in relation to England and Wales, a magistrates' court: Children and Young Persons Act 1933 s 25(11) (added by the Courts Act 2003 Sch 8 para 73(1), (2)). See also note 8 supra.

10 The particulars are:

445 (1) the names and addresses of the child, the applicant, and the child's parent (Children (Performances) Regulations 1968, SI 1968/1728, reg 41B, Sch 4 Pt II paras 1, 3, 4 (reg 41B, Sch 4 added by SI 1998/1678));

446 (2) the date and place of birth and nationality of the child (Children (Performances) Regulations 1968, SI 1968/1728, Sch 4 para 2 (as so added));

- 447 (3) particulars of the engagement including where and for how long the child is to participate (Sch 4 Pt II para 5 (as so added));
- 448 (4) a copy of the contract of employment or other document showing the terms and conditions of the engagement (Sch 4 Pt II para 6 (as so added)); and
- 449 (5) a copy of the licence (Sch 4 Pt II para 7 (as so added)).

11 Children and Young Persons Act 1933 s 25(8) (amended by the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 5(d)). As to the Secretary of State, and the transfer of certain functions, so far as exercisable in relation to Wales, to the Welsh Ministers, see para 155 ante.

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### **779. Offences in relation to children working abroad.**

Any person who acts in contravention of the provisions governing children going abroad to take part in entertainments<sup>1</sup> is guilty of an offence and liable on summary conviction to a penalty<sup>2</sup>. If any person procures a child<sup>3</sup> so to go abroad<sup>4</sup> by means of any false pretence or false representation, he is liable on conviction on indictment to imprisonment<sup>5</sup>. Where it is proved that the defendant caused, procured or allowed a child to go abroad and that that child, while abroad:

- 1439 (1) has been singing, playing, performing or being exhibited<sup>6</sup> for profit; or
- 1440 (2) has taken part in a sport, or worked as a model, in circumstances where payment in respect of his doing so, other than for defraying expenses, was made to him or another person,

the defendant is presumed to have caused, procured or allowed him to go abroad for that purpose unless the contrary is proved<sup>7</sup>. Even where the contrary is proved, the court may order the defendant to take such steps as it directs to secure the return of the child in question to the United Kingdom<sup>8</sup> or to enter into a recognisance to make provision to secure his health, kind treatment and adequate supervision while abroad and his return to the United Kingdom after such period as the court may think fit<sup>9</sup>.

Proceedings in respect of any offence or to enforce any recognisance under these provisions may be instituted at any time within three months from the first discovery by the person taking the proceedings of the commission of the offence or the non-observance of the restrictions and conditions contained in the licence or, if at the expiration of that period the prospective defendant is outside the United Kingdom, at any time within six months after his return to the United Kingdom<sup>10</sup>.

In any such proceedings, a report by a British consular officer and any deposition made on oath before him and authenticated by his signature respecting the observance or non-observance of any of the conditions or restrictions contained in a licence is, upon proof that the officer or deponent cannot be found in the United Kingdom, admissible in evidence without proof of the signature or official character of the person appearing to have signed such report or deposition<sup>11</sup>.

1    In contravention of the Children and Young Persons Act 1933 s 25(1) (as amended): see para 776 ante.

2    Ibid s 26(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 8, Sch 5; and by virtue of the Criminal Justice Act 1982 ss 37, 38, 46). The penalty is a fine not exceeding level 3 on the standard scale or imprisonment for a term of not more than three months or both: see the Children and Young Persons Act 1933 s 26(1) (as so amended). As to the standard scale see para 132 note 2 ante.

3    For the meaning of 'child' see para 743 note 1 ante.

4    As to the meaning of 'abroad' see para 776 note 3 ante.

5    Children and Young Persons Act 1933 s 26(1) proviso (amended by the Employment Act 1989 s 10(2), Sch 3 para 7). Such a person is liable to imprisonment for a term not exceeding two years: see the Children and Young Persons Act 1933 s 26(1) proviso (as so amended).

- 6 As the meaning of 'singing, playing, performing or being exhibited' see para 776 note 4 ante.
- 7 Children and Young Persons Act 1933 s 26(2) (amended by the Employment Act 1989 Sch 3 para 7; and the Children (Protection at Work) Regulations 1998, SI 1998/276, reg 6).
- 8 For the meaning of 'United Kingdom' see para 102 note 7 ante.
- 9 Children and Young Persons Act 1933 s 26(2) proviso (amended by the Employment Act 1989 Sch 3 Pt III para 7).
- 10 Children and Young Persons Act 1933 s 26(3). As to the authorities empowered to bring proceedings in respect of these offences see para 749 note 4 ante.
- 11 Ibid s 26(4).

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## **10. CHILD ABDUCTION**

### **(1) INTRODUCTION**

#### **780. The legal framework.**

Removal of children from the jurisdiction of the English courts has long given rise to problems, but the scale of the problems has been magnified by the development of fast and affordable international transport and also to some extent by a decrease in the formalities required in crossing many international frontiers. The United Kingdom is party to two international Conventions which seek to provide remedies in cases of removal of children from one state to another, which are given effect by the Child Abduction and Custody Act 1985<sup>1</sup>. The Family Law Act 1986 is concerned to prevent conflicts of jurisdiction in cases where children are removed within the United Kingdom, and provides a machinery for reciprocal registration and enforcement<sup>2</sup>.

In addition, all countries within the European Union (except Denmark) are now subject to Regulations which contain provisions on jurisdiction, and for the recognition and enforcement of judgments<sup>3</sup>.

The wrongful removal of children from those entitled to control of them may be a criminal offence under the Child Abduction Act 1984<sup>4</sup>, or may constitute the offence of kidnapping<sup>5</sup> or false imprisonment<sup>6</sup> at common law.

- 1 See paras 799-826 post.
- 2 See paras 830-843 post.
- 3 See paras 788-798 post.
- 4 See para 781 post.
- 5 See para 786 post.
- 6 See para 787 post.

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## **(2) THE CRIMINAL LAW**

### **(i) Offences under the Child Abduction Act 1984**

#### **781. Abduction of a child.**

A person connected with a child<sup>1</sup> under the age of 16 commits an offence if he takes<sup>2</sup> or sends<sup>3</sup> the child out of the United Kingdom<sup>4</sup> without the appropriate consent<sup>5</sup>. However, a person does not commit such an offence by doing anything without the appropriate consent if<sup>6</sup>:

- 1441 (1) he does it in the belief that the other person has consented or would consent if he was aware of all the relevant circumstances<sup>7</sup>; or
- 1442 (2) he has taken all reasonable steps to communicate with the other person but has been unable to do so<sup>8</sup>; or
- 1443 (3) the other person has unreasonably refused to consent<sup>9</sup>.

Nor does a person commit such an offence by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if:

- 1444 (a) he is a person in whose favour there is a residence order in force with respect to the child, and he takes or sends him out of the United Kingdom for a period of less than one month<sup>10</sup>; or
- 1445 (b) he is a special guardian of the child and he takes or sends the child out of the United Kingdom for a period of less than three months<sup>11</sup>.

A person guilty of such an offence is liable to a penalty<sup>12</sup>.

1 A person is 'connected with a child' if:

- 450 (1) he is a parent of the child (Child Abduction Act 1984 s 1(2)(a) (s 1(2)-(4) substituted, and s 1(4A) added, by the Children Act 1989 s 108(4), Sch 12 para 37(2)); or
- 451 (2) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child (Child Abduction Act 1984 s 1(2)(b) (as so substituted)); or
- 452 (3) he is a guardian of a child (s 1(2)(c) (as so substituted)); or
- 453 (4) he is a special guardian of the child (s 1(2)(ca) (s 1(2) as so substituted; and s 1(2)(ca) added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (2)); or
- 454 (5) he is a person in whose favour a residence order is in force with respect to the child (Child Abduction Act 1984 s 1(2)(d) (as so substituted)); or
- 455 (6) he has custody of the child (s 1(2)(e) (as so substituted)).

References to a child's parents and to a child whose parents were (or were not) married to each other at the time of his birth are to be construed in accordance with the Family Law Reform Act 1987 s 1 (as amended) (which extends their meaning: see para 125 ante); Child Abduction Act 1984 s 3(d) (added by the Children Act 1989 s 108(4), Sch 12 para 39). As to guardianship see para 144 ante. As to residence orders see para 262 ante. As to special guardianship see paras 151-154 ante.

2 For these purposes, a person is regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken: Child Abduction Act 1984 s 3(a). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 137.

3 For these purposes, a person is regarded as sending a child if he causes the child to be sent: *ibid* s 3(b) (amended by the Children Act 1989 s 108(4), (7), Sch 12 para 39, Sch 15).

4 For the meaning of 'United Kingdom' see para 102 note 7 ante.

5 Child Abduction Act 1984 s 1(1). Section 1(1) has effect subject to the provisions of the Schedule (as amended) in relation to a child who is in the care of a local authority, detained in a place of safety, remanded to local authority accommodation or the subject of proceedings or an order relating to adoption (see paras 782-784 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 138-141): s 1(8) (amended by the Children Act 1989 s 108(4), Sch 12 para 37). A person is to be regarded as removing a child if he is the effective, although not necessarily the sole, cause of the child's removal: *R v A (child abduction)* [2000] 2 All ER 177, [2000] 1 WLR 1879, CA.

The 'appropriate consent' in relation to a child means:

456 (1) the consent of each of the following:

1. (a) the child's mother (Child Abduction Act 1984 s 1(3)(a)(i) (as substituted: see note 1 supra));

2

2. (b) the child's father, if he has parental responsibility for him (s 1(3)(a)(ii) (as so substituted));

3

3. (c) any guardian of the child (s 1(3)(a)(iii) (as so substituted));

4

4. (d) any special guardian of the child (s 1(3)(a)(iia) (s 1(3) as so substituted; and s 1(3)(a)(iia) added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (3));

5

5. (e) any person in whose favour a residence order is in force with respect to the child (Child Abduction Act 1984 s 1(3)(a)(iv) (as so substituted));

6

6. (f) any person who has custody of the child (s 1(3)(a)(v) (as so substituted));

7

457 (2) the leave of the court granted under or by virtue of any provision of the Children Act 1989 Pt II (ss 8-16) (as amended) (see para 247 et seq ante) (Child Abduction Act 1984 s 1(3)(b) (as so substituted));

458 (3) if any person has custody of the child, the leave of the court which awarded custody to him (s 1(3)(c) (as so substituted)).

For the meaning of 'parental responsibility' see para 134 ante; definition applied by s 1(7)(a) (s 1(7) substituted by the Children Act 1989 s 108(4), Sch 12 para 37). For the meaning of 'guardian of a child' see para 144 note 5 ante; definition applied by the Child Abduction Act 1984 s 1(7)(a) (as so substituted). For the meaning of 'residence order' see para 262 ante; definition applied by s 1(7)(a) (as so substituted). For the meaning of 'special guardian' of a child see para 151 ante; definition applied by s 1(7)(a) (as so substituted; and amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (6)).

A person is treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody, or care and control of the child: Child Abduction Act 1984 s 1(7)(b) (as so substituted).

As to the abduction of a child in the care of a local authority see para 782 post. As to the abduction of a child who is detained in a place of safety see para 783 post. As to the abduction of a child who is the subject of adoption see para 784 post. As to the abduction of a child by persons other than the parent see para 785 post.

As to penalties and prosecutions see also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 142.

6 *Ibid* s 1(5). Where, in proceedings for an offence under s 1 (as amended), there is sufficient evidence to raise an issue as to the application of s 1(5), it is for the prosecution to prove that s 1(5) does not apply: s 1(6).

7 Ibid s 1(5)(a).

8 Ibid s 1(5)(b).

9 Ibid s 1(5)(c). Section 1(5)(c) does not apply if:

459 (1) the person who refused to consent is a person:

7. (a) in whose favour there is a residence order in force with respect to a child (s 1(5A)(a)(i) (s 1(5A) added by the Children Act 1989 s 108(4), Sch 12 para 37(3); and the Child Abduction Act 1984 s 1(5A)(a)(i) amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 para 42(1), (5), Sch 5));

8

8. (b) who is a special guardian of the child (Child Abduction Act 1984 s 1(5A)(a)(ia) (s 1(5A) as so added; and s 1(5A)(a)(ia) added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (5)); or

9

9. (c) who has custody of the child (Child Abduction Act 1984 s 1(5A)(a)(ii) (as so added));

10

460 (2) the person taking or sending the child out of the United Kingdom is, by so acting, in breach of an order made by a court in the United Kingdom (s 1(5A)(b) (as so added)).

10 Ibid s 1(4)(a) (s 1(4)(a), (b) substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (4)). The Child Abduction Act 1984 s 1(4)(a) (as substituted) does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under the Children Act 1989 Pt II (ss 8-16A) (as amended) (see para 247 et seq ante): Child Abduction Act 1984 s 1(4A) (added by the Children Act 1989 s 108(4), Sch 12 para 37).

11 Child Abduction Act 1984 s 1(4)(b) (as substituted: see note 10 supra). Section 1(4)(b) (as substituted) does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under the Children Act 1989 Pt II (as amended) (see para 247 et seq ante): Child Abduction Act 1984 s 1(4A) (added by the Children Act 1989 s 108(4), Sch 12 para 37).

12 Child Abduction Act 1984 s 4(1). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine (s 4(1)(a) (amended by the Statute Law (Repeals) Act 1993)); and (2) on conviction on indictment, to imprisonment for a term not exceeding seven years (Child Abduction Act 1984 s 4(1)(b)). As to the statutory maximum see para 109 note 23 ante.

No prosecution for an offence under s 1 (as amended) may be instituted except by or with the consent of the Director of Public Prosecutions: s 4(2). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066.



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## **782. Abduction of a child in the care of a local authority.**

In the case of a child who is in the care of a local authority<sup>1</sup> in England or Wales<sup>2</sup>, a person connected with such a child<sup>3</sup> under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom<sup>4</sup> without the consent of the local authority in whose care the child is<sup>5</sup>. However, in the case of:

- 1446 (1) a child who is in the care of a local authority in England or Wales, where there is a placement order<sup>6</sup> in force in respect of the child, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court which made the placement order<sup>7</sup>;
- 1447 (2) a child who is in the care of a local authority in England or Wales, where an application for a placement order has been made in respect of the child and has not been disposed of, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>8</sup>;
- 1448 (3) a child who is in the care of a local authority in England or Wales, where an application for an adoption order<sup>9</sup> has been made in respect of the child and has not been disposed of, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>10</sup>;
- 1449 (4) a child who is in the care of a local authority in England or Wales, and who is also the subject of an order giving parental responsibility prior to adoption abroad<sup>11</sup> or a pending application for such an order, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court which made the order or, as the case may be, to which the application was made<sup>12</sup>; or
- 1450 (5) a child who is in the care of a local authority in England or Wales, and who is placed for adoption by an adoption agency or whom an adoption agency is authorised to place for adoption<sup>13</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the consent of each person who has parental responsibility<sup>14</sup> for the child or leave of the court<sup>15</sup>.

A person guilty of such an offence is liable to a penalty<sup>16</sup>.

1 le a local authority within the meaning of the Children Act 1989 s 105(1) (as amended) (see para 138 note 13 ante): Child Abduction Act 1984 s 1(8), Schedule para 1(1) (amended by the Children Act 1989 s 108(4), Sch 12 paras 37(1), (5), 40(1), (2)).

2 Child Abduction Act 1984 s 1(8) (amended by the Children Act 1989 s 108(4), Sch 12 para 37); Child Abduction Act 1984 Schedule para 1(1) (amended by the Children Act 1989 Sch 12 para 40(1), (2)).

3 As to the meaning of 'connected with a child' see para 781 note 1 ante.

4 For the meaning of 'United Kingdom' see para 102 note 7 ante.

5 Child Abduction Act 1984 s 1(1), Schedule para 1.

6 Is an order under the Adoption and Children Act 2002 s 21: see para 335 ante.

7 Child Abduction Act 1984 s 1(1), Schedule paras 3(1)(b), (2)(a)(ii), 4 (Schedule para 3(1), (2) substituted by the Adoption and Children Act 2002 s 139, Sch 3 para 43(1), (2)).

8 Child Abduction Act 1984 s 1(1), Schedule paras 3(1)(c), (2)(a)(iii), 4 (Schedule para 3(1), (2) as substituted: see note 7 supra).

9 Is an adoption order under the Adoption and Children Act 2002 s 46: see para 359 et seq ante.

10 Child Abduction Act 1984 s 1(1), Schedule paras 3(1)(d), (2)(a)(iii), 4 (Schedule para 3(1), (2) as substituted: see note 7 supra).

11 Is an order under the Adoption and Children Act 2002 s 84: see para 502 ante.

12 Child Abduction Act 1984 s 1(1), Schedule paras 3(1)(e), (2)(a)(iv), 4 (Schedule para 3(1), (2) as substituted: see note 7 supra).

13 Is placed under the Adoption and Children Act 2002 s 19: see para 332 ante.

14 For the meaning of 'parental responsibility' see para 134 ante; definition applied by the Child Abduction Act 1984 s 1(7)(a) (substituted by the Children Act 1989 Sch 12 para 37(4)).

15 Child Abduction Act 1984 s 1(1), Schedule paras 3(1)(a), (2)(a)(i), 4 (Schedule para 3(1), (2) as substituted: see note 7 supra).

16 Ibid s 4(1). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine (s 4(1)(a) (amended by the Statute Law (Repeals) Act 1993)); and (2) on conviction on indictment, to imprisonment for a term not exceeding seven years (Child Abduction Act 1984 s 4(1)(b)). As to the statutory maximum see para 109 note 23 ante.

No prosecution for an offence under s 1 (as amended) may be instituted except by or with the consent of the Director of Public Prosecutions: s 4(2). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066.

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### **783. Abduction of a child who is detained in a place of safety.**

In the case of a child who is detained in a place of safety<sup>1</sup>, or remanded to local authority accommodation<sup>2</sup>, a person connected with a child<sup>3</sup> under the age of 16 commits an offence if he takes or sends the child<sup>4</sup> out of the United Kingdom<sup>5</sup> without the leave of any magistrates' court acting for the area<sup>6</sup> in which the place of safety is<sup>7</sup>.

A person guilty of such an offence is liable to a penalty<sup>8</sup>.

1   le under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 7(4): see para 608 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 265.

2   Child Abduction Act 1984 s 1(8) (amended by the Children Act 1989 s 108(4), Sch 12 para 37(5)); Child Abduction Act 1984 Schedule para 2(1) (Schedule para 2 substituted by the Children Act 1989 Sch 12 para 40(1), (3); and the Child Abduction Act 1984 Schedule para 2(1) amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 93(a), (b)).

3   As to the meaning of 'connected with a child' see para 781 note 1 ante.

4   For these purposes, a person is regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken: Child Abduction Act 1984 s 3(a). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 137.

5   For the meaning of 'United Kingdom' see para 102 note 7 ante.

6   'Area', in relation to a magistrates' court, means the petty sessions area for which the court is appointed: Child Abduction Act 1984 Schedule para 5(b) (substituted by the Children Act 1989 Sch 12 para 40; and amended by the Access to Justice Act 1999 s 106, Sch 15 Pt V Table (1)).

7   Child Abduction Act 1984 s 1(1) (modified by Schedule para 2(2)).

8   Ibid s 4(1). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine (s 4(1)(a) (amended by the Statute Law (Repeals) Act 1993)); and (2) on conviction on indictment, to imprisonment for a term not exceeding seven years (Child Abduction Act 1984 s 4(1)(b)). As to the statutory maximum see para 109 note 23 ante.

No prosecution for an offence under s 1 (as amended) may be instituted except by or with the consent of the Director of Public Prosecutions: s 4(2). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066.

## **UPDATE**

### **783 Abduction of a child who is detained in a place of safety**

NOTE 2--Child Abduction Act 1984 Schedule para 2(1) further amended and Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 93(a) repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 31, 104, Sch 28 Pt 1.

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#### **784. Abduction of a child who is the subject of adoption.**

In the case of:

- 1451 (1) a child who is subject to a placement order<sup>1</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom<sup>2</sup> without the leave of the court which made the placement order<sup>3</sup>;
- 1452 (2) a child who is the subject of a pending application for a placement order, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>4</sup>;
- 1453 (3) a child who is the subject of a pending application for an adoption order<sup>5</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>6</sup>;
- 1454 (4) a child who is the subject of an order giving parental responsibility prior to adoption abroad<sup>7</sup> or a pending application for such an order, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court which made the order or, as the case may be, to which the application was made<sup>8</sup>; or
- 1455 (5) a child who is placed for adoption by an adoption agency or whom an adoption agency is authorised to place for adoption<sup>9</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the consent of each person who has parental responsibility<sup>10</sup> for the child or leave of the court<sup>11</sup>.

In the case of:

- 1456 (a) a child who is in the care of a local authority in England or Wales, and who is also subject to a placement order<sup>12</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court which made the placement order<sup>13</sup>;
- 1457 (b) a child who is in the care of a local authority in England or Wales, and who is also the subject of a pending application for a placement order, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>14</sup>;
- 1458 (c) a child who is in the care of a local authority in England or Wales, and who is also the subject of a pending application for an adoption order, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court to which the application was made<sup>15</sup>;
- 1459 (d) a child who is in the care of a local authority in England or Wales, and who is also the subject of an order giving parental responsibility prior to adoption abroad or a pending application for such an order, a person connected with such a

child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court which made the order or, as the case may be, to which the application was made<sup>16</sup>; or

- 1460 (e) a child who is in the care of a local authority in England or Wales, and who is placed for adoption by an adoption agency or whom an adoption agency is authorised to place for adoption<sup>17</sup>, a person connected with such a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the consent of each person who has parental responsibility for the child or leave of the court<sup>18</sup>.

A person guilty of such an offence is liable to a penalty<sup>19</sup>.

1    Ie an order under the Adoption and Children Act 2002 s 21: see para 335 ante.

2    For the meaning of 'United Kingdom' see para 102 note 7 ante.

3    Child Abduction Act 1984 s 1(1), (8), Schedule para 3(1)(b), (2)(ii) (Schedule para 3(1), (2) substituted by the Adoption and Children Act 2002 s 139(1), Sch 3 para 43(1), (2)).

4    Child Abduction Act 1984 s 1(1), Schedule para 3(1)(c), (2)(a)(iii) (Schedule para 3(1), (2) as substituted: see note 3 supra).

5    Ie an adoption order under the Adoption and Children Act 2002 s 46: see para 359 et seq ante.

6    Child Abduction Act 1984 s 1(1), Schedule para 3(1)(d), (2)(a)(iii) (Schedule para 3(1), (2) as substituted: see note 3 supra).

7    Ie an order under the Adoption and Children Act 2002 s 84: see para 502 ante.

8    Child Abduction Act 1984 s 1(1), Schedule para 3(1)(e), (2)(a)(iv) (Schedule para 3(1), (2) as substituted: see note 3 supra).

9    Ie placed under the Adoption and Children Act 2002 s 19: see para 332 ante.

10   For the meaning of 'parental responsibility' see para 134 ante; definition applied by the Child Abduction Act 1984 s 1(7)(a) (substituted by the Children Act 1989 s 108(4), Sch 12 para 37(4)).

11   Child Abduction Act 1984 s 1(1), Schedule para 3(1)(a), (2)(a)(i) (Schedule para 3(1), (2) as substituted: see note 3 supra).

12   Ie an order under the Adoption and Children Act 2002 s 21: see para 335 ante.

13   Child Abduction Act 1984 s 1(1), Schedule para 3(1)(b), (2)(a)(ii) (Schedule para 3(1), (2) as substituted: see note 3 supra).

14   Ibid s 1(1), Schedule para 3(1)(c), (2)(a)(iii) (Schedule para 3(1), (2) as substituted: see note 3 supra).

15   Ibid s 1(1), Schedule para 3(1)(d), (2)(a)(iii) (Schedule para 3(1), (2) as substituted: see note 3 supra).

16   Ibid s 1(1), Schedule para 3(1)(e), (2)(a)(iv) (Schedule para 3(1), (2) as substituted: see note 3 supra).

17   Ie placed under the Adoption and Children Act 2002 s 19: see para 332 ante.

18   Child Abduction Act 1984 s 1(1), Schedule para 3(1)(a), (2)(a)(i) (Schedule para 3(1), (2) as substituted: see note 3 supra).

19   Ibid s 4(1). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine (s 4(1)(a) (amended by the Statute Law (Repeals) Act 1993)); and (2) on conviction on indictment, to imprisonment for a term not exceeding seven years (Child Abduction Act 1984 s 4(1)(b)). As to the statutory maximum see para 109 note 23 ante.

No prosecution for an offence under s 1 (as amended) may be instituted except by or with the consent of the Director of Public Prosecutions: s 4(2). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066.

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### **785. Abduction of a child by persons other than the parent etc.**

A person who is not:

- 1461 (1) where the father and mother of the child in question were married to each other at the time of his birth, the child's father or mother<sup>1</sup>;
- 1462 (2) where the father and mother of the child in question were not married to each other at the time of his birth, the child's mother<sup>2</sup>; or
- 1463 (3) the guardian of the child<sup>3</sup>, the special guardian of the child<sup>4</sup>, a person who has custody of the child<sup>5</sup>, or a person in whose favour a residence order<sup>6</sup> has been made in respect of the child<sup>7</sup>,

commits an offence if, without lawful authority or reasonable excuse, he takes or detains<sup>8</sup> a child under the age of 16 so as to remove him from the lawful control of the person having such control, or so as to keep him out of the lawful control of any person entitled to lawful control<sup>9</sup>.

In proceedings against any person for such an offence, it is a defence for that person to prove:

- 1464 (a) where the father and mother of the child in question were not married to each other at the time of his birth, that he is the child's father or that, at the time of the alleged offence, he believed on reasonable grounds that he was the child's father<sup>10</sup>; or
- 1465 (b) that, at the time of the alleged offence, he believed that the child had attained the age of 16<sup>11</sup>.

A person guilty of such an offence is liable to a penalty<sup>12</sup>.

1 Child Abduction Act 1984 s 2(2)(a) (s 2(2) substituted by the Children Act 1989 s 108(4), Sch 12 para 38(2)).

2 Child Abduction Act 1984 s 2(2)(b) (as substituted: see note 1 supra).

3 Child Abduction Act 1984 s 1(2)(c) (substituted by the Children Act 1989 Sch 12 para 37(2)); Child Abduction Act 1984 s 2(2)(c) (as substituted: see note 1 supra). For the meaning of 'guardian of a child' see para 144 note 5 ante; definition applied by s 1(7)(a) (s 1(7) substituted by the Children Act 1989 Sch 12 para 37(4)).

4 Child Abduction Act 1984 s 1(2)(ca) (added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (2)); Child Abduction Act 1984 s 2(2)(c) (as substituted: see note 1 supra). For the meaning of 'special guardian' of a child see para 151 ante; definition applied by s 1(7)(a) (as substituted (see note 3 supra); and amended by the Adoption and Children Act 2002 Sch 3 para 42(1), (6)).

5 Child Abduction Act 1984 ss 1(2)(e), 2(2)(c) (as substituted: see note 1 supra). A person is treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody, or care and control of the child: s 1(7)(b) (as substituted: see note 3 supra).

6 For the meaning of 'residence order' see para 262 ante; definition applied by ibid s 1(7)(a) (as substituted: see note 3 supra).

7 Ibid ss 1(2)(d), 2(2)(c) (as substituted: see note 1 supra).

8 For these purposes, a person is to be regarded as taking a child if he causes the child to be detained or induces the child to remain with him or any other person: *ibid* s 3(c).

9 See *ibid* s 2(1) (amended by the Children Act 1989 Sch 12 para 38(2)).

10 Child Abduction Act 1984 s 2(3)(a) (s 2(3) added by the Children Act 1989 Sch 12 para 38(2)).

11 Child Abduction Act 1984 s 2(3)(b) (as added: see note 10 supra). See also *Foster v DPP* [2004] EWHC 2955 (Admin), [2005] 1 WLR 1400, [2005] 1 FCR 153.

12 Child Abduction Act 1984 s 4(1). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine (s 4(1)(a) (amended by the Statute Law (Repeals) Act 1993)); and (2) on conviction on indictment, to imprisonment for a term not exceeding seven years (Child Abduction Act 1984 s 4(1)(b)). As to the statutory maximum see para 109 note 23 ante.

No prosecution for an offence under s 1 (as amended) may be instituted except by or with the consent of the Director of Public Prosecutions: s 4(2). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066.



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## (ii) Other Offences

### 786. Kidnapping.

The common law offence of kidnapping is committed where one person is taken or carried away by another, by force or fraud, without the consent of the person so taken or carried away and without lawful excuse<sup>1</sup>. The offence can be committed by anyone against a child, including a parent of the child in the absence of the child's consent<sup>2</sup>. However, if an offence of kidnapping is committed against a child under the age of 16 by a person connected with the child<sup>3</sup> no prosecution may be instituted for that offence without the consent of the Director of Public Prosecutions<sup>4</sup>. Further, the conduct of kidnapping parents who snatch their own children should be dealt with as a contempt of court rather than by a criminal prosecution and the latter procedure should only be used in exceptional cases where the conduct of the parent was so bad that an ordinary right-thinking person would regard it as criminal<sup>5</sup>. Nevertheless, the existence of the relevant offences as arrestable offences may be of significance since the police have the power to arrest anyone who they reasonably suspect to be committing an arrestable offence<sup>6</sup>. On conviction on indictment, the court may impose a fine or a term of imprisonment or both<sup>7</sup>.

1 See *R v D* [1984] AC 778, [1984] 2 All ER 449, HL; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136.

2 See *R v D* [1984] AC 778, [1984] 2 All ER 449, HL; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136. 'In the case of a very young child, it would not have the understanding or intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think, be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent . . . I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent': *R v D* supra at 806 and 457 per Lord Brandon of Oakbrook. The approach of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] AC 112, [1985] 3 All ER 402 should be considered.

3 As to the meaning of 'connected with a child' see para 781 note 1 ante.

4 Child Abduction Act 1984 s 5; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066. The prosecution should not include a count alleging kidnapping where the allegation was encompassed by an offence under s 1(1) (see para 781 ante): *R v C (kidnapping: abduction)* [1991] 2 FLR 252, [1991] Fam Law 522, CA.

5 *R v D* [1984] AC 778 at 806, [1984] 2 All ER 449 at 458, HL, per Lord Brandon of Oakbrook; *R v C (kidnapping: abduction)* [1991] 2 FLR 252 at 256, [1991] Fam Law 522 at 523, CA, per Watkins LJ.

6 See the Police and Criminal Evidence Act 1984 Pt III (ss 24-33) (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 924 et seq. As to the abduction of a child who is in care, or subject to an emergency protection order or child assessment order, or in police protection see para 605 ante.

7 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136.

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**787. False imprisonment.**

The common law offence of false imprisonment may be committed in respect of a child<sup>1</sup>. The offence is punishable by a fine, imprisonment or both<sup>2</sup>.

1 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 135. The elements of the offence are an unlawful, reckless or intentional restraint of movement from a particular place. *R v Rahman* (1985) 81 Cr App Rep 349, CA.

2 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 135.

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### **(3) CHILD ABDUCTION WITHIN THE EUROPEAN UNION MEMBER STATES (OTHER THAN DENMARK)**

#### **788. Introduction.**

If a child under the age of 16 has been brought from or taken to certain countries, which are signatories of the Hague Convention<sup>1</sup> or the European Convention<sup>2</sup>, proceedings may be taken pursuant to those Conventions under the Child Abduction and Custody Act 1985<sup>3</sup>. With effect from 1 March 2001, further provisions were made under the Brussels II Regulation, as between member states of the European Union (except for Denmark), with respect to judgments relating to parental responsibility for the children of both spouses involved in divorce, nullity or separation proceedings<sup>4</sup>. With effect from 1 March 2005, the Brussels II Regulation was replaced by the Brussels IIR Regulation<sup>5</sup>, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility<sup>6</sup>. The Brussels IIR Regulation applies to all judgments relating to parental responsibility and not simply those in respect of children to both spouses involved in matrimonial proceedings (that is, it includes step-children and children of unmarried parents). The Regulations are directly effective, so that domestic legislation has to be read alongside the Regulations. With respect to the European Convention, for judgments made after 1 March 2001, the Brussels II Regulation has precedence<sup>7</sup> and for those made after 1 March 2005, the Brussels IIR Regulation has precedence<sup>8</sup>. With respect to the Hague Convention, for judgments made after 1 March 2005, the Brussels IIR Regulation has precedence<sup>9</sup>.

Provisions dealing with child abduction within the different United Kingdom jurisdictions are contained within the Family Law Act 1986<sup>10</sup>. Those provisions are also subject to the Brussels Regulations<sup>11</sup>. There are detailed transitional provisions relating to recognition and enforcement<sup>12</sup>.

1    Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33). See paras 805-817 post.

2    Ie the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). See paras 818-826 post.

3    Child Abduction and Custody Act 1985 ss 1(1), 12(1). See para 799 post.

4    Ie EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. Denmark opted out of the Regulation and accordingly for these purposes member state means all member states with the exception of Denmark: art 1(3).

5    Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. As to proposed amendments to this Regulation introducing rules concerning applicable law in matrimonial matters and enabling a choice of jurisdiction in proceedings relating to divorce and legal separation see the Proposal for Council Regulation COM (2006) 399. It is intended that the amendments will have effect from 1 March 2008. However, the United Kingdom government has opted out of the proposed amending Regulation.

6 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) applies whatever the nature of the court or tribunal, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility: art 1(1)(b). The matters referred to in art 1(1)(b) may, in particular, deal with:

- 461 (1) rights of custody and rights of access (art 1(2)(a));
- 462 (2) guardianship, curatorship and similar institutions (art 1(2)(b));
- 463 (3) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child (art 1(2)(c));
- 464 (4) the placement of the child in a foster family or in institutional care (art 1(2)(d));
- 465 (5) measures for the protection of the child relating to the administration, conservation or disposal of the child's property (art 1(2)(d)).

However, EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) does not apply to:

- 466 (a) the establishment or contesting of a parent-child relationship (art 1(3)(a));
- 467 (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption (art 1(3)(b));
- 468 (c) the name and forenames of the child (art 1(3)(c));
- 469 (d) emancipation (art 1(3)(d));
- 470 (e) maintenance obligations (art 1(3)(e));
- 471 (f) trusts or succession (art 1(3)(f));
- 472 (g) measures taken as a result of criminal offences committed by children (art 1(3)(g)).

For the purposes of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29), 'parental responsibility' means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, and includes rights of custody and rights of access: art 2(7). 'Rights of custody' includes right and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence: art 2(9). 'Rights of access' includes in particular the right to take the child to a place other than his habitual residence for a limited period of time: art 2(10).

See also Case C-435/06 *Re C* [2007] All ER (D) 411 (Nov), ECJ (a single decision ordering a child to be taken into care and placed outside his original home in a foster family was covered by the term 'civil matters' for the purposes of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 1).

7 See EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36) art 37. See *Re G (foreign contact order: enforcement)* [2003] EWCA Civ 1607, [2004] 1 FLR 378, [2004] 1 FCR 266, [2004] 1 WLR 521.

8 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 60(d); and the Child Abduction and Custody Act 1985 s 12 (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 7).

9 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 60(e); and the Child Abduction and Custody Act 1985 s 1 (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 6).

10 See paras 830-843 post.

11 See the Family Law Act 1986 s 2 (substituted by the Children Act 1989 s 108(5), Sch 13 para 64; and amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 8(1), (3)).

12 Any existing proceedings prior to 1 March 2005 will continue to be governed by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29), which contains detailed transitional provisions: see art 64.

In addition to applications issued after 1 March 2005, the following categories are also covered by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29):

- 473 (1) judgments given on or after 1 March 2005 in proceedings instituted before then but after EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36) entered into force (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 64(2));
- 474 (2) judgments given before 1 March 2005 in proceedings instituted after EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36) entered into force in cases falling under the scope of that Regulation (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 64(3));
- 475 (3) judgments given before 1 March 2005 but after EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36) came into force, in proceedings instituted before that Regulation came into force in cases falling under the scope of that Regulation (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 64(4)).

EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36) entered into force in the case of the 'old' member states (except Denmark) on 1 March 2001, and for 'new' member states (ie the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia) on 1 May 2004. In the case of judgments given before 1 March 2005, the judgments must fall within the scope of EC Council Regulation 1347/2000 (OJ L160, 30.06.2000, pp 19-36), ie they must relate to parental responsibility for the children of both spouses on the occasion of matrimonial proceedings between the parents: see arts 22, 46.

## **UPDATE**

### **788 Introduction**

NOTE 6--Case C-435/06, cited, reported at [2008] 1 FLR 490, ECJ.

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### **789. Jurisdiction: in general.**

The courts of a member state<sup>1</sup> have jurisdiction in matters of parental responsibility<sup>2</sup> over a child who is habitually resident<sup>3</sup> in that member state at the time the court is seised<sup>4</sup>.

However, different provisions may apply<sup>5</sup>:

- 1466 (1) where a child has lawfully moved to another member state<sup>6</sup>;
- 1467 (2) in cases of child abduction<sup>7</sup>;
- 1468 (3) in applications for divorce, legal separation or marriage annulment<sup>8</sup>;
- 1469 (4) where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of head (3) above<sup>9</sup>.

Where no court of a member state has jurisdiction pursuant to the above provisions<sup>10</sup>, jurisdiction is determined, in each member state, by the laws of that state<sup>11</sup>. Where a court of a member state is seised of a case over which it has no jurisdiction<sup>12</sup> and over which a court of another member state has jurisdiction, it must declare of its own motion that it has no jurisdiction<sup>13</sup>.

Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different member states, the court second seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established<sup>14</sup>. Where the jurisdiction of the court first seised is established, the court second seised must decline jurisdiction in favour of that court<sup>15</sup>.

In urgent cases, these provisions<sup>16</sup> do not prevent the courts of a member state from taking such provisional, including protective, measures in respect of persons in that state as may be available under the law of that member state, even if the court of another member state has jurisdiction<sup>17</sup> as to the substance of the matter<sup>18</sup>. The measures made accordingly cease to apply when the court of the member state having jurisdiction as to the substance of the matter has taken the measures it considers appropriate<sup>19</sup>.

1 For the meaning of 'member state' see para 788 note 4 ante.

2 For the meaning of 'parental responsibility' see para 788 note 6 ante.

3 As to habitual residence see para 806 post.

4 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 8(1). A court is deemed to be seised:

- 476 (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (art 16(1)(a));
- 477 (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court (art 16(1)(b)).

- 5 Ibid art 8(1) is subject to arts 9, 10, 12: art 8(2).
- 6 See ibid art 9; and para 790 post.
- 7 See ibid art 10; and para 791 post.
- 8 See ibid art 12; and para 792 post.
- 9 See ibid art 13; and para 792 post.
- 10 Ie pursuant to ibid arts 8-13.
- 11 Ibid art 14.
- 12 Ie by virtue of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29).
- 13 Ibid art 19(2).
- 14 Ibid art 19(3).
- 15 Ibid art 17.
- 16 Ie the provisions of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29).
- 17 Ie under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29).
- 18 Ibid art 20(1).
- 19 Ibid art 20(2).

## **UPDATE**

### **789 Jurisdiction: in general**

NOTE 4--As to the approach of the court when considering the application of EC Council Regulation 2201/2003 art 8(1) to the situation in which a child has a permanent residence in one member state but is staying in another member state, see Case C-523/07 *Family proceedings concerning A* [2010] Fam 42, [2009] All ER (D) 286 (Jun), ECJ.

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**790. Jurisdiction: where a child has lawfully moved.**

Where a child moves lawfully from one member state<sup>1</sup> to another and acquires a new habitual residence<sup>2</sup> there, the courts of the member state of the child's former habitual residence must, by way of exception to the general rule<sup>3</sup>, retain jurisdiction during a three month period following the move for the purpose of modifying a judgment on access rights<sup>4</sup> issued in the member state before the child moved, where the holder of the access rights pursuant to the judgment on access rights continues to have his habitual residence in the member state of the child's former habitual residence<sup>5</sup>.

However, this does not apply if the holder of the access rights has accepted the jurisdiction of the courts of the member state of the child's new habitual residence by participating in the proceedings before those courts without contesting their jurisdiction<sup>6</sup>.

1 For the meaning of 'member state' see para 788 note 4 ante.

2 As to habitual residence see para 806 post.

3 I.e. the rule in EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 8(1) (see para 789 ante).

4 As to the meaning of 'rights of access' see para 788 note 6 ante.

5 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 9(1).

6 Ibid art 9(2).



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### **791. Jurisdiction: wrongful removal.**

In a case of wrongful removal or retention<sup>1</sup> of a child, the courts of the member state where the child was habitually resident immediately before the wrongful removal or retention retain their jurisdiction until the child has acquired a habitual residence in another member state and:

- 1470 (1) each person, institution or other body having rights of custody has acquiesced in the removal or retention<sup>2</sup>; or
  - 1471 (2) the child has resided in that other member state for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his new environment and at least one of the following conditions is met<sup>3</sup>:
- .19**
- 8. (a) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the member state where the child has been removed or is being retained<sup>4</sup>;
  - 9. (b) a request for return lodged by the holder or rights of custody has been withdrawn and no new request has been lodged within the time limit set in head (a) above<sup>5</sup>;
  - 10. (c) a case before the court in the member state where the child was habitually resident immediately before the wrongful removal or retention has been closed<sup>6</sup> following another court being seised of it<sup>7</sup>;
  - 11. (d) a judgment on custody that does not entail the return of the child has been issued by the courts of the member state where the child was habitually resident immediately before the wrongful removal or retention<sup>8</sup>.
- .20**

1 'Wrongful removal or retention' means a child's removal or retention where:

478 (1) it is in breach of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the member state where the child was habitually resident immediately before the removal or retention (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 2(11)(a)); and

479 (2) provided that, at the time of the removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention (art 2(11)(b)).

Custody is considered to be exercised jointly when, pursuant to a decision or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility: art 2(11)(b). 'Holder of parental responsibility' means any person having parental responsibility over a child: art 2(11). For the meaning of 'parental responsibility' see para 788 note 6 ante. As to habitual residence see para 806 post. For the meaning of 'rights of custody' see para 788 note 6 ante. For the meaning of 'member state' see para 788 note 4 ante.

2 Ibid art 10(a).

3 Ibid art 10(b).

- 4 Ibid art 10(b)(i).
- 5 Ibid art 10(b)(ii).
- 6 le closed pursuant to ibid art 11(7): see para 798 post.
- 7 Ibid art 10(b)(iii). As to when a court is deemed to be seised see para 789 note 4 ante.
- 8 Ibid art 10(b)(iv).

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## **792. Jurisdiction: divorce, legal separation and marriage annulment.**

The courts of a member state<sup>1</sup> exercising jurisdiction on an application for divorce, legal separation or marriage annulment<sup>2</sup> have jurisdiction in any matter relating to parental responsibility<sup>3</sup> connected with that application where:

- 1472 (1) at least one of the spouses has parental responsibility in relation to the child<sup>4</sup>; and
- 1473 (2) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility<sup>5</sup> at the time the court is seised, and is in the superior interests of the child<sup>6</sup>.

This jurisdiction ceases as soon as:

- 1474 (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final<sup>7</sup>;
- 1475 (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in head (a) above, a judgment in those proceedings has become final<sup>8</sup>;
- 1476 (c) the proceedings referred to in heads (a) and (b) above have come to an end for another reason<sup>9</sup>.

The courts of a member state also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in heads (1) and (2) above where:

- 1477 (i) the child has a substantial connection with that member state, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that member state or that the child is a national of that member state<sup>10</sup>; and
- 1478 (ii) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised, and is in the best interests of the child<sup>11</sup>.

Where the child has his habitual residence in the territory of a third state which is not a contracting party to the Hague Convention<sup>12</sup>, jurisdiction under these provisions<sup>13</sup> is deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third state in question<sup>14</sup>. Where a child's habitual residence cannot be established and jurisdiction cannot be determined in accordance with these provisions<sup>15</sup>, the courts of the member state where the child is present have jurisdiction<sup>16</sup>. This also applies to refugee children or children internationally displaced because of disturbances occurring in their country<sup>17</sup>.

<sup>1</sup> For the meaning of 'member state' see para 788 note 4 ante.

2 In matters relating to divorce, legal separation or marriage annulment, jurisdiction lies with the courts of the member state:

480 (1) in whose territory: (a) the spouses are habitually resident; or (b) the spouses were last habitually resident, in so far as one of them still resides there; or (c) the respondent is habitually resident; or (d) in the event of a joint application, either of the spouses is habitually resident; or (e) the applicant is habitually resident if he resided there for at least a year immediately before the application was made; or (f) the applicant is habitually resident if he resided there for at least six months immediately before the application was made and is either a national of the member state in question or, in the case of the United Kingdom and Ireland, has his domicile there (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 3(1)(a));

481 (2) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the domicile of both spouses (art 3(1)(b)).

'Domicile' has the same meaning as it has under the legal systems of the United Kingdom and Ireland: art 3(2). See CONFLICT OF LAWS vol 8(3) (Reissue) para 53.

3 For the meaning of 'parental responsibility' see para 788 note 6 ante.

4 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 12(1)(a).

5 For the meaning of 'holder of parental responsibility' see para 791 note 1 ante.

6 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 12(1)(b).

7 Ibid art 12(2)(a).

8 Ibid art 12(2)(b). See also *Re A (foreign contact order: jurisdiction)* [2003] EWHC 2911 (Fam), [2004] 1 All ER 912, [2004] 1 FLR 641.

9 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 12(2)(c).

10 Ibid art 12(3)(a).

11 Ibid art 12(3)(b).

12 The Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33). See para 805 et seq post.

13 Ie the provisions of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 12.

14 Ibid art 12(4).

15 See note 13 supra.

16 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 13(1).

17 Ibid art 13(2).

## UPDATE

### 792 Jurisdiction: divorce, legal separation and marriage annulment

NOTE 6--A spouse does not accept jurisdiction in relation to parental responsibility merely by filing statements in relation to divorce proceedings: *Bush v Bush* [2008] EWCA Civ 865, [2008] 3 FCR 139 (more appropriate for application concerning child's residence to be determined in court of child's habitual residence).

NOTE 11--See *Re I (a child) (contact application: jurisdiction)* [2009] UKSC 10, [2010] 1 AC 319, [2010] 1 All ER 445.

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### **793. Jurisdiction: transfer to a better court.**

Exceptionally<sup>1</sup>, the courts of a member state having jurisdiction as to the substance of the matter, if they consider that a court of another member state<sup>2</sup> with which the child has a particular connection<sup>3</sup> would be better placed to hear the case, or a specific part thereof, and where this in the best interests of the child, may:

- 1479 (1) stay the case or part thereof in question and invite the parties to introduce a request before the court of that other member state in accordance with the rules and time limits<sup>4</sup>; or
- 1480 (2) request a court of another member state to assume jurisdiction<sup>5</sup> in accordance with the rules and time limits<sup>6</sup>.

Such a transfer can be made on the application of a party, of the court's own motion or upon the application of a court of another member state with which the child has a particular connection<sup>7</sup>. If the transfer is made of the court's own motion or by application of a court of another member state, the transfer must be accepted by at least one of the parties<sup>8</sup>.

1 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 15(1). See further *Re EC (child abduction: stayed proceedings)* [2006] EWCA Civ 1115, [2007] 1 FLR 57, [2006] Fam Law 918 ('it will indeed be a truly exceptional case [to] invoke art 15': at [18] per Thorpe LJ). As to the application of a party for transfer of proceedings to a court of another member state see the Family Proceedings Rules 1991, SI 1991/1247, r 7.53 (added by SI 2005/264; and amended by SI 2005/2922). As to the application by a court of a member state for transfer of proceedings see the Family Proceedings Rules 1991, SI 1991/1247, r 7.54 (added by SI 2005/264).

2 For the meaning of 'member state' see para 788 note 4 ante.

3 A child is considered to have a particular connection to a member state if that member state:

- 482 (1) has become the habitual residence of the child after the court was seised (EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 15(3)(a));
- 483 (2) is the former habitual residence of the child (art 15(3)(b));
- 484 (3) is the place of the child's nationality (art 15(3)(c));
- 485 (4) is the habitual residence of a holder of parental responsibility (art 15(3)(d)); or
- 486 (5) is the place where property of the child is located and the case concerns measures for the protection of the child, relating to the administration, conservation or disposal of this property (art 15(3)(e)).

As to when a court is deemed to be seised see para 789 note 4 ante. For the meaning of 'holder of parental responsibility' see para 791 note 1 ante. For the meaning of 'parental responsibility' see para 788 note 6 ante.

4 Ibid art 15(1)(a).

5 The court of the member state having jurisdiction as to the substance of the matter must set a time limit by which the courts of that other member state must be seised in accordance with ibid art 15(1): art 15(4). If the courts are not seised by that time, the court which has been seised is to continue to exercise jurisdiction in accordance with arts 8-14 (see paras 789-793 supra): art 15(4).

6 Ibid art 15(1)(b).

7 Ibid art 15(2). The courts of that other member state may, where due to the specific circumstances of the case this is the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with art 15(1)(a) or (b): art 15(5). In this case, the court first seised must decline jurisdiction: art 15(5). Otherwise, the court first seised must continue to exercise jurisdiction in accordance with arts 8-14 (see paras 789-793 supra): art 15(5).

8 Ibid art 15(2).

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#### 794. Recognition.

A judgment given in a member state<sup>1</sup> is recognised in the other member states without any special procedure being required<sup>2</sup>. There are very limited exceptions to this rule, namely:

- 1481 (1) if such recognition is manifestly contrary to the public policy of the member state in which recognition is being sought, taking into account the best interests of the child<sup>3</sup>;
- 1482 (2) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the member state in which recognition is sought<sup>4</sup>;
- 1483 (3) where it was given in default of appearance if the person in default was not served with the relevant documents instituting proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his defence unless it is determined that such person has accepted the judgment unequivocally<sup>5</sup>;
- 1484 (4) on the request of any person claiming that the judgment infringes his parental responsibility<sup>6</sup>, if it was given without such person having been given an opportunity to be heard<sup>7</sup>;
- 1485 (5) if it is irreconcilable with a later judgment relating to parental responsibility given in the member state in which recognition is being sought<sup>8</sup>;
- 1486 (6) if it is irreconcilable with a later judgment relating to parental responsibility given in another member state or in the non-member state of the habitual residence<sup>9</sup> of the child provided that the later judgment fulfils the conditions necessary for its recognition in the member state in which recognition is sought<sup>10</sup>; or
- 1487 (7) if the procedure for a proposed placement of a child in institutional care or with a foster family in another member state<sup>11</sup> has not been complied with<sup>12</sup>.

Any interested party can apply for a judgment to be or not to be recognised<sup>13</sup>.

The jurisdiction of the court of the member state of origin<sup>14</sup> may not be reviewed<sup>15</sup>. Under no circumstances may a judgment be reviewed as to its substance<sup>16</sup>.

1 For the meaning of 'member state' see para 788 note 4 ante.

2 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 21(1).

3 Ibid art 23(a). 'To say something is contrary to public policy is a high hurdle, to which the Article adds the words 'manifestly': see *Re S (Brussels II: recognition: best interests of child)* [2003] EWHC 2115 (Fam) at [32], [2004] 1 FLR 571 at [32], sub nom *Re M (a child) (jurisdiction: foreign contact order)* [2003] All ER (D) 135 (Dec) at [32] per Holman J (a case which concerned similar provisions in EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses). In a case dealing with the analogous provision under EC Council Regulation 44/2001 (OJ L12, 16.1.2001, pp 1-23) on the jurisdiction and the recognition of judgments in civil and commercial matters (the 'Brussels II Regulation'), the European Court of Justice construed this defence very narrowly: see Case C-432/93 *Societe d'Informatique Service Realisation*

*Organisation v Ampersand Software BV* [1995] ECR I-2269, [1996] QB 127, [1995] All ER (EC) 783, ECJ. The test of public policy in EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 23(a) may not be applied to the rules relating to jurisdiction set out in arts 3-14 (see paras 789-793 ante): art 24.

4 Ibid art 23(b).

5 Ibid art 23(c).

6 For the meaning of 'parental responsibility' see para 788 note 6 ante.

7 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 23(d).

8 Ibid art 23(e).

9 As to habitual residence see para 806 post.

10 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 23(f).

11 Ie the procedure laid down in ibid art 56.

12 Ibid art 23(g).

13 Ibid art 21(3).

14 'Member state of origin' means the member state where the judgment to be enforced was issued: ibid art 2(5).

15 Ibid art 24.

16 Ibid art 26. See also *Re S (Brussels II: recognition: best interests of child)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571, sub nom *Re M (a child) (jurisdiction: foreign contact order)* [2003] All ER (D) 135 (Dec).



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### **795. Enforcement.**

A judgment on the exercise of parental responsibility<sup>1</sup> in respect of a child made in one member state<sup>2</sup> which is enforceable in that member state and has been served must be enforced in another member state when, on the application of any interested party, it can be declared enforceable there<sup>3</sup>. However, in the United Kingdom, such a judgment may be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom<sup>4</sup>.

The procedure for seeking registration and for the enforcement of such orders in England and Wales is governed by the Family Proceedings Rules<sup>5</sup>. Applications must be made to the Family Division in the High Court<sup>6</sup> and must be filed at the principal registry<sup>7</sup>. Applications can be made for and declarations given of partial enforcement<sup>8</sup>. Applicants who, in the member state of origin<sup>9</sup>, benefited from complete or partial legal aid are entitled to benefit from the most favourable legal aid provided by the law of the member state addressed<sup>10</sup>. Applicants may also be assisted by central authorities<sup>11</sup>. Parties may appeal against any decision on an enforcement application<sup>12</sup>.

At no point during the enforcement process can a court review a decision as to its substance<sup>13</sup>. The application may only be refused for one of a limited number of reasons<sup>14</sup>:

- 1488 (1) if such recognition is manifestly contrary to the public policy of the member state in which recognition is being sought, taking into account the best interests of the child<sup>15</sup>;
- 1489 (2) if it was given, except in case of urgency, without the child having been given an opportunity to be heard<sup>16</sup>;
- 1490 (3) where it was given in default of appearance, if the person in default was not served with the relevant documents instituting proceedings in sufficient time and in such a way as to enable that person to arrange for his defence, unless it is determined that such person has accepted the judgment unequivocally<sup>17</sup>;
- 1491 (4) on the request of any person claiming that the judgment infringes his parental responsibility, if it was given without such person having been given an opportunity to be heard<sup>18</sup>;
- 1492 (5) if it is irreconcilable with a later judgment relating to parental responsibility given in the member state in which recognition is being sought<sup>19</sup>;
- 1493 (6) if it is irreconcilable with a later judgment relating to parental responsibility given in another member state or in the non-member state of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the member state in which recognition is sought<sup>20</sup>; or
- 1494 (7) if the procedure for a proposed placement of a child in institutional care or with a foster family in another member state<sup>21</sup> has not been complied with<sup>22</sup>.

These are the only grounds for refusing enforcement. There is no variation power, although the court does have limited discretion to 'phase in' the foreign order<sup>23</sup>.

In exercising the enforcement powers, the child's welfare is not the paramount or even the primary consideration<sup>24</sup>.

Where a party wishes to enforce an order made in England and Wales in another member state, applications for a certified copy of the judgment sought to be enforced must be made to the court that made the order<sup>25</sup>. Applications should be made on a witness statement or an affidavit without notice being served on any other party<sup>26</sup>.

1 For the meaning of 'parental responsibility' see para 788 note 6 ante.

2 For the meaning of 'member state' see para 788 note 4 ante.

3 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 28(1).

4 Ibid art 28(2). An application for registration of a judgment under art 28(2) must be made without notice being served on any other party: Family Proceedings Rules 1991, SI 1991/1247, r 7.42. As to the evidence in support of an application see r 7.43.

5 See ibid Ch 5 (rr 7.40-10.27) (as amended): see CONFLICT OF LAWS vol 8(3) (Reissue) para 273 et seq.

6 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) arts 29, 68.

7 Family Proceedings Rules 1991, SI 1991/1247, r 7.41 (added by SI 2001/821; and amended by SI 2005/2922). The 'principal registry' means the Principal Registry of the Family Division: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

8 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 36.

9 For the meaning of 'member state of origin' see para 794 note 14 ante.

10 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 50.

11 See ibid art 53; and para 797 post.

12 See ibid art 33.

13 Ibid art 31(3).

14 See ibid art 31(2).

15 Ibid art 23(a). The test of public policy set out in art 23(a) may not be applied to the rules relating to jurisdiction set out in arts 3-14 (see paras 789-793 ante): art 24.

16 Ibid art 23(b).

17 Ibid art 23(c).

18 Ibid art 23(d).

19 Ibid art 23(e).

20 Ibid art 23(f).

21 See the procedure laid down in ibid art 56.

22 Ibid art 23(g).

23 *Re S (Brussels II: recognition: best interests of child) (No 2)* [2003] EWHC 2974 (Fam) at [14], [2004] 1 FLR 582 at [14], sub nom *Re M (a child) (jurisdiction: foreign contact order)* [2003] All ER (D) 136 (Dec) at [14] per Holman J.

24 *Re S (Brussels II: recognition: best interests of child) (No 2)* [2003] EWHC 2974 (Fam) at [13], [2004] 1 FLR 582 at [13], sub nom *Re M (a child) (jurisdiction: foreign contact order)* [2003] All ER (D) 136 (Dec) at [13] per Holman J.

25 See the Family Proceedings Rules 1991, SI 1991/1247, r 7.49(1) (added by SI 2001/821; and amended by SI 2005/264). See also the Family Proceedings Rules 1991, SI 1991/1247, r 7.50.

26 See *ibid* r 7.49(1) (added by SI 2001/821; and amended by SI 2005/264).

## **UPDATE**

### **795 Enforcement**

NOTE 3--See Case C-195/08P *Rinau v Rinau* [2009] 2 WLR 972, [2008] 3 FCR 370, ECJ (enforceability of decision potentially tainted by procedural impropriety).

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## **796. Access rights.**

A decision on rights of access<sup>1</sup> issued in one member state<sup>2</sup> is directly recognised and enforceable in another member state if it is accompanied by a certificate<sup>3</sup>. The judge of origin may only issue a certificate (in a standard form<sup>4</sup>) where all parties, including the child (unless it was considered inappropriate having regard to his age or degree of maturity), have been given the opportunity to be heard<sup>5</sup>. In the case of a judgment given in default, the person defaulting must have been served with the document instituting proceedings in due time to arrange for his defence or, if not, it is nevertheless established that he accepted the decision unequivocally<sup>6</sup>. Where the rights of access involve a cross-border situation at the time of delivery of the judgment, the certificate must be issued ex officio when the judgment becomes enforceable, even if only provisionally<sup>7</sup>. If the situation subsequently acquires a cross-border character, the certificate must be issued at the request of one of the parties<sup>8</sup>. It is not possible to appeal against the issuing of a certificate<sup>9</sup>, although it is possible to seek rectification in cases of error<sup>10</sup>.

The Brussels IIR Regulation<sup>11</sup> supersedes the European Convention<sup>12</sup> as between member states<sup>13</sup>. For cases where there is an access order in favour of a particular party, applications can be made under the Brussels IIR Regulation and under the Hague Convention<sup>14</sup> to seek the help of central authorities<sup>15</sup>. For cases involving rights of access not based on a court order, applications must still be made under the Hague Convention<sup>16</sup>. The courts of the member state of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the member state having jurisdiction as to the substance of the matter and provided the essential elements of the judgment are respected<sup>17</sup>. Such practical arrangements cease to apply pursuant to a later judgment by the courts of the member state having jurisdiction as to the substance of the matter<sup>18</sup>.

1    Ie the rights of access referred to in EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), art 40(1)(a). For the meaning of 'rights of access' see para 788 note 6 ante.

2    For the meaning of 'member state' see para 788 note 4 ante.

3    See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 41.

4    Ie the standard form in *ibid* art 41, Annex III. In England and Wales the court will serve a certificate under art 41 on all parties and the central authority of England and Wales: see the Family Proceedings Rules 1991, SI 1991/1247, r 7.51 (added by SI 2005/264); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21N (added by SI 2005/229). The central authority of England and Wales must keep a register of all certificates so issued: Family Proceedings Rules 1991, SI 1991/1247, r 7.52 (added by SI 2005/264).

5    See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 41(2)(b), (c).

6    See *ibid* art 41(2)(a).

7    *Ibid* art 41(3).

8    *Ibid* art 41(3).

9    See *ibid* art 43.

10 The procedure in the High Court and county court is set out in the Family Proceedings Rules 1991, SI 1991/1247, r 7.55 (added by SI 2005/264) and the procedure in the family proceedings courts is set out in the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 21P (added by SI 2005/229).

11 *Ie* EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29).

12 *Ie* the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). See paras 818-826 *post*.

13 *Ie* unless the concept of access orders are thought to be different.

14 See the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) art 21. See paras 805-817 *post*.

15 See paras 797 and 803 *post*. An advantage of the central authorities established under the Brussels IIR Regulation is that they involve no cost to the applicant. They have been established to facilitate agreement between the holders of parental responsibility through mediation or other means and to facilitate cross-border co-operation to this end.

16 See the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) art 21. See paras 805-817 *post*.

17 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 48(1).

18 *Ibid* art 48(2).

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### **797. Central authorities.**

Each member state<sup>1</sup> must designate one or more central authorities to assist with the application of the Brussels IIR Regulation<sup>2</sup> and must specify the geographical or functional jurisdiction of each<sup>3</sup>. In the United Kingdom, the central authorities which were established under the Hague Convention<sup>4</sup> also act as the authorities for the Brussels IIR Regulation. The central authorities must communicate information on national laws and procedures and take measures to improve the application of the Brussels IIR Regulation and to strengthen their co-operation<sup>5</sup>. The European Judicial Network in civil and commercial matters<sup>6</sup> must be used, it being intended that there should be regular meetings to facilitate good practice<sup>7</sup>. Upon the request from a central authority of another member state or from a holder of parental responsibility, the central authorities must co-operate on specific cases to achieve the purposes of the Brussels IIR Regulation<sup>8</sup>. They must take all appropriate steps to collect and exchange information on the situation of the child, on any procedures under way or on decisions taken concerning the child, provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child, and facilitate communications between courts<sup>9</sup>. They must also facilitate agreement between holders of parental responsibility through mediation or other means and facilitate cross-border co-operation to this end<sup>10</sup>. Any holder of parental responsibility may submit to the central authority of the member state of his habitual residence<sup>11</sup> or to the central authority of the member state where the child is habitually resident or present a request for assistance<sup>12</sup>. The assistance provided by the central authorities is free of charge<sup>13</sup>.

1 For the meaning of 'member state' see para 788 note 4 ante.

2 Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

3 Ibid art 53.

4 Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33). See para 803 post.

5 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 54.

6 Ie as created by EC Decision 2001/470 (OJ L174, 27.6.2001, pp 25-31) establishing a European Judicial Network in civil and commercial matters.

7 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 58.

8 Ibid art 55.

9 Ibid art 55.

10 Ibid art 55.

11 As to habitual residence see para 806 post.

12 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 57(1).

13 Ibid art 57(3).

**UPDATE**

**797 Central authorities**

NOTE 6--Decision 2001/470 amended: European Parliament and EC Council Decision 568/2009 (OJ L168, 30.6.2009, p 35).

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### **798. Inter-relationship between the Brussels IIR Regulation and the Conventions.**

The Brussels IIR Regulation<sup>1</sup> takes precedence over the European Convention<sup>2</sup> in so far as it concerns matters governed by the Regulation<sup>3</sup>. Applications to enforce any custody order made in a member state (other than Denmark) should therefore be made under the Brussels IIR Regulation. Effectively applications under the European Convention will be limited to those concerned with enforcing custody orders made in contracting states that are not member states of the European Union (and Denmark).

The Brussels IIR Regulation takes precedence over the Hague Convention<sup>4</sup> in so far as it concerns matters governed by the Regulation<sup>5</sup>. It governs cases where a court refuses to make a return order under the Hague Convention and also gives some guidance on how the Hague Convention should be applied as between member states<sup>6</sup>. When an application is made for a return under the Hague Convention<sup>7</sup>, it must be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age or degree of maturity<sup>8</sup>. The court must deal with the case expeditiously and, save where exceptional circumstances makes this impossible, it must issue its judgment no later than six weeks after the application is lodged<sup>9</sup>. A court cannot refuse to return a child on the basis that there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation<sup>10</sup> if it is established that adequate arrangements have been made to secure the protection of the child after his return<sup>11</sup>. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard<sup>12</sup>. If a court has issued an order on non-return<sup>13</sup>, the court must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or the central authority in the member state where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law<sup>14</sup>. The court must receive all the documents<sup>15</sup> within one month of the non-return order<sup>16</sup>.

1    Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

2    Ie the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). See paras 818-826 post.

3    See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 60(d).

4    Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33). See paras 805-817 post.

5    See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 60(e). See further *Re T and J (children) (abduction: recognition of foreign judgment)* [2006] EWHC 1472 (Fam), [2006] 3 FCR 363, [2006] 2 FLR 1290.

6    See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11.

7    Ie when applying the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) arts 12, 13 (see paras 805-817 post). The judicial or administrative authorities must



order a return forthwith if an application is brought within one year of a wrongful removal or retention subject to the exceptions provided for by art 13: see art 12; and para 810 post.

8 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(2). A child will not usually be permitted to be joined as a party save in a situation where the child's views and interests might not be properly presented to the court, in particular if there are legal arguments which the adult parties are not putting forward; in most cases an interview with an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') (see para 230 ante) will be sufficient: see *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, sub nom *Re D (a child) (abduction: foreign custody rights)* [2007] 1 FCR 1; *Re M (a minor) (abduction: child's objection to return)* [1995] 1 FCR 170, [1994] 2 FLR 126, CA; *Re S (abduction) (children: separate representation)* [1997] 2 FCR 342, [1997] 1 FLR 486; *Re HB (abduction: children's objections to return)* [1998] 1 FCR 398, [1998] 1 FLR 422, CA; *Re P (abduction: minor's views)* [1999] 1 FCR 739, [1998] 2 FLR 825, CA; *Re J (children) (abduction: child's objection to return)* [2004] EWCA Civ 428, [2004] 1 FCR 737, [2004] 2 FLR 64; *Re R (abduction: immigration concerns)* [2004] EWHC 2042 (Fam), [2005] 1 FLR 33; *S v B (abduction: human rights)* [2005] EWHC 733 (Fam), [2005] 2 FLR 878, [2005] Fam Law 610; *Re H (a child: child abduction)* [2006] EWCA Civ 1247, [2007] 1 FCR 345, [2007] 1 FLR 242; *Re D (a child) (abduction: rights of custody)* supra. Where a child's views are to be ascertained a CAFCASS officer will be appointed to undertake the inquiry: see *Re M (minors) (child abduction)* [1994] 2 FCR 750, [1994] 1 FLR 390, CA; *Re P (abduction: minor's views)* [1999] 1 FCR 739, [1998] 2 FLR 825, CA; *Re J (children) (abduction: children's objections to return)* [2004] EWCA Civ 428, [2004] 1 FCR 737, [2004] 2 FLR 64; *Re J and K (abduction: objections of child)* [2004] EWHC 1985 (Fam), [2005] Fam Law 105; *Z v Z (abduction: children's views)* [2005] EWCA Civ 1012, [2006] 1 FCR 387, sub nom *Zaffino v Zaffino (abduction: children's views)* [2006] 1 FLR 410; *Re H (a child: child abduction)* supra. See also *Re F (abduction: child's wishes) (No 2)* [2007] EWCA Civ 468, [2007] Fam Law 677, sub nom *Re F (a child) (abduction: obligation to hear child)* [2007] All ER (D) 452 (Mar).

9 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(3). This may entail other cases being removed from the court lists: see *Vigreux v Michel* [2006] EWCA Civ 630, [2007] 3 FCR 196, [2006] 2 FLR 1180. Failure to deal with abduction proceedings expeditiously may involve violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); (Cmd 8969) art 8: see paras 818-826 post. As to cases involving proceedings under the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) see *Ignaccolo-Zenide v Romania* (Application 31679/96) (2000) 31 EHRR 212, ECtHR; *Nuutinen v Finland* (Application 32842/96) (2002) 34 EHRR 358, ECtHR; *Sylvester v Austria* (Applications 36812/97 and 40104/98) [2003] 2 FCR 128, [2003] 2 FLR 210, ECtHR; *HN v Poland* (Application 77710/01) [2005] 3 FCR 85, ECtHR; *Gil and Aul v Spain* (Application 56673/00) [2005] 1 FCR 210, [2005] 1 FLR 190, ECtHR; *Iosub Caras v Romania* (Application 7198/04) [2007] 1 FLR 661, [2006] 3 FCR 130, ECtHR; *Karadzic v Croatia* (Application 35030/04) [2006] 1 FCR 36, ECtHR; *Bajrami v Albania* (Application No 35853/04) [2007] 1 FCR 91, [2007] 1 FLR 1629, ECtHR.

10 Ie under the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) art 13(b) (see para 811 post).

11 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(4). In return applications made in England and Wales, the originating summons must identify any details of measures taken by courts or authorities to ensure the protection of the child after its return to the member state of habitual residence of which the applicant is aware. Family Proceedings Rules 1991, SI 1991/1247, r 6.4(3) (added by SI 2005/264).

12 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(5). The usual practice of the courts has been to limit the evidence; and, in particular, there is no right to give oral evidence, although the court has a discretion to admit evidence which is used sparingly: *Re E (a minor) (abduction)* [1989] 1 FLR 135, [1989] Fam Law 105, CA; *Re AF (a minor: abduction)* [1992] 1 FCR 269, sub nom *Re F (a minor: child abduction)* [1992] 1 FLR 548, CA; *Re B (minors) (abduction) (No 2)* [1993] 1 FLR 993; *Re K (abduction: consent)* [1998] 1 FCR 311, [1997] 2 FLR 212; *Re R (abduction: immigration concerns)* [2004] EWHC 2042 (Fam), [2005] 1 FLR 33; *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366, [2004] 3 FCR 559, sub nom *Re W (abduction: domestic violence)* [2005] 1 FLR 727.

13 Ie pursuant to the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) art 13 (see para 811 post).

14 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(6).

15 Unless the courts in the member state where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(6) must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child: art 11(7). Without prejudice to the rules on jurisdiction contained within the Regulation, the court must close the case if no submissions have been received by the court within the time limit: art 11(7).

16 Ibid art 11(6). If a written judgment is not available then a transcript of the extempore judgment should be made available which has been approved by the judge: *Re M (a child)* [2006] EWCA Civ 630, sub nom *Vigreux v Michel Vigreux v Michel* [2006] EWCA Civ 630, [2007] 3 FCR 196, [2006] 2 FLR 1180.

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## **(4) CHILD ABDUCTION AND THE INTERNATIONAL CONVENTIONS**

### **(i) Introduction**

#### **799. The legislation.**

The Child Abduction and Custody Act 1985 gives effect to two international Conventions which make provision for the recovery of children under the age of 16 who have been wrongfully removed or retained and for the enforcement of decisions relating to custody of, or contact with, children<sup>1</sup>. Those Conventions are:

- 1495 (1) the Convention on the Civil Aspects of International Child Abduction, signed at the Hague on 25 October 1980 ('the Hague Convention')<sup>2</sup>; and
- 1496 (2) the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children, signed at Luxembourg on 20 May 1980 ('the European Convention')<sup>3</sup>.

The underlying principle of both Conventions is that it is in the interests of children that parents and others should not abduct them from one jurisdiction to another, and that any decision relating to the custody of children is best decided in the jurisdiction of their habitual residence<sup>4</sup>. Both Conventions envisage a summary procedure facilitating prompt decisions, achieved by minimising the need to consider foreign law and providing for limited defences to a child's return. The main conceptual difference between the two Conventions is that the Hague Convention is based upon the wrongful removal or retention of a child in breach of rights of custody (whether or not any court order had been made to determine or give effect to those rights), whereas the European Convention seeks to facilitate the recognition and enforcement of decisions relating to the custody of a child. Both Conventions, subject to certain provisions, have the force of law in the United Kingdom<sup>5</sup>. Countries within the European Union (save for Denmark) were subject to the Brussels II Regulation<sup>6</sup> from 1 March 2001 and subject to the Brussels IIR Regulation<sup>7</sup> from 1 March 2005. Where these Regulations apply they take precedence over the European Convention<sup>8</sup>. The Brussels IIR Regulation takes precedence over the Hague Convention in relation to the countries where it applies<sup>9</sup>.

There are important distinctions between the two Conventions<sup>10</sup> and the Conventions are accordingly considered separately in this title<sup>11</sup>. However, the provisions of the Child Abduction and Custody Act 1985 dealing with the territorial scope of the Conventions, and with the creation of central authorities, together with certain other common provisions, are considered together<sup>12</sup>.

1 See the Child Abduction and Custody Act 1985 ss 1, 12. The Conventions are scheduled to the Child Abduction and Custody Act 1985, and although not all articles are included in the Schedules, regard may be had to other articles not included: *Re E (a minor) (abduction)* [1989] 1 FLR 135 at 137, [1989] Fam Law 105 at 106, CA, per Balcombe LJ. See also *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476, [1991] 3 All ER 230, sub nom *Re H, Re S (abduction: custody rights)* [1991] 2 FLR 262, HL.

There is to be paid out of money provided by Parliament:

487 (1) any expenses incurred by the Lord Chancellor or the Secretary of State by virtue of the Child Abduction and Custody Act 1985 (s 26(a)); and

488 (2) any increase attributable to the Child Abduction and Custody Act 1985 in the sums so payable under any other Act (s 26(b)).

As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. As to the Secretary of State see para 155 ante.

2 Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

3 Ie the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

4 See *Re F (a minor) (abduction: custody rights)* [1991] Fam 25 at 32, [1990] 3 All ER 97 at 101, CA, per Neill LJ and Balcombe LJ (although that case involved a non-Convention country).

5 See the Child Abduction and Custody Act 1985 ss 1(2), 12(2).

6 Ie EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. See paras 788-798 ante.

7 Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. See paras 788-798 ante.

8 See *ibid* art 60(d); applied by the Child Abduction and Custody Act 1985 s 12(3) (added by European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 5; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 7). See also para 788 ante.

9 See EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 60(e); applied by the Child Abduction and Custody Act 1985 s 1 (substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 6). See also para 788 ante. For the inter-relationship between the Regulation and the Conventions see para 798 ante.

10 See *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, sub nom *Re G (a minor) (Hague Convention: access)* [1993] 1 FLR 669, CA; followed in *Re T (minors) (international child abduction: access)* [1993] 1 WLR 1461, sub nom *Re T (minors) (Hague Convention: access)* [1993] 2 FLR 617. These distinctions are reflected in the fact that effect is given to the two Conventions by different parts of the Child Abduction and Custody Act 1985: the Hague Convention is given effect by the Child Abduction and Custody Act 1985 Pt I (ss 1-11) (as amended), and the European Convention is given effect by the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended). The Hague Convention arts 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1. The European Convention arts 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2.

11 As to the Hague Convention see paras 805-817 post. As to the European Convention see paras 818-826 post.

12 See paras 802-804 post.

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## **800. Rules of court.**

An authority having power to make rules of court<sup>1</sup> may make such provision for giving effect to Part I of the Child Abduction and Custody Act 1985<sup>2</sup> as appears to that authority to be necessary or expedient<sup>3</sup>. In particular, rules of court may make provision:

- 1497 (1) with respect to the procedure on applications for the return of a child and with respect to the documents and information to be furnished and the notices to be given in connection with any such application<sup>4</sup>;
- 1498 (2) for the transfer of any such application between the appropriate courts in the different parts of the United Kingdom<sup>5</sup>;
- 1499 (3) for the giving of notices by or to a court of a wrongful removal or retention of a child for the purposes of certain provisions of the Hague Convention<sup>6</sup> and certain provisions of the Child Abduction and Custody Act 1985<sup>7</sup> and generally as respects proceedings to which those provisions apply<sup>8</sup>;
- 1500 (4) for enabling a person who wishes to make an application under the Hague Convention in a contracting state other than the United Kingdom to obtain from any court in the United Kingdom an authenticated copy of any decision of that court relating to the child to whom the application is to relate<sup>9</sup>.

An authority having power to make rules of court<sup>10</sup> may make such provision for giving effect to Part II of the Child Abduction and Custody Act 1985<sup>11</sup> as appears to that authority to be necessary or expedient<sup>12</sup>. In particular, rules of court may make provision:

- 1501 (a) with respect to the procedure on applications to a court under any provision of Part II of the Child Abduction and Custody Act 1985 and with respect to the documents and information to be furnished and the notices to be given in connection with any such application<sup>13</sup>;
- 1502 (b) for the transfer of any such application between the appropriate courts in the different parts of the United Kingdom<sup>14</sup>;
- 1503 (c) for the giving of directions requiring the disclosure of information about any child who is the subject of proceedings under Part II of the Child Abduction and Custody Act 1985<sup>15</sup> and for safeguarding its welfare<sup>16</sup>.

<sup>1</sup> The magistrates' courts rule committee and the family proceedings rule committee both have power to make rules of court for the purposes of family proceedings: see the Magistrates' Courts Act 1980 s 144 (as amended); the Matrimonial and Family Proceedings Act 1984 s 40 (as amended; prospectively repealed); the Courts Act 2003 s 75 (in force only for the purposes of making family procedure rules in respect of matters relating to adoption); and MAGISTRATES vol 29(2) (Reissue) para 588. See also COURTS.

As to magistrates' courts as family proceedings courts see para 208 note 10 ante. See further para 207 note 1 ante.

<sup>2</sup> ie the Child Abduction and Custody Act 1985 Pt I (ss 1-11) (as amended): see paras 805-817 post.

<sup>3</sup> Ibid s 10(1). As to rules which have been made under this general provision see the Magistrates' Courts (Child Abduction and Custody) Rules 1986, SI 1986/1141, r 3 (stay of proceedings pending in a magistrates' court), r 4 (dismissal of complaint), r 5 (resumption of proceedings after stay), r 6 (further stay of proceedings or dismissal of complaint).

4 Child Abduction and Custody Act 1985 s 10(2)(a). As to the rules which have been made under s 10(2)(a) see the Family Proceedings Rules 1991, SI 1991/1247, r 6.2 (amended by SI 1997/1893) (mode of application), the Family Proceedings Rules 1991, SI 1991/1247, r 6.3 (contents of originating summons: general provisions), r 6.4 (amended by SI 2005/264) (contents of originating summons: particular provisions), the Family Proceedings Rules 1991, SI 1991/1247, r 6.5 (defendants), r 6.6 (acknowledgement of service), r 6.7 (evidence), r 6.8 (hearing), r 6.9 (dispensing with service), r 6.10 (adjournment of summons), r 6.11(1), (3)-(5) (amended by SI 1994/2890; SI 2006/2080) (stay of proceedings), the Family Proceedings Rules 1991, SI 1991/1247, r 6.11A (added by SI 2005/264) (stay of proceedings under the Council Regulation), the Family Proceedings Rules 1991, SI 1991/1247, r 6.13 (interim directions), r 6.15 (revocation and variation of registered decisions). See paras 801, 822 post.

5 Child Abduction and Custody Act 1985 s 10(2)(b). As to the rules which have been made under s 10(2)(b) see the Family Proceedings Rules 1991, SI 1991/1247, r 6.12 (amended by SI 1994/2890; SI 2006/2080) (transfer of proceedings). For the meaning of 'United Kingdom' see para 102 note 7 ante.

6 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) art 16: see para 815 post.

7 I.e. the Child Abduction and Custody Act 1985 s 9 (as amended): see para 815 post.

8 Ibid s 10(2)(c). As to the rules which have been made under s 10(2)(c) see the Family Proceedings Rules 1991, SI 1991/1247, r 6.11(1), (3)-(5) (as amended: see note 4 supra) (notification of application relating to merits of custody application).

9 Child Abduction and Custody Act 1985 s 10(2)(d). As to the rules which have been made under s 10(2)(d) see the Magistrates' Courts (Child Abduction and Custody) Rules 1986, SI 1986/1141, r 8 (amended by SI 2005/617) (authenticated copy of magistrates' court order).

10 See note 1 supra.

11 I.e. the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended): see paras 818-826 post.

12 Ibid s 24(1).

13 Ibid s 24(2)(a). As to the rules which have been made under s 24(2)(a) see the Magistrates' Courts (Child Abduction and Custody) Rules 1986, SI 1986/1141, r 7 (notice of registration of order in respect of child), r 9 (application for declaration of unlawful removal of a child); and the Family Proceedings Rules 1991, SI 1991/1247, r 6.2 (as amended: see note 4 supra) (mode of application), r 6.3 (contents of originating summons: general provisions), r 6.4 (as amended: see note 4 supra) (contents of originating summons: particular provisions), r 6.5 (defendants), r 6.6 (acknowledgement of service), r 6.7 (evidence), r 6.8 (hearing), r 6.9 (dispensing with service), r 6.10 (adjournment of summons), r 6.11(2)-(5) (as amended: see note 4 supra) (stay of proceedings), r 6.13 (interim directions), r 6.15 (revocation and variation of registered decisions).

14 Child Abduction and Custody Act 1985 s 24(2)(b). As to the rules which have been made under s 24(2)(b) see the Family Proceedings Rules 1991, SI 1991/1247, r 6.12 (amended by SI 1994/2890; SI 2006/2080) (transfer of proceedings).

15 See note 11 supra.

16 Child Abduction and Custody Act 1985 s 24(2)(c). As to the rules which have been made under s 24(2)(c) see the Family Proceedings Rules 1991, SI 1991/1247, r 6.16 (orders for disclosure of information).

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### **801. Rules for the procedure on applications for the return of a child.**

Except as otherwise provided<sup>1</sup>, every application under the Hague Convention<sup>2</sup> and the European Convention<sup>3</sup> must be made by originating summons and issued out of the principal registry<sup>4</sup>. The originating summons under which any application is made under the Hague Convention or the European Convention must state:

- 1504 (1) the name and date of birth of the child in respect of whom the application is made<sup>5</sup>;
- 1505 (2) the names of the child's parents or guardians<sup>6</sup>;
- 1506 (3) the whereabouts or suspected whereabouts of the child<sup>7</sup>;
- 1507 (4) the interest of the plaintiff in the matter and the grounds of the application<sup>8</sup>; and
- 1508 (5) particulars of any proceedings (including proceedings out of the jurisdiction and concluded proceedings) relating to the child<sup>9</sup>.

In applications under the Hague Convention, in addition to the matters specified in heads (1) to (5) above:

- 1509 (a) the originating summons under which an application is made for the purposes of the return of a child<sup>10</sup> must state the identity of the person alleged to have removed or retained the child and, if different, the identity of the person with whom the child is presumed to be<sup>11</sup>;
- 1510 (b) the originating summons under which an application is made for the purposes of a declaration<sup>12</sup> must identify the proceedings in which the request that such a declaration be obtained was made<sup>13</sup>.

In applications under the European Convention, in addition to the matters specified in heads (1) to (5) above the originating summons must identify the decision relating to custody or rights of access which is sought to be registered or enforced or in relation to which a declaration that it is not to be recognised is sought<sup>14</sup>.

Where the application is one to which the Brussels IIR regulation<sup>15</sup> also applies, in addition to the matters in heads (1) to (5) above, the originating summons must also identify:

- 1511 (i) any details of measures taken by courts or authorities to ensure the protection of the child after its return to the member state of habitual residence of which the applicant is aware<sup>16</sup>; and
- 1512 (ii) details of any person with parental responsibility who is not already listed<sup>17</sup>.

An application in custody proceedings for a declaration under the Child Abduction and Custody Act 1985<sup>18</sup> must be made by summons in those proceedings<sup>19</sup>. However, the court may dispense with service of any summons (whether originating or ordinary) in any proceedings under that Act<sup>20</sup>.

Any application under the Child Abduction and Custody Act 1985, other than an application:

- 1513 (A) to join a defendant<sup>21</sup>;
- 1514 (B) to dispense with service or extend the time for acknowledging service; or
- 1515 (C) for the transfer of proceedings,

must be heard and determined by a judge and dealt with in chambers unless the court otherwise directs<sup>22</sup>.

In certain circumstances<sup>23</sup> an application for interim directions may where the case is one of urgency be made ex parte on affidavit but must otherwise be made by summons<sup>24</sup>.

1 le except as otherwise provided by the Family Proceedings Rules 1991, SI 1991/1247, Pt VI (rr 6.1-6.18).

2 le the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33). A party to proceedings under the Hague Convention must, where he knows that an application relating to the merits of rights of custody is pending in or before a relevant authority, file in the principal registry a concise statement of the nature of the application which is pending, including the authority before which it is pending: Family Proceedings Rules 1991, SI 1991/1247, r 6.11(1). On receipt of such a statement the proper officer must notify the relevant authority in which or before whom the application is pending and subsequently notify it or him of the result of the proceedings: see r 6.11(3). On the court receiving such notification:

489 (1) where the application relates to the merits of rights of custody, all further proceedings in the action must be stayed unless and until the proceedings under the Hague Convention are dismissed, and the parties to the action must be notified by the proper officer of the stay and of any such dismissal accordingly (Family Proceedings Rules 1991, SI 1991/1247, r 6.11(4)(a) (amended by SI 1994/2890; SI 2006/2080)); and

490 (2) where the application is such a one as is specified in the Child Abduction and Custody Act 1985 s 20(2) (see para 822 post), the proper officer must notify the parties to the action (Family Proceedings Rules 1991, SI 1991/1247, r 6.11(4)(b)).

For the meaning of 'relevant authority' for these purposes see r 6.11(5) (amended by SI 1994/2890; SI 2006/2080). For these purposes 'proper officer' means:

491 (a) in relation to the principal registry, the family proceedings department manager (Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 1997/1056)); and

492 (b) in relation to any other court or registry, the court manager (Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 1997/1056)),

or another officer of the court or registry acting on his behalf in accordance with directions given by the Lord Chancellor (Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1)). For the meaning of 'principal registry' see para 795 note 7 ante.

3 le the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

4 Family Proceedings Rules 1991, SI 1991/1247, r 6.2(1) (amended by SI 1997/1893). The hearing of the originating summons under which an application under the Hague Convention or the European Convention is made may be adjourned for a period not exceeding 21 days at any one time: Family Proceedings Rules 1991, SI 1991/1247, r 6.10. The time limited for acknowledging service of an originating summons by which an application is made under the Hague Convention or the European Convention is seven days after service of the originating summons (including the day of service) or, in the case of a defendant referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 6.5(d) or (e) (see note 21 infra), such further time as the court may direct: r 6.6.

The plaintiff, on issuing an originating summons under the Hague Convention or the European Convention, may lodge affidavit evidence in the principal registry in support of his application and serve a copy of the same on the defendant with the originating summons: Family Proceedings Rules 1991, SI 1991/1247, r 6.7(1). A defendant to an application under the Hague Convention or the European Convention may lodge affidavit evidence in the principal registry and serve a copy of the same on the plaintiff within seven days after service of the originating summons on him: Family Proceedings Rules 1991, SI 1991/1247, r 6.7(2). The plaintiff in an application under the Hague Convention or the European Convention may within seven days thereafter lodge in the principal registry a statement in reply and serve a copy thereof on the defendant: Family Proceedings Rules 1991, SI 1991/1247, r 6.7(3).



As to the application of r 4.27A (as added) (stay under the Council Regulation) to proceedings under the Family Proceedings Rules 1991, SI 1991/1247, Pt VI see r 6.11A (added by SI 2005/264).

5 Family Proceedings Rules 1991, SI 1991/1247, r 6.3(1)(a).

6 Ibid r 6.3(1)(b).

7 Ibid r 6.3(1)(c).

8 Ibid r 6.3(1)(d).

9 Ibid r 6.3(1)(e). Such particulars must be accompanied by all relevant documents including but not limited to the documents specified in the Hague Convention art 8 (see para 809 post) or, as the case may be, the European Convention art 13 (see para 811 post).

10 Ie under the Hague Convention art 8 (see para 809 post).

11 Family Proceedings Rules 1991, SI 1991/1247, r 6.4(1)(a).

12 Ie under the Hague Convention art 15 (see para 808 post).

13 Family Proceedings Rules 1991, SI 1991/1247, r 6.4(1)(b).

14 Ibid r 6.4(2).

15 Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

16 Family Proceedings Rules 1991, SI 1991/1247, r 6.4(3)(a) (added by SI 2005/264).

17 Family Proceedings Rules 1991, SI 1991/1247, r 6.4(3)(b) (added by SI 2005/264). The text refers to a person who is not already listed in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 6.3 (see the text and notes 5-9 supra).

18 Ie under the Child Abduction and Custody Act 1985 s 23(1) (see para 819 post).

19 Family Proceedings Rules 1991, SI 1991/1247, r 6.2(2).

20 Ibid r 6.9.

21 The defendants to an application under the Child Abduction and Custody Act 1985 are:

493 (1) the person alleged to have brought into the United Kingdom the child in respect of whom an application under the Hague Convention is made (Family Proceedings Rules 1991, SI 1991/1247, r 6.5(a));

494 (2) the person with whom the child is alleged to be (r 6.5(b));

495 (3) any parent or guardian of the child who is within the United Kingdom and is not otherwise a party (r 6.5(c));

496 (4) the person in whose favour a decision relating to custody has been made if he is not otherwise a party (r 6.5(d)); and

497 (5) any other person who appears to the court to have a sufficient interest in the welfare of the child (r 6.5(e)).

22 Ibid r 6.8.

23 Ie under the Child Abduction and Custody Act 1985 s 5 (see para 810 post) or s 19 (see para 822 post).

24 Family Proceedings Rules 1991, SI 1991/1247, r 6.13.

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## **802. Countries in relation to which the Conventions have effect.**

The Hague Convention<sup>1</sup> and the European Convention<sup>2</sup> have effect in respect of contracting states. For the purposes of the Conventions, as they have effect under the relevant parts of the Child Abduction and Custody Act 1985<sup>3</sup>, the contracting states other than the United Kingdom are those for the time being specified by Order in Council<sup>4</sup>. Orders in Council in relation to either Convention must specify the date of the coming into force of the Convention as between the United Kingdom and any state specified in the order<sup>5</sup>. Where the Convention in question applies, or applies only, to a particular territory or particular territories specified by a contracting state, references to that state<sup>6</sup> are to be construed as references to that territory or those territories<sup>7</sup>.

The Child Abduction and Custody Act 1985 extends to Northern Ireland<sup>8</sup>. Her Majesty may by Order in Council<sup>9</sup> direct that any of the provisions of the Child Abduction and Custody Act 1985 specified in the order are to extend, subject to such modifications as may be specified in the Order, to:

- 1516 (1) the Isle of Man<sup>10</sup>;
- 1517 (2) any of the Channel Islands<sup>11</sup>; and
- 1518 (3) any colony<sup>12</sup>.

Her Majesty may by Order in Council direct that the Child Abduction and Custody Act 1985 is to have effect in the United Kingdom as if any reference in the Child Abduction and Custody Act 1985, or in any amendment made by it, to any order which may be made, or any proceedings which may be brought or any other thing which may be done in, or in any part of, the United Kingdom included a reference to any corresponding order which may be made or, as the case may be, proceedings which may be brought or other thing which may be done in any of the territories mentioned in heads (1) to (3) above<sup>13</sup>.

1    Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

2    Ie the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

3    Ie under the Child Abduction and Custody Act 1985 Pt I (ss 1-11) (as amended) in respect of the Hague Convention, and under the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended) in respect of the European Convention.

4    Child Abduction and Custody Act 1985 ss 2(1), 13(1).

At the date at which this volume states the law the Child Abduction and Custody (Parties to Conventions) Order 1986, SI 1986/1159, art 2, Sch 1 (substituted by SI 2005/1260) lists the following as the contracting states to the Hague Convention:

- 498 (1) Argentina;
- 499 (2) Australia (Australian States and mainland territories);
- 500 (3) Austria;

- 501 (4) The Bahamas;
- 502 (5) Belarus;
- 503 (6) Belgium;
- 504 (7) Belize;
- 505 (8) Bosnia and Herzegovina;
- 506 (9) Brazil;
- 507 (10) Burkina Faso;
- 508 (11) Canada (Ontario, New Brunswick, British Columbia, Manitoba, Nova Scotia, Newfoundland, Prince Edward Island, Quebec, Yukon Territory, Saskatchewan, Alberta, Northwest Territories);
- 509 (12) Chile;
- 510 (13) China (Hong Kong Special Administrative Region, Macau Special Administrative Region);
- 511 (14) Colombia;
- 512 (15) Croatia;
- 513 (16) Cyprus;
- 514 (17) Czech Republic;
- 515 (18) Denmark;
- 516 (19) Ecuador;
- 517 (20) Estonia;
- 518 (21) Fiji;
- 519 (22) Finland;
- 520 (23) France;
- 521 (24) Georgia;
- 522 (25) Germany;
- 523 (26) Greece;
- 524 (27) Honduras;
- 525 (28) Hungary;
- 526 (29) Iceland;
- 527 (30) Republic of Ireland;
- 528 (31) Israel;
- 529 (32) Italy;
- 530 (33) Latvia;
- 531 (34) Lithuania;
- 532 (35) Luxembourg;
- 533 (36) Macedonia;
- 534 (37) Malta;

- 535 (38) Mauritius;
- 536 (39) Mexico;
- 537 (40) Monaco;
- 538 (41) Netherlands;
- 539 (42) New Zealand;
- 540 (43) Norway;
- 541 (44) Panama;
- 542 (45) Peru;
- 543 (46) Poland;
- 544 (47) Portugal;
- 545 (48) Romania;
- 546 (49) St Kitts and Nevis;
- 547 (50) Serbia and Montenegro;
- 548 (51) Slovakia;
- 549 (52) Slovenia;
- 550 (53) South Africa;
- 551 (54) Spain;
- 552 (55) Sweden;
- 553 (56) Switzerland;
- 554 (57) Turkey;
- 555 (58) Turkmenistan;
- 556 (59) United States of America;
- 557 (60) Uruguay;
- 558 (61) Uzbekistan;
- 559 (62) Venezuela;
- 560 (63) Zimbabwe.

At the date at which this volume states the law the Child Abduction and Custody (Parties to Conventions) Order 1986, SI 1986/1159, art 3, Sch 2 (substituted by SI 2005/1260) lists the following as the contracting states to the European Convention:

- 561 (a) Austria;
- 562 (b) Belgium;
- 563 (c) Bulgaria;
- 564 (d) Cyprus;
- 565 (e) Czech Republic;
- 566 (f) Denmark;

- 567 (g) Estonia;
- 568 (h) Finland;
- 569 (i) France;
- 570 (j) Germany;
- 571 (k) Greece;
- 572 (l) Hungary;
- 573 (m) Iceland;
- 574 (n) Republic of Ireland;
- 575 (o) Italy;
- 576 (p) Latvia;
- 577 (q) Liechtenstein;
- 578 (r) Lithuania;
- 579 (s) Luxembourg;
- 580 (t) Macedonia;
- 581 (u) Malta;
- 582 (v) Moldova;
- 583 (w) Netherlands;
- 584 (x) Norway;
- 585 (y) Poland;
- 586 (z) Portugal;
- 587 (aa) Romania;
- 588 (bb) Serbia and Montenegro;
- 589 (cc) Slovakia;
- 590 (dd) Spain;
- 591 (ee) Sweden;
- 592 (ff) Switzerland;
- 593 (gg) Turkey.

5 Child Abduction and Custody Act 1985 ss 2(2), 13(2). In the case of the Hague Convention it is also provided that, except where the Order in Council otherwise provides, the Convention applies as between the United Kingdom and the state in question only in relation to wrongful removals or retentions occurring on or after that date: Child Abduction and Custody Act 1985 s 2(2). See *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476, [1991] 3 All ER 230, sub nom *Re H, Re S (abduction: custody rights)* [1991] 2 FLR 262, HL; *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476, [1991] 1 All ER 836, CA. However, under the European Convention an order which is subsisting at the time of the application is enforceable, notwithstanding the fact that the order was made prior to ratification: *Re L (child abduction: European Convention)* [1992] 2 FLR 178, [1992] Fam Law 379. As to wrongful removals or retentions see para 808 post.

6 le in the Child Abduction and Custody Act 1985 ss 2(1), (2), 13(1), (2): see the text and notes 4-5 supra.

7 Ibid ss 2(3), 13(3).

8 Ibid s 29(3).

9 An Order in Council under *ibid* s 28 is subject to annulment in pursuance of a resolution of either House of Parliament: s 28(4). An Order in Council under s 28 may make such consequential, incidental and supplementary provision as Her Majesty considers appropriate: s 28(3).

10 Ibid s 28(1)(a).

11 Ibid s 28(1)(b).

12 Ibid s 28(1)(c). The following orders have been made under s 28(1)(c): the Child Abduction and Custody (Falkland Islands) Order 1996, SI 1996/3156; and the Child Abduction and Custody (Cayman Islands) Order 1997, SI 1997/2574. These orders provide that the Child Abduction and Custody Act 1985 ss 1-24 (as amended), s 24A (as added), ss 25(1), (2), 27 (as amended), Schs 1-3 (as amended) apply with modifications to the Falkland Islands and to the Cayman Islands: see the Child Abduction and Custody (Falkland Islands) Order 1996, SI 1996/3156, art 2; and the Child Abduction and Custody (Cayman Islands) Order 1997, SI 1997/2574, art 2.

13 Child Abduction and Custody Act 1985 s 28(2). The following orders have been made under s 28(2): the Child Abduction and Custody Act 1985 (Isle of Man) Order 1994, SI 1994/2799 and the Child Abduction and Custody Act 1985 (Jersey) Order 2006, SI 2006/1917. These orders provide that the Child Abduction and Custody Act 1985 has effect in the United Kingdom as if any reference in the Act to any order which may be made, or any proceedings which may be brought or any other thing which may be done in, or in any part of, the United Kingdom, included a reference to any corresponding order which may be made, or as the case may be, proceedings which may be brought or other thing which may be done in the Isle of Man or in Jersey: see the Child Abduction and Custody Act 1985 (Isle of Man) Order 1994, SI 1994/2799, art 3; and the Child Abduction and Custody Act 1985 (Jersey) Order 2006, SI 2006/1917, art 2.

## **UPDATE**

### **802 Countries in relation to which the Conventions have effect**

NOTE 4--SI 1986/1159 Schs 1, 2 substituted: SI 2009/702.

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### **803. The central authority.**

The Hague Convention<sup>1</sup> and European Convention<sup>2</sup> envisage the establishment in each contracting state of a central authority with important functions<sup>3</sup>. The central authority has the duty of tracing the child and taking steps, if necessary by court proceedings, to secure the child's return or to secure access<sup>4</sup>. The functions of the central authority in England and Wales and Northern Ireland are the responsibility of the Lord Chancellor<sup>5</sup>. The duties of the central authority in England and Wales are carried out by the Child Abduction Unit which is under the administrative control of the Official Solicitor. Any application made under the Conventions by or on behalf of a person outside the United Kingdom may be addressed to the Lord Chancellor as the central authority in the United Kingdom<sup>6</sup>.

1 The Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

2 The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

3 See the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) arts 7-11 (set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1) (see paras 799 ante, 809, 813 post); the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) arts 4, 5, 15 (set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2) (see paras 819-820, 823 post). See generally *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, sub nom *Re G (a minor) (Hague Convention: access)* [1993] 1 FLR 669, CA.

4 As to the functions of the central authority see paras 809, 820 post.

5 Child Abduction and Custody Act 1985 ss 3(1), 14(1). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. The Child Abduction and Custody Act 1985 provides that the functions of a central authority are to be discharged in Scotland by the Secretary of State, but the functions conferred upon the Secretary of State as a Minister of the Crown by ss 3(1), 14(1) are now exercisable with regard to Scotland by the Scottish Ministers: see the Scotland Act 1998 s 53(1), (2).

6 Child Abduction and Custody Act 1985 ss 3(2), 14(2). Where any such application relates to a function to be discharged by the Scottish Ministers it must be transmitted by the Lord Chancellor to the Scottish Ministers, and where such an application is addressed to the Scottish Ministers but relates to a function to be discharged by the Lord Chancellor, the Scottish Ministers must transmit it to the Lord Chancellor: ss 3(3), 14(3); and see note 5 supra.

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#### **804. Further provisions common to the Conventions; interpretation.**

The following provisions apply equally to proceedings relating to the Hague Convention<sup>1</sup> and the European Convention<sup>2</sup>. First, where there is not available to the court adequate information as to where the child is, the court may order any person who it has reason to believe may have relevant information to disclose it to the court<sup>3</sup>. Secondly, any custody order<sup>4</sup> relating to the child ceases to have effect if the court makes an order for the return of the child under the Hague Convention or if a decision<sup>5</sup> with respect to the child is registered under the provisions of the Child Abduction and Custody Act 1985<sup>6</sup>.

The legislation must be seen in its international context. It has been said that the whole purpose of such an international code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways. 'The definitions contained in the Conventions should be applied and the words of the Conventions, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having an international character'<sup>7</sup>. This approach has been further strengthened by the provisions of the Brussels II Regulation<sup>8</sup> and the Brussels IIR Regulation<sup>9</sup>, which apply to all member states of the European Union save for Denmark<sup>10</sup>.

<sup>1</sup> The Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

<sup>2</sup> The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

<sup>3</sup> See the Child Abduction and Custody Act 1985 s 24A(1) (s 24A added by the Family Law Act 1986 s 67(4)). A person is not excused from complying with an order under the Child Abduction and Custody Act 1985 s 24A(1) (as added) by reason that to do so may incriminate him or his spouse or civil partner of an offence, but a statement or admission made in compliance with such an order is not admissible in evidence against either of them in proceedings for any offence other than perjury: s 24A(2) (as so added; and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 110). The abductor's solicitor may be ordered to disclose information relating to his client's whereabouts: *Re B (abduction: disclosure)* [1995] 2 FCR 601, [1995] 1 FLR 774, CA. For judicial observations on the limitations of the Child Abduction and Custody Act 1985 s 24A (as added and amended) and its relationship with the inherent jurisdiction see *Re D (a minor) (child abduction)* [1988] FCR 585 at 588, [1989] 1 FLR 97n at 99 per Wood J.

<sup>4</sup> The Child Abduction and Custody Act 1985 s 27(1) (amended by the Family Law Act 1986 s 68, Sch 1 para 30; and the Family Law Act 1986 s 67(5)) provides that, for these purposes, 'custody order' means (unless the contrary intention appears) any such authorisation as is mentioned below:

594 (1) a care order (see para 276 et seq ante) (Child Abduction and Custody Act 1985 Sch 3 para 1(a) (Sch 3 substituted by the Children Act 1989 s 108(5), Sch 13 para 57(3)));

595 (2) a residence order (see para 262 ante) (Child Abduction and Custody Act 1985 Sch 3 para 1(b) (as so substituted; and amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 para 45, Sch 5));

596 (3) a special guardianship order (see para 151 ante) (Child Abduction and Custody Act 1985 Sch 3 para 1(bb) (Sch 3 as so substituted; and Sch 3 para 1(bb) added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 45));



597 (4) an order made by the High Court in the exercise of its jurisdiction relating to wardship giving care and control of a child to any person (see para 218 et seq ante) (Child Abduction and Custody Act 1985 Sch 3 para 2); or

598 (5) an authorisation given by the Secretary of State under the Children and Young Persons Act 1969 s 26(2) (as amended) (see para 162 ante) (except where the relevant order, within the meaning of s 26(2) (as amended), was made by virtue of the court which made it being satisfied that the child was guilty of an offence) (Child Abduction and Custody Act 1985 Sch 3 para 4).

5 le other than a decision which is only a decision relating to custody within the meaning of *ibid* s 16 (see paras 822-823 post) by virtue of being a decision relating to rights of access: s 25(1), (2).

6 See *ibid* s 25(1). The reference in the text to the provisions of the Child Abduction and Custody Act 1985 is to the provisions of s 16 (see paras 822-823 post): see s 25(2).

7 *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 at 472, [1989] 1 WLR 654 at 663, sub nom *Re C (a minor) (abduction)* [1989] 1 FLR 403 at 412, CA, per Lord Donaldson MR. For the general principles applicable to the interpretation of international Conventions enacted in an English statute see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL; applied in *B v B (minors: enforcement of access abroad)* [1988] 1 All ER 652, [1988] 1 WLR 526.

8 le EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. See para 788 ante.

9 le EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. See para 788 ante.

10 See paras 788-798 ante.

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## (ii) The Hague Convention

### 805. Policy of the Convention.

The objects of the Hague Convention<sup>1</sup> are to secure the prompt return of children wrongfully moved to or retained in any contracting state, and to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting state<sup>2</sup>. These principles have been further strengthened in member states of the European Union (except for Denmark) by the provisions of the Brussels II Regulation<sup>3</sup> and the Brussels IIR<sup>4</sup> Regulation<sup>5</sup>. The purpose of proceedings in the Hague Convention context is not to decide in any sense the long term merits of the custody of the child but to secure the prompt return of the child to the appropriate jurisdiction<sup>6</sup>. The Hague Convention sets out limited defences which, in certain circumstances, give the court a discretion not to order the child's return to its country of habitual residence<sup>7</sup>. Otherwise, the Hague Convention aims to ensure the summary return to the country of habitual residence of children wrongfully removed or retained<sup>8</sup>. The Hague Convention gives effect to the belief that in normal circumstances any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto been normally resident<sup>9</sup>. The assumption underlying the Hague Convention is that the courts of all contracting states are equally capable of ensuring a fair hearing to the parties and a skilled and humane evaluation of the issues of child welfare involved<sup>10</sup>.

<sup>1</sup> *Ile* the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

<sup>2</sup> *Ibid* art 1. This provision and the Preamble are not incorporated into the Child Abduction and Custody Act 1985 (see para 799 ante), but despite this, the courts may have regard to it where needed to assist in the interpretation of those articles which are incorporated into the Child Abduction and Custody Act 1985: *Re E (a minor) (abduction)* [1989] 1 FLR 135 at 137 per Balcombe LJ; *Re S (a minor) (custody: habitual residence)* [1998] AC 750 at 766, [1997] 4 All ER 251 at 260, sub nom *Re S (custody: habitual residence)* [1998] 1 FLR 122 at 130, HL, per Lord Slynn; *Re M (abduction: psychological harm)* [1997] 2 FLR 690 at 694, CA, per Butler-Sloss LJ. In addition, the Explanatory Report which accompanies the Hague Convention but is not incorporated into the Child Abduction and Custody Act 1985 may be referred to as an aid to construction: *R v Secretary of State for the Home Department, ex p Read* [1989] AC 1014 at 1052, (1988) 88 Cr App 242 at 249, HL, per Lord Bridge of Harwich. The court should refuse to exercise its jurisdiction under the Hague Convention where proceedings to enforce the Convention are already pending in another contracting state: *Re O (minors) (abduction)* [1998] 1 FCR 107, sub nom *Re O (minors) (child abduction: re-abduction)* [1997] 2 FLR 712.

<sup>3</sup> *Ile* EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

<sup>4</sup> *Ile* EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

<sup>5</sup> See paras 788-798 ante. With respect to judgments made after 1 March 2005, the Brussels IIR Regulation has precedence see para 788 note 8 supra. See *Re T and J (children) (abduction: recognition of foreign judgment)* [2006] EWHC 1472 (Fam), [2006] 2 FLR 1290, [2006] 3 FCR 363; *Vigreux v Michel* [2006] EWCA Civ 630, [2007] 3 FCR 196, [2006] 2 FLR 1180; *Re EC (child abduction: stayed proceedings)* [2006] EWCA Civ 1115, [2007] 1 FLR 57, [2006] Fam Law 918.

<sup>6</sup> *Re S (child abduction: acquiescence)* [1998] 2 FLR 893 at 896, [1998] Fam Law 656 per Sir Stephen Brown P.

7 See the Hague Convention art 13. The Hague Convention arts 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. See para 811 post. For an unusual situation in which contact was made between the English and American judges seized of the matter in an effort to reach as amicable a solution as possible see *Re M and J (abduction: international judicial collaboration)* [1999] 3 FCR 721, [2000] 1 FLR 803.

8 *B v B (minors: enforcement of access abroad)* [1988] 1 All ER 652, [1988] 1 WLR 526; *Re N (minors) (abduction)* [1991] FCR 765, [1991] 1 FLR 413; *Re A (minors) (abduction: custody rights)* [1992] Fam 106, [1992] 1 All ER 929, CA.

9 *Re F (minor) (abduction: jurisdiction)* [1991] Fam 25, [1990] 3 All ER 97, [1991] 1 FLR 1, CA; *Re E (a minor) (abduction)* [1989] 1 FLR 135 at 142, CA, per Balcombe LJ; *Re A (a minor) (abduction)* [1988] 1 FLR 365 at 373, CA, per Nourse LJ; *V v B (a minor) (abduction)* [1991] 1 FLR 266 at 275 per Sir Stephen Brown P; *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, [1993] 1 All ER 272, sub nom *Re A (minors) (abduction: acquiescence) (No 2)* [1993] 1 FLR 396, CA; *Re JS (private international adoption)* [2000] 2 FLR 638, [2000] Fam Law 787. The principle that a child's welfare is paramount (see para 300 ante) does not apply in a return application under the Hague Convention: see *Re M (a minor) (child abduction)* [1994] 1 FLR 390 at 392-393, CA, per Butler-Sloss LJ; *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, sub nom *Re A (minors) (abduction: acquiescence) (No 2)* [1993] 1 All ER 272, [1993] 1 FLR 396, CA; *Re L (abduction: pending criminal proceedings)* [1999] 2 FCR 604, [1999] 1 FLR 433. The court is concerned to secure the return of the child to the appropriate court which has jurisdiction, and to protect the child until return can be effected: *Re G (a minor) (abduction)* [1989] 2 FLR 475 at 483, CA, per Purchas LJ; *Re C (a minor) (abduction)* [1989] 1 FLR 403 at 413, CA, per Lord Donaldson of Lymington MR, and at 409 per Butler-Sloss LJ; *B v K (child abduction)* [1993] 1 FCR 382, [1993] Fam Law 17. See also *D v D (child abduction)* [1994] 1 FCR 654, [1994] 1 FLR 137, CA.

10 *P v P (minors) (child abduction)* [1992] 1 FLR 155 at 158 per Waite J. The Hague Convention will only be brought into force in respect of countries whose legal systems have been shown to be satisfactory (*G v G (minors) (abduction)* [1991] 2 FLR 506 at 514, CA, per Balcombe LJ), although compelling evidence will be required to show that the foreign court will be unable to protect the child from harm (*C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 at 473, sub nom *C v C (abduction: rights of custody)* [1989] 1 WLR 654 at 664, sub nom *Re C (a minor) (abduction)* [1989] 1 FLR 403 at 413, CA, per Lord Donaldson MR; *E v E (child abduction: intolerable situation)* [1998] 2 FLR 980, [1998] Fam Law 722). The principles to be applied in Convention and non-Convention cases are prima facie the same: *Re M (minors) (abduction: non-Convention country)* [1995] 2 FCR 265, [1995] 1 FLR 89, CA. Exceptional circumstances need to be shown if the assumption that a fair hearing will be provided in the court of another jurisdiction, and that due account will be taken by overseas judges of what has been ordered and undertaken to be done within the English jurisdiction, is to be departed from: *Re M (minors) (abduction: peremptory return order)* [1996] 1 FCR 557, [1996] 1 FLR 478, CA.

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### **806. Application of the Convention: habitual residence.**

The Hague Convention<sup>1</sup> applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights<sup>2</sup>, and ceases to apply when the child attains the age of 16 years<sup>3</sup>.

The term 'habitual residence' is not defined in the Hague Convention<sup>4</sup>. It is not to be treated as a term of art with some special meaning, but should be understood according to the ordinary and natural meaning of the words; it is a question of fact to be decided by reference to all the circumstances of a particular case<sup>5</sup>. An appreciable period of time and a settled intention are necessary for a person to become habitually resident in a country<sup>6</sup>. Concurrent habitual residence in more than one place at the same time is incompatible with the Hague Convention; however, where a sufficient degree of continuity is established, it is possible for a person to be habitually resident in one country for part of the year and in another for the remainder of the year<sup>7</sup>. Where a child is in the sole lawful custody of the mother, the child's habitual residence will necessarily be the same as hers<sup>8</sup>. It follows that for a change of the child's habitual residence to take effect, the child must actually be transferred into the care of the parent seeking to establish the new habitual residence<sup>9</sup>.

The habitual residence of the child falls to be considered immediately in relation to the period before the wrongful removal or retention<sup>10</sup>.

<sup>1</sup> The Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

<sup>2</sup> As to custody rights or access rights see para 807 post.

<sup>3</sup> See the Hague Convention art 4. The Hague Convention arts 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. The Hague Convention does not apply where the child has no habitual residence: *W v H (child abduction: surrogacy)* [2002] 1 FLR 1008. The Hague Convention must be taken at face value and therefore does not apply to a child who is 16 at the date of hearing but was 15 when the wronged parent made his application: *Re H (child abduction: child of sixteen)* [2000] 3 FCR 404, sub nom *Re H (abduction: child of 16)* [2000] 2 FLR 51. Although the child should be resident in a contracting state at the time of the application, the Hague Convention applies whether or not the child was resident in the state in which the right of custody or access arose: *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, sub nom *Re G (a minor) (Hague Convention: access)* [1993] 1 FLR 669, CA. It is for the applicant to establish that the court has jurisdiction, but if residence immediately before the removal is established, the burden shifts to the defendant to show that the child was not so resident: *Re E (a child: abduction)* [1992] 1 FCR 541, sub nom *F v S (wardship: jurisdiction)* [1993] 2 FLR 686.

<sup>4</sup> As to the use of the term 'habitual residence' in other areas of the law see CONFLICT OF LAWS vol 8(3) (Reissue) para 59. In relation to a contracting state which in matters of custody of children has two or more systems of law applicable in different territorial units: (1) any reference to habitual residence in that contracting state is to be construed as referring to habitual residence in a territorial unit of that contracting state; (2) any reference to the law of the contracting state of habitual residence is to be construed as referring to the law of the territorial unit in that contracting state where the child habitually resides: Hague Convention art 31.

<sup>5</sup> *Re J (a minor) (custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL; *Re M (minors) (residence)* [1993] 1 FCR 718, sub nom *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495, CA; *Re B (child abduction: habitual residence)* [1995] 1 FCR 273, [1994] 2 FLR 915; *Re KM (a minor) (habitual residence)* [1996] 2 FCR 333, sub nom *Re M (abduction) (habitual residence)* [1996] 1 FLR 887, CA; *V v B (a minor) (abduction)* [1991] FCR 451, [1991] 1 FLR 266; *Re V (a minor) (abduction) (habitual residence)* [1996] 3 FCR 173, [1995] 2 FLR 992; *Re A (abduction: habitual residence)* [1998] 3 FCR 617, [1998] 1 FLR 497; *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951;

*Re D (abduction: habitual residence)* [2005] EWHC 518 (Fam), [2005] 2 FLR 403; *Re A (wardship: habitual residence)* [2006] EWHC 3338 (Fam), [2007] 1 FLR 1589, [2007] 1 FCR 390.

6 *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL. See also *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Kapur v Kapur* [1984] FLR 920; *Macrae v Macrae* [1949] P 397, [1949] 2 All ER 34, CA; *Re E (child abduction)* [1992] 1 FCR 541, sub nom *F v S (wardship: jurisdiction)* [1993] 2 FLR 686, CA; *Re AF (a minor)* [1992] 1 FCR 269, sub nom *Re F (a minor) (child abduction)* [1992] 1 FCR 269, [1992] 1 FLR 548, CA; *Re B (minors) (Hague Convention) (No 2)* [1994] 1 FCR 394, sub nom *Re B (minors) (abduction) (No 2)* [1993] 1 FLR 993; *Re EW (wardship: jurisdiction)* [1992] 2 FCR 441, sub nom *Re R (wardship: child abduction)* [1992] 2 FLR 481, CA; *Re EW (wardship: jurisdiction) (No 2)* [1993] 1 FCR 710, sub nom *Re R (wardship: child abduction) (No 2)* [1993] 1 FLR 249; *Re B-M (wardship: jurisdiction)* [1993] 2 FCR 388, [1993] 1 FLR 979; *Re D (abduction: habitual residence)* [2005] EWHC 518 (Fam), [2005] 2 FLR 403; *Re A (wardship: habitual residence)* [2006] EWHC 3338 (Fam), [2007] 1 FLR 1589, [2007] 1 FCR 390; *Re A (abduction) (habitual residence: consent)* [2005] EWHC 2998 (Fam), [2006] 2 FLR 1; *C v FC (Brussels II: freestanding application for parental responsibility)* [2004] 1 FLR 317. While habitual residence might exceptionally be possible notwithstanding physical absence, the usual approach on the facts was to look for some physical presence: *Re F (abduction: unborn child)* [2006] EWHC 2199 (Fam), [2007] 1 FLR 627, [2006] Fam Law 1001. There is a significant difference between a person's ceasing to be habitually resident in one country and his subsequently becoming habitually resident in another: see *Re J (a minor) (abduction: custody rights)* supra at 578 and 965 per Lord Brandon of Oakbrook. See also *Re K (a minor) (custody: jurisdiction)* [1991] FCR 751n, sub nom *Re K (a minor) (wardship: jurisdiction: interim order)* [1991] 2 FLR 104, CA. See *Re K (abduction: consent: forum conveniens)* [1995] 3 FCR 697, [1995] 2 FLR 211, CA (consent to temporary removal of child may be sufficient to constitute consent to loss of habitual residence). 'Habitual residence' refers to a person's abode in a country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being: *Re A (abduction: habitual residence)* [1998] 3 FCR 617, [1998] 1 FLR 497. See also *Re N (child abduction: habitual residence)* [1993] 2 FCR 330, [1993] 2 FLR 124, CA; *Re A (a minor) (wardship: jurisdiction)* [1995] 2 FCR 298, [1995] 1 FLR 767 (parents' agreement to send child abroad to boarding-school was not sufficient to change child's habitual residence); *Re B (a minor) (child abduction: habitual residence)* [1995] 1 FCR 273, [1994] 2 FLR 915 (short period of attempted reconciliation between parents not sufficiently long for mother to have formed any settled intention about her residence). See also *E v E* [2007] EWHC 276 (Fam), [2007] 1 FLR 1977, [2007] Fam Law 480. See also *P v P* [2007] EWHC 779 (Fam), [2007] All ER (D) 95 (Apr); *Re A (abduction: habitual residence)* [2007] EWHC 779 (Fam), sub nom *P v P* [2007] All ER (D) 95 (Apr) (parents moved to USA with intention to remain seven to eight days, but later the relationship broke down; insufficient to establish habitual residence in the USA).

7 *Re V (a minor) (abduction: habitual residence)* [1996] 3 FCR 173, [1995] 2 FLR 992. Residence in a country for an intended period of no more than six weeks for the purpose of holiday contact cannot amount to habitual residence: *Re A (abduction: habitual residence)* [1998] 3 FCR 617, [1998] 1 FLR 497. See, however, *Secretary for Justice v P (habitual residence)* [2006] NZFLR 255, NZHC, where it was held that there could only be one habitual residence for the duration of a long term shared custody arrangement under which the children were to spend alternate two year periods with their mother in New Zealand and their father in Australia.

8 *Re J (a minor) (custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL; *Re O (a minor) (abduction: habitual residence)* [1995] 2 FCR 649, [1993] 2 FLR 594; *Re M (minors) (residence)* [1993] 1 FCR 718, sub nom *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495, CA; *Re B (child abduction: habitual residence)* [1995] 1 FCR 273, [1994] 2 FLR 915; *Re KM (a minor) (habitual residence)* [1996] 2 FCR 333, sub nom *Re M (abduction) (habitual residence)* [1996] 1 FLR 887. See *Re JS (private international adoption)* [2000] 2 FLR 638, [2000] Fam Law 787 (habitual residence determined by reference to that of an adoption agency which had legal responsibility for the child and retained a right to remove the child from the persons looking after her).

In *N v N (child abduction: habitual residence)* [2000] 3 FCR 84, sub nom *Re N (abduction: habitual residence)* [2000] 2 FLR 899, the married parents, who lived with the children, each had a different habitual residence, and it was held that the habitual residence of the children could only change if the parents had a common intention to change their own habitual residence.

9 *Re O (a minor) (abduction: habitual residence)* [1995] 2 FCR 649, [1993] 2 FLR 594. A person without parental rights over a child could not bring about a change in a child's habitual residence merely by removing him from the jurisdiction: *Re S (a minor) (custody: habitual residence)* [1998] AC 750, [1998] 1 FLR 122, HL. See also *N v N (child abduction: habitual residence)* [2000] 3 FCR 84, sub nom *Re N (abduction: habitual residence)* [2000] 2 FLR 899.

10 *Re F (minors) (abduction: habitual residence)* [1992] 2 FCR 595, sub nom *F v F (abduction: habitual residence)* [1993] Fam Law 199; *Re S (a minor) (abduction)* [1991] FCR 656, [1991] 2 FLR 1, CA; *Re B (child abduction: habitual residence)* [1995] 1 FCR 273, [1994] 2 FLR 915. See also *Re S (a minor) (custody: habitual residence)* [1998] AC 750, [1998] 1 FLR 122, HL. As to wrongful removal or retention see para 808 post.

## UPDATE

**806 Application of the Convention: habitual residence**

NOTE 5--See *Re P-J (abduction: habitual residence: consent)* [2009] EWCA Civ 588, [2010] 1 WLR 1237, [2010] 1 FCR 32.

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### **807. Rights of custody; rights of access.**

The Hague Convention<sup>1</sup> applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights<sup>2</sup>. For the purposes of the Hague Convention, 'rights of custody' include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence<sup>3</sup>, and 'rights of access' include the right to take a child for a limited period of time to a place other than the child's habitual residence<sup>4</sup>.

The question whether a person has rights of custody is to be determined in accordance with the law of the state in which the child was habitually resident immediately before the removal or retention<sup>5</sup>. Rights of custody may be attributed to a person, an institution or any other body<sup>6</sup>, although an unmarried parent without parental responsibility<sup>7</sup> who has no right under English domestic law to prevent the removal of a child from the jurisdiction does not have rights of custody within the meaning of the Hague Convention, unless there are pending proceedings to determine rights of custody in a domestic court or that parent is the child's primary carer<sup>8</sup>. A parent who agrees informally that the child should reside with the other parent does not thereby lose rights of custody<sup>9</sup>. Rights of custody have been said to include the inchoate rights of those who were carrying out duties and enjoying privileges of a custodial or parental character, though not formally recognised or granted by law<sup>10</sup>.

There is a firm distinction between rights of custody and rights of access, and it is important to note that rights of access in themselves are not sufficient to establish a right to custody<sup>11</sup>. In cases of a breach of rights of access, the courts have no jurisdiction in addition to or different from their ordinary domestic jurisdiction<sup>12</sup>.

<sup>1</sup> The Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

<sup>2</sup> Ibid art 4. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. As to the distinction between rights of access and rights of custody see *Re V-B (minors) (abduction: rights of custody)* [1999] 2 FCR 371, [1999] 2 FLR 192, CA (father with rights of access had no veto over mother's decision to remove child); *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, sub nom *Re D (a child) (abduction: foreign custody rights)* [2007] 1 FCR 1.

<sup>3</sup> Hague Convention art 5(a). Rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the state in which the child was habitually resident immediately before the removal or retention: see art 3. There is nothing in art 3 which indicates that a breach of rights of custody has to be a breach of the rights belonging to another person; a person may breach his own rights of custody: *Re KH (a minor) (abduction)* [1990] FCR 990, sub nom *Re H (a minor) (abduction)* [1990] 2 FLR 439. As to the circumstances in which: (1) an unmarried father who does not have parental responsibility for a child will be deemed to have rights of custody for the purposes of the Hague Convention; and (2) a court will be deemed to have such rights when proceedings are pending before it, see *Practice Note (Hague Convention: applications by fathers without parental responsibility)* [1998] 1 FLR 491. The term 'rights of custody' is to be accorded its ordinary meaning and is not necessarily confined to domestic concepts of guardianship or custody: *Dellabarca v Christie* [1999] 2 NZLR 548, NZ CA. See also *S v H (abduction: access rights)* [1998] Fam 49, [1997] 3 WLR 1086 (neither the fact that the father had earlier obtained a prohibition against removal of the child nor the fact that the Hague Convention refers to the protection of rights of access is sufficient for rights of access to be considered rights of custody). The court may have rights of custody pursuant to wardship proceedings: see *Re BM (a minor) (wardship: jurisdiction)* [1993] 2 FCR 388, [1993] 1 FLR 979.

4 Hague Convention art 5(b). The Convention must not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of art 3 (see para 808 post) or art 21 (see para 816 post) from applying directly to the judicial or administrative authorities of a contracting state, whether or not under the provisions of the Convention: art 29.

5 *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 at 468, sub nom *C v C (abduction: rights of custody)* [1989] 1 WLR 654 at 657-658, sub nom *Re C (a minor) (abduction)* [1989] 1 FLR 403 at 406-407, CA, per Butler-Sloss LJ, and at 472-473, 663-664, and 412-413 per Lord Donaldson MR (an Australian consent order which provided that neither the father nor the mother was to remove the child from Australia without the other's consent constituted a right of custody within the Hague Convention). See also *C v C (minors) (child abduction)* [1992] 1 FCR 391, [1992] 1 FLR 163; *Re P (a minor) (abduction: declaration)* [1996] 2 FCR 133, [1995] 1 FLR 831, CA; *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, sub nom *Re D (a child) (abduction: foreign custody rights)* [2007] 1 FCR 1; *Hunter v Murrow (abduction: right of custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119, [2005] 3 FCR 1. Rights granted by a state may be rights of custody for the purposes of the Hague Convention notwithstanding that they are not regarded as such by the law of that state: *Re P (a child) (abduction: custody rights)* [2004] EWCA Civ 971, [2005] Fam 293, [2005] 2 FLR 791.

In relation to a contracting state which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that contracting state is construed as referring to the legal system specified by the law of that contracting state: Hague Convention art 32.

6 See *ibid* art 3(a). Thus the court (and other institutions, such as a local authority with a care order in its favour: see para 270 et seq ante) may have rights of custody in respect of a child. In *Re H (abduction: rights of custody)* [2000] 2 AC 291, [2000] 2 All ER 1, HL, it was held that wording in the Hague Convention art 3(a) is deliberately wide, and that proceedings which called upon the court to determine a child's place of residence gave the court a right of custody; and, in general, the service of such an application will be the time at which the court's jurisdiction is invoked and whereby it acquires rights of custody. It is therefore doubtful whether the mere issue of proceedings is sufficient; they should probably have been served and it is possible that some action by the court is needed to invest it with rights of custody: *Re W (minors) (abduction: father's rights)* [1999] Fam 1 at 19, sub nom *Re W, Re B (child abduction: unmarried father)* [1998] 2 FLR 146 at 162-63 per Hale J. See two further decisions of Hale J on this point: *Re J (abduction: rights of custody)* [1999] 3 FCR 577, sub nom *Re J (abduction: declaration of wrongful removal)* [1999] 2 FLR 653 (court acquires rights of custody once it is actively seized of proceedings to determine rights of custody); and *Re C (child abduction) (unmarried father)* [1999] 3 FCR 678, sub nom *Re C (abduction: wrongful removal)* [1999] 2 FLR 859 (the court has rights of custody where it is actively seized of an application for a parental responsibility order; the view on this point expressed by the central authority for England and Wales in *Practice Note (Hague Convention: applications by fathers without parental responsibility)* [1998] 1 FLR 491 was rejected). See also *B v B (abduction)* [1993] Fam 32, [1993] 2 All ER 144, [1993] 1 FLR 238 (court may have a right of custody when it has made an interim custody order); *The Ontario Court v M and M (abduction: children's objections)* [1997] 2 FCR 573, [1997] 1 FLR 475; *Re B (abduction) (rights of custody)* [1998] 2 FCR 212, [1997] 2 FLR 594, CA; but cf *Re F (a minor) (abduction: custody rights abroad)* [1995] Fam 224, [1995] 3 All ER 641, sub nom *Re F (child abduction: risk if returned)* [1995] 2 FLR 31, CA (existence of a court order or of pending proceedings does not automatically vest in the court 'rights of custody' within the meaning of the Hague Convention). But see *Re C (a child) (unmarried father: custody rights)* [2002] EWHC 2219 (Fam), [2003] 1 WLR 493 (if a judge exercises judicial discretion as to the future conduct of proceedings, the court may have rights of custody before proceedings have been served). For consideration of the court's rights of custody where wardship proceedings have been issued see further *Re B-M (wardship: jurisdiction)* [1993] 2 FCR 388, [1993] 1 FLR 979; *Re S (custody: habitual residence)* [1998] AC 750, [1997] 4 All ER 251, [1998] 1 FLR 122, HL. As to the rights of custody of a foreign adoption agency see *Re JS (private international adoption)* [2000] 2 FLR 638, [2000] Fam Law 787.

7 For the meaning of 'parental responsibility' see para 134 ante.

8 *Re W (minors) (abduction: father's rights)* [1999] Fam 1, sub nom *Re W, Re B (child abduction: unmarried father)* [1998] 2 FCR 549, [1998] 2 FLR 146. See also *Re V-B (abduction: custody rights)* [1999] 2 FCR 371, [1999] 2 FLR 192, CA (a right to be consulted on matters of importance relating to the children, without an associated right to object, did not amount to rights of custody); *Re C (a child) (unmarried father: custody rights)* [2002] EWHC 2219 (Fam), [2003] 1 WLR 493 (if a judge exercises judicial discretion as to the future conduct of proceedings, the court may have rights of custody before proceedings have been served).

9 *Re W (a minor) (abduction)* [1996] 1 FCR 46, sub nom *Re W (abduction: procedure)* [1995] 1 FLR 878, following *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476, [1991] 3 All ER 230, HL. See also *Re J (abduction: acquiring custody rights by caring for the child)* [2005] 2 FLR 791.

10 *Re B (a minor) (abduction)* [1995] 2 FCR 505, [1994] 2 FLR 249, CA; *Re O (child abduction: custody rights)* [1997] 2 FCR 465, [1997] 2 FLR 702, [1997] Fam Law 781. However, it is difficult to reconcile these decisions with that of the House of Lords in *Re J (a minor) (custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL. See *Re G (abduction: rights of custody)* [2002] 2 FLR 703 (paternal grandmother was held to have acquired rights of custody as a consequence of a long term placement coupled with a right to make decisions for the child; the unmarried father who had lived with her for four



months also acquired rights of custody); *Re F (abduction: unmarried father: sole carer)* [2002] EWHC 2896 (Fam), [2003] 1 FLR 839 (notwithstanding the possibility that the father may not be the child's natural parent, he had been the child's sole carer at the time of the abduction and so had inchoate rights of custody, which were capable of being perfected).

11 *S v H (abduction: access rights)* [1998] Fam 49, [1997] 1 FLR 971; *Re V-B (abduction: custody rights)* [1999] 2 FCR 371, [1999] 2 FLR 192; *Hunter v Murrow (abduction: rights of custody)* [2005] EWCA Civ 976, [2005] 3 FCR 1, [2005] 2 FLR 1119.

12 *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, sub nom *Re G (a minor) (Hague Convention: access)* [1993] 1 FLR 669, CA; *Re T (minors) (Hague Convention: access)* [1993] 1 WLR 1461, [1993] 2 FLR 617, [1993] Fam Law 566; *Practice Note (child abduction unit)* [1993] 1 FLR 804. It is not necessary to establish a wrongful removal or retention in order to enforce a right of access under the Hague Convention: *B v B (minors: enforcement of access abroad)* [1988] 1 All ER 652, [1988] 1 WLR 526, sub nom *B v B (minors) (access: jurisdiction)* [1988] 2 FLR 6.

## UPDATE

### 807 Rights of custody; rights of access

NOTE 5--See *Re K (children) (rights of custody: Spain)* [2009] EWHC 1066 (Fam), [2010] 1 FLR 57, [2009] All ER (D) 179 (May) (unmarried father, whose children were subject to laws of England and Wales but were habitually resident in Spain, where father's parental rights had been legally established, had rights of custody for purposes of Hague Convention).

NOTE 6--See *S v Slough BC* [2009] All ER (D) 182 (Apr) (local authority had taken proportionate and reasonable steps to safeguard child).

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### **808. Wrongful removal or retention.**

The removal or retention of a child is to be considered wrongful where:

- 1519 (1) it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention<sup>1</sup>; and
- 1520 (2) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention<sup>2</sup>.

The rights of custody in question may arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of the state in which the child was habitually resident<sup>3</sup>.

Prior to the making of an order for the return of the child, the judicial or administrative authorities of a contracting state may request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful<sup>4</sup> where such a decision or determination may be obtained in that state<sup>5</sup>. The central authorities of the contracting states must so far as practicable assist applicants to obtain such a decision or determination<sup>6</sup>. In this regard the High Court may make a declaration that the removal of any child from, or his retention outside, the United Kingdom was wrongful on the application of any person appearing to have an interest in the matter<sup>7</sup>.

The issue is the removal from or retention out of the jurisdiction of the court of the state of a child's habitual residence<sup>8</sup>; removal and retention are mutually exclusive single events<sup>9</sup>. Removal occurs when a child is taken across the frontier away from the state of his habitual residence, and retention occurs when a child who has been outside the state of his habitual residence for a limited period is not returned to that state on the expiry of that period<sup>10</sup>.

Reference will often be necessary to a foreign legal system to determine the rights of those concerned, and whether there has been a wrongful removal or retention<sup>11</sup>. Although expert evidence of the relevant law will no doubt often be helpful, in ascertaining whether there has been a wrongful removal or retention, the judicial or administrative authorities of the requested state may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not, in the state of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for recognition of foreign decisions which would otherwise be applicable<sup>12</sup>.

1 Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') art 3(a). Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. As to the guidelines to be followed in the determination of whether a court is vested with rights of custody see *Re H (child abduction: rights of custody)* [2000] 2 AC 291, [2000] 2 All ER 1, HL. See also *Re B (a minor) (abduction) (rights of custody)* [1998] 2 FCR 212, [1997] 2 FLR 594, CA (no wardship order or interim custody order had been made so as to justify a finding that earlier court proceedings had vested rights of custody in the father or in the relevant courts); *Re BM (a minor) (wardship: jurisdiction)* [1993] 2 FCR 388, [1993] 1 FLR 979; *Re J (abduction: rights of custody)* [1999] 3 FCR 577, sub nom *Re J (abduction: declaration of wrongful removal)* [1999] 2 FLR 653 (court acquires custody rights once it is actively seised of proceedings to determine custody rights); *Re C (child abduction) (unmarried father)*

[1999] 3 FCR 678, sub nom *Re C (abduction: wrongful removal)* [1999] 2 FLR 859 (court acquires custody rights where proceedings have been before it for a considerable time and a consent order has been drawn up). See further para 807 ante.

2 Hague Convention art 3(b). As to what constitutes wrongful removal or retention generally see *Practice Note (Hague Convention: applications by fathers without parental responsibility)* [1998] 1 FLR 491. See *Re S (abduction: Hague and European Conventions)* [1997] 1 FCR 588, [1997] 1 FLR 958, CA (on receipt of order requiring return of child, recipient's retention of child wrongful within meaning of the Hague Convention art 3); *Re S (minors) (abduction: wrongful detention)* [1994] Fam 70, [1994] 1 All ER 237 (a mother who decides to retain children indefinitely cannot rely on an agreement with their father not to return the children for a specified period to prevent him from applying for their return forthwith). For the purposes of the Hague Convention art 3, a wrongful removal is not a continuing state of affairs, and one removal does not govern the child's status irrespective of what happens subsequently: *Re S (child abduction: delay)* [1998] 1 FCR 17, [1998] 1 FLR 651, DC.

3 See the Hague Convention art 3. Where the parents are not married, it is wrong for the mother to remove children from the jurisdiction if the father has parental responsibility by agreement or court order, or relevant proceedings are pending: see *Re W (minors) (abduction: father's rights)*, *Re B (a minor) (abduction: father's rights)* [1999] Fam 1, [1998] 3 WLR 1372.

4 lie within the meaning of the Hague Convention art 3: see the text and notes 1-3 supra.

5 Ibid art 15. An order that a child is to be returned, or not returned, is a final order and an application to set it aside must be made to the Court of Appeal: *Re M (abduction: undertakings)* [1995] 3 FCR 745, [1995] 1 FLR 1021, CA. The determination by the foreign authority is not binding, having persuasive value only (the decision by a New Zealand court was not followed as the English courts construe 'rights of custody' under the Hague Convention differently); *Hunter v Murrow* [2005] EWCA Civ 976, [2005] 3 FCR 1, [2005] 2 FLR 1119.

6 Hague Convention art 15.

7 See the Child Abduction and Custody Act 1985 s 8. See *Re P (a minor) (abduction: declaration)* [1996] 2 FCR 133, [1995] 1 FLR 831. For the meaning of 'United Kingdom' see para 102 note 7 ante.

8 lie as distinct from removal from or retention out of the care of the parent having custodial rights: *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476 at 498-499, [1991] 3 All ER 230 at 239-240, HL, per Lord Brandon of Oakbrook.

9 *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476 at 499-500, [1991] 3 All ER 230 at 239-240, HL, per Lord Brandon of Oakbrook. See also *Re B (a minor) (abduction)* [1995] 2 FCR 505, [1994] 2 FLR 249, CA.

10 *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476 at 500, [1991] 3 All ER 230 at 240, HL, per Lord Brandon of Oakbrook (removal occurred before the date when the Hague Convention came into force in respect of the country concerned so the Convention did not apply; removal and retention are different concepts which do not overlap and which are incapable of following upon each other). As to wrongful retention see the same case in the Court of Appeal: *Re H (minors) (abduction: custody rights)* [1991] 2 AC 476, [1991] 1 All ER 836, CA. There is a wrongful retention where both parents agree to one removing the child from the jurisdiction of habitual residence for a certain period, and before the expiry of that period the parent outside the jurisdiction announces his intention not to return the child: *Re S (minors) (abduction: wrongful retention)* [1994] Fam 70, [1994] 1 All ER 237, [1994] 1 FLR 82. There may be a wrongful retention where the parent with the child acts in a manner fundamentally inconsistent with the basis upon which the other parent consented to the child leaving the jurisdiction of habitual residence (*H v H (child abduction: habitual residence)* [1994] 2 FCR 833, sub nom *H v H (child abduction: stay of domestic proceedings)* [1994] 1 FLR 530), or where the retaining party obtains court orders which have the effect of preventing the child's return (*Re B (minors) (Hague Convention) (No 2)* [1994] 1 FCR 394, sub nom *Re B (minors) (abduction) (Nos 1 and 2)* [1993] 1 FLR 993, CA). See *B v H (children: habitual residence)* [2002] 2 FCR 329, sub nom *B v H (habitual residence: wardship)* [2002] 1 FLR 388 (habitual residence of child not altered by unilateral decision of father, who shared joint parental responsibility with the mother, to remain abroad).

The concept and ambit of wrongful retention extends the arm of the Hague Convention way beyond a 'snatch', and it can apply even after a child has been in the jurisdiction for a substantial period of time: *Re H (child abduction: wrongful retention)* [2000] 3 FCR 412, sub nom *Re H (abduction: habitual residence: consent)* [2000] 2 FLR 294.

11 See eg *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL (where the court considered the parents' rights under the law of Western Australia). See also *Re R (minors) (abduction)* [1993] 2 FCR 461, [1994] 1 FLR 190, DC; *Re D (abduction: custody rights)* [1999] 3 FCR 686, [1999] 2 FLR 626 (consideration of provisions of Zimbabwean law).

12 Hague Convention art 14. See *C v C (minors) (child abduction)* [1992] 1 FCR 391, [1992] 1 FLR 163 (court entitled to have regard to affidavit evidence of law of the state of New York). For the purposes of the Hague Convention art 14, a decision or determination of a judicial or administrative authority outside the United Kingdom may be proved by a duly authenticated copy of the decision or determination, and any document purporting to be such a copy is deemed to be a true copy unless the contrary is shown: Child Abduction and Custody Act 1985 7(1). For the purposes of s 7(1), a copy is duly authenticated if it bears the seal, or is signed by a judge or officer, of the authority in question: s 7(2). For the purposes of the Hague Convention art 14, any such document as is mentioned in art 8 (see para 809 note 1 post), or a certified copy of any such document, is sufficient evidence of anything stated in it: Child Abduction and Custody Act 1985 7(3).

## UPDATE

### 808 Wrongful removal or retention

NOTE 1--See *Re K (children) (rights of custody: Spain)* [2009] EWHC 1066 (Fam), [2010] 1 FLR 57, [2009] All ER (D) 179 (May); and PARA 807 NOTE 5.

An unmarried father who shares the care of his child in the way that mothers and fathers living under the same roof commonly do, has no rights of custody within the meaning of the Hague Convention: *AAA v ASH* [2009] EWHC 636 (Fam), [2010] 1 FLR 1, [2009] All ER (D) 136 (Jun) (see further PARA 98).

NOTE 7--See *A v B (abduction: rights of custody: declaration of wrongful removal)* [2008] EWHC 2524 (Fam), [2009] 1 FLR 1253.

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### **809. Return of children.**

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply<sup>1</sup> either to the central authority<sup>2</sup> of the child's habitual residence or to the central authority of any other contracting state for assistance in securing the return of the child<sup>3</sup>. When it is manifest that the requirements of the Hague Convention are not fulfilled or that the application is otherwise not well founded, a central authority is not bound to accept the application<sup>4</sup>. In that case, the central authority must forthwith inform the applicant or the central authority through which the application was submitted, as the case may be, of its reasons<sup>5</sup>.

The central authority of the state where the child is present<sup>6</sup> must take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child<sup>7</sup>. In particular, it must take all appropriate measures, whether directly or through an intermediary, to:

- 1521 (1) discover the whereabouts of a child who has been wrongfully removed or retained<sup>8</sup>;
- 1522 (2) prevent further harm to the child or prejudice to interested parties by taking provisional measures or causing them to be taken<sup>9</sup>;
- 1523 (3) secure the voluntary return of the child or bring about an amicable resolution of the issues<sup>10</sup>;
- 1524 (4) exchange, where desirable, information relating to the social background of the child<sup>11</sup>;
- 1525 (5) provide information of a general character as to the law of its state in connection with the application of the Hague Convention<sup>12</sup>;
- 1526 (6) initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access<sup>13</sup>;
- 1527 (7) provide or facilitate the provision of assistance from the community legal service fund and advice, including the participation of legal counsel and advisers, where the circumstances so require<sup>14</sup>;
- 1528 (8) provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child<sup>15</sup>;
- 1529 (9) keep each other informed with respect to the operation of the Hague Convention and, as far as possible, eliminate any obstacles to its application<sup>16</sup>.

1 The application must contain:

- 599 (1) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child (Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') art 8(a));
- 600 (2) where available, the date of birth of the child (art 8(b));
- 601 (3) the grounds on which the applicant's claim for return of the child is based (art 8(c));
- 602 (4) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be (art 8(d)).

The application may be accompanied or supplemented by:

- 603 (a) an authenticated copy of any relevant decision or agreement (art 8(e));
- 604 (b) a certificate or an affidavit emanating from a central authority, or other competent authority of the state of the child's habitual residence, or from a qualified person, concerning the relevant law of that state (art 8(f));
- 605 (c) any other relevant document (art 8(g)).

Any application, communication or other document sent to the central authority (see note 2 *infra*) of the requested state must be in the original language, and must be accompanied by a translation into the official language or one of the official languages of the requested state or, where that is not feasible, a translation into French or English: art 24.

Any application submitted to the central authorities or directly to the judicial or administrative authorities of a contracting state in accordance with the terms of the Hague Convention together with documents and any other information appended to it or provided by a central authority is admissible in the courts or administrative authorities of the contracting states: art 30.

Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 *ante*.

2 As to the central authority see para 803 *ante*.

3 Hague Convention art 8. If the central authority receiving an application has reason to believe that the child is in another contracting state it must directly and without delay transmit the application to the central authority of that contracting state and inform the requesting central authority, or the applicant, as the case may be: art 9. The obligations imposed by the Hague Convention on the central authority are public law rights, and an individual can only question their exercise by way of proceedings for judicial review: *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA; *Practice Note (child abduction unit)* [1993] 1 FLR 804. As to judicial review see JUDICIAL REVIEW. As to how to avoid confusion and mistakes in securing the return of a child see *Re J (minors) (children: ex parte orders)* [1997] 1 FCR 325, [1997] 1 FLR 606. As to the benefits of judicial co-operation between different jurisdictions see *Re M and J (abduction) (international judicial collaboration)* [1999] 3 FCR 721, [2000] 1 FLR 803.

4 Hague Convention art 27.

5 *Ibid* art 27. A central authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act: art 28.

6 Central authorities must co-operate with each other and promote co-operation between the competent authorities in their respective states to secure the prompt return of children and to achieve the other objects of the Hague Convention: art 7.

7 *Ibid* art 10.

8 *Ibid* art 7(a).

9 *Ibid* art 7(b).

10 *Ibid* art 7(c).

11 *Ibid* art 7(d). See *Re HB (abduction: children's objections) (No 2)* [1999] 1 FCR 331, [1998] 1 FLR 564 (mother's Hague Convention proceedings dismissed in order, *inter alia*, to allow the Official Solicitor to make necessary inquiries in Denmark). Where the Lord Chancellor or the Secretary of State is requested to provide information relating to a child under the Hague Convention art 7(d) he may:

- 606 (1) request a local authority or an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer (within the meaning given by the Children Act 2004 s 35 (see para 239 *ante*) to make a report to him in writing with respect to any matter which appears to be relevant (Child Abduction and Custody Act 1985 ss 6(a), 27 (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 79, 80; and the Children Act 2004 s 40, Sch 3 paras 2, 3));
- 607 (2) request the Department of Health and Social Services for Northern Ireland to arrange for a suitably qualified person to make such a report to him (Child Abduction and Custody Act 1985 s 6(b)); and

608 (3) request any court to which a written report relating to the child has been made to send him a copy of the report (s 6(c)),

and such a request must be duly complied with (see s 6). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. As to the Secretary of State see para 155 ante. As to CAFCASS see para 230 et seq ante.

12 Hague Convention art 7(e).

13 Ibid art 7(f). It has been held that art 7(f) confers jurisdiction on the court to order access: see *C v C (minors) (child abduction)* [1992] 1 FCR 391, [1992] 1 FLR 163; and para 816 post. The words 'in a proper place' in the Hague Convention art 7(f) indicate that the court has a discretion as to whether or not to ensure that the access order of the foreign court is complied with: *Re C (minors) (enforcing foreign access order)* [1993] 1 FCR 770.

14 Hague Convention art 7(g). Legal representation is available to a person whose application under the Hague Convention has been submitted to the central authority, without reference to his financial resources: see the Community Legal Service (Financial) Regulations 2000, SI 2000/516, reg 3(1)(f).

15 Hague Convention art 7(h). Note that the court has power to order the party responsible for the abduction to pay the costs of the child's return: see art 26, 4th para; and para 817 post. See also *V v B (a minor) (abduction)* [1991] FCR 451, [1991] 1 FLR 266 (where a child is wrongfully abducted and an order is made for the child's return, the party abducting is liable to pay the costs of returning the child).

16 Hague Convention art 7(i).

## UPDATE

### 809 Return of children

NOTE 3--See also *Re F (abduction: removal outside jurisdiction)* [2008] EWCA Civ 854, [2008] 2 FCR 629.

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### 810. Legal proceedings.

Where there has been a wrongful removal of a child<sup>1</sup>, the duty of the court<sup>2</sup> to order the return of the child to the country of habitual residence is 'almost absolute'<sup>3</sup>. However, the Hague Convention distinguishes between two situations. First, where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, that authority must order the return of the child forthwith<sup>4</sup>. Except in specified circumstances<sup>5</sup>, the court cannot refuse so to order whether on the grounds of choice of forum or the child's best interests or otherwise<sup>6</sup>. Secondly, even where the proceedings have been commenced after the expiration of that period of one year from the date of the wrongful removal or retention, the judicial or administrative authority must order the return of the child unless it is demonstrated that the child is now<sup>7</sup> settled<sup>8</sup> in its new environment<sup>9</sup>. In such a case the court is not obliged to order the return of the child, but it may do so<sup>10</sup>.

1 As to wrongful removal see para 808 ante.

2 The High Court alone has jurisdiction to entertain applications under the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') in England and Wales: Child Abduction and Custody Act 1985 s 4. For states which are members of the European Union (except Denmark), the EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation') applies with respect to judgments made after 1 March 2005: see paras 788-798 ante. For the interrelationship between the Brussels IIR Regulation and the Hague Convention see para 798 ante. Where an application has been made to a court under the Hague Convention, the court may at any time before the application is determined give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application: Child Abduction and Custody Act 1985 s 5. The court may make an interim order where a child is believed to be en route to the jurisdiction: *Re N (child abduction: jurisdiction)* [1995] Fam 96, [1995] 2 All ER 417, [1995] 2 FCR 605, sub nom *A v A (abduction: jurisdiction)* [1995] 1 FLR 341. The court may also make a return order conditional on specified requirements: *Walley v Walley* [2005] EWCA Civ 910, [2005] 3 FCR 35. Procedural rules are laid down in the Family Proceedings Rules 1991, SI 1991/1247, Pt VI (rr 6.1-6.18) (as amended): see paras 800, 840-841 post.

3 *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562 at 567, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 449 at 451, CA, per Lord Donaldson MR; affd [1990] 2 AC 562, [1990] 2 All ER 961, HL. In *Re M (abduction: conflict of jurisdiction)* [2001] 1 FCR 81, [2000] 2 FLR 372, the child's return to Spain was ordered even though previous Hague Convention proceedings had been compromised on the basis that the child should live with the abducting parent in England. Return is to a country, not to a particular person in that country: see *Re A (a minor) (abduction)* [1988] 1 FLR 365 at 373, CA, per Nourse LJ; *B v K (child abduction)* [1993] 1 FCR 382; *Re G (a minor) (abduction)* [1989] 2 FLR 475 at 483, CA, per Purchas LJ; *Re H (children: abduction)* [2003] EWCA Civ 355 at [26], [2003] 2 FCR 151 at [26], sub nom *Re H (abduction: grave risk)* [2003] 2 FLR 141 at [26] per Butler-Sloss P.

4 Hague Convention art 12. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. See also *Re R (minors) (abduction)* [1993] 2 FCR 461, [1994] 1 FCR 190; *Cannon v Cannon* [2004] EWCA Civ 1330, [2004] 3 FCR 438, [2005] 1 FLR 169.

5 See the Hague Convention art 13; and para 811 post.

6 See *Re A (a minor) (abduction)* [1988] 1 FLR 365 at 367-368, CA, per Nourse LJ. However, the fact that the child is returned to another country does not of itself preclude an English court from subsequently adjudicating



on substantive applications for residence or other orders: see *Hallam v Hallam* [1992] 2 FCR 197, sub nom *H v H (minors) (forum conveniens)* [1993] 1 FLR 958; *Re B (minors: abduction)* (1992) Times, 6 November.

7 For this purpose, 'now' means the date of the commencement of the proceedings: *Re N (minors) (abduction)* [1991] FCR 765, [1991] 1 FLR 413.

8 'Settled' has its ordinary natural meaning, and in this context has two constituents: a physical element relating to being established in a community and environment, and an emotional constituent denoting security and stability: *Re N (minors) (abduction)* [1991] FCR 765, [1991] 1 FLR 413. See also *Re S (a minor) (abduction)* [1991] FCR 656, [1991] 2 FLR 1, CA; *Re M (a minor) (abduction: acquiescence)* [1995] 3 FCR 99, [1996] 1 FLR 315; *Re C (abduction: settlement)* [2004] EWHC 1245 (Fam), [2005] 1 FLR 127; *Cannon v Cannon* [2004] EWCA Civ 1330, [2004] 3 FCR 438, [2005] 1 FLR 169; *Re C (abduction: settlement)* [2006] EWHC 1229 (Fam), [2007] 1 FCR 649. The reasons for the delay in bringing proceedings are relevant to the question of settlement, as an abducting parent should not be able to rely on his success in concealing the child's whereabouts in order to evade return: *Re H (child abduction: child of sixteen)* [2000] 3 FCR 404, sub nom *Re H (abduction: child of 16)* [2000] 2 FLR 51; *Re C (abduction: settlement)* [2004] EWHC 1245 (Fam), [2005] 1 FLR 127; *Cannon v Cannon* supra; *Re C (abduction: settlement)* supra.

9 Hague Convention art 12. See also *Cannon v Cannon* [2004] EWCA Civ 1330, [2004] 3 FCR 438, [2005] 1 FLR 169.

10 See *Re S (a minor) (abduction)* [1991] FCR 656 at 676, [1991] 2 FLR 1 at 24, CA, per Purchas LJ; *Re C (abduction: settlement)* [2004] EWHC 1245 (Fam), [2005] 1 FLR 127; *Cannon v Cannon* [2004] EWCA Civ 1330, [2004] 3 FCR 438, [2005] 1 FLR 169; *Re C (abduction: settlement) (No 2)* [2005] 1 FLR 938. See also *M v M* [2007] UKHL 55 (revsg [2007] EWHC 1820 (Fam), [2007] 2 All ER (D) 431 (July); [2007] EWCA Civ 992).

## UPDATE

### 810 Legal proceedings

NOTE 8--See also *M v M* [2008] EWHC 2049 (Fam), [2008] Fam Law 1076, [2008] All ER (D) 145 (Aug) (broad and purposive construction of what amounted to 'settled in its new environment' would properly reflect facts, including very important factor of concealment or subterfuge that had caused or contributed to asserted delay).

NOTE 10--*M v M*, cited, reported sub nom *Re M (children) (abduction: rights of custody)* [2007] UKHL 55, [2008] 1 All ER 1157, [2007] 3 WLR 975.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/10. CHILD ABDUCTION/(4) CHILD ABDUCTION AND THE INTERNATIONAL CONVENTIONS/(ii) The Hague Convention/811. Exceptions to the requirement to order return.

### **811. Exceptions to the requirement to order return.**

The judicial or administrative authority of a requested state is not bound to order the return of a child<sup>1</sup> who has been wrongfully removed or retained<sup>2</sup> if the person, institution or other body which opposes the child's return establishes that:

- 1530 (1) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in<sup>3</sup> the removal or retention<sup>4</sup>; or
- 1531 (2) there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation<sup>5</sup>.

The courts have been cautious in giving effect to these exceptions<sup>6</sup>. In particular, it has been held that 'grave risk' is not to be equated simply with considerations that the child's welfare should be paramount<sup>7</sup>. The exceptions merely provide a discretionary release from an otherwise absolute obligation<sup>8</sup>.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views<sup>9</sup>.

1 See *Re A (minors) (abduction: custody rights)* [1992] Fam 106, [1992] 1 All ER 929, CA. As to the circumstances to be taken into account in deciding on the exercise of this discretion see para 812 post.

2 No distinction is made in this provision between cases where the period elapsed since the wrongful removal or retention has been more than one year, and cases where it has been less. As to wrongful removal or retention see para 808 ante.

3 The leading case on the meaning of consent or acquiescence is *Re H (abduction: acquiescence)* [1998] AC 72, [1997] 2 All ER 225, [1997] 1 FLR 872, HL, in which the House of Lords laid down the following principles:

- 609 (1) the question whether the wronged parent has acquiesced in the removal or retention of the child is a subjective one: it depends upon his actual state of mind and not upon the other parent's perception of his conduct;
- 610 (2) the subjective intention of the wronged parent is a question of fact to be determined in all the circumstances of the case, the burden of proof being on the abducting parent;
- 611 (3) in deciding that question of fact, more weight is likely to be given to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intentions;
- 612 (4) there is only one exception: where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.

Judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach a voluntary agreement for the return of the child: see *P v P (abduction: acquiescence)* [1998] 3 FCR 550, [1998] 2 FLR 835, CA; *Re I (minors) (abduction: acquiescence)* [1999] 2 FCR 674, [1999] 1 FLR 778; *Re A (abduction: habitual residence: consent)* [2005] EWHC 2998 (Fam), [2006] 2 FLR 1, [2006] Fam Law 350.

Erroneous legal advice is a relevant consideration which the court may take into account in deciding whether an aggrieved parent has acquiesced in the removal of a child: *Re S (minors) (child abduction: acquiescence)* [1994] 2 FCR 945, [1994] 1 FLR 819, CA.

See also *A v A (child abduction)* [1993] 1 FCR 829, [1993] 2 FLR 225; *Re H (minors) (abduction: acquiescence)* [1998] AC 72, [1997] 2 All ER 225, HL (acquiescence is a question of the actual subjective intention of the wronged parent, and therefore a pure question of fact to be determined by the trial judge) (applied in *Re D (abduction: acquiescence)* [1999] 3 FCR 468, [1998] 2 FLR 335, CA; and considered in *Re B (a child) (abduction: acquiescence)* [1999] 3 FCR 557, [1999] 2 FLR 818 (acquiescence by father who obtained contact order)); *Re B (a minor) (abduction)* [1995] 2 FCR 505, [1994] 2 FLR 249, CA (consent to child's removal obtained by deceit not a true consent); *Re H (minors)* (1997) Independent, 15 April, HL; *Re S (abduction: acquiescence)* [1998] 3 FCR 113, [1998] 2 FLR 115, CA; *Re M (abduction) (consent: acquiescence)* [1999] 1 FCR 5, [1999] 1 FLR 171; *Re K (abduction: consent)* [1998] 1 FCR 311, [1997] 2 FLR 212; *P v P (abduction: consent or acquiescence)* [1998] 3 FCR 550, [1998] 2 FLR 835, CA (conduct did not amount to concluded agreement and defence of acquiescence not established); *Re S (child abduction: acquiescence)* [1998] 2 FLR 893 (letters from father, who sought the return of his child under the Hague Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; Misc 14 (1981); Cmnd 8281) (the 'Hague Convention'), did not amount to acquiescence). Written consent is not a legal requirement, but the consent must be real, positive, and unequivocal: *Re R (abduction: consent)* [1999] 1 FCR 87, [1999] 1 FLR 828. See also *T v T (child abduction: consent)* [1999] 2 FCR 2, [1999] 2 FLR 912; *Re I (minors) (abduction: acquiescence)* supra (a letter stating reluctant agreement to negotiate was not acquiescence). The abducting parent cannot argue that the wronged parent acquiesced where he has prevented communication: *Re H (child abduction: child of sixteen)* [2000] 3 FCR 404, sub nom *Re H (abduction: child of 16)* [2000] 2 FLR 51. A finding made by a court of the state of the child's habitual residence that there had been no acquiescence is conclusive: *Re R (minors) (abduction)* [1993] 2 FCR 461, [1994] 1 FLR 190.

In order to establish acquiescence, consent must have been given before the removal or retention and it is only necessary to show that the wronged parent must have been aware of his Convention rights at least in general terms, and aware that the act of removal or retention was unlawful: see *Re A (minors) (abduction: custody rights)* [1992] Fam 106, sub nom *Re A (minors) (abduction: acquiescence)* [1992] 2 FLR 14, CA; *A v A (child abduction)* [1993] 1 FCR 829, [1993] 2 FLR 225; *W v W (child abduction: acquiescence)* [1993] 2 FCR 644, [1993] 2 FLR 211; *Re A(Z) (a child abduction)* [1993] 1 FCR 733, sub nom *Re AZ (a minor) (abduction: acquiescence)* [1993] 1 FLR 682, CA; *Re S (child abduction: acquiescence)* [1998] 2 FLR 893, [1998] Fam Law 656; *Re B (abduction: acquiescence)* [1999] 3 FCR 557, [1999] 2 FLR 818. See also *Re R (minors: child abduction)* [1995] 2 FCR 609, sub nom *Re R (child abduction: acquiescence)* [1995] 1 FLR 716, CA; *Re D (abduction: acquiescence)* [1999] 1 FLR 36. The issue of consent may arise in respect of the Hague Convention art 3 or art 13, and falls to be decided under the latter where the very fact of consent is in issue: *Re O (abduction: consent and acquiescence)* [1998] 2 FCR 61, [1997] 1 FLR 924, [1997] Fam Law 469. Consent obtained by fraud, deception, misunderstanding or non-disclosure is unlikely to be valid: *Re B (a minor) (abduction)* [1995] 2 FCR 505, [1994] 2 FLR 249, CA; *Re B (abduction: article 13 defence)* [1997] 2 FLR 573, [1997] Fam Law 780; *T v T (child abduction: consent)* supra; *Re H (child abduction: child of sixteen)* supra. Consent to a temporary change of residence may be treated as consent to a change in the child's habitual residence: *Re K (abduction: forum conveniens)* [1995] 3 FCR 697, [1995] 2 FLR 211, CA. Once consent or acquiescence has been established, the court will consider all matters relating to the child's interests in deciding whether to exercise its discretion to order return, and will not confine itself to the degree of acquiescence: *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, sub nom *Re A (minors) (abduction: acquiescence) (No 2)* [1993] 1 All ER 272, CA. See also *Re P (a child) (abduction: custody rights)* [2004] EWCA Civ 971, [2005] Fam 293, sub nom *Re P (a child) (abduction: acquiescence)* [2004] 2 FCR 698 (the giving of consent does not automatically render the removal lawful; the court retains the discretion under the Hague Convention art 13 to permit the child to remain in the country to which it was agreed that he should go).

4 See the Hague Convention art 13(a). Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. See note 5 infra. See further *M v M* [2007] EWHC 1404 (Fam), [2007] All ER (D) 130 (Jun).

5 See the Hague Convention art 13(b). Art 13 paras (a), (b) are alternative, not cumulative: *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, sub nom *Re A (minors) (abduction: acquiescence) (No 2)* [1993] 1 All ER 272, CA. As to the application of the Hague Convention art 13 to younger children see *Re T (abduction: child's objections to return)* [2000] 2 FCR 159, [2000] 2 FLR 192, CA. A very high standard is required to demonstrate grave risk or intolerable situation, requiring substantial, clear and compelling evidence: *Re F (a minor) (child abduction: rights of custody abroad)* [1995] Fam 224, [1995] 3 All ER 641, sub nom *Re F (child abduction: risk if returned)* [1995] 2 FLR 31, CA; *K v K (child abduction)* [1998] 3 FCR 207; *Re M (minors) (abduction: psychological harm)* [1998] 2 FCR 488, [1997] 2 FLR 690, CA; *Re C (abduction) (grave risk of psychological harm)* [1999] 2 FCR 507, [1999] 1 FLR 1145, CA; *Re C(B) (child abduction: risk of harm)* [1999] 3 FCR 510, sub nom *Re C (abduction: grave risk of physical or psychological harm)* [1999] 2 FLR 478, CA; *Re A (abduction: custody rights)* [1992] Fam 106, [1992] 1 All ER 929, CA; *Re D (article 13B: non-return)* [2006] EWCA Civ 146, [2006] 2 FLR 305; *Re A (abduction: non-return order)* [2006] EWHC 3397 (Fam), [2007] Fam Law 290, sub nom *Re A (custody decision after Maltese non-return order)* [2007] 1 FCR 402; *Klentzeris v Klentzeris* [2007] EWCA Civ 533, [2007] Fam Law 790, [2007] All ER (D) 237 (Jul). The court is entitled to weigh the risk of

psychological harm of return against the psychological consequences of refusing return: *N v N (child abduction)* [1995] 1 FCR 595, sub nom *N v N (abduction: article 13 defence)* [1995] 1 FLR 107. The English court is likely to rely upon the courts and other authorities in the child's state of habitual residence to protect him from harm: *Re E (a minor) (abduction)* [1989] 1 FLR 135, CA; *P v P (child abduction)* [1992] 1 FCR 468, [1992] 1 FLR 155; *Re L (a minor) (abduction)* [1993] 2 FCR 509, sub nom *Re L (child abduction) (psychological harm)* [1993] 2 FLR 401; *Re K (a minor) (abduction: psychological harm)* [1996] 1 FCR 24, [1995] 2 FLR 550, CA; *E v E (child abduction: intolerable situation)* [1998] 2 FLR 980, [1998] Fam Law 722; *Re S (a minor) (abduction)* [1999] 2 FCR 541, sub nom *Re S (abduction: return into care)* [1999] 1 FLR 843; *Re L (abduction: pending criminal proceedings)* [1999] 2 FCR 604, [1999] 1 FLR 433, [1999] Fam Law 140; *Re M (child abduction: existence of undertakings)* [2000] 3 FCR 693, sub nom *Re M (abduction: intolerable situation)* [2000] 1 FLR 930 (mother had genuine fear of physical harm from father; it was held that the Norwegian court could provide protection); *TB v JB (abduction: grave risk of harm)* [2001] 2 FCR 496, sub nom *B v B (abduction: grave risk of physical or psychological harm)* [2000] All ER (D) 2355, CA. The court may accept undertakings with regard to the child's return and care following return, even though the undertakings would not be enforceable in the foreign jurisdiction: *Re O (child abduction: undertakings)* [1995] 1 FCR 721, [1994] 2 FLR 349. See also *Re M (abduction: undertakings)* [1995] 3 FCR 745, [1995] 1 FLR 1021, CA. When presenting a Hague Convention art 13(b) defence, the detail of the level of protection available in the state of habitual residence is of crucial importance: *Re M (child abduction: existence of undertakings)* [2000] 3 FCR 693, sub nom *Re M (abduction: intolerable situation)* [2000] 1 FLR 930.

As to the risk of psychological harm see eg *Re L (child abduction) (psychological harm)* [1993] 2 FCR 509, [1993] 2 FLR 401; *Re K (a minor) (abduction: psychological harm)* [1996] 1 FCR 24, CA; *Re C (abduction) (grave risk of psychological harm)* [1999] 2 FCR 507, [1999] 1 FLR 1145, CA (applied in *Re C (B) (child abduction: risk of harm)* [1999] 3 FCR 510, [1999] 2 FLR 478, CA). See also *N v N (child abduction)* [1995] 1 FCR 595, sub nom *N v N (abduction: article 13 defence)* [1995] 1 FLR 107 (such a defence must be weighed in the light of the immediate past and by a comparison of the risks involved in returning the children with those involved in refusing to return them). See also *C v B (abduction: grave risk)* [2005] EWHC 2988 (Fam), [2006] 1 FLR 1095, [2006] Fam Law 352; *W v W* [2004] EWHC 1247 (Fam), sub nom *Re W (abduction: domestic violence)* [2004] EWHC 1247 (Fam), [2004] 2 FLR 499, [2004] Fam Law 785 (case involving domestic violence). See *Re M (minors) (abduction: psychological harm)* [1998] 2 FCR 488, [1997] 2 FLR 690, CA, in which it was held that the risk of the children developing serious personality problems and behavioural difficulties, if separated from their mother and returned to their habitual residence, amounted to a grave risk of psychological harm. See also *Re S (a child) (abduction: grave risk of harm)* [2002] EWCA Civ 908, [2002] 3 FCR 43, sub nom *Re S (a child) (abduction: custody rights)* [2002] 2 FLR 815 (where there is a state of war in the country to which the child is to be returned, the issue is not whether there is a war, but whether it poses a grave risk to the child; violence and terrorism in Israel were insufficient to satisfy the stringent test of grave risk of harm to a child so as to permit an exception to her return). The risks involved in returning two children to Zimbabwe were held not sufficient in *M v M* [2007] EWHC 1820 (Fam), [2007] 2 All ER (D) 431 (July); on appeal [2007] EWCA Civ 992; revsd but without affecting this point [2007] UKHL 55. See also *Re S (child abduction: acquiescence)* [1998] 2 FLR 893 (Hague Convention art 13(b) defence defeated by the fact that the return order required the parent responsible for the abduction to accompany the returned child). It is possible for a number of factors, when taken together as opposed to being considered separately, to satisfy the exception in the Hague Convention art 13(b): *E v E (child abduction: intolerable situation)* [1998] 2 FLR 980. See also *Re M (child abduction: existence of undertakings)* supra. The court should allow authorities of the country of the children's habitual residence to resolve the problem: *Re H (children) (abduction)* [2003] EWCA Civ 355, [2003] 2 FCR 151, sub nom *Re H (abduction: grave risk)* [2003] 2 FLR 141. See also *S v B (abduction: human rights)* [2005] EWHC 733 (Fam), [2005] 2 FLR 878, [2005] Fam Law 610.

For states which are members of the European Union, EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation') also applies (see paras 788-798 ante) and stipulates that a court cannot refuse to return a child on the basis of the Hague Convention art 13(b) if it is established that adequate arrangements have been made to secure the protection of the child after his or her return: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) art 11(4). The applicant must specify in the originating summons details of measures taken by courts or authorities to protect the child of which he is aware: see the Family Proceedings Rules 1991, SI 1991/1247, r 6.4(3) (added by SI 2005/264).

6 *Re A (a minor) (abduction)* [1988] 1 FLR 365, CA; *Re G (a minor) (abduction)* [1990] FCR 189, [1989] 2 FLR 475, CA; *Re E (a minor) (abduction)* [1989] 1 FLR 135, CA; *V v B (child abduction)* [1991] FCR 451, [1991] 1 FLR 266; *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465, [1989] 1 WLR 654, CA; *Re S (a minor) (abduction)* [1991] FCR 656, [1991] 2 FLR 1, CA; *Re N (minors) (abduction)* [1991] FCR 765, [1991] 1 FLR 413; *P v P (child abduction)* [1992] 1 FCR 468, [1992] 1 FLR 155; *Re S (a minor) (abduction: custody rights)* [1993] Fam 242, sub nom *Re S (a minor) (abduction)* [1993] 2 All ER 683, CA; *Re S (abduction: intolerable situation: Beth Din)* [2000] 1 FLR 454, [2000] Fam Law 234. See also *Re K (child abduction: child's objections)* [1995] 3 FCR 473, [1995] 1 FLR 977 (regard should be taken of the practical consequences of ordering the return of a child and the protection from harm afforded to him by the laws of the state requesting his return); *K v K (child abduction)* [1998] 3 FCR 207 (abducting parent not allowed to rely on psychological situation of her own making); *Re S (a minor) (abduction)* [1999] 2 FCR 541, sub nom *Re S (abduction: return into care)* [1999] 1 FLR 843 (arrangements by the state requesting return to investigate allegations of abuse made by the child taken into account and child returned); *Re L (abduction: pending criminal proceedings)* [1999] 2 FCR 604,

[1999] 1 FLR 433 (neither criminal proceedings instituted against the abducting mother, nor threat of her arrest and removal at the airport, sufficient).

7 *V v B (child: abduction)* [1991] FCR 451, [1991] 1 FLR 266. See also *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, [1993] 1 All ER 272, CA.

8 *Re G (a minor) (abduction)* [1989] 2 FLR 475 at 479-80, CA, per Purchas LJ; *Re A (minors) (abduction: custody rights)* [1992] Fam 106, [1992] 1 All ER 929, CA; *Re A (minors) (abduction: custody rights) (No 2)* [1993] Fam 1, [1993] 1 All ER 272, CA; *Re L (abduction: pending criminal proceedings)* [1999] 2 FCR 604, [1999] 1 FLR 433. See also *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169, [2004] 3 FCR 438.

9 Hague Convention art 13. The issue of the child's objections is entirely separate from the issue of grave risk: *Re S (a minor) (abduction: custody rights)* [1993] Fam 242, sub nom *Re S (a minor) (abduction)* [1993] 2 All ER 683, CA, where it was held that the questions whether a child objects to return and whether it has attained the requisite degree of maturity are questions of fact for the trial judge. The test to be applied has two stages: (1) the judge must make findings of fact on the two questions: (a) does the child object?; and (b) has he attained an age and degree of maturity at which it is appropriate to take account of his views?; and (2) if so, the court must then consider as a matter of discretion whether to refuse to order return: *Re S (minors) (abduction: acquiescence)* [1994] 2 FCR 945 at 954, [1994] 1 FLR 819 at 826, CA, per Waite LJ; *Re J and K (abduction: objections of child)* [2004] EWHC 1985 (Fam), [2005] 1 FLR 273, [2005] Fam Law 105; *Re M (a child) (abduction: child's objections to return)* [2007] EWCA Civ 260, [2007] 2 FLR 72, [2007] All ER (D) 437 (Mar). In *Re T (abduction: child's objections to return)* [2000] 2 FCR 159, the Court of Appeal held that there is a need to ascertain why the child objects to return; it may be relevant to consider whether the child is more or less mature than his chronological age, and, considering the strength and validity of the child's views, whether it was appropriate to take account of his objections. See *Re L (a minor) (abduction: jurisdiction)* [2002] EWHC 1864 (Fam), [2002] 1 WLR 3208, sub nom *Re L (abduction: child's objections to return)* [2002] 2 FLR 1042 (child of 14 mature enough for his objections to be taken into account by the court). The child's views must be genuine and expressed of his own free will: *Re SR (a minor) (abduction)* [1992] 1 FCR 101, sub nom *Re R (a minor) (abduction)* [1992] 1 FLR 105; *Re S (a minor) (abduction)* [1991] FCR 656, [1991] 2 FLR 1, CA. The child's wishes must be weighed against other relevant factors: *Re K (child abduction: child's objections)* [1995] 3 FCR 473, [1995] 1 FLR 977; *Re R (minors) (child abduction)* [1995] 2 FCR 609, sub nom *Re R (child abduction: acquiescence)* [1995] 1 FLR 716, CA; *Re S (child abduction)* [1998] 1 FCR 17, sub nom *Re S (child abduction: delay)* [1998] 1 FLR 651. Little or no weight will be given to objections based upon a desire to remain with the abducting parent: *Re S (a minor) (abduction: custody rights)* supra; *A v A (child abduction)* [1993] 1 FCR 829, [1993] 2 FLR 225. Although the court may consider objections to returning to a particular carer: *Re M (a minor) (child abduction)* [1994] 2 FCR 750, [1994] 1 FLR 390, CA. Every effort must be made to ensure that all relevant information is available for the judge to allow a determination where the defence is being relied on: *Re J (children) (abduction: child's objections to return)* [2004] EWCA Civ 428, [2004] 1 FCR 737, [2004] 2 FLR 64. This usually involves the child being interviewed by an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') (see para 230 ante). As to the position with regard to siblings where one objects but the other cannot due to a lack of maturity, the authorities were considered by the Court of Appeal in *Re T (abduction: child's objections to return)* [2000] 2 FCR 159, [2000] 2 FLR 192, CA. See also *Z v Z (abduction: children's views)* [2005] EWCA Civ 1012, [2006] 1 FCR 387, sub nom *Zaffino v Zaffino (abduction: children's views)* [2006] 1 FLR 410; *Re HB (abduction: children's objections to return)* [1998] 1 FCR 398, [1998] 1 FLR 422, CA; *Re HB (abduction: children's objections) No 2* [1999] 1 FCR 331, [1998] 1 FLR 564; cf *The Ontario Court v M and M* [1997] 2 FCR 573, [1997] 1 FLR 475. For consideration of the issues concerning sibling groups in abduction cases with regard to their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), as incorporated by the Human Rights Act 1998 Sch 1, see *S v B (abduction: human rights)* [2005] EWHC 733 (Fam), [2005] 2 FLR 878, [2005] Fam Law 610. The child may be separately represented in certain limited circumstances (eg where there are legal arguments which the adult parties are not putting forward), the more usual course being that he would be interviewed by a CAFCASS officer (see para 230 ante): *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, sub nom *Re D (a child) (abduction: foreign custody rights)* [2007] 1 FCR 1; *Re S (abduction: separate representation of children)* [1997] 2 FCR 342, [1997] 1 FLR 486; *Re P (abduction: minor's views)* [1999] 1 FCR 739, [1998] 2 FLR 825, [1998] Fam Law 580, CA; *Re T (abduction: appointment of guardian ad litem)* [1999] 2 FLR 796, [1999] Fam Law 613; *Re J (children) (abduction: child's objections to return)* [2004] EWCA Civ 428, [2004] 1 FCR 737, [2004] 2 FLR 64; *Re H (a child: child abduction)* [2006] EWCA Civ 1247, [2007] 1 FCR 345, [2006] All ER (D) 302 (Jul); *Re H (abduction: Dominica: corporal punishment)* [2006] EWCA Civ 871, [2007] 1 FLR 72; *Re F (abduction: child's wishes) (No 2)* [2007] EWCA Civ 468, [2007] Fam Law 677, sub nom *Re F (a child) (abduction: obligation to hear child)* [2007] All ER (D) 452 (Mar). See also *Re R (abduction: Hague and European Conventions)* [1997] 1 FLR 663, CA. Exceptionally, a court may refuse to order a child's return if there has been a significant change of circumstances resulting in the child's objections satisfying the Hague Convention art 13: *Re HB (abduction: children's objections)* [1998] 1 FCR 398, [1998] 1 FLR 422, CA. In exercising its discretion, the court must consider the child's general welfare beyond the objections raised by the child: *Singh v Singh* 1998 SLT 1084, Ex Div. See also *Re B (abduction: views of children)* [1998] 3 FCR 260, [1998] 1 FLR 667 (return refused in light of children's views, despite parent's defiance of previous order to return). See also *Re P (abduction: minor's views)* [1999] 1 FCR 739, [1998] 2 FLR 825 (child's strong objections to being returned ought to have been taken into account).

## UPDATE

### 811 Exceptions to the requirement to order return

NOTES 3, 5--See also *Re G (abduction; withdrawal of proceedings, acquiescence, habitual residence)* [2007] EWHC 2807 (Fam), [2008] 1 FCR 1; *Re N (a child) (abduction: acquiescence)* [2008] EWHC 1525 (Fam), [2008] All ER (D) 454 (Jul).

NOTE 4--*M v M*, cited, reported at [2007] 2 FLR 1010.

NOTE 5--*Klentzeris*, cited, reported at [2007] EWCA Civ 533, [2007] 2 FLR 996. *M v M*, cited, reported sub nom *Re M (children) (abduction: rights of custody)* [2007] UKHL 55, [2008] 1 All ER 1157, [2007] 3 WLR 975.

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## **812. Factors to be taken into account in deciding whether to refuse return.**

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested state is not a ground for refusing to return a child under the Hague Convention<sup>1</sup>, but the judicial or administrative authorities of the requested state may take account of the reasons for such a decision in applying the Convention<sup>2</sup>. It has been said that the discretion should be exercised in the context of the approach of the Convention, and that it is only if the interests of the child render it appropriate for the courts of the country to which the child has been removed to decide the child's future that there should be any exception to the general principle that there should be an order for return<sup>3</sup>. A decision under the Convention concerning the return of the child is not taken to be a determination on the merits of any custody issue<sup>4</sup>.

In considering the circumstances which might found a refusal to order the return of a child, the judicial and administrative authorities must take into account the information relating to the social background of the child provided by the central authority<sup>5</sup> or other competent authority of the child's habitual residence<sup>6</sup>.

<sup>1</sup> *Ile* the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

<sup>2</sup> *Ibid* art 17. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. See *Re R (minors) (child abduction: acquiescence)* [1995] 2 FCR 609, [1995] 1 FLR 716, CA. The provisions of the Hague Convention arts 8-19 do not limit the power of a judicial or administrative authority to order the return of the child at any time: art 18.

<sup>3</sup> *Re A (minors) (abduction: custody rights)* [1992] Fam 106 at 122, [1992] 1 All ER 929 at 942, CA, per Lord Donaldson MR. See also *Walley v Walley* [2005] EWCA Civ 910, [2005] 3 FCR 35.

<sup>4</sup> Hague Convention art 19.

<sup>5</sup> As to the central authority see para 803 ante.

<sup>6</sup> See the Hague Convention art 13; and *Re E (a minor) (abduction)* [1989] 1 FLR 135 at 144, CA, per Balcombe LJ (the court will not allow this provision to be used as a tactic for delaying the hearing). As to the exercise of the court's discretion under the Hague Convention art 13 see also *W v W (child abduction: acquiescence)* [1993] 2 FCR 644, [1993] 2 FLR 211. As to the exchange of information of the kind mentioned in the text see the Hague Convention art 7(d); and para 809 ante.

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### **813. Avoidance of delay.**

The judicial or administrative authorities of contracting states must act expeditiously in proceedings for the return of children<sup>1</sup>. If the authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the central authority<sup>2</sup> of the requested state, on its own initiative or if asked by the central authority of the requesting state, has the right to request a statement of the reasons for delay<sup>3</sup>. If a reply is received by the central authority of the requested state, that authority must transmit the reply to the central authority of the requesting state or to the applicant, as the case may be<sup>4</sup>.

1 Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') art 11. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. For states which are members of the European Union (except Denmark), EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation') applies: see paras 788-798 ante. This Regulation provides that in cases where it applies, a court must act expeditiously in proceedings on the application and must, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged: see art 11(3); and para 798 note 9 ante. The court files for an application should be clearly marked to indicate the nature of the application and the date by which the matter needs to be resolved: *Vigreux v Michel* [2006] EWCA Civ 630, [2007] 3 FCR 196, [2006] 2 FLR 1180. Failure to deal with abduction proceedings expeditiously may involve violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953; Cmd 8969) art 8 (see paras 818-826 post): see *Ignaccolo-Zenide v Romania* (Application 31679/96) (2000) 31 EHRR 212, ECtHR; *Nuutinen v Finland* (Application 32842/96) (2002) 34 EHRR 358, ECtHR; *Sylvester v Austria* (Applications 36812/97 and 40104/98) [2003] 2 FLR 210, [2003] 2 FCR 128, ECtHR; *HN v Poland* (Application 77710/01) [2005] 3 FCR 85, ECHR; *Gil and AUI v Spain* (Application 56673/00) [2005] 1 FCR 210, [2005] 1 FLR 190, ECtHR; *Iosub Caras v Romania* (Application 7198/04) [2007] 1 FLR 661, [2006] 3 FCR 130, ECtHR; *Karadzic v Croatia* (Application 35030/04) [2006] 1 FCR 36, ECtHR; *Bajrami v Albania* (Application No 35853/04) [2007] 1 FCR 91, [2007] 1 FLR 1629. See also *Re M (child abduction: delay)* (2007) Times, 28 August, CA.

2 As to the central authority see para 803 ante.

3 Hague Convention art 11.

4 Ibid art 11. The applicant also has a duty to prosecute the proceedings: *Re G (abduction: striking out application)* [1996] 1 FCR 173, [1995] 2 FLR 410.

## **UPDATE**

### **813 Avoidance of delay**

NOTE 1--*Re M (child abduction: delay)* cited, reported at [2007] EWCA Civ 1059, [2008] Fam Law 110.



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**814. Child removed to another state.**

Where the judicial or administrative authority in the requested state has reason to believe that the child in question has been taken to another state, it may stay the proceedings or dismiss the application for the return of the child<sup>1</sup>.

<sup>1</sup> Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') art 12. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante.

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### **815. Suspension of court's powers in cases of wrongful removal or retention.**

The judicial or administrative authorities of the contracting state to which a child has been removed or in which he has been retained must not decide on the merits of rights of custody once notice has been received of a wrongful removal or retention of a child<sup>1</sup>, unless and until it has been determined that the child is not to be returned under the Hague Convention<sup>2</sup> or unless an application under the Hague Convention is not lodged within a reasonable time following receipt of the notice<sup>3</sup>.

In England and Wales, 'deciding on the merits of custody' means:

- 1532 (1) making, varying or revoking a custody order<sup>4</sup> or a supervision order<sup>5</sup>;
- 1533 (2) enforcing under the Family Law Act 1986<sup>6</sup> a custody order<sup>7</sup>; or
- 1534 (3) registering or enforcing a decision under Part II of the Child Abduction and Custody Act 1985<sup>8</sup>.

1 As to wrongful removal or retention see para 808 ante.

2 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

3 Ibid art 16. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. The court has notice of a wrongful removal or retention where it becomes aware of it either expressly or by necessary inference: *R v R (residence order: child abduction)* [1995] Fam 209, [1995] 4 All ER 115. The existence of pending proceedings with respect to a child in England does not prevent the court entertaining an application under the Hague Convention: *Re B (minors) (Hague Convention) (Nos 1 and 2)* [1994] 1 FCR 389, sub nom *Re B (minors) (abduction)* [1993] 1 FLR 988, [1993] Fam Law 450; but cf *H v H (child abduction) (habitual residence)* [1994] 2 FCR 833, sub nom *H v H (child abduction: stay of domestic proceedings)* [1994] 1 FLR 530; *C v C (abduction: jurisdiction)* [1994] 1 FCR 6.

4 For the meaning of 'custody order' see para 804 note 4 ante.

5 Child Abduction and Custody Act 1985 s 9(a) (amended by the Children Act 1989 s 108(5), (7), Sch 13 para 57(1), Sch 15). The reference in the text to a supervision order is to one under the Children Act 1989 s 31 (as amended): see para 271 et seq ante.

6 I.e. under the Family Law Act 1986 s 29 (as amended): see para 839 post.

7 Child Abduction and Custody Act 1985 s 9(aa) (added by the Family Law Act 1986 s 68(1), Sch 1 para 28). The reference in the text to a custody order (now a 'Part I order') is to one within the meaning of the Family Law Act 1986 Pt I Ch V (ss 25-32) (as amended): see para 830 et seq post.

8 Child Abduction and Custody Act 1985 s 9(b). As to Pt II (ss 12-24) (as amended) see para 799 et seq ante. See also *Re AR (a minor) (abduction)* [1997] 3 FCR 29, sub nom *Re R (abduction: Hague and European Conventions)* [1997] 1 FLR 663, CA.

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### **816. Applications with respect to rights of access.**

An application to make arrangements for organising or securing the effective exercise of rights of access<sup>1</sup> may be presented to the central authorities<sup>2</sup> of the contracting states in the same way as an application for the return of a child<sup>3</sup>. The central authorities are bound by the obligations of co-operation<sup>4</sup> to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject<sup>5</sup>. The central authorities must take steps to remove, as far as possible, all obstacles to the exercise of such rights<sup>6</sup>. Those authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting those rights and securing respect for the conditions to which the exercise of the rights may be subject<sup>7</sup>.

This obligation is imposed on the central authority (rather than on the judicial authority) of contracting states<sup>8</sup>, and the Hague Convention draws a firm distinction between rights of custody and rights of access, and is thus not intended to secure enforcement of rights of access in the same way as rights of custody<sup>9</sup>. The court has no jurisdiction to make or recognise orders for access under these provisions of the Child Abduction and Custody Act 1985<sup>10</sup>.

The obligation of the central authority is to make appropriate arrangements for the applicant by providing solicitors to act on his behalf in applying for assistance from the community legal service fund and instituting proceedings in the High Court under the Children Act 1989<sup>11</sup>. In those proceedings the child's welfare will be the paramount consideration<sup>12</sup>.

1 As to rights of custody and rights of access see para 807 ante.

2 As to the central authority see para 803 ante.

3 Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (the 'Hague Convention') art 21. Articles 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1: see para 799 ante. The duty of the central authority on receiving an application under the Hague Convention art 21 is to make appropriate arrangements to provide English solicitors to act on behalf of the applicant to institute an application under the Children Act 1989 s 8 (as amended) (see para 199 ante): *Re T (minors) (international child abduction: access)* [1993] 3 All ER 127n, [1993] 1 WLR 1461.

4 See the Hague Convention art 7; and para 809 ante.

5 Ibid art 21.

6 Ibid art 21.

7 Ibid art 21. The obligations imposed by art 21 are of an administrative, non-mandatory nature, and do not provide for the mutual recognition of access orders: *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA (court would apply domestic law unfettered by the Hague Convention in determining whether to return child).

8 *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA.

9 *Re J (abduction: ward of court)* [1989] Fam 85, [1989] 3 All ER 590; *S v H (abduction: access rights)* [1998] Fam 49, [1997] 3 WLR 1086, [1997] 1 FLR 970; *Re V-B (minors) (abduction: rights of custody)* [1999] 2 FCR 371, [1999] 2 FLR 192, CA.

10 *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA. See also *Re C (minors) (enforcing foreign access order)* [1993] 1 FCR 770.

11 *Practice Note (child abduction unit)* [1993] 1 FLR 804.

12 *McKee v McKee* [1951] AC 352 at 365, [1951] 1 All ER 942 at 948, PC; *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA. See also *C v C (minors) (child abduction)* [1992] 1 FCR 391, [1992] 1 FLR 163. As to the welfare principle see para 300 ante.

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### **817. Costs of applications under the Convention.**

Each central authority<sup>1</sup> bears its own costs in applying the Hague Convention<sup>2</sup>, and central authorities and other public services of contracting states must not impose any charges in relation to applications submitted under the Hague Convention<sup>3</sup>. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers<sup>4</sup>. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child<sup>5</sup>. However, a contracting state may, by making a reservation<sup>6</sup>, declare that it is not bound to assume any such costs resulting from the participation of legal counsel or advisers or from court proceedings, except in so far as those costs may be covered by its system of assistance from the community legal service fund and advice<sup>7</sup>. The United Kingdom<sup>8</sup> having made such a reservation<sup>9</sup>, the costs and expenses of proceedings under the Hague Convention, or where applicable, those arising from the participation of legal counsel or advisers are not to be borne by any minister or other authority in the United Kingdom except so far as they fall to be so borne by virtue of the provision of any service funded by the Legal Services Commission as part of the Community Legal Service<sup>10</sup>.

Upon ordering the return of a child or issuing an order concerning rights of access under the Hague Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and the costs of returning the child<sup>11</sup>.

1 As to the central authority see para 803 ante.

2 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

3 Ibid art 26.

4 Ibid art 26. No security, bond or deposit, however described, may be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of the Hague Convention: art 22.

5 Ibid art 26.

6 I.e. in accordance with ibid art 42.

7 Ibid art 26.

8 For the meaning of 'United Kingdom' see para 102 note 7 ante.

9 I.e. as is mentioned in the Hague Convention art 26.

10 Child Abduction and Custody Act 1985 s 11 (amended by the Access to Justice Act 1999 s 24, Sch 4 para 31).

11 Hague Convention art 26. A court may award costs against a claimant who has deliberately and persistently falsified a case in an attempt to deprive a child of his habitual residence or render custody ineffective: *EC-L v DM (child abduction: costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772, [2005] Fam Law 606.



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### **(iii) The European Convention**

#### **818. Policy of the Convention.**

The European Convention<sup>1</sup>, in contrast with the Hague Convention<sup>2</sup>, is concerned with the recognition or enforcement of decisions relating to the custody of children and on the restoration of custody of children<sup>3</sup>. Since 1 March 2001, further provisions have been made under the Brussels II Regulation<sup>4</sup> as between member states of the European Union (except for Denmark) with respect to judgments relating to parental responsibility for the children of both spouses involved in divorce, nullity or separation proceedings. With effect from 1 March 2005, the Brussels II Regulation has been replaced by the Brussels IIR Regulation<sup>5</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility<sup>6</sup>. The Brussels IIR Regulation applies to all judgments relating to parental responsibility and not simply those in respect of children of both spouses involved in matrimonial proceedings (that is, it includes step-children and children of unmarried parents)<sup>7</sup>.

Applications must be made under the European Convention with respect to judgments made before 1 March 2001. With respect to judgments made after 1 March 2001, the Brussels II Regulation has precedence<sup>8</sup>; and for those made after 1 March 2005, the Brussels IIR Regulation has precedence<sup>9</sup>. So applications to enforce any custody order made in a member state (other than Denmark) should be made under the appropriate Regulation. Effectively, applications under the European Convention will be limited to those concerned with enforcing custody orders made in contracting states<sup>10</sup> that are not member states of the European Union and those made in Denmark.

A decision relating to custody is a decision of an authority<sup>11</sup> in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him<sup>12</sup>. In relation to a contracting state which has in matters of custody two or more systems of law of territorial application, reference to the law of a person's habitual residence or to the law of a person's nationality is to be construed as referring to the system of law determined by the rules in force in that contracting state or, if there are no such rules, to the system of law with which the person concerned is most closely connected<sup>13</sup>.

1    I.e. the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). The European Convention is given force of law in the United Kingdom by the Child Abduction and Custody Act 1985: see s 12(2); and para 799 ante. The European Convention arts 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante. The European Convention arts 9, 10 are set out as they have effect in consequence of a reservation made by the United Kingdom under art 17: Child Abduction and Custody Act 1985 s 12(2). As to the states in respect of which the European Convention has effect see para 802 note 4 ante. For the meaning of 'United Kingdom' see para 102 note 7 ante.

2    I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33): see paras 805-817 ante.

3    See the European Convention art 4; the Child Abduction and Custody Act 1985 s 12(1); and para 819 post. 'Child' means a person of any nationality so long as he is under 16 years of age and does not have the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the state addressed: European Convention art 1(a).

4     le EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. See paras 788-798 ante.

5     le EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. See paras 788-798 ante.

6     Parental responsibility is defined widely in EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29).

7     See paras 788-798 ante.

8     EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, pp 19-36) art 37; Child Abduction and Custody Act 1985 s 12 (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 7). See *Re G (children)* [2003] EWCA Civ 1607, sub nom *Re G (children) (foreign contact order: enforcement)* [2004] 1 FCR 266, [2004] 1 FLR 378.

9     EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) (by which the Regulation takes precedence over the Convention, in so far as it concerns matters governed by the Regulation); Child Abduction and Custody Act 1985 s 12 (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 7).

10    See para 802 note 4 ante.

11    le a judicial or administrative authority: see the European Convention art 1(b).

12    Ibid art 1(c). In contrast to the Hague Convention, access orders are enforceable under the European Convention: *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA; *Re A (minors) (foreign access order: enforcement)* [1996] 3 FCR 165, [1996] 1 FLR 561, CA; and see *Practice Note (child abduction unit)* [1993] 1 FLR 804. As to rights of access see para 825 post. It would seem that orders relating to a child made by the court in the exercise of its inherent jurisdiction (see para 218 et seq ante), contact orders (see para 251 ante), residence orders (see para 262 ante), care orders (see para 270 et seq ante), or orders made under statutory provisions repealed by the Children Act 1989 but which are still in force, will be within the definition.

13    European Convention art 26(1)(a). Article 26(1)(a) also applies mutatis mutandis to contracting states which have in matters of custody two or more systems of law of personal application: art 26(2).



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### **819. Enforcement of decisions.**

Any person who has obtained in a contracting state<sup>1</sup> a decision relating to the custody of a child<sup>2</sup> and who wishes to have that decision recognised or enforced<sup>3</sup> in another contracting state may submit an application for this purpose to the central authority<sup>4</sup> in any contracting state<sup>5</sup>. Where a person on whom any rights are conferred by a decision relating to custody<sup>6</sup> made by a court in the United Kingdom makes such an application to the Lord Chancellor or the Secretary of State with a view to securing its recognition or enforcement in another contracting state, the Lord Chancellor or the Secretary of State may require the court which made the decision to furnish him with all or any of the documents referred to in heads (2) to (4) below<sup>7</sup>.

A request for recognition or enforcement in another contracting state of a decision relating to custody must be accompanied by:

- 1535 (1) a document authorising the central authority of the state addressed to act on behalf of the applicant or to designate another representative for that purpose<sup>8</sup>;
- 1536 (2) a copy of the decision which satisfies the necessary conditions of authenticity<sup>9</sup>;
- 1537 (3) in the case of a decision given in the absence of the defendant or his legal representative, a document which establishes that the defendant was duly served with the document which instituted the proceedings or an equivalent document<sup>10</sup>;
- 1538 (4) if applicable, any document which establishes that, in accordance with the law of the state of origin, the decision is enforceable<sup>11</sup>;
- 1539 (5) if possible, a statement indicating the whereabouts or likely whereabouts of the child in the state addressed<sup>12</sup>;
- 1540 (6) proposals as to how the custody of the child should be restored<sup>13</sup>.

If a central authority receiving an application is not the central authority in the state addressed, it is obliged to send the document directly and without delay to that latter central authority<sup>14</sup>. The central authority receiving the application must keep the applicant informed without delay of the progress of the application<sup>15</sup>.

1 As to the states which are parties to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') see para 802 note 4 ante.

2 Decisions obtained prior to ratification are within the European Convention provided they are subsisting at the time of the application: *Re L (child abduction: European Convention)* [1992] 2 FLR 178.

3 The words 'recognition and enforcement' should be construed disjunctively: *Re H (a minor) (foreign custody order: enforcement)* [1994] Fam 105, [1994] 1 All ER 812, CA.

4 As to the central authority see para 803 ante.

5 European Convention art 4(1). Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante. The application must be accompanied by the documents mentioned in the European Convention art 13 (see the text and notes 8-13 infra): art 4(2). The court has jurisdiction to allow a child to be separately represented in European Convention proceedings, which it can exercise in exceptional circumstances: *Re T (abduction: appointment of guardian ad litem)* [1999] 2 FLR 796.

6 For the meaning of 'decision relating to custody' see para 818 ante; definition applied by the Child Abduction and Custody Act 1985 s 23(3).

7 Ibid s 23(1).

8 European Convention art 13(1)(a).

9 Ibid art 13(1)(b).

10 Ibid art 13(1)(c).

11 Ibid art 13(1)(d).

12 Ibid art 13(1)(e).

13 Ibid art 13(1)(f). In any proceedings under the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended) any such document as is mentioned in the European Convention art 13, or a certified copy of any such document, is sufficient evidence of anything stated in it: Child Abduction and Custody Act 1985 s 22(3).

14 European Convention art 4(3). The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions laid down by the European Convention are not satisfied: art 4(4).

15 Ibid art 4(5).

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## **820. Duties of central authority.**

The central authority<sup>1</sup> in the state addressed must take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities<sup>2</sup>, in order:

- 1541 (1) to discover the whereabouts of the child<sup>3</sup>;
- 1542 (2) to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant<sup>4</sup>;
- 1543 (3) to secure the recognition or enforcement of the decision<sup>5</sup>;
- 1544 (4) to secure the delivery of the child to the applicant where enforcement is granted<sup>6</sup>; and
- 1545 (5) to inform the requesting authority of the measures taken and their results<sup>7</sup>.

Where the central authority in the state addressed has reason to believe that the child is in the territory of another contracting state, it must send the documents directly and without delay to the central authority of that state<sup>8</sup>. Save for the cost of repatriation, each contracting state undertakes not to claim any payment from an applicant in respect of any of the measures taken under heads (1) to (5) above by the central authority of that state on the applicant's behalf, including the costs of proceedings and, where applicable, the costs incurred by the assistance of a lawyer<sup>9</sup>. If recognition or enforcement is refused, and if the central authority of the state addressed considers that it should comply with the request by the applicant to bring proceedings in that state concerning the substance of the case, that authority must use its best endeavours to secure the representation of the applicant in the proceedings under conditions no less favourable than those available to a person who is resident in and a national of that state, and for this purpose it may, in particular, institute proceedings before its competent authorities<sup>10</sup>.

1 As to the central authority see para 803 ante.

2 As to the meaning of 'authority' see para 818 note 11 ante.

3 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') art 5(1)(a). Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante.

4 European Convention art 5(1)(b).

5 Ibid art 5(1)(c).

6 Ibid art 5(1)(d).

7 Ibid art 5(1)(e).

8 Ibid art 5(2). In any proceedings under the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended) a decision of an authority outside the United Kingdom may be proved by a duly authenticated copy of the decision, and any document purporting to be such a copy must be deemed to be a true copy unless the contrary is shown: s 22(1). For these purposes, a copy is duly authenticated if it bears the seal, or is signed by a

judge or officer, of the authority in question: s 22(2). For the meaning of 'United Kingdom' see para 102 note 7 ante.

9 See the European Convention art 5(3).

10 Ibid art 5(4). As to the availability of Community Legal Service funding see the Community Legal Service (Financial) Regulations 2000, SI 2000/516, reg 3(1)(f); and LEGAL AID vol 65 (2008) PARA 55.

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### **821. The obligation to recognise and enforce decisions.**

A decision relating to custody<sup>1</sup> given in a contracting state<sup>2</sup> must be recognised and, where it is enforceable in the state of origin, made enforceable in every other contracting state<sup>3</sup>. In no circumstances may the foreign decision be reviewed as to its substance<sup>4</sup>. A decision<sup>5</sup> which was made in a contracting state other than the United Kingdom<sup>6</sup> must be recognised in each part of the United Kingdom as if made by a court having jurisdiction to make it in that part<sup>7</sup>. However, the decision is not enforceable in any part of the United Kingdom unless registered in the appropriate court<sup>8</sup>.

In relation to a contracting state which has in matters of custody two or more systems of law of territorial application, reference to the contracting state of origin or to the contracting state addressed is to be construed as referring, as the case may be, to the territorial unit where the decision was given or to the territorial unit where recognition or enforcement of the decision or restoration of custody is requested<sup>9</sup>.

1 As to decisions relating to custody see para 818 ante.

2 As to the states which are parties to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') see para 802 note 4 ante.

3 Ibid art 7. Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante.

4 European Convention art 9(3). See also *Re A (minors) (foreign access order: enforcement)* [1996] 3 FCR 165, [1996] 1 FLR 561, CA.

5 I.e. a decision to which the European Convention art 7 applies: see the text and notes 1-3 supra. The provision also applies to a decision to which art 12 (subsequent declaration that a removal is unlawful) applies: see para 826 post.

6 For the meaning of 'United Kingdom' see para 102 note 7 ante.

7 Child Abduction and Custody Act 1985 s 15(1), (2). 'Part of the United Kingdom' means England and Wales, Scotland, or Northern Ireland: s 27(2).

8 Ibid s 15(2)(b). The appropriate court in any part of the United Kingdom may, on the application of any person appearing to it to have an interest in the matter, declare on any of the grounds specified in the European Convention art 9 (see the text and note 4 supra and para 823 post) or art 10 (see paras 823-824 post) that the decision is not to be recognised in any part of the United Kingdom: Child Abduction and Custody Act 1985 s 15(2)(a). In England and Wales or Northern Ireland, 'appropriate court' means the High Court; and in Scotland it means the Court of Session: s 27(2).

9 European Convention art 26(1)(b).

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## **822. Registration: procedure and effect.**

A person on whom any rights are conferred by a decision relating to custody<sup>1</sup> made by an authority<sup>2</sup> in a contracting state other than the United Kingdom<sup>3</sup> may make an application for the registration of the decision in an appropriate court<sup>4</sup> in the United Kingdom<sup>5</sup>. A register must be kept in the principal registry<sup>6</sup> by the proper officer<sup>7</sup> of the decisions registered together with any variation of those decisions made<sup>8</sup>. Where a decision relating to custody has been so registered, the court in which it is registered has the same powers for the purpose of enforcing the decision as if it had been made by that court, and proceedings for or with respect to enforcement may be taken accordingly<sup>9</sup>. Where a decision which has been registered is varied or revoked by an authority in the contracting state in which it was made, the person on whose behalf the application for registration of the decision was made must notify the court in which the decision is registered of the variation or revocation<sup>10</sup>.

Where an application has been made to a court for the registration of a decision or for the enforcement of such a decision, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child<sup>11</sup> concerned or of preventing changes in the circumstances relevant to the determination of the application or, in the case of an application for registration, relevant to the determination of any subsequent application for the enforcement of the decision<sup>12</sup>.

Where it appears to a court in which proceedings are pending in respect of a child that an application has been made for the registration of a decision in respect of the child<sup>13</sup> or that such a decision is registered, the powers of the court with respect to the child in those proceedings are restricted<sup>14</sup> unless, in the case of application for registration, the application is refused<sup>15</sup>. This provision only takes effect if it appears to the court in which the proceedings are pending that the decision was made in proceedings commenced before the proceedings which are pending<sup>16</sup>.

Where it appears to the Secretary of State that an application has been made for the registration of a decision in respect of a child<sup>17</sup> or that such a decision is registered, the Secretary of State must not make, vary or revoke any custody order<sup>18</sup> in respect of the child unless, in the case of an application for registration, the application is refused<sup>19</sup>.

1 For the meaning of 'decision relating to custody' for these purposes see para 818 ante; definition applied by the Child Abduction and Custody Act 1985 s 16(6).

2 For the meaning of 'authority' see para 818 note 11 ante.

3 For the meaning of 'United Kingdom' see para 102 note 7 ante.

4 For the meaning of 'appropriate court' see para 821 note 8 ante. Where the Lord Chancellor is requested to assist in making an application under the Child Abduction and Custody Act 1985 s 16 to the Court of Session he must transmit the request to the Secretary of State and the Secretary of State must transmit to the Lord Chancellor any such request to assist in making an application to the High Court: s 16(5). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497.

5 Ibid s 16(1). The central authority in the United Kingdom must assist such a person in making such an application if a request for such assistance is made by him or on his behalf by the central authority of the contracting state in question: s 16(2). An application under s 16(1) or a request under s 16(2) is treated as a request for enforcement for the purposes of the European Convention on Recognition and Enforcement of

Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') art 10 (see paras 823-824 post) and art 13 (see para 819 ante): Child Abduction and Custody Act 1985 s 16(3). The European Convention arts 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante. As to the central authority see para 803 ante.

6 For the meaning of 'principal registry' see para 795 note 7 ante.

7 For the meaning of 'proper officer' see para 801 note 2 ante.

8 Family Proceedings Rules 1991, SI 1991/1247, r 6.18 (added by SI 2005/264).

9 Child Abduction and Custody Act 1985 s 18. The court in which a decision is registered under s 16 (see the text and notes 1-5 supra) may also, on the application of any person appearing to the court to have an interest in the matter, cancel or vary the registration if it is satisfied that the decision has been revoked or, as the case may be, varied by an authority in the contracting state in which it was made: s 17(4).

10 Ibid s 17(1). Where a court is notified under s 17(1) of the revocation of a decision, it must cancel the registration, and notify such persons as may be prescribed by rules of court of the cancellation: s 17(2). Where a court is notified under s 17(1) of the variation of a decision, it must notify such persons as may be prescribed by rules of court of the variation; and, subject to any conditions which may be so prescribed, it must vary the registration: s 17(3).

The following applies to decisions which have been registered under s 16 and are subsequently varied or revoked by an authority in the contracting state in which they were made: Family Proceedings Rules 1991, SI 1991/1247, r 6.15(1). The court must, on cancelling the registration of a decision which has been revoked, notify:

613 (1) the person appearing to the court to have care of the child (r 6.15(2)(a));

614 (2) the person on whose behalf the application for registration of the decision was made (r 6.15(2)(b)); and

615 (3) the other party to that application (r 6.15(2)(c)),

of the cancellation (r 6.15(2)). The court must, on being notified of the variation of a decision, notify:

616 (a) the person appearing to the court to have care of the child (r 6.15(3)(a)); and

617 (b) any party to the application for registration of the decision (r 6.15(3)(b)),

of the variation; and any such person may apply by summons in the proceedings for the registration of the decision, for the purpose of making representations to the court before the registration is varied (r 6.15(3)). Any person appearing to the court to have an interest in the matter may apply by summons in the proceedings for the registration of a decision for the cancellation or variation of the registration: r 6.15(4). For these purposes, 'contracting state' means: (i) one of the parties to EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'), ie Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Austria, Poland, Portugal, Slovakia, Slovenia, Finland, Sweden and the United Kingdom; and (ii) a party which has subsequently adopted EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (definition added by SI 2001/821; and amended by SI 2005/264).

11 For the meaning of 'child' see para 818 note 3 ante.

12 Child Abduction and Custody Act 1985 s 19. As to applications to make interim directions under s 19 see the Family Proceedings Rules 1991, SI 1991/1247, r 6.13; and para 801 ante.

13 Ie under the Child Abduction and Custody Act 1985 s 16: see the text and notes 1-5 supra.

14 Ie as mentioned in ibid s 20(2) (as amended): see note 15 infra.

15 Ibid s 20(1)(a). This does not apply where the decision is only a decision relating to custody within the meaning of s 16 by virtue of being a decision relating to rights of access: s 20(1)(a), (3). Where s 20(1) applies, the court must not:

618 (1) in the case of custody proceedings, make, vary or revoke any custody order or a supervision order under the Children Act 1989 s 31 (see para 271 et seq ante) (Child Abduction

and Custody Act 1985 s 20(2)(a) (amended by the Children Act 1989 s 108(5), (7), Sch 13 para 57, Sch 15));

619 (2) in the case of proceedings under the Family Law Act 1986 s 29 (see para 839 post) for the enforcement of a custody order within the meaning of Pt I Ch V (ss 25-32) (as amended) (see para 837 note 1 post), enforce that order (Child Abduction and Custody Act 1985 s 20(2)(aa) (added by the Family Law Act 1986 s 68(1), Sch 1 para 29)).

16 Child Abduction and Custody Act 1985 s 20(1)(b).

17 Ie under ibid s 16: see the text and notes 1-5 supra.

18 For the meaning of 'custody order' see para 804 note 4 ante.

19 Child Abduction and Custody Act 1985 s 20(2A) (added by the Family Law Act 1986 s 67(3)). This provision does not apply where the decision is only a decision relating to custody within the meaning of the Child Abduction and Custody Act 1985 s 16 by virtue of being a decision relating to rights of access: s 20(2A) (as so added); s 20(3) (amended by the Family Law Act 1986 s 67(3)).



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### **823. Refusal of recognition and enforcement.**

The High Court must refuse to register a decision relating to custody<sup>1</sup> if:

1546 (1) an application in respect of the child<sup>2</sup> under Part I of the Child Abduction and Custody Act 1985<sup>3</sup> (which gives effect to the Hague Convention<sup>4</sup>) is pending<sup>5</sup>;

1547 (2) it is of the opinion that the decision is not enforceable in the contracting state<sup>6</sup> where it was made<sup>7</sup> and it is not a decision declaring the removal of a child across an international frontier unlawful<sup>8</sup>; or

1548 (3) it is of the opinion that on any of the following grounds the decision should not be recognised in any part of the United Kingdom<sup>9</sup>:

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12. (a) in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence (but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement<sup>10</sup> where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the state of origin)<sup>11</sup>;

13. (b) in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded on the habitual residence<sup>12</sup> of the defendant, or the last common habitual residence of the child's parents (at least one parent being still habitually resident there), or on the habitual residence of the child<sup>13</sup>;

14. (c) the decision is incompatible with a decision relating to custody which became enforceable in the state addressed before the improper removal of the child<sup>14</sup>, unless the child has had his habitual residence in the territory of the requesting state for one year before his removal<sup>15</sup>;

15. (d) it is found that the effects of the decision are manifestly incompatible with the fundamental principles of law relating to the family and children in the state addressed<sup>16</sup>;

16. (e) it is found that by reason of a change in the circumstances including the passage of time, but not including the mere change in the residence of the child as a result of the improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child<sup>17</sup>;

17. (f) at the time when the proceedings were instituted in the state of origin the child was a national of the state addressed or was habitually resident there and no such connection existed with the state of origin, or the child was a national both of the state of origin and of the state addressed and was habitually resident in the state addressed<sup>18</sup>;

18. (g) the decision is incompatible with a decision given in the state addressed or enforceable in that state after being given in a third state, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and the refusal is in accordance with the welfare of the child<sup>19</sup>.

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- 1 For the meaning of 'decision relating to custody' for these purposes see para 818 ante.
- 2 For the meaning of 'child' see para 818 note 3 ante.
- 3 Ie the Child Abduction and Custody Act 1985 Pt I (ss 1-11) (as amended): see para 802 et seq ante.
- 4 Ie the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33): see paras 805-817 ante.
- 5 Child Abduction and Custody Act 1985 s 16(4)(c). See *Re AR (a minor) (abduction)* [1997] 3 FCR 29, sub nom *Re R (abduction: Hague and European Conventions)* [1997] 1 FLR 663, CA.
- 6 As to the states which are party to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') see para 802 note 4 ante. Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante. As to the European Convention arts 9, 10 see notes 11-19 infra; and para 818 note 1 ante.
- 7 It is only decisions enforceable in the state of origin which are entitled to registration and enforcement under the European Convention: see para 821 ante.
- 8 Child Abduction and Custody Act 1985 s 16(4)(b). The reference in the text to a decision declaring the removal of a child across an international frontier unlawful is to such a decision under the European Convention art 12: see para 826 post.
- 9 Child Abduction and Custody Act 1985 s 16(4)(a). For the meaning of 'part of the United Kingdom' see para 821 note 7 ante.
- 10 'Recognition and enforcement' are to be interpreted disjunctively, so that although an order has been validly registered the court is not obliged to enforce it: *Re H (a minor) (foreign custody order: enforcement)* [1994] Fam 105, [1994] 1 All ER 812, CA.
- 11 European Convention art 9(1)(a). See also *Re S (a minor) (child abduction)* [1996] 3 FCR 115, sub nom *Re S (abduction: European Convention)* [1996] 1 FLR 660; *Re G (a minor) (child abduction: enforcement)* [1990] 2 FLR 325, [1990] FCR 973.
- 12 The term 'habitual residence' is not defined in the European Convention, but for a discussion of the term in the context of the Hague Convention see para 806 ante.
- 13 European Convention art 9(1)(b). See also *Re S (a minor) (child abduction)* [1996] 3 FCR 115, sub nom *Re S (abduction: European Convention)* [1996] 1 FLR 660.
- 14 See the Child Abduction and Custody Act 1985 s 15(3); and *Re M (child abduction) (European Convention)* [1994] 2 FCR 1209, [1994] 1 FLR 551. 'Improper removal' means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a contracting state and which is enforceable in such a state; 'improper removal' also includes:
  - 620 (1) the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised (European Convention art 1(d)(i)); and
  - 621 (2) a removal which is subsequently declared unlawful within the meaning of the European Convention art 12 (see para 826 post) (art 1(d)(ii)).
- 15 Ibid art 9(1)(c).
- 16 Ibid art 10(1)(a). See *Re G (a minor) (child abduction: enforcement)* [1990] FCR 973, [1990] 2 FLR 325; *F v F (minors) (custody: foreign order)* [1989] Fam 1, [1988] 3 WLR 959; *Re K (a minor) (abduction)* [1990] FCR 524, [1990] 1 FLR 387.
- 17 European Convention art 10(1)(b). See *F v F (minors) (custody: foreign order)* [1989] Fam 1, [1988] 3 WLR 959 (registration refused); *Re K (a minor) (abduction)* [1990] FCR 524, [1990] 1 FLR 387 (registration granted; effect of the European Convention is to make the child's welfare a relevant, but not the paramount, consideration); *Re L (child abduction: European Convention)* [1992] 2 FLR 178; *Re M (child abduction) (European Convention)* [1994] 2 FCR 1209, [1994] 1 FLR 551; *Re L (abduction: European Convention: access)* [1999] 2 FLR 1089, [1999] Fam Law 753; *W v W (residence: enforcement of order)* [2005] EWHC 1811 (Fam), [2005] All ER (D) 41 (Aug) (registration granted). The essential task under the European Convention art 10(1)(b) is to establish what the circumstances were at the time of the original decision and then to ascertain whether or

not there had been any change in those circumstances, including the passage of time, but not including the mere change in residence of the child after improper removal: *Re AR (a minor) (abduction)* [1997] 3 FCR 29, sub nom *Re R (abduction: Hague and European Conventions)* [1997] 1 FLR 663, CA. Before reaching a decision under the European Convention art 10(1)(b) the authority concerned in the state addressed must:

- 622 (1) ascertain the child's views unless this is impracticable having regard in particular to his age and understanding (art 15(1)(a)); and
- 623 (2) may request that any appropriate inquiries be carried out (art 15(1)(b)).

Where the Lord Chancellor or the Secretary of State is requested to make enquiries about a child under art 15(1)(b) he may:

- 624 (a) request a local authority or an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer (within the meaning given by the Children Act 2004 s 35: see para 239 ante) to make a report to him in writing with respect to any matter relating to the child concerned which appears to him to be relevant (Child Abduction and Custody Act 1985 ss 21(a), 27 (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 79, 80; and the Children Act 2004 s 40, Sch 3 paras 2, 3));
- 625 (b) request the Department of Health and Social Services for Northern Ireland to arrange for a suitably qualified person to make such a report to him (Child Abduction and Custody Act 1985 s 21(b)); or
- 626 (c) request any court to which a written report relating to the child has been made to send him a copy of the report (s 21(c)),

and any such request must be duly complied with (s 21). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 477-497. As to the Secretary of State see para 155 ante. As to CAFCASS see para 230 et seq ante.

The child's views in themselves do not constitute a defence to recognition and enforcement: there must first be a change in circumstances before the court can go on to ask whether the effect of the decision is manifestly no longer in accordance with the welfare of the child, and the child's views are only one of the factors which are relevant to that: *Re AR (a minor) (abduction)* supra at 37 and 669 per Hale J; *Re A (a minor) (foreign access order: enforcement)* [1996] 3 FCR 165, [1996] 1 FLR 561, CA. The court may order a welfare report and/or appoint a children's guardian for this purpose: see *Re T (abduction: appointment of guardian ad litem)* [1999] 2 FLR 796, [1999] Fam Law 613. As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante.

The cost of inquiries in any contracting state must be met by the authorities of the state where they are carried out: European Convention art 15(2).

18 Ibid art 10(1)(c).

19 Ibid art 10(1)(d).

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#### **824. Adjournment of proceedings.**

Proceedings for recognition or enforcement of a decision relating to custody<sup>1</sup> may be adjourned if:

- 1549 (1) an ordinary form of review of the original decision has been commenced<sup>2</sup>;
- 1550 (2) proceedings relating to the custody of the child<sup>3</sup>, commenced before the proceedings in the state of origin were instituted, are pending in the state addressed<sup>4</sup>; or
- 1551 (3) another decision concerning the custody of the child is the subject of proceedings for enforcement or of any other proceedings concerning recognition of the decision<sup>5</sup>.

1 As to decisions relating to custody see para 818 ante.

2 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') art 10(2)(a). Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante.

3 For the meaning of 'child' see para 818 note 3 ante.

4 European Convention art 10(2)(b).

5 Ibid art 10(2)(c).

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## **825. Rights of access.**

Decisions on rights of access<sup>1</sup> and provisions of decisions relating to custody<sup>2</sup> which deal with the rights of access must be recognised and enforced subject to the same conditions as other decisions relating to custody<sup>3</sup>. However, the competent authority<sup>4</sup> of the state addressed may fix the conditions for the implementation and exercise of the right of access, taking into account, in particular, undertakings given by the parties on this matter<sup>5</sup>. Moreover, where no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority<sup>6</sup> of the state addressed may apply to its competent authorities for a decision on the right of access if the person claiming a right of access so requests<sup>7</sup>.

1 'A decision relating to rights of access' means a decision as to the contact which a child may or may not have with any person: Child Abduction and Custody Act 1985 s 27(4) (added by the Children Act 1989 s 108(5), Sch 13 para 57(2)). See *Re L (abduction: European Convention: access)* [1999] 2 FLR 1089, [1999] Fam Law 753. For the meaning of 'child' see para 818 note 3 ante. As to contact orders see para 251 ante.

2 As to decisions relating to custody see para 818 ante.

3 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (the 'European Convention') art 11(1). Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante.

4 For the meaning of 'authority' see para 818 note 11 ante.

5 European Convention art 11(2). See *Re L (abduction: European Convention: access)* [1999] 2 FLR 1089 (where the discretion under the European Convention art 11(2) to grant access was not exercised where the grandparents had obtained a contact order in France on the basis that their grandchildren were residing in France, but the parents had subsequently relocated to England with the children).

6 As to the central authority see para 803 ante.

7 European Convention art 11(3).

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## **826. Chasing orders.**

The European Convention<sup>1</sup> is not limited in its application to cases where a child has been removed in defiance of a decision. Where, at the time of the removal of the child<sup>2</sup> across an international frontier there is no enforceable decision given in the contracting state relating to his custody<sup>3</sup>, the provisions of the European Convention apply to any subsequent decision relating to the custody of that child and declaring the removal to be unlawful which is given in a contracting state<sup>4</sup> at the request of any interested person<sup>5</sup>. A decision to which these provisions apply may be registered in the same way as any other decision relating to custody<sup>6</sup>.

Where in any custody proceedings a court in the United Kingdom<sup>7</sup> makes a decision relating to a child who has been removed from the United Kingdom, the court may also, on an application made by any person for the provisions of the European Convention to apply to any such decision<sup>8</sup>, declare the removal to have been unlawful if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the United Kingdom without the consent of the person (or, if more than one, all the persons) having the right to determine the child's place of residence under the law of the part of the United Kingdom in which the child was habitually resident<sup>9</sup>.

1    Ie the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191).

2    For the meaning of 'child' see para 818 note 3 ante.

3    As to decisions relating to custody see para 818 ante.

4    As to the states which are parties to the European Convention see para 802 note 4 ante.

5    Ibid art 12. Articles 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2: see para 799 ante. See also *Re S (a minor) (child abduction)* [1996] 3 FCR 115, sub nom *Re S (abduction: European Convention)* [1996] 1 FLR 660.

6    See paras 822-823 ante.

7    For the meaning of 'United Kingdom' see para 102 note 7 ante.

8    Ie for the purposes of the European Convention art 12: see the text and notes 1-5 supra.

9    Child Abduction and Custody Act 1985 s 23(2).

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## **(5) NON-CONVENTION COUNTRIES**

### **827. Removal of child from United Kingdom to non-Convention country.**

If legal proceedings with respect to the child have been instituted in the United Kingdom prior to the child's removal to a country which is not party to either the Hague Convention<sup>1</sup> or the European Convention<sup>2</sup>, then it may be possible to take enforcement proceedings against any person who has acted inconsistently with the court's order. In particular, no person may remove a ward of court from the jurisdiction without the permission of the court, and removal without permission constitutes a contempt of court<sup>3</sup>. Appropriate enforcement proceedings may be taken if the child has been removed in breach of the terms of a prohibited steps order<sup>4</sup> or of a condition imposed as part of a contact order<sup>5</sup>, a residence order<sup>6</sup> or a specific issue order<sup>7</sup>. Where a residence order is in force with respect to a child, it is provided that no person may remove the child from the United Kingdom without either the written consent of every person who has parental responsibility for the child or the permission of the court<sup>8</sup>, but this does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made<sup>9</sup>.

If a court order has been breached by the removal of a child, it may be possible to bring contempt proceedings, seeking either the committal of a person in breach or the sequestration of his assets<sup>10</sup>.

Whether or not an order of the English court will be recognised abroad is a matter for the law of the country concerned and it will often be necessary to take proceedings in the country to which the child has been taken<sup>11</sup>. If no court proceedings have been instituted before the child's removal, the question whether the English court has jurisdiction to make orders for the child's recovery depends on statute<sup>12</sup>.

The removal of a child to a non-Convention country may constitute an offence under the Child Abduction Act 1984<sup>13</sup>. It may accordingly be possible to seek the extradition to the United Kingdom of any adult involved<sup>14</sup>.

Child abduction cases involving the United Kingdom and Pakistan have been the subject of a Protocol drawn up by the family judiciary in the United Kingdom and Pakistan<sup>15</sup>.

1     I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33): see paras 805-817 ante. For the meaning of 'United Kingdom' see para 102 note 7 ante.

2     I.e. the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191): see paras 818-826 ante.

3     *Hockly v Lukin* (1762) 1 Dick 353; *Wellesley v Duke of Beaufort, Long Wellesley's Case* (1831) 2 Russ & M 639; *Harrison v Goodall* (1852) Kay 310; *Re J (an infant)* (1913) 108 LT 554. As to wardship see paras 218-222 ante. As to contempt of court see CONTEMPT OF COURT.

A substantial custodial sentence may be appropriate: *M v M* [1992] 1 FCR 317, CA. However, this rule does not prevent the removal of the ward without the consent of any court to any other part of the United Kingdom (ie a part of the United Kingdom outside the jurisdiction of the court of which he is a ward) in which proceedings for divorce, nullity or judicial separation in respect of the marriage of the ward's parents are continuing, or proceedings for dissolution or annulment or legal separation in respect of civil partnership of his parents are continuing, nor to another part of the United Kingdom in which the ward is habitually resident, except where

that other part is Scotland and he has attained the age of 16: see the Family Law Act 1986 s 38(1), (2), (3)(a) (amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 18(1)). Moreover, the rule does not prohibit the ward's removal to any other place with the consent of either the appropriate court in that other part of the United Kingdom or the court in which the proceedings for divorce, nullity or judicial separation in respect of the marriage of the ward's parents or proceedings for dissolution or annulment or legal separation in respect of civil partnership of his parents are continuing: see the Family Law Act 1986 s 38(1), (2), (3)(b) (amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 18(1), (2)). 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: Family Law Act 1986 s 42(1).

See also *Re KR (abduction: forcible removal by parents)* [1999] 4 All ER 954, [1999] 2 FCR 337, [1999] 2 FLR 542, in which wardship proceedings were instituted following the removal of a child to a non-Convention country.

The provisions of the Family Law Act 1986 s 38(2), (3) are modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

As from a day to be appointed, the Family Law Act 1986 s 2 (as amended) (see paras 831, 834 post), s 2A (as added and amended) (see para 831 post), s 3 (see para 833 post), s 6 (see para 836 post), s 38, s 42 and s 51 are to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 37, but at the date at which this volume states the law no such day had been appointed and these amendments are unlikely to be brought into force: see para 150 note 7 ante.

4 As to prohibited steps orders see para 261 ante.

5 As to contact orders see para 251 ante. Strict conditions may be required before contact is allowed to take place in a non-Convention country: see *Re T (a minor) (contact: non-Convention country)* [1998] 3 FCR 574n, sub nom *Re T (staying contact in non-Convention country)* [1999] 1 FLR 262.

6 As to residence orders see para 262 ante.

7 As to specific issue orders see para 263 ante.

8 See the Children Act 1989 s 13(1)(b); and para 262 ante. See *Re A (a minor) (holiday in non-Convention country)* [1999] 1 FCR 284, sub nom *Re A (security for return to jurisdiction)* [1999] 2 FLR 1n (guarantees sought from mother's family in the form of declarations sworn before a Sharia judge on the Koran that child would be returned before permission given for child to visit Saudi Arabia); *Re A (return of passport)* [1997] 2 FLR 137, [1997] Fam Law 534, CA; *Re L (removal from jurisdiction: holiday)* [2001] 1 FLR 241. See also *Re K (a minor) (removal from jurisdiction: practice)* [1999] 3 FCR 673, [1999] 2 FLR 1084, CA.

9 See the Children Act 1989 s 13(2); and para 262 ante. In making a residence order with respect to a child the court may grant the permission required by the statute either generally or for specified purposes: see s 13(3); and para 262 ante. Although permission to remove a child may be granted on terms that a person enter into a bond or security for a sum of money which will be forfeited in the event of non-compliance, it has been questioned whether there is jurisdiction to make such an order in the absence of agreement; and in any event it is thought that the procedure should be invoked only where there is a real danger that the child may not be returned: see *Re H (minors) (wardship: surety)* [1991] FCR 45, [1991] 1 FLR 40, CA.

10 As to sequestration of assets in family cases see *Romilly v Romilly* [1964] P 22, [1963] 3 All ER 607; *Richardson v Richardson* [1989] Fam 95, [1989] 3 All ER 779 (sequestration to enforce access order); *Mir v Mir* [1992] Fam 79, [1992] 1 All ER 765; *Re S (minors) (child abduction: sequestration)* [1995] 3 FCR 707, [1995] 1 FLR 858 (a Hague Convention case). See further CONTEMPT OF COURT vol 9(1) (Reissue) para 507.

11 In *Re KR (abduction: forcible removal by parents)* [1999] 4 All ER 954, [1999] 2 FCR 337, [1999] 2 FLR 542, the English court, seised of wardship proceedings, made an order to the effect that every person in a position to do so should co-operate in securing the child's return to England, the purpose of which was to encourage the relevant authorities in the country to which the child had been taken (in that case, India) to give assistance to that end, although the order itself was without extra-territorial effect as a matter of law. See also *Practice Direction* [1984] 3 All ER 640, sub nom *Practice Note* [1984] 1 WLR 1216 (practical but not legal advice can be offered by the Foreign and Commonwealth Office). Advice on recovery is intended to supplement the advice given by the aggrieved person's legal representative. Inquiries for assistance in tracing missing abducted children should be referred directly to the Foreign and Commonwealth Office Consular Department. See *President's Guidance (Liaison between Courts in England and Wales and British Embassies and High Commissions Abroad)* (28 November 2003) [2004] Fam Law 68.

12 See the provisions of the Family Law Act 1986; and para 830 et seq post.



13 See para 781 ante.

14 As to the process of extradition see EXTRADITION.

15 *UK and Pakistan Consensus on Child Abduction* [2003] Fam Law 199; *Implementation of the UK-Pakistan Judicial Protocol on Child Contact and Abduction* [2004] Fam Law 609.

## **UPDATE**

### **827 Removal of child from United Kingdom to non-Convention country**

NOTE 10--See *Re A (a child) (removal from jurisdiction: contempt of court)* [2008] EWCA Civ 1138, [2009] 1 WLR 1482, [2008] All ER (D) 121 (Aug) (no contempt where mother could not prove father was capable of effecting child's return).

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## **828. Child removed to United Kingdom from non-Convention country.**

Where a child is brought to the United Kingdom<sup>1</sup> from a country which is not party to either the Hague Convention<sup>2</sup> or the European Convention<sup>3</sup>, proceedings may be initiated by any person with the appropriate standing in relation to the child<sup>4</sup>. In particular, an individual<sup>5</sup> may issue a summons to make a child a ward of court and an order sought in the wardship proceedings that the child be removed from the United Kingdom<sup>6</sup>. Alternatively, proceedings may be brought under the Children Act 1989 seeking a specific issue order<sup>7</sup>, a prohibited steps order<sup>8</sup>, or any other order which the court has power to make under that Act which is relevant in the circumstances<sup>9</sup>.

Child abduction cases involving the United Kingdom and Pakistan have been the subject of a Protocol drawn up by the family judiciary in the United Kingdom and Pakistan<sup>10</sup>.

1 For the meaning of 'United Kingdom' see para 102 note 7 ante.

2 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33): see paras 805-817 ante.

3 I.e. the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191): see paras 818-826 ante.

4 See the Children Act 1989 s 10 (as amended); and paras 247-249 ante.

5 For restrictions on the use of wardship by local authorities see *ibid* s 100(3), (4); and para 218 ante.

6 See *D v D (child abduction)* [1994] 1 FCR 654, [1994] 1 FLR 137, CA (application of Convention principles in a wardship case where children removed from non-Convention country to United Kingdom). See also *Re Z (a minor) (abduction: non-Convention country)* [1999] 1 FCR 251, [1999] 1 FLR 1270. As to wardship proceedings see paras 218-222 ante.

7 As to specific issue orders see para 263 ante. See also *Re J (a child) (custody rights: jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, sub nom *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] 3 All ER 291.

8 As to prohibited steps orders see para 261 ante.

9 See generally para 247 et seq ante.

10 *UK and Pakistan Consensus on Child Abduction* [2003] Fam Law 199; *Implementation of the UK-Pakistan Judicial Protocol on Child Contact and Abduction* [2004] Fam Law 609.

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### **829. Principles to be applied in deciding applications for return of child.**

It is well settled that the court may act in wardship matters despite the fact that the court of a foreign country also has jurisdiction to make an order, and even if a foreign court has made an order relating to the upbringing of a child<sup>1</sup>. An English court is bound in duty to protect the child's welfare without being bound to enforce a foreign order or to follow it<sup>2</sup>. The concept of *forum conveniens* has no place in the wardship jurisdiction<sup>3</sup>. If the court has embarked upon a full-scale investigation of the facts, the applicable principles do not differ from those which apply in any other case; the action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, but the weight to be given to it will depend on all the circumstances<sup>4</sup>.

In many cases, the court will be asked to make a peremptory order for the return of the child to a foreign country without any investigation of the merits. In such cases, the cardinal rule remains that the welfare of the child must always be the paramount consideration<sup>5</sup>. The fact that the child has been removed to another country may of itself involve a risk of damage to his welfare in terms of alienation from background, home, schools, friends, relations and, ultimately, from his country and its society and culture<sup>6</sup>. If such a case is promptly brought to the attention of the court in the United Kingdom, the judge may feel that it is in the best interests of the child that those disturbing factors should be eliminated from his life as speedily as possible; and a full investigation of the merits of the case in an English court may be incompatible with achieving this<sup>7</sup>. These matters have to be balanced against the risk to the child of a precipitate return<sup>8</sup>. The approach of the foreign legal system may be relevant depending on the facts of the case<sup>9</sup>.

By definition, the court resolving the issue of whether to order the return of a child is not bound to apply the principles laid down in either the Hague Convention<sup>10</sup> or the European Convention<sup>11</sup>. The courts have rejected the argument that, in passing the Child Abduction and Custody Act 1985, Parliament was substituting a test which did not put the child's welfare as the first and paramount consideration<sup>12</sup>. However, it has been held that that Act gives effect to the belief that in normal circumstances it is in the interests of children that parents or others should not abduct them from one jurisdiction to another, and that any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto been normally resident<sup>13</sup>.

It appears that in relation to the welfare of the child two questions must be addressed: first, it must be decided which court should determine what the child's best interests require; and secondly, if the answer to that question is that the issue should be resolved by the English court, what orders as to residence, contact and other matters should be made<sup>14</sup>.

1 *Re B's Settlement, B v B* [1940] Ch 54, [1951] 1 All ER 949n; *McKee v McKee* [1951] AC 352, [1951] 1 All ER 942, PC; *Re Kernot (an infant), Kernot v Kernot* [1965] Ch 217, [1964] 3 All ER 339.

2 *Re L (minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA; *J v C* [1970] AC 668 at 701, [1969] 1 All ER 788 at 812, HL, per Lord Guest, at 714 and 824 per Lord MacDermott, and at 720 and 828-829 per Lord Upjohn.

3 *Re R (minors) (wardship: jurisdiction)* (1981) 2 FLR 416 at 426-427, CA, per Ormrod LJ. Cf *Hallam v Hallam* [1992] 2 FCR 197, sub nom *Hallam v Hallam (No 2)* [1992] 2 FCR 205, sub nom *H v H (minors) (forum conveniens) (Nos 1 and 2)* [1993] 1 FLR 958; *Re B (minors) (abduction) (No 1)* [1993] 1 FLR 988; *Re B (minors) (abduction) (No 2)* [1993] 1 FLR 993.

4 *Re L (minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA, per Buckley LJ.

5 *Re J (a child) (custody rights: jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, sub nom *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] 3 All ER 291 (the child's welfare was paramount; the foreign legal system could not be irrelevant but its relevance would depend upon the facts of the individual case). See also *Re L (minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA, per Buckley LJ; *D v D (child abduction)* [1994] 1 FCR 654, sub nom *D v D (child abduction: non-Convention country)* [1994] 1 FLR 137, CA; *Re P (a minor) (child abduction: non-Convention country)* [1997] Fam 45, [1997] 2 WLR 223, [1997] 1 FLR 780, CA; *T v T (child abduction: non-Convention country)* [1999] 2 FCR 70, [1998] 2 FLR 1110; *Re H (abduction: non-Convention application)* [2006] EWHC 199 (Fam), [2006] 2 FLR 314. See *Re KR (a minor) (abduction: forcible removal by parents)* [1999] 4 All ER 954, [1999] 2 FCR 337 (whilst English courts were sensitive to traditional and/or religious values and the concept of family, particularly paternal, authority shared by many minority ethnic and religious communities, the welfare of the individual child would usually prevail; in particular, the voice of the young person would be heard and would prevail in so personal a context as opposition to an arranged or enforced marriage). See also *Osman v Elasha* [2000] Fam 62, [2000] 2 WLR 1036, CA (paramount consideration of the child's welfare must be looked at in the context of the custom and culture of a country applying Islamic Sharia law). The fact that a child is the dependant of an asylum applicant does not preclude a court from ordering the immediate return of the child to its country of habitual residence: *Re S (children) (abduction: asylum appeal)* [2002] EWCA Civ 843, [2002] 1 WLR 2548, [2002] 2 FLR 465, [2002] 2 FCR 642. See also *Re H (child abduction: mother's asylum)* [2003] 2 FLR 1105, [2003] EWHC 1820 (Fam), sub nom *Re W (a child) (abduction: jurisdiction)* [2003] All ER (D) 442 (Jul) (mother and child granted asylum in United Kingdom; application for return of child to Pakistan allowed).

6 *Re R (minors) (wardship: jurisdiction)* (1981) 2 FLR 416 at 426, CA, per Ormrod LJ; *Re L (minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA.

7 *Re L (minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA.

8 See *Re R (minors) (wardship: jurisdiction)* (1981) 2 FLR 416 at 426, CA, per Ormrod LJ.

9 In *Re J (a child) (custody rights: jurisdiction)* [2005] UKHL 40 at [15], [39], [2006] 1 AC 80 at [15], [39], sub nom *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] 3 All ER 291 at [15], [39], Baroness Hale made the following points in relation to the relevance of a foreign legal system:

- 627 (1) the difference between the legal system of the home country and that of the United Kingdom cannot be irrelevant, but its relevance will depend on the facts of the individual case;
- 628 (2) in practice it will be for the party resisting return to show that there is a difference which might be detrimental to the child's welfare;
- 629 (3) there are bound to be cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems should carry little weight.

In *Re M (minors) (abduction: peremptory return order)* [1996] 1 FCR 557, [1996] 1 FLR 478, the Court of Appeal upheld the judge's refusal to adjourn proceedings to allow the mother to adduce evidence of the legal process in Dubai. 'Underlying the whole purpose of the peremptory return order is a principle of international comity under which judges in England will assume that facilities for a fair hearing will be provided in the court of the other jurisdiction, and that due account will be taken by overseas judges of what has been said, ordered and undertaken to be done within the English jurisdiction . . . Very exceptional circumstances would be needed to show that in a particular case the English court would be justified in departing from that general principle': *Re M (abduction: peremptory return order)* supra at 560 and 480-481 per Waite LJ. Cf *Re JA (a minor) (abduction: non-Convention country)* [1998] 2 FCR 159 at 174, [1998] 1 FLR 231 at 243, CA, per Ward LJ, where it was held that it would be an abnegation of the duty of the court to the ward under its protection to surrender the determination of its ward's future to a foreign court whose regime might be inimical to the child's welfare; on the evidence, the powers of the foreign court were limited and there was no indication that welfare was the test; the application for an order for summary return therefore failed; and *Re M (abduction: peremptory return order)* supra was said to have been decided per incuriam. However, in *Osman v Elasha* [2000] Fam 62, [2000] 2 WLR 1036, sub nom *Re E (abduction: non-Convention country)* [1999] 2 FLR 642, the Court of Appeal said that *Re M (abduction: peremptory return order)* supra was not decided per incuriam; and summary return was not ordered in *Re JA (child abduction: non-Convention country)* supra because expert evidence established a risk of harm to the child if a return was ordered (see at 175 and 244-245 per Ward LJ). Save in exceptional circumstances, it is not wise to permit the abducting parent to criticise the standards of family justice applied in a non-Convention state.

10 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33); see paras 805-817 ante. See *Re J (a child) (custody rights: jurisdiction)* [2005] UKHL 40, [2006]

1 AC 80, sub nom *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] 3 All ER 291; *Re H (abduction: non-Convention application)* [2006] EWHC 199 (Fam), [2006] 2 FLR 314.

11 The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191): see paras 818-826 ante. See *Re JA (a minor) (abduction: non-Convention country)* [1998] 2 FCR 159, [1998] 1 FLR 231, CA. 'The established authority of this court is that a decision for or against peremptory return can be informed by the spirit of the [Hague] Convention but, in my judgment, it does not follow that adherence to the spirit, which is to achieve the quick return of children, imports the letter . . . I see no reason why our courts should not be cautious and circumspect about offering close adherence to the Convention . . . to citizens of those countries who do not offer reciprocal enjoyment when our citizens appear in their courts': *Re JA (child abduction: non-Convention country)* supra at 168 and 238 per Ward LJ.

12 *G v G (minors) (abduction)* [1991] FCR 12, [1991] 2 FLR 506, CA.

13 The concepts of the Hague Convention were not to be applied by analogy in a non-Convention case: *Re J (a child) (custody rights: jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, sub nom *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] 3 All ER 291; *Re H (abduction: non-Convention application)* [2006] EWHC 199 (Fam), [2006] 2 FLR 314.

14 *Re F (a minor) (abduction: custody)* [1991] Fam 25, [1990] 3 All ER 97, CA; applied in *Re P (a minor) (child abduction: non-Convention country)* [1997] Fam 45, [1997] 2 WLR 223. See also *Re A (minors) (abduction: custody rights)* [1992] Fam 106, [1992] 1 All ER 929, CA. As to residence orders see para 262 ante. As to contact orders see para 251 ante.

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## **(6) REMOVAL BETWEEN DIFFERENT UNITED KINGDOM JURISDICTIONS**

### **830. Introduction: application of the Family Law Act 1986.**

The Family Law Act 1986 seeks to ensure that, so far as possible, there should at any one time be only one jurisdiction in the United Kingdom in which there is power to make orders relating to the upbringing of a child, and makes provision whereby an order made by a court in one part of the United Kingdom<sup>1</sup> may be registered in another part of the United Kingdom<sup>2</sup>, and then enforced in that part of the United Kingdom as an order made by the court there<sup>3</sup>. The orders (known as 'Part I orders'<sup>4</sup>) to which the relevant provisions of the Family Law Act 1986<sup>5</sup> apply include relevant orders made by the courts in Scotland and Northern Ireland<sup>6</sup>. The orders made by courts in England and Wales which are Part I orders are:

- 1552 (1) a contact order<sup>7</sup>, a prohibited steps order<sup>8</sup>, a residence order<sup>9</sup>, a specific issue order<sup>10</sup>, other than an order varying or discharging such an order<sup>11</sup>;
- 1553 (2) a special guardianship order<sup>12</sup>;
- 1554 (3) an order for contact with a child placed for adoption<sup>13</sup> other than an order varying or revoking such an order<sup>14</sup>; and
- 1555 (4) an order made in the exercise of the inherent jurisdiction of the High Court with respect to children so far as it gives care of a child to any person or provides for contact with, or the education of, a child, but not an order varying or discharging such an order<sup>15</sup>.

The Family Law Act 1986 distinguishes between matrimonial and other orders<sup>16</sup>.

1 For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

2 For the meaning of 'United Kingdom' see para 102 note 7 ante.

3 The Family Law Act 1986 is based on recommendations made by the Law Commission and the Scottish Law Commission: see *Recognition of Foreign Nullity Decrees and Related Matters* (Law Com No 137; Scot Law Com No 88) (1984).

4 See the Family Law Act 1986 s 1(1) (amended by the Children Act 1989 s 108(5), Sch 13 paras 62(1)(2)(a), 63; the Adoption and Children Act 2002 s 139(1), Sch 3 paras 46, 47; the Children (Scotland) Act 1995 s 105(4), Sch 4 para 41(2); the Age of Legal Capacity (Scotland) Act 1991 s 10, Sch 1 para 44; and the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(2)(a)(i), (ii)). As to what constitutes a Part I order for the purposes of the Family Law Act 1986 Pt I, Ch V (ss 25-32) (as amended) see para 837 note 1 post. See also note 15 infra.

5 The relevant provisions are contained in *ibid* Pt I (ss 1-43) (as amended): see para 830 et seq post.

6 See *ibid* s 1(1)(b) (amended by the Children (Scotland) Act 1995 Sch 4 para 41(2); and the Age of Legal Capacity (Scotland) Act 1991 Sch 1 para 44); the Family Law Act 1986 s 1(1)(c) (substituted by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(2)(a)(i)); the Family Law Act 1986 s 1(1)(e) (substituted by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(2)(a)(ii)); the Family Law Act 1986 s 1(2) (amended by the Children Act 1989 Sch 13 para 63(2), Sch 15; and the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756); the Family Law Act 1986 s 1(3) (substituted by the Children Act 1989 Sch 13 para 63(3); and amended by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(2)(b)).

The provisions of the Family Law Act 1986 ss 2-7 (as amended) (jurisdiction of the courts) apply only to England and Wales, although the Act makes similar provision in relation to Scotland and Northern Ireland, and can be applied to dependent territories, thus giving full effect to the object of Pt I (as amended) as between those jurisdictions. See further ss 8-18 (as amended) (jurisdiction of courts in Scotland), ss 19-24 (as amended) (jurisdiction of courts in Northern Ireland), and s 43 (as amended) (application to dependent territories). The Act has been applied to the Isle of Man and Jersey: see the Family Law Act 1986 (Dependent Territories) Order 1991, Sch 1 (amended by SI 2006/1456).

The Family Law Act 1986 s 1 (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

7 As to contact orders see para 251 ante.

8 As to prohibited steps orders see para 261 ante.

9 As to residence orders see para 262 ante.

10 As to specific issue orders see para 263 ante.

11 Family Law Act 1986 s 1(1)(a) (amended by the Children Act 1989 Sch 13 para 63). The orders listed in head (1) in the text are orders made under the Children Act 1989 s 8 (as amended). A court may not make an order under the Family Law Act 1986 s 1(1)(a) (as amended) with respect to a child unless it has jurisdiction under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) (the 'Brussels IIR Regulation'): Family Law Act 1986 s 2(1)(a) (substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 8(1), (2)).

12 Family Law Act 1986 s 1(1)(aa) (added by the Adoption and Children Act 2002 s 139, Sch 3). As to special guardianship orders see para 151 ante.

13 Is an order made under the Adoption and Children Act 2002 s 26: see para 339 ante.

14 Family Law Act 1986 s 1(1)(ab) (added by the Adoption and Children Act 2002 Sch 3 paras 46, 47). As to the inherent jurisdiction of the High Court see para 218 et seq ante.

Note that parties to proceedings for a Part I order must, to such extent and in such manner as may be prescribed, give particulars of other proceedings known to them which relate to the child concerned, including proceedings instituted abroad and proceedings which are no longer continuing: Family Law Act 1986 s 39 (amended by the Children Act 1989 s 108(5), Sch 13 para 62). As to the prescribed manner of notification by a party to proceedings in a magistrates court in England and Wales see the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 6, Schedule (amended by SI 2005/617).

15 Family Law Act 1986 s 1(1)(d) (substituted by the Children Act 1989 Sch 13 para 63(1)(b)). Prior to the amendment of the Family Law Act 1986 by the Children Act 1989, the orders referred to in the Family Law Act 1986 Pt I were known as 'custody orders'; a 'Part I order' also includes any order which would have been a custody order by virtue of the Family Law Act 1986 s 1 (as amended) in any form in which it was in force at any time before its amendment by the Children Act 1989, and, subject to the provisions of the Family Law Act 1986 ss 32, 40 (both as amended), excludes any order which would have been excluded from being a custody order by virtue of s 1 (as amended): s 1(3) (substituted by the Children Act 1989 Sch 13 para 63(3)).

16 See paras 831-832 post.

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### **831. Orders relating to children in matrimonial proceedings or civil partnership proceedings.**

A court in England and Wales has no jurisdiction to make a contact order<sup>1</sup>, prohibited steps order<sup>2</sup>, residence order<sup>3</sup> or specific issue order<sup>4</sup> with respect to a child<sup>5</sup> unless:

- 1556 (1) it has jurisdiction under the Council Regulation<sup>6</sup>; or
- 1557 (2) the Council Regulation does not apply but the question of making the order arises in or in connection with matrimonial proceedings<sup>7</sup> or civil partnership proceedings<sup>8</sup> and the matrimonial or civil partnership proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned<sup>9</sup> and:

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- 19. (a) the proceedings are proceedings for divorce or nullity of marriage or dissolution or annulment of civil partnership and are continuing<sup>11</sup>;
- 20. (b) the proceedings are proceedings for judicial separation or legal separation of civil partners and are continuing and the jurisdiction of the court is not excluded<sup>12</sup>; or
- 21. (c) the proceedings have been dismissed after the beginning of the trial but the contact order, prohibited steps order, residence order or specific issue order<sup>13</sup> is being made forthwith, or the application for the order was made on or before the dismissal<sup>14</sup>.

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1 As to contact orders see para 251 ante.

2 As to prohibited steps orders see para 261 ante.

3 As to residence orders see para 262 ante.

4 As to specific issue orders see para 263 ante.

5 I.e. the court has no jurisdiction to make an order falling within the Family Law Act 1986 s 1(1)(a) (see para 830 ante): see ss 2(1), 7(d) (s 7 substituted by the Children Act 1989 s 108(5), Sch 13 para 67). 'Child' means a person who has not attained the age of 18: Family Law Act 1986 s 7(a) (as so substituted).

6 Ibid s 2(1)(a) (s 2 substituted by the Children Act 1989 Sch 13 para 64; and the Family Law Act 1986 s 2(1) substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 8). The Council Regulation referred to in the text is EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'): Family Law Act 1986 s 42(1) (definition added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 8; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 16). See paras 788-798 ante. As from a day to be appointed the Family Law Act 1986 s 2 (as amended), s 2A (as added and amended) and s 42 are to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 37, but at the date at which this volume states the law no such day had been appointed and these amendments are unlikely to be brought into force: see para 150 note 7 ante.

7 'Matrimonial proceedings' means proceedings for divorce, nullity of marriage or judicial separation: Family Law Act 1986 s 7(b) (as substituted: see note 5 supra). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.



8 'Civil partnership proceedings' means proceedings for the dissolution or annulment of a civil partnership or for a legal separation of the civil partnership: Family Law Act 1986 s 7(aa) (s 7 as substituted (see note 5 supra); and s 7(aa) added by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 10).

9 Family Law Act 1986 s 2(1)(b) (as substituted (see note 6 supra); and amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 5). See note 6 supra.

10 A reference to proceedings in respect of the marriage or civil partnership of the parents of the child concerned, in relation to a child who, though not a child of both parties to the marriage or civil partnership, is a child of the family of those parties, includes proceedings in respect of that marriage or civil partnership: Family Law Act 1986 s 42(4) (amended by Children Act 1989 Sch 13 para 71); Family Law Act 1986 s 42(4A) (added by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 19). For this purpose, 'child of the family', in relation to proceedings in England and Wales, means any child who has been treated by both parties as a child of their family, except a child placed with them as foster parents by a local authority or voluntary organisation: see the Family Law Act 1986 s 42(4)(a) (as so amended); s 42(4A) (as so added).

Section s 42(4) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 1994/2800; SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

11 Family Law Act 1986 s 2A(1)(a) (s 2A added by the Children Act 1989 Sch 13 para 64; and the Family Law Act 1986 s 2A(1)(a) amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 7). For this purpose, proceedings for divorce, nullity or judicial separation in respect of the marriage of the parents of a child or proceedings for dissolution, annulment or legal separation in respect of the civil partnership of the parents of the child are, unless they have been dismissed, treated as continuing until the child concerned attains the age of 18 (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute and whether or not a dissolution, nullity or separation order has been made in civil partnership proceedings and whether or not, in the case of a dissolution or nullity order, that order has been made final): Family Law Act 1986 s 42(2), (2A) (added by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 19). Where there are concurrent matrimonial proceedings in England and Wales and elsewhere, the court's discretion to stay proceedings will be fettered if the mandatory provisions governing matrimonial proceedings contained in the Domicile and Matrimonial Proceedings Act 1973 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW) apply: see *T v T (custody: jurisdiction)* [1992] 1 FCR 329, [1992] 1 FLR 43.

The Family Law Act 1986 s 42(2) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

See note 6 supra.

12 Family Law Act 1986 s 2A(1)(b) (as added (see note 11 supra); and amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 7). See note 6 supra.

For the purposes of the Family Law Act 1986 s 2A(1)(b) (as added and amended), the jurisdiction of the court is excluded if:

630 (1) after the grant of a decree of judicial separation, on the relevant date, proceedings for divorce or nullity in respect of the marriage are continuing in Scotland or Northern Ireland (s 2A(2)(a) (s 2A as so added; and s 2A(2) substituted by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 7)); or

631 (2) after the making of a separation order, on the relevant date, proceedings for the dissolution or annulment in respect of the civil partnership are continuing in Scotland or Northern Ireland (Family Law Act 1986 s 2A(2)(b) (as so added and substituted)).

Section 2A(2) (as added and substituted) does not apply if the court in which those other proceedings are continuing has made an order declining jurisdiction or staying the proceedings: s 2A(3) (as so added; and amended by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(1), (5) (a)). The Family Law Act 1986 s 2A(2) (as added and substituted) and s 2A(3) (as added and amended) are modified, for the purpose of regulating, as between any specified British overseas territory and any part of the

United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

'The relevant date' means in relation to the making or variation of an order:

- 632 (a) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together) (Family Law Act 1986 s 7(c)(i) (as substituted: see note 5 supra)); and
- 633 (b) where no such application is made, the date on which the court is considering whether to make or, as the case may be, vary the order (s 7(c)(ii) (as so substituted)).

As to the 'relevant date' see *Re F (residence order: jurisdiction)* [1996] 1 FCR 577, [1995] 2 FLR 518; *Re S (a minor) (contact: jurisdiction)* [1995] 2 FCR 162, sub nom *Re S (residence order: forum conveniens)* [1995] 1 FLR 314; *Re J (abduction: rights of custody)* [1999] 3 FCR 577, sub nom *Re J (abduction: declaration of wrongful removal)* [1999] 2 FLR 653. As to when proceedings are treated as continuing see note 11 supra.

13 Is an order falling within the Family Law Act 1986 s 1(1)(a) (see para 830 ante): see s 2A(1)(c)(i) (as added: see note 11 supra); s 7(d) (as substituted: see note 5 supra).

14 Family Law Act 1996 s 2A(1)(c) (as added: see note 11 supra). See note 6 supra.

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### **832. Power to decline jurisdiction.**

Where the Council Regulation<sup>1</sup> does not apply<sup>2</sup> and a court in England and Wales has power to make a contact order<sup>3</sup>, prohibited steps order<sup>4</sup>, residence order<sup>5</sup> or specific issue order<sup>6</sup> in, or in connection with, matrimonial proceedings<sup>7</sup> or civil partnership proceedings<sup>8</sup> but considers that it would be more appropriate for Part I matters<sup>9</sup> relating to the child to be determined outside England and Wales, the court may by order direct that for the duration of the order no contact order, prohibited steps order, residence order or specific issue order may be made by any court in or in connection with those proceedings<sup>10</sup>.

1 The Council Regulation referred to in the text is EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'): Family Law Act 1986 s 42(1) (definition added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 8; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 16). See paras 788-798 ante.

2 As to when the courts of England and Wales have jurisdiction under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) see para 789 ante.

3 As to contact orders see para 251 ante.

4 As to prohibited steps orders see para 261 ante.

5 As to residence orders see para 262 ante.

6 The orders mentioned in the text are orders falling within the Family Law Act 1986 s 1(1)(a) (see para 830 ante): see ss 2(1), 7(d) (s 7 substituted by the Children Act 1989 s 108(5), Sch 13 para 67). As to specific issue orders see para 263 ante.

7 For the meaning of 'matrimonial proceedings' see para 831 note 7 ante.

8 Family Law Act 1986 s 2(1)(b)(i) (s 2 substituted by the Children Act 1989 Sch 13 para 64; the Family Law Act 1986 s 2(1) substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265; and the Family Law Act 1986 s 2(1)(b)(i) amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 5). For the meaning of 'civil partnership proceedings' see para 831 note 8 ante.

9 References to 'Part I matters' are references to matters that might be determined by a Part I order or an order corresponding to a Part I order: Family Law Act 1986 s 42(7)(b) (substituted by the Children Act 1989 Sch 13 para 62). For the meaning of 'Part I order' see para 830 ante.

10 Family Law Act 1986 s 1(1)(a) (substituted by the Children Act 1989 Sch 13 para 63(1)(a)); Family Law Act 1986 s 2A(4) (s 2A added by the Children Act 1989 Sch 13 para 64; and the Family Law Act 1986 s 2A(4) amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 9); Children Act 1989 s 8(1), (2). Although the English court may in principle have jurisdiction, the Family Law Act 1986 s 2A(4) (as added and amended) gives it a discretion to direct that it would be more appropriate for matters to be resolved in the competing jurisdiction: *Re S (a minor) (jurisdiction to stay proceedings)* [1995] 3 FCR 164, [1995] 1 FLR 1093. See also *Re M (minors) (jurisdiction: habitual residence)* [1997] 2 FCR 527, sub nom *M v M (abduction: England and Scotland)* [1997] 2 FLR 263, CA.

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### **833. Orders relating to children in non-matrimonial cases.**

Where the Council Regulation<sup>1</sup> does not apply, a court in England and Wales has no jurisdiction to make a contact order<sup>2</sup>, prohibited steps order<sup>3</sup>, residence order<sup>4</sup> or specific issue order<sup>5</sup> in a non-matrimonial case<sup>6</sup> unless<sup>7</sup> on the relevant date<sup>8</sup> the child concerned<sup>9</sup>:

- 1558 (1) is habitually resident<sup>10</sup> in England and Wales<sup>11</sup>; or
- 1559 (2) is present in England and Wales and is not habitually resident in any part of the United Kingdom<sup>12</sup>,

and in either case the jurisdiction of the court is not excluded<sup>13</sup>. Jurisdiction is excluded if on the relevant date matrimonial proceedings<sup>14</sup> or civil partnership proceedings<sup>15</sup> are continuing in a court in Scotland or Northern Ireland in respect of the marriage or civil partnership of the parents of the child concerned<sup>16</sup>, unless the court in which those other proceedings are continuing has made an order declining jurisdiction or staying proceedings and that order is in force<sup>17</sup>.

1 The Council Regulation referred to in the text is EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'): Family Law Act 1986 s 42(1) (definition added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 8; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 16). See paras 788-798 ante. As to when the courts of England and Wales have jurisdiction under the Brussels IIR Regulation see para 789 ante.

2 As to contact orders see para 251 ante.

3 As to prohibited steps orders see para 261 ante.

4 As to residence orders see para 262 ante.

5 The orders mentioned in the text are orders falling within the Family Law Act 1986 s 1(1)(a) (see para 830 ante): see ss 2(1), 7(d) (s 7 substituted by the Children Act 1989 s 108(5), Sch 13 para 67). As to specific issue orders see para 263 ante.

6 I.e. a case where the condition in the Family Law Act 1986 s 2A (as added and amended) is not satisfied: see para 831 ante.

7 Ibid s 2(1)(b)(ii) (s 2 substituted by the Children Act 1989 Sch 13 para 64).

8 For the meaning of 'relevant date' see para 831 note 12 ante.

9 Family Law Act 1986 s 3(1) (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 10). For the meaning of 'child' see para 831 note 5 ante.

As from a day to be appointed the Family Law Act 1986 s 3 (as amended) is to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 37, but at the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 ante.

The Family Law Act 1986 s 3 (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family

Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

10 The term 'habitual residence' is not defined in the Family Law Act 1986, but it has been said that a young child for whom the mother has sole parental responsibility will normally have his habitual residence with her: *Re M (minors) (residence order: jurisdiction)* [1993] 1 FCR 718, [1993] 1 FLR 495, CA. See *Re V (jurisdiction: habitual residence)* [2001] 1 FLR 253, where the court considered whether a child sent to Ghana by its mother retained the habitual residence of its parents in England for the purposes of the Family Law Act 1986 s 3(1)(a) (as amended). For a discussion of the term in the context of international child abduction see para 806 ante.

11 Family Law Act 1986 s 3(1)(a). See note 9 supra.

12 Family Law Act 1986 s 3(1)(b). See note 9 supra. For the meaning of 'part of the United Kingdom' see para 827 note 3 ante. See *Re M (minors) (residence order: jurisdiction)* [1993] 1 FCR 718, [1993] 1 FLR 495, CA.

13 Family Law Act 1986 s 3(1). See note 9 supra. See also *Re M (a minor) (immigration: residence order)* [1995] 2 FCR 793, [1993] 2 FLR 858.

14 For the meaning of 'matrimonial proceedings' see para 831 note 7 ante.

15 For the meaning of 'civil partnership proceedings' see para 831 note 8 ante.

16 Family Law Act 1986 s 3(2) (amended by the Children Act 1989 Sch 13 para 65; and the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 8). See note 9 supra. In *A v A (forum conveniens)* [1999] 3 FCR 376, [1999] 1 FLR 1, divorce proceedings were current both in Wales and Scotland, both parties having also applied for residence orders in each jurisdiction. Hughes J, holding that there were consequently no reciprocal statutory provisions excluding the jurisdiction of one court or the other, resolved the conflict of jurisdiction according to the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 (as amended; prospectively amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 840 et seq).

17 See the Family Law Act 1986 s 3(3) (amended by the Children Act 1989 Sch 13 para 62; and the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12). See note 9 supra.

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### **834. Exercise of the inherent jurisdiction.**

A court in England and Wales has no jurisdiction to make an order in the exercise of the High Court's inherent jurisdiction<sup>1</sup> with respect to children unless:

- 1560 (1) it has jurisdiction under the Council Regulation<sup>2</sup>; or
- 1561 (2) the Council Regulation does not apply but the condition relating to habitual residence<sup>3</sup> is satisfied<sup>4</sup>; or
- 1562 (3) the Council Regulation does not apply but the child<sup>5</sup> concerned is present in England and Wales on the relevant date<sup>6</sup> and the court considers that the immediate exercise of its powers is necessary for his protection<sup>7</sup>.

1    le an order under the Family Law Act 1986 s 1(1)(d) (as substituted): see para 830 ante. As to the inherent jurisdiction of the High Court see paras 218-222 ante.

2    Ibid s 2(3)(a) (s 2(3) substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 8). The Council Regulation referred to in the text is EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'): Family Law Act 1986 s 42(1) (definition added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 8; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 16). See paras 788-798 ante. As to when the courts of England and Wales have jurisdiction under the Brussels IIR Regulation see para 789 ante.

As from a day to be appointed the Family Law Act 1986 s 2 is to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 37, but at the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 ante.

3    le the condition set out in the Family Law Act 1986 s 3 (as amended): see para 833 ante.

4    Ibid s 2(3)(b)(i) (as substituted: see note 2 supra). See note 2 supra.

5    For the meaning of 'child' see para 831 note 5 ante.

6    For the meaning of 'relevant date' see para 831 note 12 ante.

7    Family Law Act 1986 s 2(3)(b)(ii) (as substituted: see note 2 supra). See *B v B (Scottish contact order: jurisdiction to vary)* [1996] 1 WLR 231, [1996] 1 FCR 705, [1996] 1 FLR 688. See also *Re P (a child) (mirror orders)* [2000] 1 FCR 350; and CONFLICT OF LAWS vol 8(3) (Reissue) para 269. See note 2 supra.

## **UPDATE**

### **834 Exercise of the inherent jurisdiction**

NOTE 1--See *Y v I* [2009] EWHC 1378 (Fam), [2009] Fam Law 805.

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### **835. Power to refuse application or stay proceedings.**

A court in England and Wales which has jurisdiction to make a Part I order<sup>1</sup> may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales<sup>2</sup>. Moreover, where at any stage of the proceedings on an application made to a court in England and Wales for a Part I order, or for the variation of a Part I order, it appears to the court<sup>3</sup>:

- 1563 (1) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales<sup>4</sup>; or
- 1564 (2) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales<sup>5</sup>; or
- 1565 (3) that it should exercise its powers under the Council Regulation<sup>6</sup> to transfer to a court better placed to hear the case<sup>7</sup>,

a court may stay proceedings on the application or, as the case may be, exercise its powers under the Council Regulation<sup>8</sup>.

The court may remove a stay granted by virtue of head (3) above in respect of the Council Regulation only in accordance with that Regulation<sup>9</sup>. The court may remove a stay granted by virtue of head (1) or head (2) above if it appears to the court that there has been unreasonable delay in the taking or prosecution of the other proceedings, or that those other proceedings are stayed, sisted or concluded<sup>10</sup>.

1 For the meaning of 'Part I order' see para 830 ante. As to courts which have jurisdiction to make Part I orders see para 830 ante.

2 Family Law Act 1986 s 5(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62). As to interim directions under the Child Abduction and Custody Act 1985 s 5 see the Family Proceedings Rules 1991, SI 1991/1247, r 6.13; and para 801 ante.

3 Family Law Act 1986 s 5(2) (amended by the Children Act 1989 Sch 13 para 62; the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 7; and the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11).

4 Family Law Act 1986 s 5(2)(a).

5 Ibid s 5(2)(b).

6 The Council Regulation referred to in the text is EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, pp 1-29) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the 'Brussels IIR Regulation'): see the Family Law Act 1986 s 42(1) (definition added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 8; and substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 16). See paras 788-798 ante. The text refers to the court's powers under the Brussels IIR Regulation art 15.

7 Family Law Act 1986 s 5(2)(c) (added by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11).

8 Family Law Act 1986 s 5(2) (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11). See *Re EC (child abduction: stayed proceedings)* [2006] EWCA Civ 1115, [2007] 1 FLR 57, [2006] Fam Law 918. Where under the Family Law Act 1986 s 5(2) a magistrates' court stays proceedings on an application for a Part I order it must cause notice of the stay to be given to the parties to the proceedings: Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 7(1). As from a day to be appointed, if the proceedings on the application are proceedings in which a contact activity direction has been made under the Children Act 1989 s 11A (prospectively added) (see para 252 ante), or an enforcement order has been made under s 11J (prospectively added) (see para 257 ante), the court may when granting a stay under or by virtue of the Family Law Act 1986 s 5(2) (as amended) also suspend the contact activity direction or the enforcement order: s 5(2A) (prospectively added by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 2, 3). At the date at which this volume states the law no such day had been appointed.

9 Family Law Act 1986 s 5(3A) (added by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11). The text refers to removal in accordance with the Brussels IIR Regulation art 15. As from a day to be appointed, if the stay removed under the Family Law Act 1986 s 5(3) (as amended) (see the text and note 10 infra) or s 5(3A) (as added) is a stay in relation to which the court suspended a contact activity direction made under the Children Act 1989 s 11A (prospectively added) (see para 252 ante), or an enforcement order made under s 11J (prospectively added) (see para 257 ante), the court may when removing the stay under the Family Law Act 1986 s 5(3) (as amended) or s 5(3A) (as added) also bring the suspension to an end: s 5(3B) (prospectively added by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 2, 3). At the date at which this volume states the law no such day had been appointed.

10 Family Law Act 1986 s 5(3) (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11). Nothing in the Family Law Act 1986 s 5 (as amended) so far as it relates to proceedings not governed by the Brussels IIR Regulation affects any power otherwise exercisable to refuse an application or to grant or remove a stay: Family Law Act 1986 s 5(4) (amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265, reg 11). Where the Brussels IIR Regulation applies there is no scope for the application of forum non conveniens. For a consideration of the Family Law Act 1986 s 5(2) (as amended) in relation to cases which were not governed by the Brussels IIR Regulation see *Hallam v Hallam* [1992] 2 FCR 197, sub nom *Hallam v Hallam (No 2)* [1992] 2 FCR 205, sub nom *H v H (minors) (forum conveniens) (Nos 1 and 2)* [1993] 1 FLR 958, in which Waite J held that the applicable principles were those set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL, and that the child's welfare was the paramount consideration when deciding the issue of forum conveniens, as the jurisdictional issue was a question with respect to the upbringing of a child and therefore fell within the Children Act 1989 s 1(1)(a) (see para 300 ante). Cf *Re S (a minor) (contact: jurisdiction)* [1995] 2 FCR 162, sub nom *Re S (residence order: forum conveniens)* [1995] 1 FLR 314, in which Thorpe J held that the jurisdictional issue did not fall within the Children Act 1989 s 1(1)(a), and therefore, although the welfare of the child was an important consideration, it was not the paramount consideration. See also *Re S (a minor) (stay of proceedings)* [1994] 1 FCR 577, [1993] 2 FLR 912, [1993] Fam Law 674, CA; *M v B (child: jurisdiction)* [1994] 2 FCR 899, sub nom *M v B (residence: forum conveniens)* [1994] 2 FLR 819; *T v T (forum conveniens)* [1995] 1 FCR 478, [1995] 2 FLR 660; *H v H (a minor) (No 2) (forum conveniens)* [1997] 1 FCR 603; *Re M (minors) (jurisdiction: habitual residence)* [1997] 2 FCR 527, sub nom *M v M (abduction: England and Scotland)* [1997] 2 FLR 263, CA. See also *Re K (abduction: consent: forum conveniens)* [1995] 3 FCR 697, [1995] 2 FLR 211, CA.

## UPDATE

### 835 Power to refuse application or stay proceedings

NOTES 8, 9--Family Law Act 1986 s 5(2A), (3B) in force on 8 December 2008: SI 2008/2870.



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### **836. Duration and variation of orders.**

If a Part I order<sup>1</sup> made by a court in Scotland or Northern Ireland, or a variation of such an order, comes into force with respect to a child<sup>2</sup> at a time when a Part I order made by a court in England and Wales has effect with respect to him, the latter order ceases to have effect so far as it makes provision for any matter for which the same or different provision is made by, or by the variation of, the order of the court in Scotland or Northern Ireland<sup>3</sup>.

A court in England and Wales does not have jurisdiction to vary a Part I order if on the relevant date<sup>4</sup> matrimonial proceedings<sup>5</sup> or civil partnership proceedings<sup>6</sup> are continuing in Scotland or Northern Ireland in respect of the marriage of the parents of the child concerned<sup>7</sup>.

1 For the meaning of 'Part I order' see para 830 ante.

2 For the meaning of 'child' see para 831 note 5 ante.

3 Family Law Act 1986 s 6(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62). Where an order has ceased to have effect by virtue of the Family Law Act 1986 s 6(1) (as amended) so far as it makes provision for any matter, a court in England and Wales does not have jurisdiction to vary that order so as to make provision for that matter: s 6(2) (amended by the Children Act 1989 Sch 13 para 62). Where a Part I order which is:

634 (1) a residence order in favour of a person with respect to a child (Family Law Act 1986 s 6(6)(a) (s 6(6), (7) substituted by the Children Act 1989 Sch 13 para 66));

635 (2) an order made in the exercise of the High Court's inherent jurisdiction with respect to children by virtue of which a person has care of a child (Family Law Act 1986 s 6(6)(b) (as so substituted)); or

636 (3) an order of a kind under s 1(3)(a) (see para 830 ante) under which a person is entitled to the actual possession of a child (s 6(6)(c) (as so substituted)),

ceases to have effect in relation to that person by virtue of these provisions, any family assistance order made under the Children Act 1989 s 16 (as amended) (see para 267 ante) with respect to the child also ceases to have effect: Family Law Act 1986 s 6(6), (7) (as so substituted). For the meaning of 'residence order' see para 262 ante.

As from a day to be appointed the Family Law Act 1986 s 6 is to be amended by the Family Law Act 1996 s 66(1), Sch 8 para 37, but at the date at which this volume states the law no such day had been appointed and this amendment is unlikely to be brought into force: see para 150 note 7 ante.

The Family Law Act 1986 s 6(1) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

4 For the meaning of 'relevant date' see para 831 note 12 ante.

5 For the meaning of 'matrimonial proceedings' see para 831 note 7 ante.

6 For the meaning of 'civil partnership proceedings' see para 831 note 8 ante.

7 Family Law Act 1986 s 6(3) (substituted by the Children Act 1989 Sch 13 paras 62(1), 66(1); and amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 9(1), (2)(a), (b)). See note 3 supra. This does not apply if:

- 637 (1) the Part I order was made in or in connection with proceedings for divorce or nullity in England and Wales in respect of the marriage of the parents of the child concerned or was made in or in connection with proceedings for dissolution or annulment in England and Wales in respect of the civil partnership of the parents of the child concerned, and those proceedings are continuing (Family Law Act 1986 s 6(3A) (s 6(3A), (3B) added by the Children Act 1989 Sch 13 para 66(1); and substituted by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, arts 4, 9));
- 638 (2) the Part I order was made in or in connection with proceedings for judicial separation or for a separation order in England and Wales, those proceedings are continuing and, as the case may be, the decree of judicial separation has not yet been granted or the separation order has not yet been made (Family Law Act 1986 s 6(3B) (as so added and substituted));
- 639 (3) the court in which the proceedings are continuing has made an order declining jurisdiction or staying proceedings and that order is in force (s 6(4) (amended by the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, art 12(1), (5)(c))); or
- 640 (4) in the case of a variation of an order under the Family Law Act 1986 s 1(1)(d) (as substituted) (see para 830 ante), the child concerned is present in England and Wales on the relevant date and the court considers the immediate exercise of its powers is necessary for his protection (s 6(5) (amended by the Children Act 1989 Sch 13 para 66(2))).

The provisions of the Family Law Act 1986 s 6(3) (as substituted and amended) and s 6(4) (as amended) are modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders (see para 830 ante), and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

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### **837. Recognition of orders.**

Where a Part I order<sup>1</sup> made by a court in any part of the United Kingdom<sup>2</sup> is in force with respect to a child who has not attained the age of 16, then the order must be recognised in any other part of the United Kingdom as having the same effect in that other part as if it had been made by the appropriate court<sup>3</sup> in that other part and as if that court had had jurisdiction to make it<sup>4</sup>. A court must not, however, enforce the order unless it has been registered in that part of the United Kingdom<sup>5</sup> and proceedings for enforcement are taken in accordance with the provisions of the Family Law Act 1986<sup>6</sup>.

1 For the meaning of 'Part I order' see para 830 ante. In the Family Law Act 1986 Pt I Ch V (ss 25-32) (as amended), 'Part I order' also includes (except where the context otherwise requires) any order within s 1(3) (as substituted) (see para 830 ante) which, on the assumptions mentioned in heads (a) and (b) infra: (1) could have been made notwithstanding the provisions of Pt I (ss 1-43) (as amended); (2) would have been a Part I order for the purposes of Pt I (as amended); and (3) would not have ceased to have effect by virtue of s 6, s 15 or s 23 (see para 836 ante): s 32(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62). The assumptions are:

641 (a) that the Family Law Act 1986 Pt I had been in force at all material times (s 32(3)(a)); and

642 (b) that any reference in s 1 (as amended) (see para 830 ante) to any enactment included a reference to any corresponding enactment previously in force (s 32(3)(b)).

The provisions of s 32(1) (as amended) and s 32(3) are modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). The provisions of the Family Law Act 1986 s 42(1) are also modified by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (as so amended). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

2 For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

3 In relation to England and Wales or Northern Ireland, 'appropriate court' means the High Court; and in relation to Scotland, it means the Court of Session: Family Law Act 1986 s 32(1) (as amended: see note 1 supra).

4 Ibid s 25(1) (s 25 amended by the Children Act 1989 Sch 13 para 62). This provision does not apply where a Part I order includes provision as to the means by which rights conferred by the order are to be enforced: see the Family Law Act 1986 s 25(2) (as so amended).

The Family Law Act 1986 s 25(1) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

5 Ie under the Family Law Act 1986 s 27 (as amended): see para 838 post.

6 Ibid s 25(3) (as amended: see note 4 supra). The reference in the text to proceedings for enforcement is a reference to proceedings taken in accordance with s 29 (as amended): see para 839 post.

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### **838. Registration of orders.**

Any person on whom any rights are conferred by a Part I order<sup>1</sup> may apply to the court which made it for the order to be registered in another part of the United Kingdom<sup>2</sup> under a corresponding provision<sup>3</sup>. The application must be made in the prescribed manner<sup>4</sup>, contain prescribed information<sup>5</sup> and be accompanied by such documents as may be prescribed<sup>6</sup>. On receiving such an application, the court which made the order must, unless it appears to the court that the order is no longer in force, cause the following documents to be sent to the appropriate court<sup>7</sup> in the part of the United Kingdom specified in the application, namely<sup>8</sup>:

- 1566 (1) a certified copy<sup>9</sup> of the order<sup>10</sup>;
- 1567 (2) where the order has been varied, prescribed particulars of any variation which is in force<sup>11</sup>; and
- 1568 (3) a copy of the application and of any accompanying documents<sup>12</sup>.

Where the prescribed officer of the appropriate court in any part of the United Kingdom receives a certified copy of a Part I order, he must forthwith cause the order, together with particulars of any variation, to be registered in that court in the prescribed manner<sup>13</sup>.

A court which revokes, recalls or varies a registered order<sup>14</sup> must cause notice of the revocation, recall or variation to be given in the prescribed manner to the prescribed officer of the court in which it is registered<sup>15</sup>. On receiving the notice the prescribed officer must, in the case of the revocation or recall of the order, cancel the registration and, in the case of the variation of the order, cause particulars of the variation to be registered in the prescribed manner<sup>16</sup>.

Where a registered order ceases in whole or in part to have effect in the part of the United Kingdom in which it was made, otherwise than because of its revocation, recall or variation, the court in which the order is registered may, of its own motion or on the application of any person who appears to the court to have an interest in the matter, cancel the registration, or if the order has ceased to have effect in part, cancel the registration so far as it relates to the provisions which have ceased to have effect<sup>17</sup>.

Any applicant for registration of a Part I order, any person who satisfies a district judge that he has an interest under the order, and any person who obtains the leave of a district judge, may inspect any entry in the register relating to the order and may bespeak copies of the order and of any document relating to it<sup>18</sup>.

1 For the meaning of 'Part I order' see paras 830, 837 note 1 ante.

2 Family Law Act 1986 s 27(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62). For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

The Family Law Act 1986 s 27(1) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

3 Family Law Act 1986 s 27(1) (as amended: see note 2 supra). See note 2 supra. An order cannot be registered under s 27 (as amended) in respect of a child who has attained the age of 16, and the registration of a child who has not attained that age ceases to have effect on the attainment by the child of that age: s 27(5).

4 le in the manner set out in the Family Proceedings Rules 1991, SI 1991/1247, r 7.8 (amended by SI 1994/2890). See also the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 3 (amended by SI 1991/1991; SI 2001/615; SI 2005/617).

5 The prescribed information is set out in the Family Proceedings Rules 1991, SI 1991/1247, r 7.8 (amended by SI 1994/2890). See also the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 3, Schedule (amended by SI 1991/1991; SI 2001/615; SI 2005/617).

6 Family Law Act 1986 s 27(2). As to the prescribed documents see the Family Proceedings Rules 1991, SI 1991/1247, r 7.8 (amended by SI 1994/2890). See also the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 3 (amended by SI 1991/1991; SI 2001/615; SI 2005/617).

7 For the meaning of 'appropriate court' see para 837 note 3 ante.

8 Family Law Act 1986 s 27(3) (amended by the Children Act 1989 Sch 3 para 62(1), (2)(a)). The Family Law Act 1986 s 27(3) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

9 'Certified copy' in relation to an order of the court means a copy certified by the prescribed officer of the court to be a true copy of the order or of the official record of the order: Family Law Act 1986 s 42(1). As to the prescribed officer see the Family Proceedings Rules 1991, SI 1991/1247, r 7.7(2) (amended by SI 1997/1056).

10 Family Law Act 1986 s 27(3)(a). See note 8 supra.

11 Ibid s 27(3)(b). See note 8 supra.

12 Ibid s 27(3)(c). See note 8 supra.

13 See ibid s 27(4) (amended by the Children Act 1989 Sch 13 para 62(1), (2)(a)). As to the prescribed manner of registration of the order see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.8, 7.9 (both amended by SI 1994/2890). A party to proceedings for or relating to a Part I order who knows of other proceedings which relate to the child concerned must file an affidavit providing details of those other proceedings: see the Family Proceedings Rules 1991, SI 1991/1247, r 7.14.

The Family Law Act 1986 s 27(4) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

14 Any order which provides for a person to be allowed contact with or to be given access to a child who is the subject of a Part I order, or which makes provision for the education of such a child, is treated as varying the Part I order to which it relates: Family Law Act 1986 s 42(6)(a) (amended by the Children Act 1989 Sch 13 paras 62, 71, Sch 15).

15 Family Law Act 1986 s 28(1). As to the prescribed manner of causing notice of the revocation, recall or variation to be given by the court to the prescribed officer see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.10, 7.11 (both amended by SI 1994/2890). See also the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 4 (amended by SI 1991/1991; SI 2001/615; SI 2005/617).

16 Family Law Act 1986 s 28(1). As to the prescribed manner of registration of the varied order see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.10, 7.11 (both as amended: see note 15 supra). See also the Magistrates' Courts (Family Law Act 1986) Rules 1988, SI 1988/329, r 4 (as amended: see note 15 supra).

17 Family Law Act 1986 s 28(2)(a). Where an order registered under s 27 (as amended) (see the text and notes 1-13 supra) in Scotland ceases (in whole or in part) to have effect there as a result of the making of an order in proceedings outside the United Kingdom, the court in which the order is registered may, of its own motion or on the application of any person who appears to the court to have an interest in the matter, cancel the registration, or if the order has ceased to have effect in part, cancel the registration so far as it relates to the provisions which have ceased to have effect: s 28(2)(b).

Section 28(2) (as amended) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the

recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

18 Family Proceedings Rules 1991, SI 1991/1247, r 7.15.

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### **839. Enforcement of orders.**

The court in which a Part I order<sup>1</sup> is registered<sup>2</sup> has the same powers for the purpose of enforcing the order<sup>3</sup> as it would have if it had itself made the order and had jurisdiction to make it, and proceedings for or with respect to enforcement may be taken accordingly<sup>3</sup>. Where an application has been made to any court for the enforcement of an order registered in that court, the court may at any time before the application is determined give interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application<sup>4</sup>.

Where proceedings are taken in any court for the enforcement of an order registered in that court, any person who appears to the court to have an interest in the matter may apply for the proceedings to be stayed (or in Scotland sisted) on the ground that he has taken or intends to take other proceedings (in the United Kingdom or elsewhere) as a result of which the order may cease to have effect, or may have a different effect, in the part of the United Kingdom<sup>5</sup> in which it is registered<sup>6</sup>. If, after considering such an application, the court considers that the proceedings for enforcement should be stayed (or sisted) in order that other proceedings may be taken or concluded, it must stay (or sist) the enforcement proceedings accordingly<sup>7</sup>, but the court may remove the stay (or recall the sist) so granted if it appears to the court:

- 1569 (1) that there has been unreasonable delay in the taking or prosecution of the other proceedings<sup>8</sup>; or
- 1570 (2) that those proceedings are concluded and that the registered order or a relevant part of it is still in force<sup>9</sup>.

Where proceedings are taken in any court for the enforcement of an order<sup>10</sup> registered in that court, any person who appears to the court to have an interest in the matter may apply for those proceedings to be dismissed on the ground that the order has (in whole or in part) ceased to have effect in the part of the United Kingdom in which it was made<sup>11</sup>.

1 For the meaning of 'Part I order' see paras 830, 837 note 1 ante. The references in the Family Law Act 1986 s 29(1) (as amended) to a Part I order do not include references to any provision of the order as to the means by which rights conferred by the order are to be enforced: s 29(3) (amended by the Children Act 1989 s 108(5), Sch 13 para 62).

2 Ie under the Family Law Act 1986 s 27 (as amended): see para 838 ante.

3 As from a day to be appointed, this includes, where an order with respect to contact is registered in England and Wales, the powers under the Children Act 1989 s 110 (prospectively added) (see para 260 ante): see the Family Law Act 1986 s 29(1) (prospectively amended by the Children and Adoption Act 2006 s 15(1), Sch 2 paras 2, 4). At the date at which this volume states the law no such day had been appointed.

3 See the Family Law Act 1986 s 29(1) (amended by the Children Act 1989 Sch 13 para 62).

4 Family Law Act 1986 s 29(2). An application for interim directions may be heard and determined by a district judge: Family Proceedings Rules 1991, SI 1991/1247, r 7.12(1). The parties to the enforcement proceedings and, if he is not already a party, the applicant for the Part I order must be made parties to the application for interim directions: r 7.12(2).

5 For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

- 6 Family Law Act 1986 s 30(1). Nothing in s 30 affects any power exercisable apart from s 30 to grant, remove or recall a stay or sist: s 30(4).
- 7 Ibid s 30(2).
- 8 Ibid s 30(3)(a).
- 9 Ibid s 30(3)(b). For the procedure for staying of enforcement proceedings see the Family Proceedings Rules 1991, SI 1991/1247, r 7.13.
- 10 Ie under the Family Law Act 1986 s 29 (as amended): see the text and notes 1-4 supra.
- 11 Ibid s 31(1). If, after considering an application under s 31(1), the court is satisfied that the registered order has ceased to have effect, it must dismiss the proceedings for enforcement or, if it is satisfied that the order has ceased to have effect in part, it must dismiss the proceedings so far as they relate to the enforcement of provisions which have ceased to have effect: s 31(3). For the procedure for dismissal of enforcement proceedings see the Family Proceedings Rules 1991, SI 1991/1247, r 7.13.

As from a day to be appointed, no application may be made under the Family Law Act 1986 s 31(1) for proceedings to be dismissed if the proceedings are proceedings on an application for an order under the Children Act 1989 s 11O(2) (prospectively added) (see para 260 ante): see the Family Law Act 1986 s 31(1A) (prospectively added by the Children and Adoption Act 2006 Sch 2 paras 2, 6). At the date at which this volume states the law no such day had been appointed.

The Family Law Act 1986 s 31(1) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH VOL 13 (2009) PARA 702.

## **UPDATE**

### **839 Enforcement of orders**

NOTES 3, 11--Amendment to Family Law Act 1986 ss 29(1), 31(1A) in force on 8 December 2008: SI 2008/2870.

NOTE 6--No application may be made under the Family Law Act 1986 s 30(1) for proceedings to be stayed or sisted if the proceedings are proceedings on an application for an order under the Children Act 1989 s 11O(2): Family Law Act 1986 s 30(1A) (added by Children and Adoption Act 2006 Sch 2 para 5).



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#### **840. Power to order disclosure of child's whereabouts.**

Where in proceedings for or relating to a Part I order<sup>1</sup> in respect of a child there is not available to the court adequate information as to where the child is, the court may order any person who it has reason to believe may have relevant information to disclose it to the court<sup>2</sup>. A person is not excused from complying with such an order by reason that to do so may incriminate him or his spouse or civil partner of an offence; but a statement or admission made in compliance with such an order is not admissible in evidence against either of them in proceedings for any offence other than perjury<sup>3</sup>.

1 For these purposes, 'Part I order' includes (except where the context otherwise requires) any such order as is mentioned in the Family Law Act 1986 s 32(1) (as amended) (see para 837 note 1 ante): s 40(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62(1), (2)(a)).

2 Family Law Act 1986 s 33(1) (amended by the Children Act 1989 Sch 13 para 62(1), (2)(a)). The form to be used in respect of an order under the Family Law Act 1986 s 33 (as amended) is Form C30: see the Family Proceedings Rules 1991, SI 1991/1247, r 6.17, Appendix 1 (r 6.17 added, and Appendix 1 amended, by SI 1994/3155); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 31A, Sch 1 (r 31A added, and Sch 1 amended, by SI 1994/3156). See para 224 ante.

Although disclosure orders under the Family Law Act 1986 s 33 (as amended) may be made against the police, such applications should be strongly discouraged by the courts: *S v S (Chief Constable of West Yorkshire Police intervening)* [1999] 1 All ER 281, [1998] 1 WLR 1716, CA.

3 Family Law Act 1986 s 33(2) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 124).

#### **UPDATE**

#### **840 Power to order disclosure of child's whereabouts**

NOTE 2--SI 1991/1395 Sch 1 further amended: SI 2008/2858, SI 2009/2025.

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### **841. Power to order recovery of child.**

Where a person is required by a Part I order<sup>1</sup>, or an order for the enforcement of such an order, to give up a child to another person ('the person concerned'), and the court which made the order is satisfied that the child has not been given up in accordance with the order, the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned<sup>2</sup>. The authority conferred by such an order includes authority to enter and search any premises where the person acting in pursuance of the order has reason to believe that the child may be found<sup>3</sup>, and to use such force as may be necessary to give effect to the purpose of the order<sup>4</sup>.

1 For the meaning of 'Part I order' for these purposes see paras 830, 840 note 1 ante.

2 Family Law Act 1986 s 34(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62(1), (2)(a)). The form to be used in respect of an order under the Family Law Act 1986 s 34 (as amended) is Form C31: see the Family Proceedings Rules 1991, SI 1991/1247, r 6.17, Appendix 1 (r 6.17 added, and Appendix 1 amended, by SI 1994/3155); and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 31A, Sch 1 (r 31A added, and Sch 1 amended, by SI 1994/3156). See para 224 ante.

Where, by virtue of the Children Act 1989 s 14 (see para 262 ante), a Part I order or a provision thereof may be enforced as if it were an order requiring a person to give a child to another person, the Family Law Act 1986 s 34(1) (as amended) applies as if the order had included such a requirement: s 34(3)(a) (amended by the Children Act 1989 Sch 13 paras 62, 70). The court is unlikely to make an order under the Family Law Act 1986 s 34 (as amended) without notice; there should be an on notice hearing at which the merits can be properly considered, otherwise there is a risk of inflicting additional moves on the children: *A v A (forum conveniens)* [1999] 3 FCR 376, [1999] 1 FLR 1.

3 Family Law Act 1986 s 34(2)(a).

4 Ibid s 34(2)(b). The provisions of s 34 (as amended) are without prejudice to any power conferred on a court by or under any other enactment or rule of law: s 34(4).

### **UPDATE**

### **841 Power to order recovery of child**

NOTE 2--SI 1991/1395 Sch 1 further amended: SI 2008/2858, SI 2009/2025.

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#### **842. Removal of child; surrender of passport.**

Any order made by a court in the United Kingdom<sup>1</sup> prohibiting the removal of a child<sup>2</sup> from the United Kingdom or from any specified part of it<sup>3</sup>, has effect in each other part as if it had been made:

- 1571 (1) by the appropriate court<sup>4</sup> in that part<sup>5</sup>; and
- 1572 (2) in the case of an order which has the effect of prohibiting the child's removal to that part, as if it had included a prohibition on his further removal to any place except one to which he could be removed consistently with the order<sup>6</sup>.

Where an order is in force prohibiting or otherwise restricting the removal of a child<sup>7</sup> from the United Kingdom or from any specified part of it, the court by which the order was in fact made, or is treated as having been made<sup>8</sup>, may require any person to surrender any United Kingdom passport<sup>9</sup> which has been issued to, or contains particulars of, the child<sup>10</sup>.

1 For the meaning of 'United Kingdom' see para 102 note 7 ante.

2 For these purposes, 'child' means a person who has not attained the age of 16, and the Family Law Act 1986 s 36 ceases to apply to an order relating to a child when he attains that age: s 36(4).

3 For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

4 For the meaning of 'appropriate court' see para 837 note 3 ante; definition applied by the Family Law Act 1986 s 40(1).

5 Ibid s 36(1), (2)(a). Section 36(1), (2) are modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

6 Family Law Act 1986 s 36(1), (2)(b). See note 5 supra. References in s 36(1), (2) to prohibitions on a child's removal include references to prohibitions subject to exceptions; and in a case where removal is prohibited except with the consent of the court, nothing in s 36(2) is to be construed as affecting the identity of the court whose consent is required: s 36(3).

7 Note that the definition of 'child' set out in note 2 supra does not apply for the purposes of ibid s 37.

8 Ie under ibid s 36: see the text and notes 1-6 supra.

9 'United Kingdom passport' means a current passport issued by the government of the United Kingdom: ibid s 37(2).

10 Ibid s 37(1). Section 37(1) is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456).

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### **843. Habitual residence of child after removal.**

Where a child who has not attained the age of 16 and who is habitually resident<sup>1</sup> in a part of the United Kingdom<sup>2</sup> becomes habitually resident outside that part of the United Kingdom in consequence of specified circumstances, he is treated as continuing to be habitually resident in that part of the United Kingdom for one year beginning with the date on which those circumstances arise<sup>3</sup>. Those circumstances exist where the child is removed from or retained outside, or himself leaves or remains outside, the part of the United Kingdom, without the agreement of the person or all the persons having, under the law of that part of the United Kingdom, the right to determine where he is to reside<sup>4</sup>, or in contravention of an order made by a court in any part of the United Kingdom<sup>5</sup>. A child ceases to be treated by virtue of the above provisions as being habitually resident in a part of the United Kingdom if, during the one-year period he attains the age of 16, or if he becomes habitually resident outside that part of the United Kingdom with the agreement of the person or persons entitled to determine his place of residence<sup>6</sup> and not in contravention of an order of a court in any part of the United Kingdom<sup>7</sup>.

1 The term 'habitually resident' is not defined in the Family Law Act 1986. For a discussion of habitual residence in the context of international child abduction see para 806 ante.

2 For the meaning of 'part of the United Kingdom' see para 827 note 3 ante.

3 Family Law Act 1986 s 41(1). Section 41 is modified, for the purpose of regulating, as between any specified British overseas territory and any part of the United Kingdom, the jurisdiction of courts to make Part I orders, and the recognition and enforcement of orders corresponding to such orders, by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723 (amended by SI 2006/1456). As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

4 Family Law Act 1986 s 41(2)(a). See note 3 supra. A preliminary view expressed by such a person during the course of legal proceedings taken to determine the child's future residence will not be regarded as an agreement to a change in the child's habitual residence: *D v D (custody: jurisdiction)* [1996] 3 FCR 19, [1996] 1 FLR 574.

5 Family Law Act 1986 s 41(2)(b). See note 3 supra.

6 Ie the person or persons mentioned in *ibid* s 41(2)(a) (as amended): see the text and note 4 supra.

7 *Ibid* s 41(3). See note 3 supra.

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## **11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC**

### **(1) SUPPORT BY LOCAL AUTHORITY**

#### **(i) Support generally for Children**

##### **844. Day care and supervised activities.**

A local authority<sup>1</sup> has a duty to provide appropriate day care<sup>2</sup> for children<sup>3</sup> in need within its area who are aged five or under and not yet attending schools<sup>4</sup>. It may provide facilities, including training, advice, guidance and counselling, for those caring for children in day care or who at any time accompany such children while they are in day care<sup>5</sup>.

A local authority in Wales may also provide day care for children aged five or under and not yet attending schools<sup>6</sup> even though they are not in need<sup>7</sup> and may provide care or supervised activities<sup>8</sup> for children who are attending any school even though they are not in need<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'day care' see para 860 post. As to the provision of services by voluntary organisations and others see para 851 et seq post.

3 For the meaning of 'child' see para 3 ante.

4 See the Children Act 1989 s 18(1); and para 860 post. See also para 1070 et seq post.

5 Ibid s 18(3).

6 For the meaning of 'school' see para 271 note 8 ante.

7 See the Children Act 1989 s 18(2) (amended by the Childcare Act 2006 s 103(1), Sch 2 para 4(a)). As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 post.

8 For the meaning of 'supervised activity' see para 860 note 6 post.

9 Children Act 1989 s 18(6) (amended by the Childcare Act 2006 Sch 2 para 4(b)).

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#### **845. Children's service plans in Wales.**

In relation to Wales the following provisions have effect until a day to be appointed<sup>1</sup>. On or before 31 March 1997, every local authority<sup>2</sup> had to:

- 1573 (1) review its provision of services for children and families<sup>3</sup>; and
- 1574 (2) having regard to that review and to its most recent review of provision for day care<sup>4</sup> and child minding<sup>5</sup>, prepare and publish a plan for the provision of services under Part III of the Children Act 1989<sup>6</sup>.

Every local authority:

- 1575 (a) must from time to time review the plan prepared by it under head (2) above (as modified or last substituted under this head or head (b) below)<sup>7</sup>; and
- 1576 (b) may, having regard to that review and to its most recent review of provision for day care and child minding<sup>8</sup>, prepare and publish<sup>9</sup> modifications (or, as the case may be, further modifications) to the plan reviewed<sup>10</sup> or a plan in substitution for that plan<sup>11</sup>.

In carrying out any review<sup>12</sup> and in preparing any plan or modifications to a plan, a local authority must consult:

- 1577 (i) every local health board, health authority or primary care trust the whole or any part of whose area lies within the area of the local authority<sup>13</sup>;
- 1578 (ii) every national health service trust which manages a hospital, establishment or facility<sup>14</sup> in the authority's area<sup>15</sup>;
- 1579 (iii) if the local authority is not itself a local education authority, every local education authority the whole or any part of whose area lies within the area of the local authority<sup>16</sup>;
- 1580 (iv) any organisation which represents certain schools<sup>17</sup> in the authority's area<sup>18</sup>;
- 1581 (v) the governing body of every such school in the authority's area which is not so represented<sup>19</sup>;
- 1582 (vi) such voluntary organisations<sup>20</sup> as appear to the local authority:

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- 22. (A) to represent the interests of persons who use or are likely to use services provided by the local authority under Part III of the Children Act 1989<sup>21</sup>; or
- 23. (B) to provide services in the area of the local authority which, were they to be provided by the local authority, might be categorised as services provided under Part III of the Children Act 1989<sup>22</sup>;

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- 1583 (vii) the chief constable of the police force for the area<sup>23</sup>;
- 1584 (viii) the local probation board for the area<sup>24</sup>;
- 1585 (ix) such other persons as appear to the local authority to be appropriate<sup>25</sup>; and
- 1586 (x) such other persons as the Welsh Ministers may direct<sup>26</sup>.

Every local authority must, within 28 days of receiving a written request from the Welsh Ministers, submit a copy of the plan prepared by it under heads (1) and (2) above<sup>27</sup>, or where that plan has been modified or substituted, the plan as modified or last substituted<sup>28</sup>.

1 As from a day to be appointed, the Children Act 1989 s 17, Sch 2 para 1A (added by the Children Act 1989 (Amendment) (Children's Services Planning) Order 1996, SI 1996/785, art 2) is repealed by the Children Act 2004 s 64, Sch 5 Pt 1. At the date at which this volume states the law this repeal was in force in relation to England but no day had been appointed for it to come into effect in relation to Wales.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 Children Act 1989 s 17, Sch 2 para 1A(1)(a) (as added: see note 1 supra). The reference in the text to the local authority's provision of services for children and families is to such provision under s 17 (as amended) (see paras 848-853, 859 post), s 20 (see paras 863-866 post), s 21 (as amended; prospectively further amended) (see para 863 post), s 23 (as amended) (see paras 869, 877-878 post) and s 24 (as substituted and amended) (see para 922 post).

4 For the meaning of 'day care' see para 860 post.

5 *Ie* under the Children Act 1989 s 19 (repealed).

6 *Ibid* Sch 2 para 1A(1)(b) (as added: see note 1 supra). As to the provision of services under Pt III (ss 17-30) (as amended; prospectively further amended) see para 851 post.

7 *Ibid* Sch 2 para 1A(2)(a) (as added: see note 1 supra).

8 *Ie* under *ibid* s 19 (repealed).

9 *Ibid* Sch 2 para 1A(2)(b) (as added: see note 1 supra).

10 *Ibid* Sch 2 para 1A(2)(b)(i) (as added: see note 1 supra).

11 *Ibid* Sch 2 para 1A(2)(b)(ii) (as added: see note 1 supra).

12 *Ie* under *ibid* Sch 2 para 1A (as added and amended).

13 *Ibid* Sch 2 para 1A(3)(a) (as added (see note 1 supra); and amended by the National Health Service Reform and Health Care Professions Act 2002 s 2(5), Sch 2 para 52; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (11); and the Health, Social Care and Well-being Strategies (Wales) Regulations 2003, SI 2003/154, reg 7(6), Schedule paras 1, 2). As to local health boards and primary care trusts see HEALTH SERVICES vol 54 (2008) PARAS 74, 111 et seq. As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

14 *Ie* within the meaning of the National Health Service and Community Care Act 1990. As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

15 Children Act 1989 Sch 2 para 1A(3)(b) (as added: see note 1 supra).

16 *Ibid* Sch 2 para 1A(3)(c) (as added: see note 1 supra). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

17 The Children Act 1989 refers to grant-maintained schools or grant-maintained special schools, but schools are no longer categorised as such: see EDUCATION vol 15(1) (2006 Reissue) paras 102, 106. For the meaning of 'school' see para 271 note 8 ante.

18 *Ibid* Sch 2 para 1A(3)(d) (as added: see note 1 supra).

19 *Ibid* Sch 2 para 1A(3)(e) (as added: see note 1 supra).

20 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

21 Children Act 1989 Sch 2 para 1A(3)(f)(i) (as added: see note 1 supra).

22 *Ibid* Sch 2 para 1A(3)(f)(ii) (as added: see note 1 supra).

23 Ibid Sch 2 para 1A(3)(g) (as added: see note 1 supra). As to chief officers of police see POLICE vol 36(1) (2007 Reissue) para 178 et seq.

24 Ibid Sch 2 para 1A(3)(h) (as added: see note 1 supra). The Children Act 1989 refers to probation committees, but these have been replaced by local probation boards established under the Criminal Justice and Court Services Act 2000 s 4: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq.

25 Children Act 1989 Sch 2 para 1A(3)(i) (as added: see note 1 supra).

26 Ibid Sch 2 para 1A(3)(j) (as added: see note 1 supra). As to the Welsh Ministers see para 155 ante.

27 Ibid Sch 2 para 1A(4)(a) (as added: see note 1 supra).

28 Ibid Sch 2 para 1A(4)(b) (as added: see note 1 supra).



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#### **846. Prevention of ill-treatment or neglect.**

Each local authority<sup>1</sup> must take reasonable steps, through the provision of services under Part III of the Children Act 1989<sup>2</sup>, to prevent children<sup>3</sup> within its area suffering ill-treatment<sup>4</sup> or neglect<sup>5</sup>. Where a local authority believes that a child who is at any time within its area is likely to suffer harm<sup>6</sup> but lives or proposes to live in the area of another local authority, the former local authority must inform the latter<sup>7</sup>, specifying the harm believed to be likely, and, if possible, the place where the child lives or proposes to live<sup>8</sup>.

Every local authority is also required to take reasonable steps designed to:

- 1587 (1) reduce the need to bring:
  - .27
  - 24. (a) proceedings for care orders or supervision orders<sup>9</sup> with respect to children within its area;
  - 25. (b) criminal proceedings against such children;
  - 26. (c) any family or other proceedings<sup>10</sup> with respect to such children which might lead to their being placed in the authority's care; or
  - 27. (d) proceedings under the inherent jurisdiction of the High Court<sup>11</sup> with respect to children<sup>12</sup>;
- .28
- 1588 (2) encourage children within its area not to commit criminal offences<sup>13</sup>; and
- 1589 (3) avoid the need for children within its area to be placed in secure accommodation<sup>14</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 I.e. the Children Act 1989 Pt III (ss 17-30) (as amended). As to the meaning of 'service' see para 851 note 7 post. As to the provision of services by voluntary organisations and others see para 849 post.

3 For the meaning of 'child' see para 3 ante.

4 For the meaning of 'ill-treatment' see para 274 ante.

5 Children Act 1989 s 17(2), Sch 2 para 4(1).

6 For the meaning of 'harm' see para 274 ante.

7 Children Act 1989 Sch 2 para 4(2).

8 Ibid Sch 2 para 4(3).

9 As to care orders see paras 276-280 ante. As to supervision orders see paras 281-287 ante.

10 For the meaning of 'family proceedings' see para 199 ante.

11 As to the inherent jurisdiction of the High Court see para 218 et seq ante.

12 Children Act 1989 Sch 2 para 7(a).

13 Ibid Sch 2 para 7(b).

14 Ibid Sch 2 para 7(c). As to secure accommodation see paras 1037-1048 post.

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### **847. Family centres.**

Each local authority<sup>1</sup> must provide such family centres as it considers appropriate in relation to children<sup>2</sup> within its area<sup>3</sup>. A family centre is a centre at which the child, his parents<sup>4</sup>, any other person who has parental responsibility<sup>5</sup> for the child, and any other person who is looking after the child, may:

- 1590 (1) attend for occupational, social, cultural or recreational activities;
- 1591 (2) attend for advice, guidance or counselling; or
- 1592 (3) be provided with accommodation while he is receiving advice, guidance or counselling<sup>6</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 post.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 17(2), Sch 2 para 9(1).

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 Sch 2 para 9(2), (3). Family centres may be run by local authorities or voluntary bodies: see para 849 post. There are three main types of family centre, namely therapeutic, community, and self-help; the local authority should ensure that its policy on family centres is developed in line with that for children in need: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) paras 3.18-3.24. As to the guidance and regulations generally see para 163 ante.

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#### **848. Provision of assistance to person ill-treating child.**

Where it appears to a local authority<sup>1</sup> that a child<sup>2</sup> who is living on particular premises is suffering, or is likely to suffer, ill-treatment<sup>3</sup> at the hands of another person who is living on those premises, and that other person proposes to move from the premises, the authority may assist that other person to obtain alternative accommodation<sup>4</sup>. Such assistance may be given in cash<sup>5</sup>. The assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part)<sup>6</sup>. Before giving any assistance or imposing any conditions the local authority must have regard to the means of the child concerned and of each of his parents<sup>7</sup>. No person is liable to make a repayment of assistance or its value at any time when he is in receipt of income support<sup>8</sup>, working families' tax credit or disabled person's tax credit, or an income-based jobseeker's allowance<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 post.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'ill-treatment' see para 274 ante.

4 Children Act 1989 s 17(2), Sch 2 para 5(1).

5 Ibid Sch 2 para 5(2).

6 Ibid s 17(7); applied by Sch 2 para 5(3).

7 Ibid s 17(8); applied by Sch 2 para 5(3).

8 Ie under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 173 et seq.

9 Children Act 1989 s 17(9) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(a); the Jobseekers Act 1995 s 41(4), Sch 2 para 19(2); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 16(1), (2)); applied by the Children Act 1989 Sch 2 para 5(3). As from a day to be appointed s 17(9) (as amended) is further amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (2) so as to also exclude a person in receipt of an income-related employment and support allowance. At the date at which this volume states the law no such day had been appointed. For the meaning of 'income-based jobseeker's allowance' see para 535 note 18 ante. The reference to working families' tax credit or disabled person's tax credit is to any element of child tax credit, other than the family element, or of working tax credit: Children Act 1989 s 17(9) (amended by the Tax Credits Act 2002 Sch 3 para 16(2), Sch 6). The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of the Children Act 1989 Pt III (ss 17-30) (as amended) (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit: s 17(12) (added by the Tax Credits Act 2002 Sch 3 para 16(3)). Accordingly a person must be treated, for the purposes of the Children Act 1989 Pt III (as amended), as in receipt of working tax credit, or of any element of child tax credit other than the family element, where: (1) the person is in receipt of assistance under s 17 (as amended), or of a direct payment or voucher under s 17A (as added) (see para 861 post) or s 17B (as added) (see para 862 post); and (2) that assistance consists in the provision (or a direct payment or voucher to secure the provision) of child care, the cost of which (if paid for by the person out of his own resources) would be relevant child care charges in relation to that person and cause that person (in circumstances where, but for that cost, he would otherwise not be) to be entitled to working tax credit, or to any element of child tax credit other than the family element: Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077, reg 3. 'Child care' and 'relevant child care charges' have the meanings given in the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005 (see SOCIAL SECURITY AND PENSIONS): Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077, reg 2.

**UPDATE**

**848 Provision of assistance to person ill-treating child**

NOTE 9--Appointed day is 27 October 2008: SI 2008/787.

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#### **849. Collaboration between local authorities and other bodies.**

Each local authority<sup>1</sup> must facilitate the provision by others (including in particular voluntary organisations<sup>2</sup>) of services which the authority has power to provide under specified provisions<sup>3</sup> of the Children Act 1989<sup>4</sup>. The authority may make such arrangements as it sees fit for any person to act on its behalf in the provision of any such service<sup>5</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

3 The provisions in question are the Children Act 1989 s 18 (day care: see paras 844 ante, 860 post), s 20 (accommodation for children: see paras 863-866 post), s 23 (as amended) (accommodation and maintenance for children being looked after: see paras 869, 877-878 post), ss 23B-23D (as added) (functions of the responsible authority in respect of relevant children: see paras 929-931 post), s 24A (as added) (advice and assistance: see para 923 post) and s 24B (as added) (employment, education and training: see para 924 post): s 17(5)(a) (amended by the Children (Leaving Care) Act 2000 s 7(1), (2)).

4 Children Act 1989 s 17(5)(a).

5 Ibid s 17(5)(b).

#### **UPDATE**

#### **849-850 Collaboration between local authorities and other bodies, Method of providing services**

Local authorities may enter into arrangements with bodies corporate for the discharge by that body of some or all of the authority's social services functions in relation to individual children who are looked after by the authority and its functions in relation to care leavers: see the Children and Young Persons Act 2008 ss 1-3, 5, 6; and PARA 850A.

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## **850. Method of providing services.**

The services<sup>1</sup> provided by a local authority<sup>2</sup> in the exercise of its functions<sup>3</sup> in relation to the provision of services for children in need<sup>4</sup> may include providing accommodation and giving assistance in kind, or, in exceptional circumstances, in cash<sup>5</sup>. The assistance may be unconditional or subject to conditions regarding the repayment of the assistance or of its value (in whole or in part)<sup>6</sup>. Before giving any assistance or imposing any conditions, a local authority must have regard to the means of the child concerned and of each of his parents<sup>7</sup>.

1 For the meaning of 'service' see para 851 note 7 post.

2 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 851 et seq post.

3 As to the meaning of 'functions' see para 156 note 23 ante.

4 For the meaning of 'child' see para 3 ante. As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 post.

5 Children Act 1989 s 17(6) (amended by the Adoption and Children Act 2002 s 116(1)). See *R v Hammersmith and Fulham London Borough Council, ex p D* [1999] 2 FCR 401, [1999] 1 FLR 642 (threat by local authority to withdraw assistance because the mother refused to accept financial assistance to return to her country of origin where she would receive social security benefits).

6 Children Act 1989 s 17(7). However, no person is liable to make a repayment of assistance or its value at any time when he is in receipt of income support under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 173 et seq), any elements of child tax credit other than the family element of working tax credit, or an income-based jobseeker's allowance: s 17(9) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(a); the Jobseekers Act 1995 s 41(4), Sch 2 para 19(2); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 16). As from a day to be appointed this provision is further amended so as to refer also to an income-related employment and support allowance: see the Children Act 1989 s 17(9) (as so amended; prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (2)). At the date at which this volume states the law no such day had been appointed. For the meaning of 'income-based jobseeker's allowance' see para 535 note 18 ante. The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of the Children Act 1989 Pt III (ss 17-30) (as amended) (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit: Children Act 1989 s 17(12) (added by the Tax Credits Act 2002 Sch 3 para 16(3)). Accordingly a person must be treated, for the purposes of the Children Act 1989 Pt III (as amended), as in receipt of working tax credit, or of any element of child tax credit other than the family element, where: (1) the person is in receipt of assistance under s 17 (as amended), or of a direct payment or voucher under s 17A (as added) (see para 861 post) or s 17B (as added) (see para 862 post); and (2) that assistance consists in the provision (or a direct payment or voucher to secure the provision) of child care, the cost of which (if paid for by the person out of his own resources) would be relevant child care charges in relation to that person and cause that person (in circumstances where, but for that cost, he would otherwise not be) to be entitled to working tax credit, or to any element of child tax credit other than the family element: Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077, reg 3. 'Child care' and 'relevant child care charges' have the meanings given in the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005 (see SOCIAL SECURITY AND PENSIONS): Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077, reg 2.

7 Children Act 1989 s 17(8). As to the meaning of 'parent' see para 248 note 1 ante.

## **UPDATE**

**849-850 Collaboration between local authorities and other bodies, Method of providing services**

Local authorities may enter into arrangements with bodies corporate for the discharge by that body of some or all of the authority's social services functions in relation to individual children who are looked after by the authority and its functions in relation to care leavers: see the Children and Young Persons Act 2008 ss 1-3, 5, 6; and PARA 850A.

**850 Method of providing services**

NOTE 6--Appointed day is 27 October 2008: SI 2008/787.



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### **850A. Delivery of social work services for children and young persons.**

A local authority may enter into arrangements with a body corporate for the discharge by that body of some or all of the relevant care functions, which are (1) its social services functions in relation to individual children who are looked after by it; and (2) its functions under the Children Act 1989 ss 23B-23D (see PARAS 929-931): Children and Young Persons Act 2008 s 1(1), (2) (s 1 in force in England in relation to specified local authorities, ss 2, 3, 5, 6 in force in relation to England: SI 2009/268, SI 2009/323). 'Local authority' means, in relation to England, the council of a county, a metropolitan district or a london borough or the Common Council of the City of London and, in relation to Wales, the council of a county or a county borough; 'function' includes any power to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of a function; and 'social services functions' has the meaning given by the Local Authority Social Services Act 1970 s 1A (see Sch 1; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1006): Children and Young Persons Act 2008 s 1(10), (11). References to a child looked after by a local authority have the same meaning as they have in the Children Act 1989 (see s 22; and PARA 867): Children and Young Persons Act 2008 s 1(9). A party, other than the local authority concerned, to such arrangements ('a provider of social work services') may not include any other local authority: s 1(3). See also s 1(4), (5). The Secretary of State and the Welsh Ministers may by regulations (a) specify functions not falling within s 1(2) which are to be treated as being relevant care functions, and specify functions otherwise falling within s 1(2) which are to be treated as not being relevant care functions (s 1(6)); (b) make provision about the bodies corporate which may, or may not, be parties to arrangements under s 1 (s 1(7)); (c) provide that arrangements under s 1 may not be entered into for a period shorter than the prescribed minimum period, or for a period exceeding the prescribed maximum period (s 1(8)). However, a local authority must not enter into arrangements under s 1 for the discharge of its functions (i) in relation to independent reviewing officers; or (ii) its functions as an adoption agency, unless the other party to the arrangements is a registered adoption society: see s 2(1), (2), (7). A local authority's functions in relation to independent reviewing officers are its functions under regulations made by virtue of the Children Act 1989 s 26(2)(k) (see PARA 936), or under s 25A: Children and Young Persons Act 2008 s 2(3). Further restrictions on arrangements under s 1 are made by s 2(4), (5). Any acts or omissions of a provider of social work services or its employees are to be treated as the acts and omissions of a local authority: see s 3. Provision is made specifying the duration of the piloting of arrangements: see s 6.

### **UPDATE**

### **849-850 Collaboration between local authorities and other bodies, Method of providing services**

Local authorities may enter into arrangements with bodies corporate for the discharge by that body of some or all of the authority's social services functions in relation to individual children who are looked after by the authority and its functions in relation to care leavers: see the Children and Young Persons Act 2008 ss 1-3, 5, 6; and PARA 850A.

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## **(ii) Support for Children in Need**

### **A. PROVISION OF SERVICES**

#### **851. Duty to provide for children in need.**

It is the general duty of each local authority<sup>1</sup> (in addition to the other duties imposed on it by Part III of the Children Act 1989<sup>2</sup>) to safeguard and promote the welfare of children within its area who are in need<sup>3</sup>. This duty is discharged by providing a range and level of services appropriate to those children's needs<sup>4</sup>. A child is taken to be in need if:

- 1593 (1) he is unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health<sup>5</sup> or development<sup>6</sup> without provision for him of services by a local authority under Part III of the Children Act 1989<sup>7</sup>; or
- 1594 (2) if his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services<sup>8</sup>; or
- 1595 (3) he is disabled<sup>9</sup>.

The Department of Health has issued guidance as to when a child is taken to be in need<sup>10</sup>, and the Department for Education and Skills (now the Department for Children, Schools and Families) has issued guidance on the duty to provide for children<sup>11</sup>.

For the purpose of facilitating the discharge of the general duty described above, the local authority has a number of specific powers and duties<sup>12</sup>.

Where a local authority can fulfil its duties in a number of ways, it is entitled to consider the financial implications of the various available resources before committing itself to the provision of a particular service<sup>13</sup>. However, where a local authority has a specific duty, lack of finance will not justify the failure to perform the duty<sup>14</sup>. A local authority may owe a duty of care concerning operational rather than policy decisions in relation to children in its care<sup>15</sup>.

If the Secretary of State is, or the Welsh Ministers are, satisfied that any local authority has failed, without reasonable excuse, to comply with any of the duties imposed on it by or under the Children Act 1989, he or they may make an order declaring that authority to be in default with respect to that duty<sup>16</sup>. Such an order, which must give the reasons of the Secretary of State or the Welsh Ministers for making it<sup>17</sup>, may contain such directions for the purpose of ensuring that the duty is complied with, within such a period as may be specified in the order, as appear to the Secretary of State or the Welsh Ministers to be necessary<sup>18</sup>. Such directions are enforceable, on the application of the Secretary of State or the Welsh Ministers, by mandatory order<sup>19</sup>. It is not necessary for there to have been a complaint before the Secretary of State or the Welsh Ministers intervene; they may act of their own motion. If a local authority fails to follow the statutory complaints procedure<sup>20</sup>, that failure is remediable by application to the Secretary of State or the Welsh Ministers to exercise the default powers<sup>21</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. Guidance has been given on the assessment to be made by a local authority under the Children Act 1989 Pt III (ss 17-30) (as amended) when determining whether an applicant asylum seeker is to be correctly classified as a child to whom the authority

would owe a duty: see *R (on the application of B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280, [2005] 3 FCR 69.

2 The Children Act 1989 Pt III (ss 17-30) (as amended) sets out the main responsibilities of a local authority for children in its area who are in need and for children in need who are being looked after by the local authority: see para 852 et seq post. Part III (as amended) does not affect any duty imposed on a local authority by or under any other enactment: s 30(1). Where the functions conferred on a local authority by Pt III (as amended) and the functions of a local education authority are concurrent, the Secretary of State or the Welsh Ministers may by regulations provide by which authority the functions are to be exercised: s 30(3). The Secretary of State or Welsh Ministers may make regulations for determining, as respects any local education authority functions specified in the regulations, whether a child who is being looked after by a local authority is to be treated, for purposes so specified, as a child of parents of sufficient resources or as a child of parents without resources: s 30(4). At the date at which this volume states the law no such regulations had been made. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq. As to the Secretary of State and the Welsh Ministers see para 155 ante.

The Children Act 1989 draws together the functions of local authorities towards children which formerly existed under the Childcare Act 1980, the National Assistance Act 1948, and the National Health Service Act 1977 Sch 8 (as amended) in relation to children with disabilities and children under the age of five.

The Children Act 1989 Pt III (as amended) and Sch 2 (as amended) have been supplemented by the amendments made by the Children (Leaving Care) Act 2000, which came into force on 1 October 2001. The provisions of the Children Act 1989 are also supplemented by the Department of Health publications *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991), and *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991). As to the guidance and regulations generally see para 163 ante. Local authorities are required by statute, in the exercise of their social services functions, to act under the general guidance of the Secretary of State or the Welsh Ministers: Local Authority Social Services Act 1970 s 7(1); and see the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006).

3 Children Act 1989 s 17(1)(a). As to local authorities' duties to protect children see generally *Nottinghamshire County Council v P* [1994] Fam 18, [1993] 3 All ER 815, [1993] 2 FLR 134, CA. See also *X (minors) v Bedfordshire County Council*, *M (a minor) v Newham London Borough Council*, *E (a minor) v Dorset County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL (no common law duty of care superimposed on local authorities' statutory duties under child care legislation). A claim in negligence may be brought against a local authority by a child in its care, for damage suffered as a consequence of sexual abuse by a foster parent: *S v Gloucestershire County Council*, *L v Tower Hamlets London Borough Council* [2001] Fam 313, [2000] 3 All ER 346, CA (overruling *H v Norfolk County Council* [1997] 2 FCR 334, [1997] 1 FLR 384, CA). A local authority's duties under the Children Act 1989 s 17 (as amended) in relation to the provision of housing must be exercised in relation to the needs of the child, and not merely to the needs of the family: *R v Tower Hamlets London Borough Council*, *ex p Bradford* [1998] 1 FCR 629, (1997) 29 HLR 756. A local authority is not under a general duty to inform other bodies of the identities of and findings against people found guilty of sexual abuse in care or family proceedings: *Re V (minors) (sexual abuse: disclosure)*, *Re L (sexual abuse: disclosure)* [1999] 1 WLR 299, [1999] 1 FCR 308, CA. A local authority which provides accommodation for a child in pursuance of the Children Act 1989 s 17(1) is not by virtue thereof also required to provide accommodation for the child's mother: see *R (on the application of G) v Barnet London Borough Council* [2001] EWCA Civ 540, [2001] 2 FCR 193, [2001] All ER (D) 144 (Apr) (affd sub nom *R (on the application of G) v Barnet London Borough Council*, *R (on the application of W) v Lambeth London Borough Council*, *R (on the application of A) v Lambeth London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97). See also *R (on the application of J) v Enfield London Borough Council* [2002] EWHC 432 (Admin), [2002] 2 FLR 1, [2002] All ER (D) 209 (Mar) (assistance given under the Local Government Act 2000 s 2 (see LOCAL GOVERNMENT vol 69 (2009) PARA 463)). 'Within its area' denotes mere physical presence: *R (on the application of S) v Wandsworth London Borough Council*, *Hammersmith London Borough Council*, *Lambeth London Borough Council* [2001] EWHC 709 (Admin), [2002] 1 FLR 469, [2002] Fam Law 180. See *R (on the application of Conde) v Lambeth London Borough Council* [2005] EWHC 62 (Admin), [2005] 1 FCR 189 (provision of assistance under the Children Act 1989 s 17 (as amended; prospectively amended) not for purpose of enabling work seeker to obtain employment so that refusal did not contravene freedom to seek work under the Treaty Establishing the European Community (Rome, 25 March 1957; TS (1973); Cmnd 5179) art 39). The duties of a local authority under the Children Act 1989 s 17 (as amended; prospectively amended) to a child in need continue even when the child is placed in a young offenders institution: *R (on the application of the Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, [2003] Fam Law 149.

4 Children Act 1989 s 17(1). Before determining what (if any) services to provide for a particular child in need, a local authority must, so far as is reasonably practicable and consistent with the child's welfare:

- 643 (1) ascertain the child's wishes and feelings regarding the provision of those services (s 17(4A) (a) (s 17(4A) added by the Children Act 2004 s 53(1))); and

644 (2) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as it has been able to ascertain (Children Act 1989 s 17(4A)(b) (as so added)).

5 'Health' means physical or mental health: *ibid* s 17(11).

6 'Development' means physical, intellectual, emotional, social or behavioural development: *ibid* s 17(11).

7 *Ibid* ss 17(10)(a), 105(7). 'Service', in relation to any provision made under Pt III (as amended), includes any facility: s 105(1).

8 *Ibid* ss 17(10)(b), 105(7).

9 *Ibid* ss 17(10)(c), 105(7). A child is 'disabled' if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed: ss 17(11), 105(1). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). At the date at which this volume states the law no regulations had been made prescribing any disability. Each local authority must provide services designed to minimise the effect on disabled children within its area of their disabilities, and to give such children the opportunity to lead lives which are as normal as possible: s 17(2), Sch 2 para 6. These duties in relation to disabled children are extended by the Carers and Disabled Children Act 2000: see para 854 *et seq* post.

10 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991). As to the guidance and regulations generally see para 163 *ante*.

A local authority is not expected to meet every individual need, but it is asked to identify the extent of need and then make decisions on the priorities for service provision in its area in the context of that information and its statutory duties. A local authority must ensure that a range of services is available to meet the extent and nature of need identified within its administrative area. In addition to day care provision for pre-school and school age children, it is likely that a range of services designed to support and improve the strengths and skills of parents in their own homes and neighbourhoods will be required. It is also likely that a vigorous foster care service will be required, offering a range of placements which reflects the racial, cultural, linguistic and religious needs of children requiring accommodation, and is responsive to the amount of short term, longer term, or permanent placements which the children may need. It remains likely that some children will need special forms of residential care. In many areas these services exist already, provided by statutory, voluntary and independent sources. It is important to recognise the benefits of developing packages of services appropriate to the assessed needs of individual children and their families, rather than directing them to existing services which may not be appropriate: para 2.11. Sometimes the needs will be found to be intrinsic to the child; at other times, however, it may be that parenting skills and resources are depleted or under-developed and thus threaten the child's well-being: para 2.5.

11 See the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006).

A local authority, acting in order to fulfil its social services functions, has specific legal duties in respect of children under the Children Act 1989 and the Children Act 2004. It has a general duty to safeguard and promote the welfare of children in its area, and, provided that this is consistent with the child's safety and welfare, to promote the upbringing of such children by their families, by providing services appropriate to the child's needs. The local authority should do this in partnership with parents and in a way which is sensitive to the child's race, religion, culture and language and that, where practicable, takes account of the child's wishes and feelings. Services might include day care for young children, after school care for school children, counselling, respite care, family centres or practical help in the home: Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006) para 2.12. This guidance is complemented by the *Framework for the Assessment of Children in Need and their Families* which is issued as Appendix 1 to the guidance.

A decision made by a local authority must take into account the rights of the child and the family under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): see *Re X, Barnet London Borough Council v Y and X* [2006] Fam law 740.

12 See the Children Act 1989 Sch 2 Pt I; and para 856 *et seq* post.

13 See *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, [1997] 2 All ER 1, HL; and see also *R (on the application of Spink) v Wandsworth London Borough Council* [2005] EWCA Civ 302, [2005] 2 All ER 955 (local authority could lawfully have regard to parental resources when deciding whether it had to make arrangements to meet claimant children's needs).

14 *R v East Sussex County Council, ex p Tandy* [1998] AC 714, [1998] 2 All ER 769, HL.

15 *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193, HL.

16 Children Act 1989 s 84(1). See also *R(on the application of M) v Islington London Borough Council* [2003] EWHC 1388 (Admin) [2003] 2 FLR 903. Orders under the Children Act 1989 s 84 are not statutory instruments and are not noted in this work.

17 *Ibid* s 84(2).

18 *Ibid* s 84(3).

19 *Ibid* s 84(4). For the power to direct an inspection see s 80 (as amended); and para 156 ante. As to mandatory orders see JUDICIAL REVIEW vol 61 (2010) PARA 703 et seq.

20 *Ie* established under *ibid* s 26 (as amended): see para 944 post.

21 *R v Barnet London Borough Council, ex p B* [1994] 2 FCR 781, [1994] 1 FLR 592.

## UPDATE

### 851 Duty to provide for children in need

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--Children Act 1989 s 30(4) amended: Children and Young Persons Act 2008 Sch 3 para 21(4).

NOTE 9--The services must also be designed to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring (such duty to be performed in accordance with regulations made by the Secretary of State or the Welsh Ministers): Children Act 1989 Sch 2 para 6 (amended by Children and Young Persons Act 2008 s 25(4) (in force for the purpose of making regulations: SI 2009/2273 (England), SI 2010/1329 (Wales))).

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## **852. Identification of children in need and provision of information.**

Each local authority<sup>1</sup> must take reasonable steps to identify the extent to which there are children in need<sup>2</sup> within its area<sup>3</sup>. A local authority must publish information about services<sup>4</sup> provided by it, and, where the local authority considers it appropriate, about the provision by others including, in particular, voluntary organisations<sup>5</sup>, of services which the local authority has power to provide, and must take such steps as are reasonably practicable to ensure that those who might benefit from services receive the information relevant to them<sup>6</sup>. A local authority must open and maintain a register of disabled<sup>7</sup> children within its area<sup>8</sup>.

Parliament intended that the exercise of the local authority's powers and duties under Part III of the Children Act 1989<sup>9</sup> should not be the subject of judicial scrutiny or control except by means of judicial review; therefore a specific issue order<sup>10</sup> is inapposite to determine the question of whether or not a specific child is a child in need<sup>11</sup>. In most circumstances, a person who is dissatisfied with the performance by a local authority of its duties<sup>12</sup> should initially pursue a complaint under the statutory complaints procedure<sup>13</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante. Where it appears to a local authority that a child within its area is in need, it may assess a child's needs for the purposes of the Children Act 1989 at the same time as any assessment is made under the Chronically Sick and Disabled Persons Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE), the Education Act 1996 Pt IV (ss 312-349) (as amended) (see EDUCATION), the Disabled Persons (Services, Consultation and Representation) Act 1986 (see SOCIAL SERVICES AND COMMUNITY CARE), or any other enactment: Children Act 1989 s 17(2), Sch 2 para 3 (amended by the Education Act 1996 s 582(1), Sch 37 para 92). Guidance is given about the requirement of good practice in assessing needs: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) paras 2.7-2.9. As to the guidance and regulations generally see para 163 ante. See further the Department of Health publication *Protecting Children: A Guide for Social Workers Undertaking a Comprehensive Assessment* (HMSO, 1988).

3 Children Act 1989 Sch 2 para 1(1).

4 I.e. services provided under *ibid* s 17 (as amended) (see paras 848-853, 859 post), s 18 (see paras 844 ante, 860 post), s 20 (see paras 863-866 post), ss 23B-23D (as added) (see paras 929-931 post), s 24A (as added) (see para 923 post), s 24B (as added) (see para 924 post).

5 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

6 Children Act 1989 Sch 2 para 1(2) (amended by the Children (Leaving Care) Act 2000 s 7(1), (4)).

7 For the meaning of 'disabled' see para 851 note 9 ante.

8 Children Act 1989 Sch 2 para 2(1). The register may be kept by means of a computer: Sch 2 para 2(2).

9 I.e. under *ibid* Pt III (ss 17-30) (as amended).

10 As to specific issue orders see para 263 ante.

11 *Re J (a minor) (specific issue order)* [1995] 3 FCR 799, sub nom *Re J (specific issue order: leave to apply)* [1995] 1 FLR 669.

- 12    le under the Children Act 1989 s 17 (as amended): see para 851 ante.
- 13    le established under *ibid* s 26: see para 944 post.

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### **853. Partnership with families.**

It is the general duty of every local authority<sup>1</sup> (in addition to the other duties imposed by Part III of the Children Act 1989<sup>2</sup>) so far as is consistent with the duty to safeguard and promote the welfare of children who are in need<sup>3</sup>, to promote the upbringing<sup>4</sup> of such children by their families<sup>5</sup>. This duty is discharged by providing a range and level of services<sup>6</sup> appropriate to those children's needs<sup>7</sup>.

For the purpose of facilitating the discharge of the general duty described above, local authorities have a number of specific powers and duties<sup>8</sup>.

The Department for Education and Skills (now the Department for Children, Schools and Families) has issued guidance on the upbringing of children by their families<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Ie the Children Act 1989 Pt III (ss 17-30) (as amended).

3 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'upbringing' see para 266 note 9 ante.

5 Children Act 1989 s 17(1)(b). 'Family', in relation to a child in need, includes any person who has parental responsibility for the child and any other person with whom he has been living: s 17(10). For the meaning of 'parental responsibility' see para 134 ante.

This provision is intended to give effect to the concept of partnership; partnership with parents in consultation with children on the basis of careful joint planning and agreement is the guiding principle for the provision of services within the family home and where children are provided with accommodation under voluntary arrangements. Such arrangements are intended to assist the parent and enhance, not undermine, the parent's authority and control: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) para 2.1. As to the guidance and regulations generally see para 163 ante.

6 For the meaning of 'service' see para 851 note 7 ante.

7 Children Act 1989 s 17(1). See *R (on the application of G) v Barnet London Borough Council* [2001] EWCA Civ 540, [2001] 2 FCR 193, [2001] All ER (D) 144 (Apr). Where an authority does not follow statutory guidelines for assessing the needs of a child it should follow an approach that is substantially similar to that contained in guidelines: *R (on the application of AB and SB) v Nottingham City Council* [2001] EWHC 235 (Admin), [2001] 3 FCR 350.

8 See the Children Act 1989 s 17(2), Sch 2 Pt I (as amended; prospectively further amended); and see para 846 et seq ante. The Secretary of State or the Welsh Ministers may by order amend any provision of Sch 2 Pt I (as amended; prospectively amended) or add any further duty or power to those for the time being mentioned there: s 17(4). As to the Secretary of State and the Welsh Ministers see para 155 ante.

9 See the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006).

## **UPDATE**

### **853 Partnership with families**



NOTE 8--Children Act 1989 s 17(2) amended: Children and Young Persons Act 2008 Sch 3 para 2.

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#### **854. Assessments: persons with parental responsibility for disabled children.**

If a person with parental responsibility<sup>1</sup> for a disabled child<sup>2</sup>:

1596 (1) provides or intends to provide a substantial amount of care on a regular basis for the child<sup>3</sup>; and

1597 (2) asks a local authority<sup>4</sup> to carry out an assessment of his ability to provide and to continue to provide care for the child<sup>5</sup>,

the local authority must carry out such an assessment if it is satisfied that the child and his family<sup>6</sup> are persons for whom it may provide or arrange for the provision of services<sup>7</sup>. The Secretary of State<sup>8</sup> or the Welsh Ministers<sup>9</sup> may give directions as to the manner in which such an assessment is to be carried out or the form it is to take<sup>10</sup>, and subject to any such directions, it is to be carried out in such manner, and is to take such form, as the local authority considers appropriate<sup>11</sup>. The local authority must take the assessment into account when deciding what, if any, services to provide<sup>12</sup>. Such an assessment must include consideration of whether the person with parental responsibility for the child works or wishes to work, or is undertaking or wishes to undertake education, training or any leisure activity<sup>13</sup>.

1 For the meaning of 'parental responsibility' see para 134 ante; definition applied by the Carers and Disabled Children Act 2000 s 6(6). For the meaning of 'disabled' see para 851 note 9 ante; definition applied by s 6(6). For the meaning of 'child' see para 3 ante; definition applied by s 6(6).

2 Ibid s 6(1).

3 Ibid s 6(1)(a).

4 For the meaning of 'local authority' see para 248 note 10 ante; definition applied by ibid s 6(6).

5 Ibid s 6(1)(b).

6 For the meaning of 'family' see para 853 note 5 ante; definition applied by ibid s 6(6).

7 Ibid s 6(1). The text refers to the provision of services under the Children Act 1989 s 17 (as amended; prospectively further amended): see paras 851-853 ante, 859 post. For the purposes of such an assessment, the local authority may take into account, so far as it considers it to be material, an assessment under the Carers (Recognition and Services) Act 1995 s 1(2) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1016): Carers and Disabled Children Act 2000 s 6(2).

8 As to the Secretary of State see para 155 ante.

9 As to the Welsh Ministers see para 155 ante.

10 Carers and Disabled Children Act 2000 s 6(3).

11 Ibid s 6(4).

12 Ibid s 6(5). As to the duty of local authorities to inform carers of entitlement to a carer's assessment see s 6A (as added); and para 855 post.

13 Ibid s 6(2A) (added by the Carers (Equal Opportunities) Act 2004 s 2(3)). Once the assessment is concluded and a care plan produced, the court may declare the care plan for the child unlawful if the local authority has failed to take relevant factors into account: see *R (on the application of CD) v Isle of Anglesey County Council* [2004] EWHC 1635 (Admin), [2004] 3 FCR 171, [2005] 1 FLR 59.

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### **855. Assessments: duty to inform carers of right to assessment.**

If it appears to a local authority<sup>1</sup> that it would be required to carry out a carer's assessment<sup>2</sup> on being asked to do so by the carer or a person with parental responsibility for a disabled child ('the responsible person') it must inform the carer or, as appropriate, the responsible person, that he may be entitled to a carer's assessment<sup>3</sup>. There is no duty to inform the carer if the local authority has previously:

- 1598 (1) carried out a carer's assessment for him in relation to the person cared for;
- 1599 (2) informed him that he may be entitled to a carer's assessment in relation to the person cared for; or
- 1600 (3) carried out an assessment<sup>4</sup> of him<sup>5</sup>.

There is no duty to inform the responsible person if the local authority has previously carried out a carer's assessment for him in relation to the disabled child or informed him that he may be entitled to a carer's assessment in relation to the disabled child<sup>6</sup>.

1 For these purposes, 'local authority' has the meaning given in the National Health Service and Community Care Act 1990 s 46(3) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1005); definition applied by the Carers and Disabled Children Act 2000 s 11(1).

2 'Carer's assessment' means: (1) in the case of the carer, an assessment under *ibid* s 1 (see SOCIAL SERVICES AND COMMUNITY CARE) of his ability to provide and continue to provide care for the person cared for; (2) in the case of the responsible person (see the text to note 3 *infra*), an assessment under s 6 (see para 854 *ante*) of his ability to provide and to continue to provide care for the disabled child: s 6A(5) (s 6A added by the Carers (Equal Opportunities) Act 2004 s 1(2)).

3 Carers and Disabled Children Act 2000 s 6A(1), (2) (as added: see note 2 *supra*).

4 *Ie* under the Community Care (Delayed Discharges etc) Act 2003 s 4(3): see SOCIAL SERVICES AND COMMUNITY CARE.

5 Carers and Disabled Children Act 2000 s 6A(3) (as added: see note 2 *supra*).

6 *Ibid* s 6A(4) (as added: see note 2 *supra*).

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## ***B. DUTIES WITH REGARD TO CHILDREN IN NEED***

### **856. Children living with their families.**

Each local authority<sup>1</sup> must make such provision as it considers appropriate so that the following services<sup>2</sup> are available for children in need<sup>3</sup> within its area while the children are living with their families<sup>4</sup>:

- 1601 (1) advice, guidance and counselling;
- 1602 (2) occupational, social, cultural or recreational activities;
- 1603 (3) home help (which may include laundry facilities);
- 1604 (4) facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under the Children Act 1989 or any similar service; and
- 1605 (5) assistance to enable the child concerned and his family to have a holiday<sup>5</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

2 For the meaning of 'service' see para 851 note 7 ante.

3 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'family' in relation to a child in need see para 853 note 5 ante.

5 Children Act 1989 s 17(2), Sch 2 para 8.

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### **857. Maintenance of family home.**

Each local authority<sup>1</sup> must take such steps as are reasonably practicable to enable any child<sup>2</sup> within its area who is in need<sup>3</sup> and whom it is not looking after<sup>4</sup> and who is living apart from his family<sup>5</sup> to live with his family, or to promote contact between him and his family, if in the local authority's opinion it is necessary to do so in order to safeguard or promote his welfare<sup>6</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante.

4 As to the meaning of 'look after' where a local authority looks after a child see para 867 post.

5 As to the meaning of 'family' in relation to a child in need see para 853 note 5 ante.

6 Children Act 1989 s 17(2), Sch 2 para 10.

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### **858. Duty to consider racial grouping.**

In making any arrangements for the provision of day care<sup>1</sup>, or which are designed to encourage persons to act as local authority foster parents<sup>2</sup>, each local authority<sup>3</sup> must have regard to the different racial groups to which children in need<sup>4</sup> within its area belong<sup>5</sup>.

The Department for Education and Skills (now the Department for Children, Schools and Families) has issued guidance on the duty to consider racial grouping<sup>6</sup>.

1 As to the local authority's duty to provide day care see para 860 post.

2 As to the meaning of 'local authority foster parent' see para 249 note 13 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

5 Children Act 1989 s 17(2), Sch 2 para 11.

6 See the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006).

Professionals should also be aware of the broader social factors that serve to discriminate against black and minority ethnic people. Working in a multi-racial and multi-cultural society requires professionals and organisations to be committed to equality in meeting the needs of all children and families, and to understand the effects of racial harassment, racial discrimination and institutional racism, as well as cultural misunderstanding or misinterpretation: para 10.10.

The assessment process should maintain a focus on the needs of the individual child; and it should always include consideration of the way religious beliefs and cultural traditions in different racial, ethnic and cultural groups influence their values, attitudes and behaviour, and the way in which family and community life is structured and organised: para 10.11.

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### **859. Provision for family of child in need.**

Any service<sup>1</sup> provided by a local authority<sup>2</sup> in the exercise of functions conferred on it<sup>3</sup> may be provided for a family<sup>4</sup> of a particular child in need<sup>5</sup> or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare<sup>6</sup>.

1 For the meaning of 'service' see para 851 note 7 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

3 I.e. the functions conferred on the local authority by the Children Act 1989 s 17 (as amended; prospectively further amended): see paras 856-858 ante. As to the meaning of 'functions' see para 156 note 23 ante.

4 As to the meaning of 'family' in relation to a child in need see para 853 note 5 ante.

5 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

6 Children Act 1989 s 17(3). Section 17(3) confers a power, not a duty, on a local authority: see *R (on the application of G) v Barnet London Borough Council* [2001] EWCA Civ 540, [2001] 2 FCR 193, [2001] All ER (D) 144 (Apr).



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## **860. Day care and supervised activities.**

Every local authority<sup>1</sup> must provide<sup>2</sup>, for children in need<sup>3</sup> within its area:

- 1606 (1) for children who are aged five or under and not yet attending schools<sup>4</sup>, such day care as is appropriate<sup>5</sup>; and
- 1607 (2) for children who are attending any school such care or supervised activities<sup>6</sup> as is appropriate outside school hours or during school holidays<sup>7</sup>.

'Day care' means any form of care or supervised activity provided for children during the day<sup>8</sup>, whether or not it is provided on a regular basis<sup>9</sup>.

A local authority may also provide facilities, including training, advice, guidance and counselling, for those caring for children in day care or who at any time accompany such children while they are in day care<sup>10</sup>.

The Department for Education and Skills (now the Department for Children, Schools and Families) has issued guidance on the conduct of child care services<sup>11</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the provision of services by voluntary organisations and others see para 849 ante.

3 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

4 For the meaning of 'school' see para 271 note 8 ante.

5 Children Act 1989 s 18(1). For the type of day care envisaged by s 18(1) see also the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991). As to the guidance and regulations generally see para 163 ante.

6 'Supervised activity' means an activity supervised by a responsible person: Children Act 1989 s 18(7). See further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) para 3.12.

7 Children Act 1989 s 18(5).

8 The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) paras 3.3-3.17, under the general heading 'Day Care Services', refers to day nurseries, play groups, child minding, out of school clubs and holiday schemes, other supervised activities, befriending services, parent/toddler groups, toy libraries, drop-in centres and playbuses.

9 Children Act 1989 s 18(4).

10 Ibid s 18(3).

11 See the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006).

Family and children's centres, day nurseries, child minders, pre-schools, playgroups, and holiday and out-of-school schemes play an important part in the lives of large numbers of children. Many child care providers have

considerable experience of working with families where a child needs to be safeguarded from harm and many local authorities provide, commission or sponsor specific services, including child minders, to work with children in need and their families: para 2.132.

Child minders and everyone working in day care services should know how to recognise and respond to the possible abuse or neglect of a child: para 2.133.

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### ***C. DIRECT PAYMENTS AND VOUCHERS FOR DISABLED CHILDREN***

#### **861. Direct payments for disabled children.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may by regulations<sup>2</sup> make provision for and in connection with requiring or authorising the responsible authority in the case of a person of a prescribed description<sup>3</sup> who falls within the criteria given below to make<sup>4</sup>, with that person's consent, such payments to him as it may determine in accordance with the regulations in respect of his securing the provision of services as mentioned below<sup>5</sup>. This applies to a person of a prescribed description if he is:

- 1608 (1) a person with parental responsibility for a disabled child<sup>6</sup>;
- 1609 (2) a disabled person with parental responsibility for a child<sup>7</sup>; or
- 1610 (3) a disabled child aged 16 or 17<sup>8</sup>,

and a local authority ('the responsible authority') has decided<sup>9</sup> that the child's needs (or, if he is such a disabled child, his needs) call for the provision by it of a service in exercise of functions conferred on it<sup>10</sup>.

A direct payment must be made as a gross payment unless the responsible authority decides it is to be made as a net payment<sup>11</sup>. Except under specified circumstances<sup>12</sup>, a direct payment must be subject to the condition that the service in respect of which it is made must not be secured from:

- 1611 (a) the spouse or civil partner of the prescribed person<sup>13</sup>;
- 1612 (b) a person who lives with the prescribed person as if his spouse or civil partner<sup>14</sup>;
- 1613 (c) a person living in the same household as the prescribed person who is the prescribed person's:

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- 28. (i) parent or parent-in-law<sup>15</sup>;
- 29. (ii) son or daughter<sup>16</sup>;
- 30. (iii) son-in-law or daughter-in-law<sup>17</sup>;
- 31. (iv) stepson or stepdaughter<sup>18</sup>;
- 32. (v) brother or sister<sup>19</sup>;
- 33. (vi) aunt or uncle<sup>20</sup>; or
- 34. (vii) grandparent<sup>21</sup>;

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- 1614 (d) the spouse or civil partner of any person specified in head (c) above who lives in the same household as the prescribed person<sup>22</sup>; and
- 1615 (e) a person who lives with any person specified in head (c) above as if that person's spouse or civil partner<sup>23</sup>.

A responsible authority may make a direct payment subject to such other conditions (if any) as it thinks fit<sup>24</sup>. The fact that an authority makes a direct payment does not affect its functions

with respect to the provision under the relevant enactment of the service to which the payment relates<sup>25</sup>. However, where a responsible authority makes a direct payment, it is not under any obligation with respect to the provision under the relevant enactment of the service to which the payment relates as long as it is satisfied that the need which calls for the provision of the service will be secured by the payee's own arrangements<sup>26</sup>.

Where a responsible authority which has made a direct payment is satisfied, in relation to the whole or any part of the payment, that it has not been used to secure the provision of the service to which it relates or that a condition imposed<sup>27</sup> has not been complied with, it may require the payment or, as the case may be, the part of the payment to be repaid<sup>28</sup>. A responsible authority must terminate the making of direct payments to a person if he ceases to be a prescribed person or the relevant conditions<sup>29</sup> cease to be met<sup>30</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 As to the power to make regulations under the Children Act 1989 see para 161 ante.

Such regulations must provide that where payments are made under the regulations to a person falling within s 17A(5) (as added, substituted and amended; prospectively amended), the payments must be made at the rate mentioned in the Health and Social Care Act 2001 s 57(4)(a) (see SOCIAL SERVICES AND COMMUNITY CARE) and s 57(4)(b) does not apply: Children Act 1989 s 17A(4) (s 17A added by the Carers and Disabled Children Act 2000 s 7(1); and substituted by the Health and Social Care Act 2001 s 58).

A person falls within the Children Act 1989 s 17A(5) (as added, substituted and amended; prospectively amended) if he is: (1) a person falling within s 17A(2)(a) or (b) (as added and substituted) (see heads (1), (2) in the text) and the child in question is aged 16 or 17; or (2) a person who is in receipt of income support under the Social Security Contributions and Benefits Act 1992 Pt 7 (ss 123-137) of any element of tax credit other than the family element, of working tax credit or of an income-based jobseeker's allowance: Children Act 1989 s 17A(5) (as so added and substituted; and amended by the Tax Credits Act 2002 ss 47, 60, Sch 3 paras 15, 17, Sch 6). As from a day to be appointed this provision is amended so as to refer also to an income-related employment and support allowance: see the Children Act 1989 s 17A(5) (as so added, substituted and amended; and prospectively amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (3)). At the date at which this volume states the law no such day had been appointed.

The provisions of the Health and Social Care Act 2001 s 57(3)-(5), (7) apply, with any necessary modifications, in relation to regulations under the Children Act 1989 s 17A (as added, substituted and amended; prospectively amended) as they apply to regulations under the Health and Social Care Act 2001 s 57 (see SOCIAL SERVICES AND COMMUNITY CARE): Children Act 1989 s 17A(3) (as so added and substituted).

3 'Prescribed' means specified in or determined in accordance with regulations under *ibid* s 17A (as added, substituted and amended; prospectively amended) (and has the same meaning in the Health and Social Care Act 2001 s 57(3)-(5), (7) as they apply by virtue of the Children Act 1989 s 17A(3) (as added and substituted) (see note 2 *supra*): s 17A(6) (as added and substituted: see note 2 *supra*).

For the purposes of s 17A(1) (as added, substituted and amended; prospectively amended), a person is of a prescribed description if:

645 (1) he is a person who appears to the responsible authority to be capable of managing a direct payment by himself or with such assistance as may be available to him (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 3(a); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(a)); and

646 (2) he is not a person to whom the following applies:

10. (a) he is required to submit to treatment for his mental condition or for his drug or alcohol dependency by virtue of a requirement of a community rehabilitation order within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000 s 41 (repealed) or a community punishment and rehabilitation order within the meaning of s 51 (repealed) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(a), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (a));

11. (b) he is subject to a drug treatment and testing order within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000 s 52 (repealed) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(b), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (b));
- 12
12. (c) he is released on licence under the Criminal Justice Act 1991 s 37 (repealed) subject to a condition that he submit to treatment for his mental condition or for his drug or alcohol dependency (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(c), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (c));
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13. (d) he is placed under guardianship in pursuance of an application made in accordance with the Mental Health Act 1983 s 7 (see MENTAL HEALTH vol 30(2) (Reissue) para 469) or an order made under s 37 (see MENTAL HEALTH vol 30(2) (Reissue) para 491) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(d), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (d));
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14. (e) he is absent from hospital with leave given in accordance with the Mental Health Act 1983 s 17 (see MENTAL HEALTH vol 30(2) (Reissue) para 506) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(e), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (e));
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15. (f) he is subject to after-care under supervision within the meaning of the Mental Health Act 1983 s 25A (as added and amended) (see MENTAL HEALTH vol 30(2) (Reissue) para 528) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(f), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (f));
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16. (g) there is in force in respect of him a condition imposed in accordance with the Mental Health Act 1983 s 42(2) (see MENTAL HEALTH vol 30(2) (Reissue) para 524) or s 73(4) (see MENTAL HEALTH vol 30(2) (Reissue) para 570) (including such a condition which has been varied in accordance with s 73(5) or 75(3): see MENTAL HEALTH vol 30(2) (Reissue) paras 570, 572) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(g), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (g));
- 17
17. (h) there is in force in respect of him a supervision and treatment order within the meaning of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 Sch 2 Pt 1 (repealed) (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, regs 2(2)(h), 3(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 4(b), Sch 1 para (h)).
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As to community sentences see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163 et seq; and as to youth community orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 229 et seq. As to release on licence see PRISONS vol 36(2) (Reissue) para 612 et seq.

4 le under the Children Act 1989 s 17A(2) (as added and substituted): see the text and notes 6-10 infra.

5 Ibid s 17A(1) (as added and substituted: see note 2 supra). The power to make a payment under s 17A(1) (as added and substituted) is not exercisable in relation to the provision of residential accommodation for any disabled child for a period in excess of 28 days, and in any period of 12 months for periods which exceed 120

days in total: see the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 7; and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 8.

6 Children Act 1989 s 17A(2)(a) (as added and substituted: see note 2 supra). For the meaning of 'disabled', in relation to a child, see para 851 note 9 ante.

7 Ibid s 17A(2)(b) (as added and substituted: see note 2 supra). 'Disabled', in relation to an adult, has the same meaning as that given by s 17(11) in relation to a child (see note 6 supra; and para 851 note 9 ante): s 17A(6) (as so added and substituted).

8 Ibid s 17A(2)(c) (as added and substituted: see note 2 supra).

9 Ie for the purposes of ibid s 17 (as amended; prospectively amended).

10 Ibid s 17A(2) (as added and substituted: see note 2 supra). The text refers to functions conferred on the local authority by s 17 (as amended; prospectively amended): see para 851 et seq ante.

If certain conditions are satisfied, a responsible authority must make in respect of a prescribed person who falls within s 17A (as added, substituted and amended; prospectively amended) such payments (ie direct payments) as are determined in accordance with the following provisions in respect of a relevant service (ie (1) a community care service within the meaning of the National Health Service and Community Care Act 1990; or (2) a service under the Carers and Disabled Children Act 2000 s 2 (see SOCIAL SERVICES AND COMMUNITY CARE); or (3) a service which it may provide in exercise of functions under the Children Act 1989 s 17 (as amended; prospectively amended)): Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 4(1), (2); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 5(1), (2) (reg 5(1) amended by SI 2006/2840). The conditions referred to above are that the responsible authority is satisfied that the person's needs for the relevant service can be met by securing the provision of it by means of a direct payment; and in the case of a relevant service mentioned in head (3) supra, the responsible authority is satisfied that the welfare of the child in respect of whom the service is needed will be safeguarded and promoted by securing the provision of it by means of the direct payment: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 4(3); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 5(3).

11 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 5(1); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 6(1). For the purpose of making the direct payment, the responsible authority must determine, having regard to the prescribed person's means, what amount or amounts (if any) it is reasonably practicable for him to pay towards securing the provision of the relevant service (whether by way of reimbursement as mentioned in the Health and Social Care Act 2001 s 57(4) or by way of a contribution as mentioned in s 57(5) (see SOCIAL SERVICES AND COMMUNITY CARE)): Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 5(2); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 6(2). Where the relevant service is one which would otherwise be provided under the Mental Health Act 1983 s 117 (after-care: see MENTAL HEALTH vol 30(2) (Reissue) paras 414, 428), the payment must be made at the rate mentioned in the Health and Social Care Act 2001 s 57(4)(a) (see SOCIAL SERVICES AND COMMUNITY CARE) and s 57(4)(b) does not apply: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 5(3); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 6(3). Where a direct payment is made to a person falling within the Children Act 1989 s 17A(2) (as added, substituted and amended; prospectively amended) (see the text and notes 6-10 supra), the payment must be made at the rate mentioned in the Health and Social Care Act 2001 s 57(4)(a) (see SOCIAL SERVICES AND COMMUNITY CARE) and s 57(4)(b) does not apply: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 5(4); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 6(4). A direct payment may be paid to the prescribed person who falls within the Health and Social Care Act 2001 s 57(2) (see SOCIAL SERVICES AND COMMUNITY CARE) or the Children Act 1989 s 17A(2) (as added and substituted) (see the text and notes 6-10 supra) or a person nominated by the prescribed person to receive the payment on his behalf: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 5(5); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 6(5).

12 Ie unless:

- 647 (1) in the case of a service mentioned in the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 4(2)(a) or (b) or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 5(2)(a) or (b) (see note 10 heads (1), (2) supra), the responsible authority is satisfied that securing the service from such a person is necessary to

meet satisfactorily the prescribed person's need for that service (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1)(a); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1)(a));

- 648 (2) in the case of a service mentioned in the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 4(2)(c) or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 5(2)(c) (see note 10 head (3) supra), the responsible authority is satisfied that securing the service from such a person is necessary for promoting the welfare of the child in need (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1)(a); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1)(b)).

13 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(a) (amended by SI 2005/2114); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(a) (amended by SI 2005/3302).

14 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(b) (amended by SI 2005/2114); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(b) (amended by SI 2005/3302).

15 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(i); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(i).

16 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(ii); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(ii). Head (c)(ii) in the text does not apply in the case of a person mentioned in the Children Act 1989 s 17A(2)(c) (as added and substituted) (see head (3) in the text): Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(3); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(3).

17 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(iii); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(iii). Head (c)(iii) in the text does not apply in the case of a person mentioned in the Children Act 1989 s 17A(2)(c) (as added and substituted) (see head (3) in the text): Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(3); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(3).

18 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(iv); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(iv).

19 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(v); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(v).

20 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(vi); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(vi).

21 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(c)(vii); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(c)(vii).

22 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(d) (amended by SI 2005/2114); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(d) (amended by SI 2005/3302).

23 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(1), (2)(e) (amended by SI 2005/2114); Community Care, Services for Carers and

Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(1), (2)(e) (amended by SI 2005/3302).

24 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(4); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(4). Such conditions may, in particular, require that the payee must not secure the relevant service from a particular person and must provide such information to the responsible authority as it considers necessary in connection with the direct payment: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6(5); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7(5).

25 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 8(1); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 9(1). References to the relevant enactment, in relation to the provision of a service, are to the enactment under which the service would fall to be provided apart from the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762 (as amended) and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748 (as amended): Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 8(3); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 9(3).

26 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 8(2); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 9(2).

27 Is a condition imposed under the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6 or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7.

28 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 9(1); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 10(1). Any sum falling to be so repaid is recoverable as a debt due to the authority: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 9(2); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 10(2).

29 Is a condition mentioned in the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 4(3) or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 5(3): see note 10 supra.

30 Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 10(1); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 11(1). A responsible authority may terminate the making of direct payments to a prescribed person if any condition imposed under the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 6 or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 7 (see note 12 supra) or referred to in the Health and Social Care Act 2001 s 57(4)(b) (see SOCIAL SERVICES AND COMMUNITY CARE) is not complied with: Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 10(2); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 11(2).

Notwithstanding that the person in respect of whom direct payments are made ceases to be capable of managing such payments, a responsible authority may continue to make such payments if:

- 649 (1) the authority is reasonably satisfied that the person's incapability will be temporary (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 10(3)(a); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 11(3)(a));
- 650 (2) another person is prepared to accept and manage such payments on the incapable person's behalf (Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, reg 10(3)(b); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 11(3)(b)); and
- 651 (3) the person with whom the arrangement for the provision of the relevant service has been made agrees to accept payment for the services from the person mentioned in head (2) supra (Community Care, Services for Carers and Children's Services (Direct Payments) (England)



Regulations 2003, SI 2003/762, reg 10(3)(c); Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748, reg 11(3)(c)).

## **UPDATE**

### **861 Direct payments for disabled children**

NOTE 2--Appointed day is 27 October 2008: SI 2008/787.

NOTE 5--Children Act 1989 s 17A(1) amended: Children and Young Persons Act 2008 Sch 3 para 3.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(1) SUPPORT BY LOCAL AUTHORITY/(ii) Support for Children in Need/C. DIRECT PAYMENTS AND VOUCHERS FOR DISABLED CHILDREN/862. Vouchers for disabled children.

## **862. Vouchers for disabled children.**

Regulations<sup>1</sup> may make provision for the issue by a local authority of vouchers<sup>2</sup> to a person with parental responsibility for a disabled child<sup>3</sup>. The regulations may, in particular, provide:

- 1616 (1) for the value of a voucher to be expressed in terms of money, or of the delivery of a service for a period of time, or both<sup>4</sup>;
- 1617 (2) for the person who supplies a service against a voucher, or for the arrangement under which it is supplied, to be approved by the local authority<sup>5</sup>;
- 1618 (3) for a maximum period during which a service (or a service of a prescribed description) can be provided against a voucher<sup>6</sup>.

1 As to the regulations that have been made see the Carers and Disabled Children (Vouchers) (England) Regulations 2003, SI 2003/1216. As to the powers to make regulations generally under the Children Act 1989 see para 161 ante.

2 'Voucher' means a document whereby, if the local authority agrees with the person with parental responsibility that it would help him care for the child if the person with parental responsibility had a break from caring, that person may secure the temporary provision of services for the child under *ibid* s 17 (as amended; prospectively amended): s 17B(2) (s 17B added by the Carers and Disabled Children Act 2000 s 7(1)). At the date at which this volume states the law the Children Act 1989 s 17B (as added) had not been brought into effect in relation to Wales.

3 See *ibid* s 17B(1) (as added: see note 1 *supra*).

4 *Ibid* s 17B(3)(a) (as added: see note 1 *supra*).

5 *Ibid* s 17B(3)(b) (as added: see note 1 *supra*).

6 *Ibid* s 17B(3)(c) (as added: see note 1 *supra*).

## **UPDATE**

### **862 Vouchers for disabled children**

NOTE 3--Children Act 1989 s 17B(1) amended: Children and Young Persons Act 2008 Sch 3 para 4.

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## **(2) PROVISION OF ACCOMMODATION**

### **863. Duty to provide accommodation.**

Each local authority<sup>1</sup> must provide accommodation<sup>2</sup> for any child in need<sup>3</sup> within its area who appears to it to require accommodation as a result of<sup>4</sup>:

- 1619 (1) there being no person who has parental responsibility<sup>5</sup> for him<sup>6</sup>;
- 1620 (2) his being lost or having been abandoned<sup>7</sup>; or
- 1621 (3) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care<sup>8</sup>.

However, a local authority may not provide accommodation for any child if any person who has parental responsibility for him and is willing and able to provide accommodation for him or arrange for accommodation to be provided for him, objects<sup>9</sup>. Where a child is accommodated, the local authority may only arrange for the transfer of the child from a residential institution to foster care if the parents give their permission<sup>10</sup>.

Where a local authority provides accommodation for a child who is ordinarily resident<sup>11</sup> in the area of another local authority, the latter authority may take over the provision of accommodation for the child within three months of being notified in writing that the child is being provided with accommodation, or such other longer period as may be prescribed<sup>12</sup>.

Each local authority must also provide accommodation for any child in need within its area who has reached the age of 16 years if the authority considers that his welfare is likely to be seriously prejudiced if it does not do so<sup>13</sup>.

Each local authority must make provision for the reception and accommodation of children who are removed or kept away from home under the provisions of Part V of the Children Act 1989<sup>14</sup> (which deal with the protection of children)<sup>15</sup> and must receive and provide accommodation for children who are in police protection whom it is requested to receive<sup>16</sup>.

Local authorities also have a duty to provide accommodation for children whom they are looking after<sup>17</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 'Accommodation' is not defined for this purpose in the Children Act 1989. Cf the definition of 'accommodation' in s 22(2): see para 867 post. References in the Children Act 1989 to accommodation provided by or on behalf of a local authority are references to accommodation so provided in the exercise of functions of that or any other local authority which are social services functions within the meaning of the Local Authority Social Services Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006): Children Act 1989 s 105(5) (amended by the Local Government Act 2000 s 107, Sch 5 para 22).

Where accommodation is provided as a service under voluntary arrangements which parents with a child in need may seek to take up, a high degree of co-operation is assumed between parents and local authorities in negotiating and agreeing what form of accommodation can be offered and the use to be made of it: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) para 2.25. As to the guidance and regulations generally see para 163 ante.

As to the provision of services by voluntary organisations and others see para 849 ante.

3 As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante. For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 20(1). The duty to provide accommodation may be fulfilled by offering accommodation to a child notwithstanding that no offer of accommodation is made to the child's mother: see *R (on the application of G) v Barnet London Borough Council* [2001] EWCA Civ 540, [2002] LGR 34, [2001] 2 FCR 193.

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 s 20(1)(a).

7 Ibid s 20(1)(b).

8 Ibid s 20(1)(c). See *Re C (a minor) (secure accommodation: jurisdiction)* [1994] 2 FCR 1153, sub nom *Re C (secure accommodation: bail)* [1994] 2 FLR 922 (child's mother prevented from looking after child because of bail condition entrusting her to local authority accommodation; authority obliged to accommodate child as it saw fit). See also *R (on the application of L) v Nottingham County Council* [2007] All ER (D) 158 (Sep).

9 Children Act 1989 s 20(7).

10 See *R v Tameside Metropolitan Borough Council, ex p J* [2000] 1 FCR 173, [2000] 1 FLR 942, [2000] Fam Law 90.

11 As to the ordinary residence of a child see para 271 notes 8-9 ante. Any question arising in this context as to the child's ordinary residence must be determined by agreement between the local authorities concerned or, in default of agreement, by the Secretary of State or Welsh Ministers: Children Act 1989 s 30(2). As to the Secretary of State and the Welsh Ministers see para 155 ante. As to the meaning of 'ordinarily resident' see eg *Re M (minors) (residence)* [1993] 1 FCR 718, sub nom *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495, CA; *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, sub nom *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, HL; *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Re S (a minor) (custody: habitual residence)* [1998] AC 750, [1997] 4 All ER 251, HL; *Re C (responsible authority)* [2005] EWHC 2939 (Fam), [2006] 1 FLR 919.

12 Children Act 1989 s 20(2). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). At the date at which this volume states the law no such longer period had been prescribed by regulations.

Where a child was removed from voluntary foster care in one local authority's area, and placed with paternal grandparents within another local authority's area, this amounted to a private family arrangement approved by the original local authority under the Children Act 1989 s 23(6) (see para 869 post) and not accommodation by either authority under s 23(2) (see para 877 post): *Re C (responsible authority)* [2005] EWHC 2939 (Fam), [2006] 1 FLR 919.

13 Children Act 1989 s 20(3). Where a 16-year-old child had escaped from her tragic family background and found a home with a married couple, the local authority refused to treat the child as accommodated and therefore refused to pay the married couple a foster allowance. It was held that the Director of Social Services had erred when, in reaching his decision, he was satisfied that the past provision of support under the Children Act 1989 s 17 (as amended; prospectively amended) (see para 851 et seq ante) made it unlikely that the child's welfare would be seriously prejudiced if she was not provided with accommodation. The focus of attention should have been on the future and, at the time he made his decision, the Director of Social Services did not consider the likelihood of the local authority exercising its powers under s 17 (as amended; and prospectively amended) to a sufficient degree to avoid serious prejudice to the child's welfare in the future. In exercising its discretion under s 20(3) to provide accommodation for a child, a local authority must look at all the circumstances of the case. The powers and duties under s 17 (as amended; and prospectively amended) must not be excluded. However, because the provisions and duties were discretionary in nature, it did not seem that they could amount to factors to which much weight could be attached for the purposes of s 20(3): see *Re T (accommodation of child by local authority)* [1995] 1 FCR 517, [1995] 1 FLR 159 per Johnson J.

14 Ie the Children Act 1989 Pt V (ss 43-52) (as amended): see paras 578-592 ante.

15 Ibid s 21(1). Where a child has been removed under Pt V (as amended) and he is not being provided with accommodation by a local authority or in a hospital vested in the Secretary of State or a primary care trust, or otherwise made available pursuant to arrangements made by a local health board or a primary care trust, any reasonable expenses of accommodating him are recoverable from the local authority in whose area he is ordinarily resident: s 21(3) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 36(1); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (3); and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule

para 20(1), (2)(a)). For the meaning of 'hospital' see para 283 note 3 ante. As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq; as to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq; and as to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq.

As to the ordinary residence of a child see para 271 notes 8-9 ante. Any question arising under the Children Act 1989 s 21(3) (as amended) as to the child's ordinary residence must be determined by agreement between the local authorities concerned or, in default of agreement, by the Secretary of State or Welsh Ministers: s 30(2).

16 Ibid s 21(2). The authority may be requested to receive, and provide accommodation for, children: (1) under s 46(3)(f) (see para 596 ante) (see s 21(2)(a)); or (2) under the Police and Criminal Evidence Act 1984 s 38(6) (as substituted and amended) (juvenile in custody after being charged: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 944) (see the Children Act 1989 s 21(2)(b)). Each local authority must also receive, and provide accommodation for, children who are:

652 (a) on remand under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 7(5) (see para 1357 post) or the Children and Young Persons Act 1969 s 23(1) (as substituted and amended) (see para 1247 post) (Children Act 1989 s 21(2)(c)(i) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 38; and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 126(a))); or

653 (b) the subject of a supervision order imposing a local authority residence requirement under the Powers of Criminal Courts (Sentencing) Act 2000 s 63 (as amended), Sch 6 para 5 (see para 1346 post) or a foster parent residence requirement under Sch 6 para 5A (as added) (see para 1348 post) (Children Act 1989 s 21(2)(c)(ii) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 126(b); and the Anti-social Behaviour Act 2003 s 88, Sch 2 para 5)),

and with respect to whom it is the designated authority (Children Act 1989 s 21(2)(c)). As to supervision orders see paras 281-287 ante.

Where a child has been detained under the Police and Criminal Evidence Act 1984 s 38 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 944) and he is not being provided with accommodation by a local authority or in a hospital vested in the Secretary of State or a primary care trust, or otherwise made available pursuant to arrangements made by a local health board or a primary care trust, the reasonable expenses of accommodating him are recoverable from the local authority in whose area he is ordinarily resident: Children Act 1989 s 21(3) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 36(1); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (3); and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(a)).

17 See the Children Act 1989 s 23(1); and para 877 post.

## UPDATE

### 863 Duty to provide accommodation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--Question as to whether person is a child is question for court rather than for other kinds of decision makers, and is to be determined on evidence available: *R (on the application of A) v Croydon LBC*; *R (on the application of M) v Lambeth LBC* [2009] UKSC 8, [2010] 1 All ER 469.

NOTES 4-8--Once a local authority is under a duty to provide accommodation to a child in need, it cannot side-step the issue of accepting its duty by claiming to act under some other power: *R (on the application of G) v Southwark LBC* [2009] UKHL 26, [2009] 3 All ER 189.

NOTE 4--Eligibility criteria should have no role to play in relation to a local authority's duty under the 1989 Act s 20(1) which imposes an absolute duty: *R (on the application of JL) v Islington LBC* [2009] EWHC 458 (Admin), [2009] Fam Law 485, [2009] All ER (D) 140 (Mar).

NOTE 6--See also *R (on the application of Liverpool City Council) v Hillingdon LBC* [2009] EWCA Civ 43, [2009] 3 FCR 46. Decisions under the Children Act 1989 s 20 are not susceptible to challenge under the European Convention on Human Rights art 6 (right to fair trial) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 134): *R (on the application of M) v Lambeth LBC* [2008] EWCA Civ 1445, [2009] 1 FCR 317 (decision reversed on other grounds: [2009] UKSC 8, [2009] 1 WLR 2557, [2009] All ER (D) 288 (Nov)).

NOTE 8--A public authority may be taken by its conduct to be exercising its functions under the Children Act 1989 s 20 even where that is not its intention: *R (on the application of A) v Coventry City Council* [2009] EWHC 34 (Admin), [2009] 1 FCR 501.

NOTES 11, 15--Children Act 1989 s 30(2) amended, s 30(2A), (2B) added: Children and Young Persons Act 2008 Sch 3 para 2.

NOTE 15--Children Act 1989 s 21(3) amended by the Children and Young Persons Act 2008 Sch 3 para 5 so as to also refer to a hospital vested in the Welsh Ministers.

NOTE 16--Children Act 1989 s 21(2)(c) further amended, s 21(2A) added, Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 126(b) and Anti-social Behaviour Act 2003 s 88, Sch 2 repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 34, 105, Sch 28 Pt 1.

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#### **864. Power to provide accommodation.**

Although in certain circumstances a local authority is under a duty to provide accommodation for certain children<sup>1</sup>, there are also circumstances in which the local authority has a power but not a duty to provide accommodation<sup>2</sup>.

A local authority<sup>3</sup> may provide accommodation<sup>4</sup> for any child<sup>5</sup> within its area, even though a person who has parental responsibility<sup>6</sup> for him is able to provide him with accommodation, if the authority considers that to do so would safeguard or promote the child's welfare<sup>7</sup>. Moreover, a local authority may provide accommodation for any person who has reached the age of 16 years but is under 21 years in any community home which takes children who have reached the age of 16 years if the authority considers that to do so would safeguard or promote his welfare<sup>8</sup>.

1 See the Children Act 1989 s 20(1), (3); and para 863 ante.

2 See *ibid* s 20(4), (5); and the text and notes 3-8 *infra*.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 As to the meaning of 'accommodation' in this context see para 863 note 2 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

5 For the meaning of 'child' see para 3 ante.

6 For the meaning of 'parental responsibility' see para 134 ante.

7 Children Act 1989 s 20(4). The exercise of this power is not restricted to cases where a child is in need.

8 *Ibid* s 20(5). See note 7 *supra*. As to the meaning of 'community home' see para 967 post.

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### **865. Factors to be taken into account in deciding on provision of accommodation.**

Before providing accommodation<sup>1</sup>, a local authority<sup>2</sup>, so far as is reasonably practicable and consistent with the child's<sup>3</sup> welfare, must ascertain the child's wishes and feelings regarding the provision of accommodation and give due consideration, having regard to his age and understanding, to such wishes and feelings of the child as it has been able to ascertain<sup>4</sup>. The local authority has a general duty in making decisions for children, including regarding the provision of accommodation, so far as is practicable, to ascertain the wishes and feelings of the child's parents, any other person who has parental responsibility for him and any other person whose wishes and feelings the authority considers to be relevant<sup>5</sup>.

The Department for Education and Skills (now the Department for Children, Schools and Families) has issued guidance on involving children in decisions concerning their welfare<sup>6</sup>.

1     le under the Children Act 1989 s 20 (as distinct from the particular duty under s 21 (as amended; prospectively further amended) to provide accommodation for children in police protection or detention: see para 863 text and notes 14-16 ante): see paras 863-864 ante, 866 post. As to the meaning of 'accommodation' in this context see para 863 note 2 ante.

2     For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

3     For the meaning of 'child' see para 3 ante.

4     Children Act 1989 s 20(6) (amended by the Children Act 2004 s 53(2)).

Partnership, a key element of the modern legislation, requires informed participation; the Act therefore requires that parents and children be consulted during the decision-making process and notified of the outcome: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) para 2.28. As to the guidance and regulations generally see para 163 ante.

5     See the Children Act 1989 s 22(4); and para 868 post.

6     See the Department for Education and Skills guidance *Working Together to Safeguard Children* (TSO, 2006) para 5.4.



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### **866. Objections to provision of accommodation.**

A local authority<sup>1</sup> may not provide accommodation<sup>2</sup> for any child<sup>3</sup> if any person who has parental responsibility<sup>4</sup> for him, and is willing and able to provide accommodation or arrange for accommodation to be provided for him, objects<sup>5</sup>. Additionally, any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority<sup>6</sup>.

The provisions described above do not apply, however, where:

- 1622 (1) any person<sup>7</sup> in whose favour a residence order<sup>8</sup> is in force with respect to the child, who is a special guardian<sup>9</sup> of the child or who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children<sup>10</sup> agrees to the child being looked after in accommodation provided by or on behalf of the local authority<sup>11</sup>; or
- 1623 (2) a child who has attained the age of 16 years agrees to being provided with accommodation<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 See under the Children Act 1989 s 20 (as amended): see paras 864-865 ante. As to the meaning of 'accommodation' in this context see para 863 note 2 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

3 For the meaning of 'child' see para 3 ante.

4 For the meaning of 'parental responsibility' see para 134 ante.

5 Children Act 1989 s 20(7). There is no provision for determining whether a person is 'able' to provide accommodation. If the local authority considers that the child is at risk of suffering significant harm, the provisions of the Children Act 1989 regarding care or emergency protection proceedings may be applied: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991) paras 2.29-2.30; and see paras 276 et seq, 583 et seq ante. As to the guidance and regulations generally see para 163 ante.

A local authority which has care of a child by the mere provision of accommodation rather than by a care order has no power to transfer the child from a residential institution to foster care without the parent's permission: see *R v Tameside Metropolitan Borough Council, ex p J* [2000] 1 FCR 173, [2000] 1 FLR 942. As to care orders see paras 276-280 ante.

6 Children Act 1989 s 20(8). The text refers to accommodation provided by or on behalf of the local authority under s 20 (as amended): see paras 864-865 ante. The fact that a person wishes to remove a child from accommodation may be a ground for invoking the provisions of Pt V (ss 43-52) (as amended) dealing with the protection of children: see para 583 ante.

7 Where there is more than one such person, all of them must agree: *ibid* s 20(10).

8 As to residence orders see para 262 ante.

9 As to special guardianship see para 151 ante.

10 As to the inherent jurisdiction of the High Court see para 218 et seq ante.

11 Children Act 1989 s 20(9) (amended by the Adoption and Children Act 2002 s 139(1), (3), Sch 3 paras 54, 59, Sch 5).

12 Children Act 1989 s 20(11).

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### **(3) DUTIES OF LOCAL AUTHORITIES IN RELATION TO CHILDREN LOOKED AFTER BY THEM**

#### **(i) In general**

##### **867. The general duty.**

It is the duty of a local authority<sup>1</sup> looking after any child<sup>2</sup> to safeguard and promote his welfare<sup>3</sup> and to make such use of services<sup>4</sup> available for children cared for by their own parents<sup>5</sup> as appear to the authority reasonable in the child's case<sup>6</sup>.

A child is 'looked after' by a local authority if he is in the care<sup>7</sup> of the local authority or is provided with accommodation<sup>8</sup> by the authority in the exercise of any functions<sup>9</sup> (in particular its functions under the Children Act 1989) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from certain functions<sup>10</sup> under the Children Act 1989<sup>11</sup>.

In the case of a child who is in care, the local authority has parental responsibility for the child<sup>12</sup>; where the child is simply provided with accommodation<sup>13</sup>, the local authority does not have parental responsibility<sup>14</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. See generally *Re T (judicial review: local authority decisions concerning child in need)* [2003] EWHC 2515 (Admin), [2004] 1 FLR 601, sub nom *R (on the application of T) v A Local Authority* [2003] All ER (D) 02 (Nov).

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 22(3)(a). The duty of a local authority under s 22(3)(a) to safeguard and promote the welfare of a child looked after by it includes in particular a duty to promote the child's educational achievement: s 22(3A) (added by the Children Act 2004 s 52).

4 For the meaning of 'service' see para 851 note 7 ante.

5 As to the meaning of 'parent' see para 248 note 1 ante.

6 Children Act 1989 s 22(3)(b). Although the requirement of the Childcare Act 1980 in respect of promotion of a child's welfare 'throughout his childhood' is not reproduced in the Children Act 1989, the intention is still that both the immediate and the long term needs of the child should be considered and provided for in the local authority's planning for the child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.5. As to the guidance and regulations generally see para 163 ante.

7 Ie he is in the care of the authority by virtue of a care order (including an interim care order): Children Act 1989 ss 31(11), 105(1). As to care orders see paras 276-280 ante.

8 'Accommodation' in this context means accommodation which is provided for a continuous period of more than 24 hours: *ibid* s 22(2).

9 As to the meaning of 'functions' see para 156 note 23 ante.

10 Ie functions under the Children Act 1989 s 17 (as amended; prospectively amended) (provision of services for children in need, their families and others: see paras 849-851 ante), s 23B (as added) (additional

functions of the responsible authority in respect of relevant children: see para 929 post), s 24B (as added) (functions in respect of employment, education and training: see para 924 post).

11 Ibid s 22(1) (amended by the Local Government Act 2000 s 107, Sch 5 para 19; the Children (Leaving Care) Act 2000 s 2(1), (2); and the Adoption and Children Act 2002 s 116(2)).

12 See the Children Act 1989 s 33(3)(b); and para 138 text and note 19 ante. For the meaning of 'parental responsibility' see para 134 ante. The child's parents will retain parental responsibility despite the local authority also having parental responsibility: see para 141 ante. This reflects the intention underpinning the Children Act 1989 that parents should be encouraged to exercise their responsibility for their child's welfare in a constructive way and that where compulsory intervention in the family is used it should where possible enhance rather than undermine the parental role: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.3.

13 See paras 863-866 ante.

14 See note 12 supra.

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### **868. The duty of consultation.**

Before making any decision with respect to a child<sup>1</sup> whom it is looking after<sup>2</sup>, or proposing to look after, a local authority<sup>3</sup>, so far as is reasonably practicable, must ascertain the wishes and feelings, regarding the matter to be decided, of:

- 1624 (1) the child<sup>4</sup>;
- 1625 (2) his parents<sup>5</sup>;
- 1626 (3) any person who is not a parent of his but who has parental responsibility for him<sup>6</sup>; and
- 1627 (4) any other person whose wishes and feelings the authority considers to be relevant<sup>7</sup>.

In making any such decision the local authority must give due consideration:

- 1628 (a) having regard to his age and understanding, to such wishes and feelings of the child as it has been able to ascertain<sup>8</sup>;
- 1629 (b) to such wishes and feelings of any person mentioned in heads (2) to (4) above as it has been able to ascertain<sup>9</sup>; and
- 1630 (c) to the child's religious persuasion, racial origin and cultural and linguistic background<sup>10</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 Children Act 1989 s 22(4)(a).

5 Ibid s 22(4)(b). As to the meaning of 'parent' see para 248 note 1 ante. However, where: (1) a local authority is entitled to place a child for adoption; or (2) a child who has been placed for adoption by a local authority is less than six weeks old, the requirement in s 22(4)(b) to consult his parents does not apply: Adoption and Children Act 2002 s 53; Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(a).

6 Children Act 1989 s 22(4)(c). For the meaning of 'parental responsibility' see para 134 ante. However, where: (1) a local authority is entitled to place a child for adoption; or (2) a child who has been placed for adoption by a local authority is less than six weeks old, the requirement in s 22(4)(c) applies instead to any prospective adopter with whom the local authority has placed the child for adoption: Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(b).

7 Children Act 1989 s 22(4)(d). See *R v Devon County Council, ex p B* [1997] 3 FCR 411, sub nom *R v Devon County Council, ex p O (adoption)* [1997] 2 FLR 388 (failure of local authority to consider wishes and feelings of child and prospective adopters). The Children Act 1989 s 22(4) applies equally to children in care and to children who are being looked after under voluntary arrangements: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.5. As to the guidance and regulations generally see para 163 ante. See *Re P (Children Act 1989 ss 22, 26: local authority compliance)* [2000] 2 FLR 910; *R (on the application of M) v Sheffield Magistrates' Court* [2004] EWHC 1830 (Admin), [2004] 3 FCR 281 (guidance on making anti-social behaviour order).

Relevant persons may be a children's guardian (see *R v North Yorkshire County Council, ex p M* [1989] QB 411, [1989] 1 All ER 143), or foster carers (see *R v Hereford and Worcester County Council, ex p D* [1992] 1 FCR 497,

[1992] 1 FLR 448). As to children's guardians (formerly known as guardians ad litem: see para 230 ante) see paras 319-321 ante.

8 Children Act 1989 s 22(5)(a).

9 Ibid s 22(5)(b). However, where: (1) a local authority is entitled to place a child for adoption; or (2) a child who has been placed for adoption by a local authority is less than six weeks old, due consideration must be given instead to the wishes and feelings of any person mentioned in heads (3) and (4) in the text: Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(c).

10 Children Act 1989 s 22(5)(c).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(3) DUTIES OF LOCAL AUTHORITIES IN RELATION TO CHILDREN LOOKED AFTER BY THEM/(ii) Visits by or to a Child/A. CONTACT BETWEEN CHILD AND FAMILY/869. Preservation of family links.

## **(ii) Visits by or to a Child**

### **A. CONTACT BETWEEN CHILD AND FAMILY**

#### **869. Preservation of family links.**

A local authority<sup>1</sup> looking after<sup>2</sup> a child<sup>3</sup> must make arrangements to enable the child to live with<sup>4</sup>:

- 1631 (1) a parent of his<sup>5</sup>;
- 1632 (2) a person who is not a parent of the child but who has parental responsibility<sup>6</sup> for him<sup>7</sup>;
- 1633 (3) where the child is in care<sup>8</sup> and there was a residence order<sup>9</sup> in force with respect to him immediately before the care order<sup>10</sup> was made, a person in whose favour<sup>11</sup> the residence order was made<sup>12</sup>; or
- 1634 (4) a relative<sup>13</sup>, friend or other person connected with him<sup>14</sup>,

unless that would not be reasonably practicable or consistent with his welfare<sup>15</sup>.

Moreover, so far as is reasonably practicable and consistent with the welfare of each child, the local authority must secure that the accommodation is near the child's home, and where the authority is also providing accommodation for a sibling of his, that they are accommodated together<sup>16</sup>.

Where a child looked after by a local authority is disabled<sup>17</sup>, the authority, so far as is reasonably practicable, must secure that the accommodation is not unsuitable to his particular needs<sup>18</sup>.

Where a child is in the care of a local authority, the local authority may only allow him to live with a person who falls within heads (1) to (3) above in accordance with regulations made by the Secretary of State or Welsh Ministers<sup>19</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 23(6).

5 Ibid s 23(4)(a), (6)(a). As to the meaning of 'parent' see para 248 note 1 ante. It has been held that a local authority which permits children to remain living at home under an interim care order in care proceedings is not providing accommodation for them within s 23(1)(a) (see paras 877-878 ante): *Hackney London Borough Council v C* [1997] 1 FCR 509 at 517, [1997] 1 FLR 544 at 549 per Wall J.

6 For the meaning of 'parental responsibility' see para 134 ante.

7 Children Act 1989 s 23(4)(b), (6)(a).

8 As to the meaning of 'in care' see para 867 note 7 ante.

9 As to residence orders see para 262 ante.

10 As to care orders see paras 276-280 ante.

11 References in the Children Act 1989 to a person in whose favour a residence order is in force are to be construed as references to the person named in the order as the person with whom the child is to live: s 105(3)(b).

12 Ibid s 23(4)(c), (6)(a).

13 For the meaning of 'relative' see para 249 note 15 ante.

14 Children Act 1989 s 23(6)(b).

15 Ibid s 23(6). This requirement is intended to ensure that the Act's emphasis on the promotion of the upbringing of children within or by their families is applied equally to 'looked after' children: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.6. As to the guidance and regulations generally see para 163 ante. However, note that the Children Act 1989 s 23(6) does not impose a duty to provide accommodation for the mother of a child in need: *R (on the application of G) v Barnet London Borough Council*, *R (on the application of W) v Lambeth London Borough Council*, *R (on the application of A) v Lambeth London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97; and see para 851 ante.

16 Children Act 1989 s 23(7); and see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.7.

17 For the meaning of 'disabled' see para 851 note 9 ante.

18 Children Act 1989 s 23(8). See *R v London Borough of Brent, ex p S* [1994] 2 FCR 996, [1994] 1 FLR 203 ('The wording of the duty in [the Children Act 1989] s 23(8) seems to me designed to avoid placing an unrealistically heavy burden on local authorities. The accommodation to be secured is not required to be suitable to the particular needs of the child, but only to be not unsuitable, and the duty to secure even that is qualified by what is reasonably practicable. Accordingly, it may not be reasonably practicable to secure accommodation which is not unsuitable, but so long as the council is doing the best it can, within the bounds of what is reasonably practicable, to secure not unsuitable accommodation, I do not think that it is in breach of its statutory duty': at 215 per Peter Gibson LJ).

19 Children Act 1989 s 23(5). For the purposes of s 23(5), a child is regarded as living with a person if he stays with that person for a continuous period of more than 24 hours: s 23(5A) (added by the Courts and Legal Services Act 1990 s 116, Sch 16 para 12).

Regulations under the Children Act 1989 s 23(5) may, in particular, impose requirements on a local authority as to: (1) the making of any decision by a local authority to allow a child to live with any person falling within heads (1)-(3) in the text (including requirements as to those who must be consulted before the decision is made, and those who must be notified when it has been made); (2) the supervision or medical examination of the child concerned; (3) the removal of the child, in such circumstances as may be prescribed, from the care of the person with whom he has been allowed to live; (4) the records to be kept by local authorities: s 23(9), Sch 2 para 14 (amended by the Courts and Legal Services Act 1990 Sch 16 para 26).

In pursuance of the Children Act 1989 s 23(5), the following regulations have been made: the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (amended by SI 1991/2033; SI 1993/3069; SI 1995/2015; SI 1997/649; SI 2002/546; SI 2007/310) (see para 879 et seq); the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (amended by SI 1995/2015; SI 2002/546; SI 2002/2469; SI 2002/2935) (see para 890 et seq post); and the Placement of Children (Wales) Regulations 2007/SI 2007/310 (see para 879 et seq post).

As to the Secretary of State and the Welsh Ministers see para 155 ante.

## UPDATE

### 869 Preservation of family links

TEXT AND NOTES--Children Act 1989 s 23 substituted: see PARA 877.



Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 4, 19--Children Act 1989 s 23(5), (6) amended: Children and Young Persons Act 2008 Sch 3 para 7(4), (5).

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### **870. Duty to promote and maintain contact between child and family.**

A local authority<sup>1</sup> looking after<sup>2</sup> a child<sup>3</sup> must, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and:

- 1635 (1) his parents<sup>4</sup>;
- 1636 (2) any person who is not a parent of his but who has parental responsibility for him<sup>5</sup>; and
- 1637 (3) any relative<sup>6</sup>, friend or other person connected with him<sup>7</sup>.

The local authority looking after a child must take such steps as are reasonably practicable to secure that the child's parents, and any person who is not a parent but who has parental responsibility for him, are kept informed of where he is being accommodated<sup>8</sup>. Every such person must secure that the local authority is kept informed of his address<sup>9</sup>. However, a local authority is not required to inform any person of the whereabouts of a child who is in the care of the authority<sup>10</sup>, if the authority has reasonable cause to believe that informing the person would prejudice the child's welfare<sup>11</sup>.

A local authority may make payments to:

- 1638 (a) a parent of the child;
- 1639 (b) any person who is not a parent of his but who has parental responsibility for him; or
- 1640 (c) any relative, friend or other person connected with him, in respect of travelling, subsistence or other expenses incurred by that person in visiting the child<sup>12</sup>.

Equally, a local authority may make payments to the child, or to any person on his behalf, in respect of travelling, subsistence or other expenses incurred by or on behalf of the child in his visiting the persons mentioned in heads (a) to (c) above<sup>13</sup>. The conditions which must be satisfied before this power becomes exercisable are that:

- 1641 (i) the child is being looked after by a local authority<sup>14</sup>; and
- 1642 (ii) it appears to the authority that the visit in question could not otherwise be made without undue financial hardship<sup>15</sup>; and
- 1643 (iii) the circumstances warrant the making of the payments<sup>16</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

3 For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'parental responsibility' see para 134 ante.

6 For the meaning of 'relative' see para 249 note 15 ante.

7 Children Act 1989 s 23(9), Sch 2 para 15(1). Schedule 2 para 15 does not apply where: (1) a local authority is authorised to place a child for adoption; or (2) a child who has been placed for adoption by a local authority is less than six weeks old: see the Adoption and Children Act 2002 s 53; and the Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(d). An order which provides for such contact to take place at the local authority's discretion does not erode the authority's duty under the Children Act 1989 Sch 2 para 15(1): *Re L (minors) (care proceedings: contact)* [1998] 3 FCR 339, sub nom *L v Bromley London Borough Council* [1998] 1 FLR 709. As to 'reasonable contact' see *Re P (minors) (contact with children in care)* [1993] 2 FLR 156.

8 Children Act 1989 Sch 2 para 15(2)(a). See note 7 supra. Where a local authority ('the receiving authority') takes over the provision of accommodation for a child from another local authority ('the transferring authority') under s 20(2) (see para 863 ante), the receiving authority must (where reasonably practicable) inform the child's parents, and any person who is not a parent of his but who has parental responsibility for him, of the transfer (Sch 2 para 15(3)(a)); but the transferring authority, as well as the receiving authority, remains under a duty to notify those concerned as to the place where the child is accommodated until at least one parent or other relevant person has been informed of the change of authority (Sch 2 para 15(3)(b)). The obligation on parents, etc to notify changes of address (see the text and note 9 infra) does not require any person to inform the receiving authority of his address until he has been so informed: Sch 2 para 15(3)(c).

9 Ibid Sch 2 para 15(2)(b). See note 7 supra. Any person who fails (without reasonable excuse) to comply with this requirement is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale: Sch 2 para 15(5). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante. It is a defence to prove that the defendant was residing at the same address as another person who was the child's parent or had parental responsibility for the child and had reasonable cause to believe that the other person had informed the appropriate authority that both of them were residing at that address: Sch 2 para 15(6). As to the position where the functions of the local authority are transferred to another local authority in respect of the child see also note 8 supra.

10 As to the meaning of 'in care' see para 867 note 7 ante.

11 Children Act 1989 Sch 2 para 15(4).

12 Ibid Sch 2 para 16(2)(a).

13 Ibid Sch 2 para 16(2)(b).

14 Ibid Sch 2 para 16(1)(a).

15 Ibid Sch 2 para 16(1)(b), (3)(a).

16 Ibid Sch 2 para 16(1)(b), (3)(b).

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## ***B. INDEPENDENT VISITORS***

### **871. Appointment of visitor for child.**

A local authority<sup>1</sup> looking after<sup>2</sup> a child<sup>3</sup> may appoint an independent person to be the child's visitor, if it appears that:

- 1644 (1) communication between the child and a parent of his, or any other person who has parental responsibility<sup>4</sup> for him, has been infrequent; or
- 1645 (2) the child has not visited or been visited by, or lived with, any such person during the preceding 12 months; and
- 1646 (3) it would be in the child's best interests for such an appointment to be made<sup>5</sup>.

However, no such appointment may be made if the child objects to it and the local authority is satisfied that he has sufficient understanding to make an informed decision<sup>6</sup>.

A person is to be regarded as being independent of the local authority appointing him if he is not connected with the local authority by virtue of being:

- 1647 (a) a member of the local authority or any of its committees or sub-committees, whether elected or co-opted or a council manager of the local authority; or
- 1648 (b) an officer of the local authority employed in the social services department; or
- 1649 (c) a spouse of any such person<sup>7</sup>.

Where the child who is to receive visits is accommodated by an organisation other than the local authority, a person is to be regarded as independent if he is not:

- 1650 (i) a member of that organisation; or
- 1651 (ii) a patron or trustee of that organisation; or
- 1652 (iii) an employee of that organisation, whether paid or not; or
- 1653 (iv) a spouse of any such person<sup>8</sup>.

A visitor appointed under the provisions described above has the duty of visiting, advising and befriending the child<sup>9</sup>. He is entitled to recover from the authority which appointed him any reasonable expenses incurred by him for the purpose of his statutory functions<sup>10</sup>.

The local authority must determine the appointment of a visitor if the child objects to its continuing and the authority is satisfied that he has sufficient understanding to make an informed decision<sup>11</sup>. The visitor's appointment is also determined if he gives notice in writing to the authority which appointed him that he resigns the appointment, or the authority gives him notice in writing that it has terminated the appointment<sup>12</sup>. However, the determination of such

an appointment does not prejudice any duty under the statutory provisions to make a further appointment<sup>13</sup>.

- 1 For the meaning of 'local authority' see para 248 note 10 ante.
  - 2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.
  - 3 For the meaning of 'child' see para 3 ante.
  - 4 For the meaning of 'parental responsibility' see para 134 ante.
  - 5 Children Act 1989 s 23(9), Sch 2 para 17(1). As to the provision of services by voluntary organisations and others see para 849 ante.
  - 6 Ibid Sch 2 para 17(5).
  - 7 Ibid Sch 2 para 17(7); Definition of Independent Visitors (Children) Regulations 1991, SI 1991/892, reg 2(a) (amended by SI 2001/2237; SI 2002/808). See also the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991). As to the guidance and regulations generally see para 163 ante.
- The text refers to a council manager of the local authority within the meaning of the Local Government Act 2000 s 11(4)(b): see LOCAL GOVERNMENT vol 69 (2009) PARA 327.
- 8 Definition of Independent Visitors (Children) Regulations 1991, SI 1991/892, reg 2(b).
  - 9 Children Act 1989 Sch 2 para 17(2)(a).
  - 10 Ibid Sch 2 para 17(2)(b). As to the meaning of 'functions' see para 156 note 23 ante.
  - 11 Ibid Sch 2 para 17(6).
  - 12 Ibid Sch 2 para 17(3).
  - 13 Ibid Sch 2 para 17(4).

## UPDATE

### 871 Appointment of visitor for child

NOTE 7--Children Act 1989 Sch 2 para 17(7) amended: Children and Young Persons Act 2008 Sch 3 para 27(2).

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### **(iii) Miscellaneous Powers and Duties**

#### **872. Guarantee of articles of apprenticeship.**

While a child<sup>1</sup> is being looked after<sup>2</sup> by a local authority<sup>3</sup>, or is a person qualifying for advice and assistance<sup>4</sup>, the local authority may undertake any obligation by way of guarantee under any deed of apprenticeship or articles of clerkship which he enters into<sup>5</sup>. Where a local authority has undertaken such an obligation under any deed or articles it may at any time, whether or not it is still looking after the person concerned, undertake the like obligation under any supplemental deed or articles<sup>6</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

4 For the meaning of 'person qualifying for advice and assistance' see para 922 post.

5 Children Act 1989 s 23(9), Sch 2 para 18(1). As to apprenticeships see EMPLOYMENT vol 39 (2009) PARAS 103-104.

6 Ibid Sch 2 para 18(2).

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### **873. Duties of the local authority on child ceasing to be looked after by it.**

It is the duty of the local authority<sup>1</sup> looking after a child<sup>2</sup> to advise, assist and befriend him with a view to promoting his welfare when it has ceased to look after him<sup>3</sup>. A local authority has the following additional functions in relation to an eligible child<sup>4</sup> whom it is looking after<sup>5</sup>:

- 1654 (1) for each eligible child, it must carry out an assessment of his needs with a view to determining what advice, assistance and support it would be appropriate for it to provide him under the Children Act 1989 while it is still looking after him, and after it ceases to look after him, and must then prepare a pathway plan for him<sup>6</sup>;
- 1655 (2) it must keep the pathway plan under regular review<sup>7</sup>, and any such review may be carried out at the same time as a review of the child's case<sup>8</sup>; and
- 1656 (3) it must arrange for each such child to have a personal adviser<sup>9</sup>.

<sup>1</sup> For the meaning of 'local authority' see para 248 note 10 ante.

<sup>2</sup> As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'child' see para 3 ante.

<sup>3</sup> Children Act 1989 Sch 2 para 19A (Sch 2 paras 19A-19C added by the Children (Leaving Care) Act 2000 s 1).

<sup>4</sup> 'Eligible child' means, subject to the Children Act 1989 Sch 2 para 19B(3) (as added), a child who is aged 16 or 17, and has been looked after by a local authority for a prescribed period, or periods amounting in all to a prescribed period, which began after he reached a prescribed age and ended after he reached the age of 16: Sch 2 para 19B(2) (as added: see note 3 supra). Regulations may prescribe additional categories of eligible children, and categories of children who are not to be eligible children despite falling within Sch 2 para 19B(2) (as added): Sch 2 para 19B(3) (as so added). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). In relation to England, for the purposes of Sch 2 para 19B(2)(b) (as added), the prescribed period is 13 weeks and the prescribed age is 14: Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 3(1). A child falling within reg 3(3) is not an eligible child despite falling within the Children Act 1989 Sch 2 para 19B(2) (as added): Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 3(2). A child falls within reg 3(3) if he has been looked after by a local authority in circumstances where the authority has arranged to place him in a pre-planned series of short term placements, none of which individually exceeds four weeks (even though they may amount in all to the prescribed period), and at the end of each such placement the child returns to the care of his parent or a person who is not a parent but who has parental responsibility for him: reg 3(3). The Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 3, makes corresponding provision in relation to Wales.

An eligible child for the purposes of the Children Act 1989 Sch 2 para 19B (as added) is not entitled to income-based jobseeker's allowance under the Jobseekers Act 1995, or to income support or housing benefit under the Social Security Contributions and Benefits Act 1992: see the Children (Leaving Care) Act 2000 s 6; and SOCIAL SECURITY AND PENSIONS.

<sup>5</sup> Children Act 1989 Sch 2 para 19B(1) (as added: see note 3 supra).

<sup>6</sup> Ibid Sch 2 para 19B(4) (as added: see note 3 supra). Regulations may make provision as to assessments for the purposes of Sch 2 para 19B(4) (as added): Sch 2 para 19B(7) (as so added). The regulations may in particular provide for the matters set out in s 23B(6) (as added) (see para 929 post): Sch 2 para 19B(8) (as so added). As to regulations made in relation to Sch 2 para 19B (as added) see the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874 (amended by SI 2002/546; SI 2006/1738); and the Children (Leaving

Care) (Wales) Regulations 2001, SI 2001/2189 (amended by SI 2004/163; SI 2004/1510; SI 2005/2929; SI 2006/362).

7 Children Act 1989 Sch 2 para 19B(5) (as added: see note 3 supra).

8 Ibid Sch 2 para 19B(6) (as added: see note 3 supra). The text refers to a review of the child's case carried out by virtue of s 26: see para 936 post.

9 Ibid Sch 2 para 19C (as added: see note 3 supra). There is nothing in law to prevent an officer or employee of a local authority being appointed as a personal adviser of a child in care; however, in such circumstances the personal adviser and the local authority should recognise that the personal adviser is acting in that role and not in some other conflicting role: *R (on the application of J) v Caerphilly Borough Council* [2005] EWHC 586 (Admin), [2005] 2 FCR 153.

## **UPDATE**

### **873 Duties of the local authority on child ceasing to be looked after by it**

NOTES 4, 6--Children Act 1989 Sch 2 para 19B(3), (7) amended: Children and Young Persons Act 2008 Sch 3 para 27(3).

NOTE 6--See *R (on the application of G) v Nottingham City Council* [2008] EWHC 400 (Admin), [2008] 3 FCR 568, [2008] All ER (D) 46 (Mar).



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#### **874. Death of child being looked after by local authority.**

If a child<sup>1</sup> who is being looked after<sup>2</sup> by a local authority<sup>3</sup> dies, the authority must notify, as appropriate, the Secretary of State, the Welsh Ministers and Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup>, and, so far as reasonably practicable, the child's parents and every person who is not a parent of his but who has parental responsibility<sup>5</sup> for him<sup>6</sup>. The local authority may, with the consent (so far as it is reasonably practicable to obtain it) of every person who has parental responsibility for the child, arrange for the child's body to be buried or cremated<sup>7</sup>.

A local authority may make payments to any person who has parental responsibility for the child, or any relative<sup>8</sup>, friend or other person connected with the child, in respect of travelling, subsistence or other expenses incurred by that person in attending the child's funeral<sup>9</sup> if it appears to the local authority that the person concerned could not otherwise attend the child's funeral without undue financial hardship, and that the circumstances warrant the making of the payments<sup>10</sup>.

The above provisions do not authorise cremation where it does not accord with the practice of the child's religious persuasion<sup>11</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

4 Children Act 1989 s 23(9), Sch 2 para 20(1)(a) (amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 9, 17). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the Secretary of State and the Welsh Ministers see para 155 ante.

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children Act 1989 Sch 2 para 20(1)(b).

7 Ibid Sch 2 para 20(1)(c). This does not, however, affect any enactment regulating or authorising the burial, cremation or anatomical examination of the body of a deceased person: Sch 2 para 20(6); and see generally CREMATION AND BURIAL. Where a local authority has exercised its power to arrange burial or cremation of a deceased child who was under 16 when he died, it may recover from any parent of the child any expenses incurred by it: Sch 2 para 20(4). Any sums so recoverable, without prejudice to any other method of recovery, are recoverable summarily as a civil debt: Sch 2 para 20(5). It appears that a foster parent who has no parental responsibility for a child has no locus standi in relation to funeral arrangements: *R v Gwynedd County Council, ex p B* [1992] 3 All ER 317, [1991] 2 FLR 365, CA.

8 For the meaning of 'relative' see para 249 note 15 ante.

9 Children Act 1989 Sch 2 para 20(1)(d).

10 Ibid Sch 2 para 20(2).

11 Ibid Sch 2 para 20(3).

#### **UPDATE**

**874 Death of child being looked after by local authority**

TEXT AND NOTE 4--Children Act 1989 Sch 2 para 20(1)(a) amended: Children and Young Persons Act 2008 Sch 3 para 27(4).

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### **875. Arrangements to assist children to live abroad.**

A local authority<sup>1</sup> may, with the approval of every person who has parental responsibility<sup>2</sup> for a child<sup>3</sup> (other than a child in its care<sup>4</sup>), arrange for or assist in arranging for any child looked after<sup>5</sup> by it to live outside England and Wales<sup>6</sup>. Leave of the court is required if a local authority is to arrange for, or assist in arranging for, any child in its care to live outside England and Wales<sup>7</sup>. The court must not give its approval unless it is satisfied that:

- 1657 (1) living outside England and Wales would be in the child's best interests;
- 1658 (2) suitable arrangements have been or will be made for his reception and welfare in the country in which he will live;
- 1659 (3) the child has consented to living in that country; and
- 1660 (4) every person who has parental responsibility for the child has consented to his living in that country<sup>8</sup>.

However, where the court is satisfied that the child does not have sufficient understanding to give or withhold consent, it may disregard the requirement that his consent be obtained and give its approval if he is to live in the country concerned with a parent, guardian special guardian, or other suitable person<sup>9</sup>. Moreover, where a person whose consent is required is a person with parental responsibility, the court may disregard the statutory requirement and give its approval if it is satisfied that the person concerned cannot be found, is incapable of consenting or is withholding his consent unreasonably<sup>10</sup>.

Where a court decides to give its approval it may order that its decision is not to have effect during the appeal period<sup>11</sup>.

The restriction on the removal of children from the United Kingdom for the purpose of adoption<sup>12</sup>, does not apply in the case of any child who is to live outside England and Wales with the approval of the court given under the above provisions<sup>13</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

2 For the meaning of 'parental responsibility' see para 134 ante.

3 For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'in care' see para 867 note 7 ante.

5 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

6 Children Act 1989 s 23(9), Sch 2 para 19(2).

7 Ibid Sch 2 para 19(1). The court may bypass the procedure set out in Sch 2 para 19 when it is in a child's best interests to do so: *Re G (a minor) (leave to appeal: jurisdiction)* [1999] 3 FCR 281, [1999] 1 FLR 771, CA.

8 Children Act 1989 Sch 2 para 19(3).

9 Ibid Sch 2 para 19(4) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 72(a)).

10 Children Act 1989 Sch 2 para 19(5). In deciding whether a parent is withholding his consent unreasonably, the court should apply the same test as it does in adoption proceedings when considering whether to dispense with a parent's consent under the Adoption Act 1976 s 16(2)(b) (repealed): see *Re G (child in care: arrangements to live abroad)* [1994] 2 FCR 359, sub nom *Re G (minors) (care: leave to place outside jurisdiction)* [1994] 2 FLR 301; *Re W (child in care: proposed placement abroad)* [1994] 3 FCR 242, sub nom *Re W (care: leave to place outside jurisdiction)* [1994] 2 FLR 1087; *A London Borough Council v M* [2006] EWHC 1907 (Fam), [2006] All ER (D) 416 (Jul).

11 Children Act 1989 Sch 2 para 19(7). 'The appeal period' means: (1) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and (2) otherwise, the period during which an appeal may be made against the decision: Sch 2 para 19(8).

12 See the Adoption and Children Act 2002 s 85; and para 503 ante. For the meaning of 'United Kingdom' see para 102 note 7 ante.

13 Children Act 1989 Sch 2 para 19(6) (amended by the Adoption and Children Act 2002 Sch 3 para 54, 72(b)).

## **UPDATE**

### **875 Arrangements to assist children to live abroad**

NOTE 13--As to permitting a child to leave the jurisdiction for the purposes of a trial placement with prospective adopters see *Re MA (an infant) (placement outside jurisdiction)* [2008] All ER (D) 282 (Jul).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(3) DUTIES OF LOCAL AUTHORITIES IN RELATION TO CHILDREN LOOKED AFTER BY THEM/(iii) Miscellaneous Powers and Duties/876. Protection of the public.

## **876. Protection of the public.**

If it appears to a local authority<sup>1</sup> that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise its powers with respect to a child<sup>2</sup> whom it is looking after<sup>3</sup> in a manner which may not be consistent with its general duties towards such a child<sup>4</sup>, it may do so<sup>5</sup>. If the Secretary of State or the Welsh Ministers<sup>6</sup> consider it necessary, for the purpose of protecting members of the public from serious injury, to give directions to a local authority with respect to the exercise of its powers in respect of a child whom it is looking after, he or they may give such directions to the local authority<sup>7</sup>. A local authority must comply with any such directions even though doing so is inconsistent with its general duty towards such a child<sup>8</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

4 I.e. the duties imposed by the Children Act 1989 s 22 (as amended): see paras 867-868 ante.

5 Ibid s 22(6). See *R (on the application of M) v Sheffield Magistrates' Court* [2004] EWHC 1830 (Admin), [2004] 3 FCR 281 (guidance on making anti-social behaviour order).

6 As to the Secretary of State and the Welsh Ministers see para 155 ante.

7 Children Act 1989 s 22(7).

8 Ibid s 22(8). See note 4 supra.

## **UPDATE**

## **876 Protection of the public**

NOTE 7--Children Act 1989 s 22(7) amended: Children and Young Persons Act 2008 Sch 3 para 6.

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### **877. Provision of accommodation and maintenance.**

It is the duty of any local authority<sup>1</sup> looking after<sup>2</sup> a child<sup>3</sup> who is in its care<sup>4</sup> to provide accommodation for him and to maintain him in other respects apart from providing accommodation for him<sup>5</sup>. The duty may be met by:

- 1661 (1) placing<sup>6</sup> him with a family, a relative<sup>7</sup> of his, or any other suitable person, on such terms as to payment by the authority and otherwise as the authority may determine<sup>8</sup>;
- 1662 (2) maintaining him in an appropriate children's home<sup>9</sup>; or
- 1663 (3) making such other arrangements as seem appropriate to the authority and which comply with any regulations made<sup>10</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'in care' see para 867 note 7 ante.

5 Children Act 1989 s 23(1). Contributions may be required from other persons: see para 935 post. As to the inspection of premises in which children looked after by a local authority are accommodated see para 156 ante.

6 As to placements of children see para 878 et seq post. Where a child who has been accommodated by a local authority under the Children Act 1989 s 20 (see paras 863-866 ante) moves to live with another member of the family, the child ceases to be 'accommodated' and any services required will be provided under s 17 (as amended) (see para 851 et seq ante): see *Re C (responsible authority)* [2005] EWHC 2939 (Fam), [2006] 1 FLR 919.

7 For the meaning of 'relative' see para 249 note 15 ante. A local authority may only allow a child who is in its care to live with: (1) a parent; (2) a person who has parental responsibility for him; or (3) a person in whose favour a residence order was in force immediately before the making of the care order, in accordance with regulations: see the Children Act 1989 s 23(4), (5); and para 869 ante. For the purposes of s 23(5), a child is regarded as living with a person if he stays with that person for a continuous period of more than 24 hours: see s 23(5A) (as added); and para 869 ante. As to such regulations see paras 869 note 19 ante, 890 et seq post. As to residence orders see para 262 ante. As to care orders see paras 276-280 ante.

8 Ibid s 23(2)(a). This is expressed to be subject s 23(5) (see para 869 ante) and any regulations made by the Secretary of State or the Welsh Ministers. Section 23 (as amended) is also subject to the Children Act 2004 s 49 whereby the Secretary of State or the Welsh Ministers may by order make provision as to the payments to be made by a children's services authority in England or Wales or a person exercising functions on its behalf to a local authority foster parent with whom any child is placed by that authority or person under the Children Act 1989 s 23(2)(a): Children Act 2004 s 49(1)(a), (2). At the date at which this volume states the law no such orders had been made. As to the Secretary of State and the Welsh Ministers see para 155 ante. As to the duty of a local authority under the Children Act 1989 s 23(2) see further *D v Southwark London Borough Council* [2007] EWCA Civ 182, [2007] 1 FCR 788.

Any person with whom a child has been placed under the Children Act 1989 s 23(2)(a) is referred to as a local authority foster parent unless he falls within head (1), head (2) or head (3) in note 7 supra: s 23(3); and see para 900 post. As to the 'placement' of a child see further para 878 post. Where a child is accommodated by a voluntary organisation, that organisation has the same power of placement: see s 59(1)(a), (2); and para 975 post.

Regulations under s 23(2)(a) may, in particular, make provision:

- 654 (1) with regard to the welfare of children placed with local authority foster parents (Sch 2 para 12(a));
- 655 (2) as to the arrangements to be made by local authorities in connection with the health and education of such children (Sch 2 para 12(b));
- 656 (3) as to the records to be kept by local authorities (Sch 2 para 12(c));
- 657 (4) for securing that a child is not placed with a local authority foster parent unless that person is for the time being approved as a local authority foster parent by such local authority as may be prescribed (Sch 2 para 12(d));
- 658 (5) for securing that where possible the local authority foster parent with whom a child is to be placed:
  - 18. (a) is of the same religious persuasion as the child (Sch 2 para 12(e)(i)); or
  - 19 19. (b) gives an undertaking that the child will be brought up in that religious persuasion (Sch 2 para 12(e)(ii));
  - 20 20.
- 659 (6) for securing that children placed with local authority foster parents, and the premises in which they are accommodated, will be supervised and inspected by a local authority and that the children will be removed from those premises if their welfare appears to require it (Sch 2 para 12(f));
- 660 (7) as to the circumstances in which local authorities may make arrangements for duties imposed on them by the regulations to be discharged on their behalf (Sch 2 para 12(g)).

In pursuance of s 23(2)(a) the following regulations have been made in relation to England: the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (amended by SI 1991/2033; SI 1993/3069; SI 1995/2015; SI 1997/649; SI 2002/546; SI 2002/2469) (see para 880 et seq post); and the Fostering Services Regulations 2002, SI 2002/57 (amended by SI 2002/865; SI 2002/2469; SI 2004/664; SI 2004/865; SI 2006/1738) (see paras 900-921 post). The following regulations have been made in relation to Wales: the Placement of Children (Wales) Regulations 2007, SI 2007/310 (see para 880 et seq post); and the Fostering Services (Wales) Regulations 2003, SI 2003/237 (see paras 900-921 post).

See *R (on the application of L) v Manchester City Council*, *R (on the application of R) v Manchester City Council* [2001] EWHC 707 (Admin), [2002] 1 FLR 43 (policy of paying foster carers who were relatives significantly lower rate than other foster carers was unlawful).

9 Children Act 1989 s 23(2)(aa) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (3)(a)). Where, under the Children Act 1989 s 23(2)(aa) (as added), a local authority maintains a child in a home provided, equipped and maintained by the Secretary of State under s 82(5) (see para 158 ante), it must do so on such terms as the Secretary of State may from time to time determine: s 23(2A) (added by the Care Standards Act 2000 Sch 4 para 14(1), (3)(b)). 'Appropriate children's home' means a children's home in respect of which a person is registered under the Care Standards Act 2000 Pt II (ss 11-42) (see para 985-986 post; and SOCIAL SERVICES AND COMMUNITY CARE); and 'children's home' has the same meaning as in that Act (see para 983 post): Children Act 1989 s 23(10) (added by the Care Standards Act 2000 Sch 4 para 14(3)(c)).

10 Children Act 1989 s 23(2)(f). Regulations under s 23(2)(f) may, in particular, make provision as to:

- 661 (1) the persons to be notified of any proposed arrangements (Sch 2 para 13(a));
- 662 (2) the opportunities such persons are to have to make representations in relation to the arrangements proposed (Sch 2 para 13(b));
- 663 (3) the persons to be notified of any proposed changes in arrangements (Sch 2 para 13(c));
- 664 (4) the records to be kept by local authorities (Sch 2 para 13(d)); and
- 665 (5) the supervision by local authorities of any arrangements made (Sch 2 para 13(e)).

In pursuance of s 23(2)(f), the following regulations have been made in relation to England: the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (amended by SI 1991/2033; SI 1993/3069; SI 1995/2015; SI 1997/649; SI 2002/546; SI 2002/2469) (see para 880 et seq post). In relation to Wales, the

following regulations have been made: the Placement of Children (Wales) Regulations 2007, SI 2007/310 (amended by SI 2002/865; SI 2002/2469; SI 2004/664; SI 2004/865; SI 2006/1738) (see paras 900-921 post).

## UPDATE

### 877 Provision of accommodation and maintenance

TEXT AND NOTES--Replaced. Children Act 1989 s 23, Sch 2 paras 12-14 replaced by ss 22A-22F, Sch 2 paras 12A-12G (substituted by Children and Young Persons Act 2008 s 8(1), (2), Sch 1 para 4).

For transitory modifications of Children Act 1989 Sch 2 para 12 see Children and Young Persons Act 2008 s 8(3), Sch 2.

The following provisions are not yet in force unless otherwise stated.

When a child is in the care of a local authority, it is the duty of that authority to provide the child with accommodation: Children Act 1989 s 22A. A local authority must also maintain a child it is looking after in other respects apart from the provision of accommodation: s 22B. Where a local authority is looking after a child ('C'), it must make arrangements for C to live with a person who (1) is a parent of C; (2) is not a parent of C but who has parental responsibility for C; or (3) in a case where C is in the care of the authority and there was a residence order in force with respect to C immediately before the care order was made, the person in whose favour the residence order was made: see s 22C(1)-(3), (10). However, the authority is not required to make such arrangements if doing so would not be consistent with C's welfare, or would not be reasonably practicable: s 22C(4). If the authority is unable to make such arrangements, it must place C in the placement which is, in its opinion, the most appropriate placement available: s 22C(5). 'Placement' means (a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent (see PARA 249); (b) placement with a local authority foster parent who does not fall within head (a) above; (c) placement in a children's home in respect of which a person is registered under the Care Standards Act 2000 Pt 2 (ss 11-42); or (d) subject to the Children Act 1989 s 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of s 22C: s 22C(6). In determining the most appropriate placement for C, the authority must give preference to a placement falling within head (a): s 22C(7)(a). Further, so far as it is reasonably practicable, the authority must ensure that the placement is near C's home, does not disrupt C's education or training, enables C to live with a sibling for whom the authority is also providing accommodation and, if C is disabled, the accommodation provided is suitable to C's particular needs: s 22C(7)(b), (8). An authority is generally required to provide a placement with accommodation within its area: see s 22C(7)(c), (9). The appropriate national authority may make regulations for, and in connection with, the purposes of s 22C: s 22C(11) (in force: SI 2009/2273 (England), SI 2010/1329 (Wales)). 'The appropriate national authority' means, in relation to England, the Secretary of State and, in relation to Wales, the Welsh Ministers: Children Act 1989 s 30A (added by Children and Young Persons Act 2008 Sch 3 para 22). The Children Act 1989 Sch 2 Pt 2 (paras 12A-20) (see PARAS 869-875) has effect for the purposes of making further provision as to children looked after by local authorities and in particular as to the regulations which may be made under s 22C(11): s 22F (in force: SI 2009/2273 (England), SI 2010/1329 (Wales)). Regulations under the Children Act 1989 s 22C (i) may impose requirements on a local authority as to conditions under which a child is to live with any person falling within heads (1)-(3) (see Sch 2 para 12A); (ii) in relation to placements of the kind specified in head (d), may make provision as to the persons to be notified of any proposed arrangements (see Sch 2 para 12B); (iii) may impose requirements which a local authority must



comply with before a child its looks after is provided with accommodation at a place outside the authority's area (see Sch 2 para 12C); (iv) may make provision in relation to a child's education, health, welfare and religious upbringing (see Sch 2 paras 12D, 12E); (v) may make provision in relation to approval of local authority foster parents (see Sch 2 para 12F); and (vi) may make provision as to the circumstances in which local authorities may make arrangements for duties imposed on them by the regulations to be discharged on their behalf (see Sch 2 para 12G). Schedule 2 paras 12A-12G in force: SI 2009/2273 (England), SI 2010/749 (Wales).

Where a local authority is providing accommodation for a child other than by arrangements under head (d), it must not make such arrangements for the child unless it has decided to do so in consequence of a review of the child's case carried out in accordance with regulations made under s 26 (s 22D(1)); but this does not prevent an authority making arrangements for the child under head (d) above if it is satisfied that in order to safeguard the child's welfare it is necessary to make such arrangements and to do so as a matter of urgency (s 22D(2)). Where a local authority places a child it is looking after in a children's home provided, equipped and maintained by the appropriate national authority under s 82(5) (see PARA 158), it must do so on such terms as the appropriate national authority may from time to time determine: s 22E.

NOTE 5--A public authority, by its conduct, can be taken to be exercising its functions under the Children Act 1989 s 23 even where that is not its intention: *R (on the application of A) v Coventry City Council* [2009] EWHC 34 (Admin), [2009] 1 FCR 501.

TEXT AND NOTES 7-10--Children Act 1989 s 23(2)(a), (f), (2A), (5) amended: Children and Young Persons Act 2008 Sch 3 para 7(2)-(4).

NOTE 8--SI 2002/57 further amended: SI 2008/640, SI 2009/394.

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## **(4) PLACEMENTS BY LOCAL AUTHORITIES AND OTHERS**

### **(i) Arrangements for Placements**

#### **A. DUTY TO MAKE ARRANGEMENTS**

##### **878. Provision of accommodation by local authority.**

It is the duty of any local authority<sup>1</sup> looking after<sup>2</sup> a child<sup>3</sup> who is in its care<sup>4</sup> to provide accommodation for him<sup>5</sup>. The duty may be met by:

- 1664 (1) placing<sup>6</sup> him with a family, a relative<sup>7</sup> of his, or any other suitable person, on such terms as to payment by the authority and otherwise as the authority may determine<sup>8</sup>;
- 1665 (2) maintaining him in an appropriate children's home<sup>9</sup>; or
- 1666 (3) making such other arrangements as seem appropriate to the authority and which comply with any regulations<sup>10</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante. As to the provision of services by voluntary organisations and others see para 849 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'in care' see para 867 note 7 ante.

5 Children Act 1989 s 23(1). Contributions may be required from other persons: see para 935 post. As to the inspection of premises in which children looked after by a local authority are accommodated see para 156 ante.

6 Where a child who has been accommodated by a local authority under the Children Act 1989 s 20 (as amended) (see para 863 ante) moves to live with another member of the family, the child ceases to be 'accommodated' and any services required will be provided under s 17 (as amended) (see para 851 et seq ante): see *Re C (responsible authority)* [2005] EWHC 2939 (Fam), [2006] 1 FLR 919.

7 For the meaning of 'relative' see para 249 note 15 ante. A local authority may only allow a child who is in its care to live with: (1) a parent; (2) a person who has parental responsibility for him; or (3) a person in whose favour a residence order was in force immediately before the making of the care order, in accordance with regulations: see the Children Act 1989 s 23(4), (5); and para 869 ante. For the purposes of s 23(5), a child is regarded as living with a person if he stays with that person for a continuous period of more than 24 hours: see s 23(5A) (as added); and para 869 ante. As to such regulations see paras 869 note 19 ante, 890 et seq post. As to residence orders see para 262 ante. As to care orders see paras 276-280 ante.

8 Ibid s 23(2)(a). This is expressed to be subject to s 23(5) (see para 869 ante) and any regulations made by the Secretary of State or the Welsh Ministers. Section 23 (as amended) is also subject to the Children Act 2004 s 49 (see para 877 note 8 ante). As to the Secretary of State and the Welsh Ministers see para 155 ante.

Any person with whom a child has been placed under the Children Act 1989 s 23(2)(a) is referred to as a local authority foster parent unless he falls within head (1), head (2) or head (3) in note 7 supra: s 23(3); and see para 900 post. Where a child is accommodated by a voluntary organisation, that organisation has the same power of placement: see s 59(1)(a), (2); and para 975 post.

Regulations under s 23(2)(a) may, in particular, make provision:

- 666 (1) with regard to the welfare of children placed with local authority foster parents (Sch 2 para 12(a));
- 667 (2) as to the arrangements to be made by local authorities in connection with the health and education of such children (Sch 2 para 12(b));
- 668 (3) as to the records to be kept by local authorities (Sch 2 para 12(c));
- 669 (4) for securing that a child is not placed with a local authority foster parent unless that person is for the time being approved as a local authority foster parent by such local authority as may be prescribed (Sch 2 para 12(d));
- 670 (5) for securing that where possible the local authority foster parent with whom a child is to be placed:
  - 20. (a) is of the same religious persuasion as the child (Sch 2 para 12(e)(i)); or
  - 21 21. (b) gives an undertaking that the child will be brought up in that religious persuasion (Sch 2 para 12(e)(ii));
  - 22
- 671 (6) for securing that children placed with local authority foster parents, and the premises in which they are accommodated, will be supervised and inspected by a local authority and that the children will be removed from those premises if their welfare appears to require it (Sch 2 para 12(f));
- 672 (7) as to the circumstances in which local authorities may make arrangements for duties imposed on them by the regulations to be discharged on their behalf (Sch 2 para 12(g)).

As to regulations made under s 23(2)(a) see para 877 note 8 ante.

9 Children Act 1989 s 23(2)(aa) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (3)(a)). Where, under the Children Act 1989 s 23(2)(aa) (as added), a local authority maintains a child in a home provided, equipped and maintained by the Secretary of State or the Welsh Ministers under s 82(5) (see para 158 ante), it must do so on such terms as the Secretary of State or the Welsh Ministers may from time to time determine: s 23(2A) (added by the Care Standards Act 2000 Sch 4 para 14(1), (3)(b)). For the meaning of 'appropriate children's home' see para 877 note 9 ante.

10 Children Act 1989 s 23(2)(f). Regulations under s 23(2)(f) may, in particular, make provision as to:

- 673 (1) the persons to be notified of any proposed arrangements (Sch 2 para 13(a));
- 674 (2) the opportunities such persons are to have to make representations in relation to the arrangements proposed (Sch 2 para 13(b));
- 675 (3) the persons to be notified of any proposed changes in arrangements (Sch 2 para 13(c));
- 676 (4) the records to be kept by local authorities (Sch 2 para 13(d)); and
- 677 (5) the supervision by local authorities of any arrangements made (Sch 2 para 13(e)).

As to regulations made under s 23(2)(f) see para 877 note 10 ante.

## UPDATE

### 878 Provision of accommodation by local authority

TEXT AND NOTES 7-10--Children Act 1989 s 23(2)(a), (f), (2A), (5) amended: Children and Young Persons Act 2008 Sch 3 para 7(2)-(4).

NOTE 8--For transitional modifications of the Children Act 1989 Sch 2 para 12 see Children and Young Persons Act 2008 s 8(3), Sch 2.

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### **879. Power to make regulations.**

Regulations exist which make provision governing the placement of children<sup>1</sup> by local authorities<sup>2</sup> and voluntary organisations<sup>3</sup>. These regulations include the Arrangements for Placement of Children (General) Regulations 1991<sup>4</sup> and the Arrangements for Placement of Children (Wales) Regulations 2007<sup>5</sup>, as well as the Fostering Services Regulations 2002<sup>6</sup>, the Fostering Services (Wales) Regulations 2003<sup>7</sup> and the Placement of Children with Parents etc Regulations 1991<sup>8</sup>.

The Arrangements for Placement of Children (General) Regulations 1991<sup>9</sup> and the Placement of Children (Wales) Regulations 2007<sup>10</sup> apply to placements by a local authority of any child, to placements by a voluntary organisation of a child who is not looked after by a local authority, and to placements in a private children's home<sup>11</sup> by a person carrying on the home of a child who is neither looked after by a local authority nor accommodated in such a home by a voluntary organisation<sup>12</sup>. However, these regulations do not apply to placements of a child, otherwise than by a local authority or voluntary organisation, in a school which is a children's home within the meaning of the Care Standards Act 2000<sup>13</sup> or to any placement of a child for adoption under the Adoption and Children Act 2002<sup>14</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 See the Children Act 1989 s 23(2) (as amended), (3), (5), (6), s 59(1) (as amended), (2), (4), Sch 2 paras 12-14 (as amended); and paras 869, 876-878 ante, 975 post. For the meaning of 'voluntary organisation' see para 248 note 10 ante.

4 Ie the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended): see para 880 et seq post.

5 Ie the Arrangements for Placement of Children (Wales) Regulations 2007, SI 2007/310: see para 880 et seq post.

6 Ie the Fostering Services Regulations 2002, SI 2002/57 (as amended): see paras 900-921 post.

7 Ie the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended): see paras 900-921 post.

8 Ie the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (as amended): see para 890 et seq post.

9 Ie the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended): see para 880 et seq post.

10 Ie the Arrangements for Placement of Children (Wales) Regulations 2007, SI 2007/310: see para 880 et seq post.

11 For the meaning of 'private children's home' see para 980 note 2 post.

12 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 2(1) (substituted by SI 1993/3069; amended by SI 1997/649; SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Arrangements for Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 3(1).

13 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 2(2) (substituted by SI 1993/3069; amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Arrangements for Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 3(2). As to a school which is a children's home see the Care Standards Act 2000 s 1(6); and para 983 post.

14 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 2(3) (added by SI 1997/649; and revoked, in relation to Wales, by SI 2007/310); Arrangements for Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 3(3). As to adoption see para 323 et seq ante.

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### **880. Duty of the responsible authority to make arrangements.**

The responsible authority<sup>1</sup>, so far as is reasonably practicable, must make immediate and long term arrangements<sup>2</sup> for a placement<sup>3</sup>, and for promoting the welfare of the child who is to be placed, before making the placement<sup>4</sup>. Where it is not practicable to do so before the placement, the responsible authority must make such arrangements as soon as reasonably practicable thereafter<sup>5</sup>. In the case of any child who is 16 or over who has agreed to be provided with accommodation<sup>6</sup>, the arrangements must so far as reasonably practicable be agreed by the responsible authority with the child before a placement is made, or if that is not practicable as soon as reasonably practicable thereafter<sup>7</sup>. In other cases in which a child is looked after or accommodated but is not in care<sup>8</sup>, the arrangements must so far as reasonably practicable be agreed by the responsible authority with a person with parental responsibility<sup>9</sup> for the child or, if there is no such person, the person who is caring for the child, before a placement is made, or if that is not practicable as soon as reasonably practicable thereafter<sup>10</sup>. Any such arrangements made by the responsible authority must be recorded in writing<sup>11</sup>.

There is a mandatory duty on a local authority to apply for a placement order:

1667 (1) where a child is placed for adoption by the local authority or is being provided with accommodation by the local authority and certain circumstances apply<sup>12</sup>; and

1668 (2) where there is a pending application for a care or supervision order or the child is subject to a care order and the local authority is not authorised to place the child for adoption, and the local authority is satisfied that the child ought to be placed for adoption<sup>13</sup>.

1 'Responsible authority' means: (1) where the child is placed by a local authority, that authority; (2) where the child is not looked after by the local authority and is placed by a voluntary organisation, that organisation; or (3) where a child who is neither looked after by the local authority nor accommodated by a voluntary organisation is placed in a private children's home, the person carrying on that home: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 1(2) (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 2(1). For the meaning of 'child' see para 3 ante; for the meaning of 'local authority' see para 248 note 10 ante; for the meaning of 'voluntary organisation' see para 248 note 10 ante; and for the meaning of 'private children's home' see para 980 note 2 post.

2 The Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended) and the Placement of Children (Wales) Regulations 2007, SI 2007/310, place a duty on local authorities, and also on voluntary organisations and private children's homes, in making arrangements to place a child and to draw up and record an individual plan for the child; and it is said that the primary purpose of planning and review (see the Review of Children's Cases Regulations 1991, SI 1991/895 (as amended) and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, is to safeguard and promote the welfare of a child living away from his family. Planning is required from the earliest possible time after recognition of need or referral where the provision of accommodation (whether under voluntary arrangements or on a compulsory basis) is likely to be necessary. Thereafter, the plan should be reviewed on an ongoing basis. All the necessary considerations for the child's welfare, including the child's wishes and feelings and the wishes and feelings of the parents and others which the authority is required to seek and take into account, must be given due attention: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.9. As to the guidance and regulations generally see para 163 ante.

Note that the duty to ascertain the wishes and feelings of parents before making any decision with respect to a looked-after child is directory rather than mandatory: *Re P (Children Act 1989 ss 22 and 26: local authority compliance)* [2000] 2 FLR 910.

3 'Placement' means: (1) the provision of accommodation and maintenance by a local authority for any child whom it is looking after by any of the means specified in the Children Act 1989 s 23(2)(a) (as amended), s 23(2)(aa) (as added) or s 23(2)(f) (see para 877 ante); (2) the provision of accommodation for a child by a voluntary organisation by any of the means specified in s 59(1)(a) (as amended), s 59(1)(aa) (as added) or s 59(1)(f) (see para 975 post); and (3) the provision of accommodation for a child in a private children's home: Arrangement for Placement of Children (General) Regulations 1991, SI 1991/890, reg 1(2) (amended by SI 2002/546; SI 2002/2935; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 1(2). The definition of 'placement' is subject to the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 13 (as amended) and the Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 14, which provide that any series of short term placements, where a responsible authority has arranged to place a child in a series of short term placements at the same place and the arrangement is such that no single placement is to last for more than four weeks and the total duration of the placements is not to exceed 120 days in any period of 12 months, may be treated as a single placement for the purposes of the Arrangement for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended) and the Placement of Children (Wales) Regulations 2007, SI 2007/310: Arrangement for Placement of Children (General) Regulations 1991, SI 1991/890, reg 13 (amended by SI 1995/2015; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 14.

4 Arrangement for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3(1) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4(1).

5 Arrangement for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3(2) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4(2).

6 See the Children Act 1989 s 20(11); and para 866 ante.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3(3) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4(3).

8 As to the meaning of 'in care' see para 867 note 7 ante.

9 For the meaning of 'parental responsibility' see para 134 ante.

10 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3(4) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4(4).

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3(5) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4(5).

Planning for the child should begin prior to placement; after placement the plan should be scrutinised and adjusted if necessary at the first review four weeks after the date the child was first looked after; once a plan has been drawn up it should be notified to the child and his parents; persons who have been consulted and other relevant individuals should be notified on a need to know basis, normally prior to placement, but where this is not possible then as soon as possible after placement; and any amendments made to the plan on review should be recorded in writing and notified: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 2.17-2.18.

As to reviews of placements see para 936 et seq post. The first review must be carried out within four weeks of the date at which the child begins to be looked after or provided with accommodation and the second review must be carried out no more than three months after the first with subsequent reviews being carried out no more than six months after the date of the previous review: see the Review of Children's Cases Regulations 1991, SI 1991/895, reg 3(1), (2) (substituted by SI 2004/1419; and revoked, in relation to Wales, by SI 2007/307); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4(1), (2). Reviews must be carried out before the time specified if the independent reviewing officer so directs: see the Review of Children's Cases Regulations 1991, SI 1991/895, reg 3(3) (substituted by SI 2004/1419; and revoked, in relation to Wales, by SI 2007/307); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4(3). Each local authority is required to appoint an independent reviewing officer in respect of each case to participate in the review and monitor the performance of the local authority's functions in respect of the review: Review of Children's Cases Regulations 1991, SI 1991/895, reg 2A(1)(a), (b) (added by SI 2004/1419; and revoked, in relation to Wales, by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 3(1)(a), (b).

12 See the Adoption and Children Act 2002 s 22(1); and para 335 ante.

13 See *ibid* s 22(2); and para 335 ante.

**UPDATE**

**880 Duty of the responsible authority to make arrangements**

NOTE 3--See *R (on the application of L) v Merton LBC* [2008] EWHC 1628 (Admin), [2008] 2 FLR 1481, [2008] All ER (D) 144 (Jun).



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### **881. Arrangements between authorities.**

A local authority may generally arrange for the discharge of functions by another local authority<sup>1</sup>. Where arrangements are made, between a local authority<sup>2</sup> which is looking after<sup>3</sup> a child<sup>4</sup> (the 'local authority') and another authority in whose area the child is or is to be placed (the 'area authority')<sup>5</sup>, for the area authority to carry out functions<sup>6</sup> in relation to a placement<sup>7</sup> on behalf of a local authority<sup>8</sup>:

- 1669 (1) the local authority must supply the area authority with all information necessary to carry out those functions<sup>9</sup>;
- 1670 (2) the area authority must keep the local authority informed of the child's progress, and must in particular furnish reports following each visit to the home in which the child is placed and each review<sup>10</sup> carried out by the area authority<sup>11</sup>; and
- 1671 (3) the local authority and the area authority must consult each other from time to time as necessary, and as soon as reasonably practicable after each review, with regard to what action is required in respect of the child<sup>12</sup>.

1 See the Local Government Act 1972 s 101(1)(a); and LOCAL GOVERNMENT vol 69 (2009) PARAS 370, 380.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

4 For the meaning of 'child' see para 3 ante.

5 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 1(2) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 2(1).

6 As to the meaning of 'functions' see para 156 note 23 ante.

7 For the meaning of 'placement' see para 880 note 3 ante.

8 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 12 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 13.

9 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 12(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 13(a).

10 As to reviews of placements see para 936 et seq post.

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 12(b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 13(b).

12 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 12(c) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 13(c).

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## ***B. CONSIDERATIONS ON MAKING AND CONTENTS OF ARRANGEMENTS***

### **882. General considerations.**

In making arrangements for the placement<sup>1</sup> of a child<sup>2</sup>, the responsible authority<sup>3</sup> must consider the following general matters<sup>4</sup>:

- 1672 (1) in the case of a child who is in care<sup>5</sup>, whether an application should be made to discharge the care order<sup>6</sup>;
- 1673 (2) where the responsible authority is the local authority<sup>7</sup>, whether to seek a change in the child's legal status<sup>8</sup>;
- 1674 (3) the arrangements for contact, and whether there is any need for changes in the arrangements in order to promote contact with the child's family and others so far as is consistent with his welfare<sup>9</sup>;
- 1675 (4) the responsible authority's immediate and long term arrangements for the child, previous arrangements in respect of the child, and whether a change in those arrangements is needed, including consideration of alternative courses of action<sup>10</sup>;
- 1676 (5) where the responsible authority is a local authority, whether an independent visitor should be appointed<sup>11</sup>;
- 1677 (6) whether arrangements need to be made for the time when the child will no longer be looked after by the responsible authority<sup>12</sup>; and
- 1678 (7) whether plans need to be made to find a permanent substitute family for the child<sup>13</sup>.

1 For the meaning of 'placement' see para 880 note 3 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'responsible authority' see para 880 note 1 ante. As to the duty of the responsible authority to make arrangements see para 880 ante.

4 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 4(1), Sch 1 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 5(1), Sch 1.

5 As to the meaning of 'in care' see para 867 note 7 ante.

6 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 1 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 1. As to care orders see paras 276-280 ante.

7 For the meaning of 'local authority' see para 248 note 10 ante.

8 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 2 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 2.

9 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 3 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 3. As to the duty to promote contact between a child and his family see para 870 ante.

10 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 4 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 4.

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 5 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 5. As to the appointment and functions of independent visitors see para 871 ante.

12 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 6 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 6. As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

13 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 1 para 7 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 1 para 7.

Planning for the child should begin prior to placement; after placement the plan should be scrutinised and, if necessary, adjusted, at the first review four weeks after the date on which the child was first looked after, and at subsequent reviews; once a plan has been drawn up it should be notified to the child and his parents; persons who have been consulted and other relevant individuals should be notified on a need to know basis, normally prior to placement, but where this is not possible then as soon as possible thereafter; and any amendments made to the plan on review should be recorded in writing and notified: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 2.17-2.18. As to the weight to be attached to that guidance see para 208 note 1 ante. As to the guidance and regulations generally see para 163 ante.

As to reviews of placements see para 936 et seq post.

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### **883. Health considerations.**

In making arrangements for the placement<sup>1</sup> of a child<sup>2</sup>, the responsible authority<sup>3</sup> must consider the following matters relevant to the child's health<sup>4</sup>:

- 1679 (1) the child's state of health<sup>5</sup>;
- 1680 (2) the child's health history<sup>6</sup>;
- 1681 (3) the effect of the child's health and health history on his development<sup>7</sup>;
- 1682 (4) the existing arrangements for the child's medical and dental care and treatment and health and dental surveillance<sup>8</sup>;
- 1683 (5) the possible need for an appropriate course of action which should be identified to assist necessary change of such care, treatment or surveillance<sup>9</sup>; and
- 1684 (6) the possible need for preventive measures<sup>10</sup>.

In relation to Wales the responsible authority must also consider:

- 1685 (a) any need the child has for mental health services<sup>11</sup>; and
- 1686 (b) taking into account that information as well as the information in heads (1) to (6) above, whether the child's needs will be met in the proposed placement<sup>12</sup>.

A responsible authority must: (i) before making a placement, or if that is not reasonably practicable, as soon as reasonably practicable after a placement is made (which, in Wales, must not be later than 14 days after the placement is made), make arrangements for a registered medical practitioner<sup>13</sup> (or, in Wales, a registered practitioner or a registered nurse) to conduct an assessment<sup>14</sup>, which may include a physical examination, of the child's state of health<sup>15</sup>; and (ii) prepare a plan for the future health care of the child if one is not already in existence<sup>16</sup>. Heads (i) and (ii) above do not apply if the child has been examined and an assessment made within the period of three months immediately preceding the placement of the child, or if the child is of sufficient understanding and refuses to submit to the examination<sup>17</sup>.

The responsible authority must also ensure that each child is provided during the placement with health care services including medical and dental treatment (and, in Wales, mental health care and treatment) and advice and guidance on health, personal care and health promotion issues appropriate to his needs<sup>18</sup>.

1 For the meaning of 'placement' see para 880 note 3 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'responsible authority' see para 880 note 1 ante. As to the duty of the responsible authority to make arrangements see para 880 ante.

4 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 4(1), Sch 2 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 5(1), Sch 2. As to provisions providing for the duty of responsible authorities to ensure the child is registered with a general practitioner see, in relation to Wales, the Placement of Children (Wales) Regulations

2007, SI 2007/310, reg 8(3), (4); and see, in relation to England, the Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 3 Family Placements* (HMSO, 1991) paras 2.23-2.29. As to the guidance and regulations generally see para 163 ante.

5 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 1 (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 1.

6 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 2 (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 2.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 3 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 3.

8 See the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 4 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 5.

9 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 5 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 6.

10 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 2 para 6 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 2 para 7.

11 Ibid Sch 2 para 4.

12 Ibid Sch 2 para 8.

13 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.

14 The responsible authority must require the person carrying out the assessment to prepare a written report of the assessment: see the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 7(1)(b) (substituted by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 8(1)(b). In Wales, the responsible authority must ensure that a copy of any report, and any subsequent assessment report prepared during the placement, is forwarded to the child's general practitioner and, where applicable, any general practitioner with whom the child is to be registered after the placement is made: see regs 6(1)(d), 8(1)(c).

15 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 7(1)(a) (substituted by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 8(1)(a). As to the giving or withholding of consent to treatment by a child see para 4 ante.

16 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 7(1) (substituted by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 8(d).

17 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 7(3), (4) (substituted by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 8(5), (6).

The responsible authority should draw the child's attention to his rights to give or refuse consent to an examination or treatment if he is 16 or over or if he is under 16 and the doctor considers him of sufficient understanding to understand the consequences of consent or refusal. There is no prohibition on placement if it is impossible to persuade a child to be medically examined. But it is a responsibility of the authority, and part of the carer's task, to help and encourage young people to understand the importance of health care and to take responsibility for their own health: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.32.

It is emphasised that the responsible authority should have clear policies and procedures in relation to consent to the medical examination and treatment of children while placed by it and should make these known to the health authority and the child's carers. Arrangements for this should be clearly set out in each plan or agreement. The details will vary according to whether a responsible authority does or does not have parental responsibility for the child. When a child is not in care and the parents refuse consent to medical examination or treatment, the local authority may have to resort to obtaining an appropriate court order (including eg a

specific issue order (see para 263 ante), an emergency protection order (see para 583 et seq ante) or a child assessment order (see para 578 et seq ante)). If the child is in care, but the local authority has not acted to restrict the parents' exercise of parental responsibility under the Children Act 1989 s 33(3)(b) (see paras 138, 276 ante) in this respect, then it must do so to comply with these regulations and to ensure that necessary medical examinations and treatment are made available to the child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.30.

18 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 7(2) (substituted by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 8(2).

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#### **884. Educational considerations.**

In making arrangements for the placement<sup>1</sup> of a child<sup>2</sup>, the responsible authority<sup>3</sup> must consider the following matters relevant to the child's education<sup>4</sup>:

- 1687 (1) the child's educational history<sup>5</sup>;
- 1688 (2) the need to achieve continuity in the child's education (and, in Wales, to promote the child's educational achievement)<sup>6</sup>;
- 1689 (3) the need to identify any educational need which a child may have and to take action to meet that need<sup>7</sup>; and
- 1690 (4) the need to carry out assessments in respect of special educational needs and to meet any needs identified in a statement of special educational needs<sup>8</sup>.

The education authority<sup>9</sup> must be notified before placement or, if that is not possible, as soon as practicable thereafter<sup>10</sup>.

1 For the meaning of 'placement' see para 880 note 3 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'responsible authority' see para 880 note 1 ante. As to the duty of the responsible authority to make arrangements see para 880 ante.

4 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 4(1), Sch 3 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 5(1), Sch 3.

5 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 3 para 1 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 3 para 1.

6 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 3 para 2 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 3 para 2.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 3 para 3 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 3 para 3.

8 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 3 para 4 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 3 para 4. For the meaning of 'special educational needs' see para 296 note 7 ante. As to assessments in respect of special educational needs, and statements of special educational needs, see EDUCATION vol 15(2) (2006 Reissue) para 988 et seq.

Children who are looked after or accommodated have the same rights as all children to education, including further and higher education, and to other opportunities for development. Some children's perception of their ability may have been undermined and their true potential may not be immediately evident. As children who may be damaged and vulnerable they often need extra help and encouragement and opportunities to compensate for early deprivation and for educational disadvantage arising from changes of placement while in care: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.33. As to the guidance and regulations generally see para 163 ante.

9 As to education authorities see EDUCATION.

10 See the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(c), (2) (revoked, in relation to Wales, by SI 2007/310); and the Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(c), (2). See also para 886 post.



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**885. Other matters to be included in arrangements to accommodate children who are not in care.**

Except in a case in which the child<sup>1</sup> is in care<sup>2</sup>, the arrangements to be made for a placement<sup>3</sup> must include, where practicable, arrangements concerning the following matters<sup>4</sup>:

- 1691 (1) the type of accommodation to be provided and its address, together with the name of any person who will be responsible for the child at that accommodation on behalf of the responsible authority<sup>5</sup>;
- 1692 (2) details of any services<sup>6</sup> to be provided for the child<sup>7</sup>;
- 1693 (3) the respective responsibilities of the responsible authority and the child, any parent<sup>8</sup>, and any person not being a parent who has parental responsibility<sup>9</sup> for him<sup>10</sup>;
- 1694 (4) what delegation of parental responsibility for the child's day to day care there has been by parents or other persons with parental responsibility to the responsible authority<sup>11</sup>;
- 1695 (5) the arrangements for involving these persons and the child in decision-making with respect to the child, having regard to specified duties<sup>12</sup>;
- 1696 (6) the arrangements for contact between the child and the child's parents, any other person who has parental responsibility for him, and any relative<sup>13</sup>, friend or other person connected with him; and, if appropriate, the reasons why contact with any such person would not be reasonably practicable or would be inconsistent with the child's welfare<sup>14</sup>;
- 1697 (7) the arrangements for notifying changes in arrangements for contact to any of the persons referred to in head (6) above<sup>15</sup>;
- 1698 (8) in the case of a child aged 16 or over, whether the child wishes to be provided with accommodation notwithstanding parental opposition<sup>16</sup>; and
- 1699 (9) the expected duration of the arrangements and the steps which should apply to bring the arrangements to an end, including arrangements for rehabilitation of the child with the person whom he was living before the voluntary arrangements were made or with some other suitable person<sup>17</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'in care' see para 867 note 7 ante.

3 I.e. the arrangements to be made under the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 3 or the Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 4: see para 880 ante. For the meaning of 'placement' see para 880 note 3 ante.

4 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 4(2), Sch 4 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 5(8), Sch 4.

5 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 1 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 1. For the meaning of 'responsible authority' see para 880 note 1 ante.

6 For the meaning of 'service' see para 851 note 7 ante.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 2 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 2.

8 As to the meaning of 'parent' see para 248 note 1 ante.

9 For the meaning of 'parental responsibility' see para 134 ante.

10 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 3 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 3.

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 4 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 4.

12 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 5 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 5. The specified duties are:

678 (1) the local authority's duty under the Children Act 1989 s 20(6) (involvement of children before provision of accommodation: see para 865 ante) and s 22(3)-(5) (general duties of the local authority in relation to children looked after by it: see paras 867-868 ante) (Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 5(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 5(a));

679 (2) the duty of voluntary organisations under the Children Act 1989 s 61(1), (2) (see para 977 post) (Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 5(b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 5(b)); and

680 (3) the duty of the person carrying on a private children's home under the Children Act 1989 s 64(1), (2) (s 64(1) as amended) (see para 980 post) (Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 5(c) (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 5(c)).

For the meaning of 'voluntary organisation' see para 248 note 10 ante; and for the meaning of 'private children's home' see para 980 note 2 post.

13 For the meaning of 'relative' see para 249 note 15 ante.

14 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 6 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 6. In operating arrangements under head (6) in the text a voluntary organisation or person running a private children's home must endeavour to promote contact between the child and the persons mentioned in head (6) in the text, unless it is not reasonably practicable or consistent with the child's welfare: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 6 (amended by SI 2002/2935; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 7. As to the duty to promote contact between a child and his family see para 870 ante.

15 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 7 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 7.

16 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 8 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 7. As to the provision of accommodation in such circumstances see the Children Act 1989 s 20(11); and para 866 ante.

17 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, Sch 4 para 9 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 9. Regard must be had in particular, in the case of a local authority looking after a child, to the Children Act 1989 s 23(6) (duty to place children where practicable with parents: see para 869 ante) and Sch 2 para 15 (maintenance of contact between child and family: see para 870 ante): Arrangements for Placement of Children

(General) Regulations 1991 Sch 4 para 9 (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, Sch 4 para 9.

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### **C. NOTIFICATION**

#### **886. Notification of placement arrangements.**

Where arrangements have been made for the placement of a child<sup>1</sup> it is essential that those involved in the decision-making process be notified of the decision so that they may have an opportunity to make any necessary arrangements for their involvement in the placement or to make their views of the placement decision known<sup>2</sup>. Accordingly, the responsible authority<sup>3</sup> must, so far as is reasonably practicable<sup>4</sup>, notify certain persons in writing of the arrangements to place a child<sup>5</sup>, before the placement<sup>6</sup> is made (or, in relation to Wales, not more than 10 working days from the date the placement is made)<sup>7</sup>.

The following are the persons who have to be notified:

- 1700 (1) any person whose wishes and feelings have been sought under certain provisions of the Children Act 1989<sup>8</sup> requiring consultation prior to decision making<sup>9</sup>;
- 1701 (2) the primary care trust or the health authority<sup>10</sup> (or, in relation to Wales, the health care provider) for the area in which the child is living, and if different, for the area in which the child is to be placed<sup>11</sup>;
- 1702 (3) the local education authority<sup>12</sup> for the area in which the child is living and, if it is different, for the area in which the child is to be placed<sup>13</sup>;
- 1703 (4) the child's registered medical practitioner and, where applicable, any registered medical practitioner with whom the child is to be registered following the placement<sup>14</sup>;
- 1704 (5) the area authority<sup>15</sup>;
- 1705 (6) any person who is caring for the child immediately before arrangements are made<sup>16</sup>;
- 1706 (7) where the child is in the care<sup>17</sup> of a local authority, any person who has contact with the child<sup>18</sup>, and in other cases, any person in whose favour a contact order<sup>19</sup> is in force<sup>20</sup>.

The responsible authority must send a copy of the arrangements, or such part of the arrangements as it considers will not prejudice the welfare of the child, with the notifications, but, save in the case of persons mentioned in head (1) above, the authority must send details of only such part of the arrangements as it considers those persons need to know<sup>21</sup>.

1 As to the duty of the responsible authority to make arrangements see para 880 ante.

2 See the Department of Health publication *The Children Act 1989 Guidance and Regulations Vol 3 Family Placements* (HMSO, 1991) para 2.68. As to the guidance and regulations generally see para 163 ante.

3 For the meaning of 'responsible authority' see para 880 note 1 ante.

4 If it is not reasonably practicable to give the notification before the placement, it must be given as soon as reasonably practicable thereafter: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(2) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(2).

5 For the meaning of 'child' see para 3 ante.

6 For the meaning of 'placement' see para 880 note 3 ante.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1). Any such notice is to be given in writing and may be sent by post: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 1(3) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 1(3).

The written notification should include: (1) a summary of the proposed arrangements and the objectives covering details of the placement and its likely duration; (2) arrangements for contact; (3) who is responsible for implementing the plan; (4) the role of the child's parent on a day to day basis; (5) arrangements for or issues of reunification; and (6) contingency plans if the placement is unsuccessful: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.72. Good practice requires that the responsible authority's social worker explain personally to the parents and the child what the plan entails and the reasons for reaching the decisions therein; and that this should be done in addition to any explanations given during the assessment and planning process: para 2.70.

8 See the Children Act 1989 ss 22(4), 61(2), 64(2): see paras 868 ante, 977, 980 post.

9 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(a).

10 As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq. As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(b) (substituted by SI 2002/546; amended by SI 2002/2469; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(b).

12 As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

13 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(c) (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(c).

14 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(d) (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(d). As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.

15 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(f) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(e). For the meaning of 'area authority' see para 881 text to note 5 ante.

16 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(g) (amended by SI 1991/2033; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(f).

17 As to the meaning of 'in care' see para 867 note 7 ante.

18 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(i) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(h). The text refers to any person who has contact with the child pursuant to the Children Act 1989 s 34 (contact with a child in care by parents etc) or an order under s 34: see paras 278-279 ante.

19 As to contact orders see para 251 ante.

20 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(1)(h) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(1)(g).

21 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 5(3) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(3).

Careful note should be taken of these provisions, and notification to third parties should only contain the amount of information it is necessary to divulge. However, the responsible authority will need to identify others who are not involved in the decision-making process but who will be involved with the child and need to know of

the placement arrangements: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.68.

In relation to Wales, in the case of notification to any of the persons or bodies specified in heads (3) and (4) in the text, the responsible authority must provide that person or body with copies of any relevant report or assessment available at the time the placement is made or obtained subsequently during the placement: Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 6(4). Where a child is placed in an area different from the area in which the child is ordinarily resident, when notifying the arrangements to those persons or bodies specified in heads (2)-(4) in the text, the responsible authority must at the same time request that the persons or bodies so specified, where applicable, seek a transfer of records before, or if that is not practicable, as soon as practicable after the placement is made: reg 6(5). The responsible authority must continue to review any request made until it is satisfied either that the transfer of records has taken place or is no longer necessary: reg 6(6).

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## (ii) Records and Registers

### 887. Records.

A responsible authority<sup>1</sup> must keep a written case record for every child<sup>2</sup> placed by the authority<sup>3</sup>. The record must include:

- 1707 (1) a copy of the placement arrangements<sup>4</sup>;
- 1708 (2) a copy of any written report in the authority's possession concerning the child's welfare<sup>5</sup>;
- 1709 (3) a copy of any document considered or record established in the course of or as a result of a review<sup>6</sup> of the child's case<sup>7</sup>;
- 1710 (4) details of arrangements for contact<sup>8</sup>, of contact orders<sup>9</sup> and of other court orders relating to the child<sup>10</sup>; and
- 1711 (5) details of any arrangements whereby another person acts on behalf of the local authority or organisation which placed the child<sup>11</sup>.

In relation to Wales, the record must also include written reasons<sup>12</sup>.

A case record relating to a child who is placed must be retained<sup>13</sup> by the authority for 75 years from the date of the child's birth or, where the child dies before reaching 18, for 15 years from the date of his death<sup>14</sup>. The authority must ensure the safekeeping of case records and must take all necessary steps to ensure that the information contained in the records is treated as confidential<sup>15</sup>.

1 For the meaning of 'responsible authority' see para 880 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(1) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(1).

Accurate, comprehensive and well organised records are essential to good practice. They are the basis, as social workers and carers change, for a clear and common understanding of the plan for the child, the arrangements made, agreements which have been reached and decisions which have been made and the reasons for them. Careful recording of agreements and decisions relating to the plan, to the child, the aim of the placement and of the child's progress in the placement enables the implementation of planning decision to be monitored effectively and kept under review. The responsible authority's records will be an important source of information for the child who is permanently placed away from his birth family: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 2.78. As to the guidance and regulations generally see para 163 ante. As to the child's placement plan for a child accommodated in a children's home see para 1005 post. As to records to be kept by registered persons in relation to children's homes see para 1017 post.

4 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(2)(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(2)(a). For the meaning of 'placement' see para 880 note 3 ante. As to the placement arrangements see para 880 ante.

5 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(2)(b) (revoked, in relation to Wales by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(2)(b).

6 As to reviews of placements see para 936 et seq post.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(2)(c) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(2)(c).

8 See further para 885 heads (6)-(7) ante.

9 As to contact orders see para 251 ante; and as to contact with children in care see paras 278-279 ante.

10 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(2)(d) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(2)(d).

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 8(2)(e) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 9(2)(e).

12 Ie provided in accordance with *ibid* reg 5(3) or (5): reg 9(2)(f).

13 This obligation may be met by retaining the original record or a copy of it, or by keeping all the information from it in some other accessible form, eg by means of a computer: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 9(2) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 10(2).

14 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 9(1) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 10(1).

15 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 9(3) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 10(3). This is subject only to provisions of statute giving access to the records, and to any court order giving such access: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 9(3)(a), (b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 10(3)(a), (b).

As to the circumstances when a duty to disclose the contents of records arises see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 2.85-2.87; and para 889 post. As to the guidance and regulations generally see para 163 ante.

As to data protection generally see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 418 et seq.



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## **888. Registers.**

A local authority<sup>1</sup> must keep a register of all children in its area who are placed in its area by that or another responsible authority<sup>2</sup>, and of all children placed by the local authority outside its area<sup>3</sup>. Voluntary organisations<sup>4</sup> and persons carrying on private children's homes<sup>5</sup> must keep a register of every child<sup>6</sup> placed by them<sup>7</sup>.

Each entry in the register must contain the following particulars<sup>8</sup>:

- 1712 (1) the child's name, sex and date of birth (and, in relation to Wales, the national health service number and, where applicable, social services identification number of the child)<sup>9</sup>;
- 1713 (2) the name and address of the person with whom he is placed, and, if different, of the child's parent or other person who has parental responsibility<sup>10</sup> for him<sup>11</sup>;
- 1714 (3) in the case of a child placed on behalf of a local authority by a voluntary organisation or in a private children's home, the name of the authority<sup>12</sup>;
- 1715 (4) whether the child's name is entered on any local authority register as being at risk of being abused<sup>13</sup>;
- 1716 (5) whether the child's name is entered on the register of disabled children<sup>14</sup>;
- 1717 (6) the date on which each placement<sup>15</sup> began and terminated, and the reason for each termination<sup>16</sup>;
- 1718 (7) in the case of a child in the care<sup>17</sup> of the local authority, the name of that authority<sup>18</sup>;
- 1719 (8) the legal provisions under which the child is being looked after or cared for<sup>19</sup>.

In relation to Wales, where a child is placed in a children's home, the register must also contain the name of the child's link worker<sup>20</sup>.

An entry in the register may also contain such of the following particulars as may be appropriate<sup>21</sup>:

- 1720 (a) in the case of a child in respect of whom there are arrangements for the carrying out of functions<sup>22</sup> by an area authority<sup>23</sup>, a note that there are such arrangements and the name of the authority with which they were made<sup>24</sup>;
- 1721 (b) where there are arrangements for the supervision of the placement other than as mentioned in head (a) above, a note that there are such arrangements and the name of the person with whom they were made<sup>25</sup>.

Entries in registers must be retained<sup>26</sup> until the child reaches the age of 23, or if he dies before that time, for five years from the date of his death<sup>27</sup>. The responsible authority must ensure the safekeeping of registers and must take all necessary steps to ensure that the information contained in the records is treated as confidential<sup>28</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'responsible authority' see para 880 note 1 ante. As to arrangements between local authorities for the placement of children by one authority in the area of another see para 881 ante. As to guidance on record keeping see para 887 note 3 ante.

3 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(1) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(1).

4 For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to voluntary organisations see para 975 et seq post.

5 For the meaning of 'private children's home' see para 980 note 2 post.

6 For the meaning of 'child' see para 3 ante.

7 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(2) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(2).

8 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(1)(a), (2)(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3).

9 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(a).

10 For the meaning of 'parental responsibility' see para 134 ante.

11 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(b).

12 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(c) (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(d).

13 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(d) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(e).

14 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(e) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(f). As to the register of children in need see para 852 ante.

15 For the meaning of 'placement' see para 880 note 3 ante.

16 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(f) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(g).

17 As to the meaning of 'in care' see para 867 note 7 ante.

18 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(g) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(h).

19 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(3)(h) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(3)(i).

20 Ibid reg 11(3)(c).

21 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(1)(b), (2)(b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 12(1)(b), (2)(b).

22 In pursuant to the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 12 or the Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 13: see para 881 ante. As to the meaning of 'functions' see para 156 note 23 ante.

23 For the meaning of 'area authority' see para 881 text to note 5 ante.

24 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(4)(a) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(4) (a).

25 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(4)(b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(4) (b).

26 This obligation may be met by retaining the original register or a copy of it, or by keeping all the information from it in some other accessible form, eg by means of a computer: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(6) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(6).

27 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(5) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(5).

28 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(7) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(7). This is subject only to provisions of statute giving access to the registers, and to any court order giving such access: Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 10(7)(a), (b) (revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 11(7)(a), (b).

As to the circumstances when a duty to disclose the contents of registers arises see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 2.85-2.87; and para 889 post. As to the guidance and regulations generally see para 163 ante.

As to data protection generally see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 503 et seq.

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### **889. Access by children's guardian to records and register.**

Every voluntary organisation<sup>1</sup>, where it is not acting as an authorised person, and every person carrying on a private children's home<sup>2</sup> must provide an officer of the Children and Family Court Advisory and Support Service ('CAFCASS')<sup>3</sup> or Welsh family proceedings officer<sup>4</sup> of the child<sup>5</sup> such access as may be required to case records<sup>6</sup> and registers<sup>7</sup> and the information from such records or registers held in whatever form (such as by means of a computer), and such copies of the records or entries in the registers as he may require<sup>8</sup>.

1 For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to voluntary organisations see para 975 et seq post.

2 For the meaning of 'private children's home' see para 980 note 2 post. As to registered children's homes see para 983 et seq post.

3 As to CAFCASS generally see para 230 ante.

4 See para 230 note 9 ante.

5 For the meaning of 'child' see para 3 ante.

6 As to case records see para 887 ante.

7 As to registers see para 888 ante.

8 Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890, reg 11 (amended by SI 2002/546; and revoked, in relation to Wales, by SI 2007/310); Placement of Children (Wales) Regulations 2007, SI 2007/310, reg 12.

As to other circumstances in which a duty to disclose the contents of records and registers arises see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 2.85-2.87. As to the guidance and regulations generally see para 163 ante.

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### **(iii) Particular Kinds of Arrangements for Children**

#### ***A. PLACEMENT OF CHILD IN CARE WITH PARENTS ETC***

##### **890. Placements.**

Where a child<sup>1</sup> is in the care<sup>2</sup> of a local authority<sup>3</sup>, the authority may only allow him to live with<sup>4</sup> a parent<sup>5</sup> or other specified member of his family<sup>6</sup> in accordance with regulations made by the Secretary of State or the Welsh Ministers<sup>7</sup>. Regulations have accordingly been made to deal with cases in which it is considered that a placement with parents during the continuance of a care order would be appropriate<sup>8</sup>.

The regulations apply to every child in the care of a local authority who is or is proposed to be placed<sup>9</sup>. For these purposes, 'placement' means allowing a child who is in the care of the local authority to live<sup>10</sup> with:

- 1722 (1) a parent of the child;
- 1723 (2) a person who is not a parent of the child but who has parental responsibility for him; or
- 1724 (3) a person in whose favour a residence order was in force with respect to him immediately before the care order was made<sup>11</sup>.

However, nothing in the regulations requires the temporary removal of a child from the person with whom he is already living and with whom he may be placed, before a placement decision<sup>12</sup> is made concerning him<sup>13</sup>.

The regulations do not apply to the placement of a child for adoption pursuant to the Adoption Act 1976<sup>14</sup>, nor in a case to the extent that they are incompatible with any order made by a court under the statutory provisions<sup>15</sup> dealing with parental contact<sup>16</sup>. Certain provisions of the regulations do not apply to a child who is aged 16 or over<sup>17</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'in care' see para 867 note 7 ante. Where a child was committed to care under a court order made in matrimonial, guardianship, custodianship or wardship proceedings, the care will be subject to the court's directions (see the Children Act 1989 s 108(6), Sch 14 para 15 (amended by the Armed Forces Act 1991, s 26, Sch 3; and the Courts and Legal Services Act 1990, ss 116, 125(7), Sch 16, para 33, Sch 20)) and a placement with a parent would require judicial approval.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 As to the meaning of 'live with' in this context see para 877 note 7 ante. A child is to be regarded as living with a person if he stays with that person for a continuous period of more than 24 hours: Children Act 1989 s 23(5A) (added by the Courts and Legal Services Act 1990 s 116, Sch 16 para 12). Where a child is allowed by the local authority to live with relatives, the authority is making 'arrangements to enable' the child to live with a relative under the Children Act 1989 s 23(6)(b) (see para 869 ante) and not placing him with a relative under s 23(2) (see para 877 ante): *Kirklees Metropolitan Borough Council v London Borough of Brent* [2004] 2 FLR 800.

5 As to the meaning of 'parent' see para 248 note 1 ante.

6 As to the meaning of 'family' see para 853 note 5 ante.

7 Children Act 1989 s 23(5). As to the Secretary of State and the Welsh Ministers see para 155 ante.

Although the Children Act 1989 is based on the partnership principle (see para 853 ante) and provides that a local authority must make arrangements for a child whom it is looking after (see s 22(1) (as amended); and para 867 ante) to enable him to live with a member of his family unless that would not be reasonably practicable or consistent with his welfare (see s 23(4), (6); and para 869 ante), a care order will only have been made if a court has been satisfied that the child is suffering or is likely to suffer significant harm which is attributable to the care given or likely to be given to him not being what it would be reasonable to expect a parent to give or to the child's being beyond parental control (see s 31(2); and para 274 ante). In these circumstances it is important to be especially careful when such children are placed with their parents: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.1. As to the guidance and regulations generally see para 163 ante.

8 See the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (as amended). As to care orders see paras 276-280 ante.

If it is decided that the best interests of a child who is the subject of a care order would be met by a placement with the parent, the local authority should look again at why it is considered that the care order is still required. It may be that an arrangement can be negotiated between the parent and the local authority that would enable the authority to agree that application to discharge the care order would be appropriate; and if the care order were discharged, the rules laid down by the regulations would no longer apply: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.2. Placement with a parent is part of the progress towards discharge of the care order; the management of the placement should aim to enhance the parent's role and support the family relationship with that aim in mind: para 5.3.

9 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 2(1).

10 Ie pursuant to the Children Act 1989 s 23(5): see para 869 ante.

11 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 1(2). The expressions 'place' and 'placed' are to be construed accordingly; and 'placed with' a person means being allowed to live with that person pursuant to the Children Act 1989 s 23(5) (see para 869 ante): Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 1(2). As to residence orders see para 262 ante. As to references to a person in whose favour a residence order is in force see para 869 note 11 ante.

It follows that the regulations cover a wide variety of circumstances, eg they apply to a young person who has previously been in long term residential or foster care or to a child who has spent a very short time away from home before such placement; but they will equally apply to a child who has remained at home pending court proceedings and remains there after the granting of a care order: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.10.

12 'Placement decision' means a decision to place a child which is made in accordance with the Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 5(2) (see para 892 post): reg 1(2).

13 Ibid reg 2(4). Whether a short absence from home is relevant involves questions of fact and law: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.10.

14 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 2(3). As to the placement of children for adoption see generally para 331 et seq ante.

15 Ie the Children Act 1989 s 34: see paras 278-279 ante.

16 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 2(5). Nor do the regulations apply to a case where the court has made a direction taking effect under the Children Act 1989 s 108(6), Sch 14 para 16(5) (amended by the Courts and Legal Services Act 1990, s 116, Sch 16, para 33, and Children Act 1989 (Commencement and Transitional Provisions) Order 1991, SI 1991/828, art 4, Schedule, para 2) (transitional provisions): Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 2(5).

17 Ibid reg 2(2). The regulations which do not apply are regs 3, 6-9, 12: see paras 892-897 post. However, the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.9 states that local authorities will wish to consider how far to apply the principles of these regulations in their arrangements for children over 16, depending on the maturity of the child and the individual circumstances.

## **UPDATE**

### **890 Placements**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 1-7--Children Act 1989 s 23 replaced by ss 22A-22F: see PARA 877.

TEXT AND NOTE 7--Children Act 1989 s 23(5), (6) amended: Children and Young Persons Act 2008 Sch 3 para 7(4), (5).

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### **891. Pre-placement inquiries and assessment.**

Before a placement decision<sup>1</sup>, a local authority<sup>2</sup> must normally<sup>3</sup> carry out certain procedures; and thereafter a placement decision may be made and the child placed pursuant to that decision<sup>4</sup>. The authority must make all necessary inquiries<sup>5</sup> in respect of:

- 1725 (1) the health of the child<sup>6</sup>;
- 1726 (2) the suitability of the person with whom it is proposed that the child be placed<sup>7</sup>;
- 1727 (3) the suitability of the proposed accommodation, including the proposed sleeping arrangements<sup>8</sup>;
- 1728 (4) the educational and social needs of the child<sup>9</sup>; and
- 1729 (5) the suitability of all other members of the household, aged 16 and over, in which it is proposed the child will live<sup>10</sup>.

In considering the suitability of the person with whom the child is to be placed as required by head (2) or head (5) above, the local authority, so far as practicable, must have regard to<sup>11</sup>:

- 1730 (a) the age of the person<sup>12</sup>;
- 1731 (b) his health<sup>13</sup>;
- 1732 (c) his personality<sup>14</sup>;
- 1733 (d) his marital status and particulars of any previous marriage<sup>15</sup>;
- 1734 (e) his experience of looking after children and his capacity to look after children and to care for the child<sup>16</sup>;
- 1735 (f) the result of any application by him to have a child placed with him or to adopt a child or any application for registration for child minding or day care, and details of any prohibition on his acting as a child minder, providing day care, or caring for foster children privately or caring for children in a voluntary or registered children's home<sup>17</sup>;
- 1736 (g) details of children in his household, living there or not<sup>18</sup>;
- 1737 (h) religious persuasion and degree of observance, racial origin and cultural and linguistic background<sup>19</sup>;
- 1738 (i) past and present employment and leisure activities and interests<sup>20</sup>;
- 1739 (j) details of the living standards and accommodation of his household<sup>21</sup>;
- 1740 (k) details of any criminal offences of which he has been convicted, or in respect of which he has been cautioned by a constable and which, at the time the caution was given, he admitted<sup>22</sup>.

In respect of the members of the person's household aged 16 and over, the local authority, so far as practicable, must take account of the particulars specified in heads (a) to (d), (f), (i) and (k) above<sup>23</sup>.

1 For the meaning of 'placement decision' see para 890 note 12 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.



3 In certain circumstances a child may be placed immediately, without complying with the regulations: see the Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 6; and para 893 post. For the meaning of 'child' see para 3 ante.

4 See *ibid* reg 5; and para 892 post. For the meaning of 'placed' see para 890 note 11 ante.

5 As to the steps to be taken in making these inquiries see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 5.23-5.29. As to the guidance and regulations generally see para 163 ante.

The authority will also need to ascertain the wishes and feelings of the child under the provisions of the Children Act 1989 s 22(4): see para 868 ante.

6 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 3(1)(a).

7 *Ibid* reg 3(1)(b).

8 *Ibid* reg 3(1)(c).

9 *Ibid* reg 3(1)(d).

10 *Ibid* reg 3(1)(e).

11 *Ibid* reg 3(2). See further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 5.20-5.29.

12 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 3(2), Sch 1 para 1(a).

13 *Ibid* Sch 1 para 1(b).

14 *Ibid* Sch 1 para 1(c).

15 *Ibid* Sch 1 para 1(d).

16 *Ibid* Sch 1 para 1(e).

17 *Ibid* Sch 1 para 1(f) (amended by SI 2002/546; SI 2002/2935).

18 Placement of Children with Parents etc Regulations 1991, SI 1991/893, Sch 1 para 1(g).

19 *Ibid* Sch 1 para 1(h).

20 *Ibid* Sch 1 para 1(i).

21 *Ibid* Sch 1 para 1(j).

22 *Ibid* Sch 1 para 1(k) (substituted, in relation to England, by SI 2002/546; and, in relation to Wales, by SI 2002/2935). This is subject to the provisions of the Rehabilitation of Offenders Act 1974: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

23 Placement of Children with Parents etc Regulations 1991, SI 1991/893, Sch 1 para 2.

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## **892. Duty in relation to placements; placement decisions.**

The local authority<sup>1</sup> must satisfy itself that the placement<sup>2</sup> of a child<sup>3</sup> is the most suitable way of performing its duty to safeguard and promote the child's welfare<sup>4</sup> and that the placement is the most suitable having regard to all the circumstances<sup>5</sup>. A placement can only be made after a 'placement decision'<sup>6</sup> has been made<sup>7</sup>; and the decision to place a child must be made on behalf of the local authority either by the Director of Social Services<sup>8</sup> or by an officer of the local authority nominated in writing for that purpose by the Director<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'placement' see para 890 text and notes 11, 12 ante.

3 For the meaning of 'child' see para 3 ante.

4 I.e. its duty under the Children Act 1989 s 22(3): see para 867 ante.

5 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 4.

The inquiries to be carried out will involve extensive consultation; in particular, in cases of child protection, the views of a child abuse case conference will normally be expected to comment on a proposal to place a child under the regulations, and to make a recommendation: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.34. As to the guidance and regulations generally see para 163 ante.

As to the disclosure of information gathered for litigation to the child abuse case conference see *Re M (disclosure)* [1998] 1 FLR 734, CA (medical reports and mother's statement of responsibility).

6 For the meaning of 'placement decision' see para 890 note 12 ante.

7 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 5(1).

8 I.e. the Director of Social Services appointed by the authority under the Local Authority Social Services Act 1970 s 6 (as amended): see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1007.

9 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 5(2). Where the Director designates another officer, the nomination should reflect the serious nature of the decision and this nomination should rest at third tier level, i.e. assistant chief officer, area director or area manager or an equivalent senior level; nominees will need a good knowledge of child care practice in order to provide a considered opinion: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.40.

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### **893. Immediate placements.**

The general requirement to carry out inquiries prior to a placement<sup>1</sup> does not prevent the immediate placement of a child<sup>2</sup> pursuant to a placement decision<sup>3</sup> in circumstances in which the local authority<sup>4</sup> considers that to be necessary and in accordance with its duty to safeguard and promote the child's welfare<sup>5</sup>. In such a case, however, the authority must take steps to ensure that the provisions of the regulations that would otherwise have to be complied with before the placement decision is made are complied with as soon as practicable thereafter<sup>6</sup>.

Before an immediate placement can be made under this exception, a local authority must arrange for the person with whom the child is to be placed to be interviewed in order to obtain as much of the information normally required<sup>7</sup> as can be readily ascertained at the interview, and arrange to obtain as much of the information normally required in relation to other members of the household aged 16 and over<sup>8</sup> as can be readily ascertained at the time of that interview<sup>9</sup>.

1    Ie under the Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 3: see para 891 ante. For the meaning of 'placement' see para 890 text and notes 11-12 ante.

2    For the meaning of 'child' see para 3 ante.

3    For the meaning of 'placement decision' see para 890 note 12 ante.

4    For the meaning of 'local authority' see para 248 note 10 ante.

5    Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 6(1). As to the duty to safeguard and promote the child's welfare see the Children Act 1989 s 22(3); and para 867 ante.

6    Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 6(1).

7    Ie the information specified in *ibid* Sch 1 para 1: see para 891 heads (a)-(k) ante.

8    Ie the information specified in *ibid* Sch 1 para 2: see para 891 text and note 24 ante.

9    *Ibid* reg 6(2). It seems that this duty of the authority includes a duty to inspect the accommodation: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.11. As to the guidance and regulations generally see para 163 ante.

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#### **894. Provisions of agreements.**

Once a placement decision<sup>1</sup> has been taken, the local authority<sup>2</sup> must seek to reach agreement with the person with whom the child<sup>3</sup> is to be placed on specified particulars, so far as is practicable<sup>4</sup>. The placement<sup>5</sup> must not be put into effect unless and until such an agreement on all the particulars has been reached and recorded in writing and a copy given or sent to the person with whom the child is to be placed<sup>6</sup>.

The particulars with regard to which there must be agreement are as follows:

- 1741 (1) the authority's plans for the child and the objectives of the placement<sup>7</sup>;
- 1742 (2) arrangements for support of the placement<sup>8</sup>;
- 1743 (3) arrangements for visiting the child in connection with the supervision of the placement by the person authorised by or on behalf of the local authority or area authority<sup>9</sup>, and the frequency of visits and reviews of the child's case under regulations<sup>10</sup>;
- 1744 (4) arrangements for contact, if any, including prohibition of contact<sup>11</sup>;
- 1745 (5) the removal of the child from the placement<sup>12</sup>;
- 1746 (6) the need to notify the local authority of relevant changes in the circumstances of the person with whom the child is placed, including any intention to change address, changes in the household, and any serious occurrence involving the child such as injury or death<sup>13</sup>;
- 1747 (7) the provision of a statement concerning the child's health, the need for health care and surveillance, and the child's educational needs and the local authority's arrangements to provide for all such needs<sup>14</sup>;
- 1748 (8) any arrangements for any delegation and exercise of responsibility for consent to medical examination or treatment<sup>15</sup>;
- 1749 (9) the need to ensure that any information relating to any child or his family or any other person given in confidence to the person with whom the child is placed in connection with the placement is kept confidential and that such information is not disclosed to any person without the consent of the local authority<sup>16</sup>;
- 1750 (10) the circumstances in which it is necessary to obtain in advance the approval of the local authority for the child's living, even temporarily, in a household other than the household of the person with whom the child has been placed<sup>17</sup>;
- 1751 (11) the arrangements for requesting a change in the agreement<sup>18</sup>.

1 For the meaning of 'placement decision' see para 890 note 12 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 For the meaning of 'child' see para 3 ante.

4 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 7. 'So far as is practicable' means that not all particulars will apply to all cases; but it does not mean that certain particulars can be overlooked for convenience: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 5.41. It is envisaged that, although there is no requirement that the agreement be signed, drawing up and signing the agreement together will demonstrate

the carer's and the local authority's commitment to the placement and recognise their respective roles: para 5.41. As to the guidance and regulations generally see para 163 ante.

5 For the meaning of 'placement' see para 890 text and notes 11-12 ante.

6 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 7.

7 Ibid reg 7, Sch 2 para 1.

8 Ibid Sch 2 para 2.

9 'Area authority' means, in relation to a child who is or is to be placed, the local authority in whose area the child is or is to be placed where the child is in the care of a different authority: *ibid* reg 1(2).

10 Ibid Sch 2 para 3. The text refers to regulations made under the Children Act 1989 s 26 (as amended) (review of cases): see para 936 post. As to the regulations made see para 936 et seq post.

11 Placement of Children with Parents etc Regulations 1991, SI 1991/893, Sch 2 para 4. The text refers to arrangements for contact in pursuance of the Children Act 1989 s 34 (as amended) (parental contact for children in care): see paras 278-279 ante.

12 Placement of Children with Parents etc Regulations 1991, SI 1991/893, Sch 2 para 5. As to the removal of children from placement see reg 11; and para 897 post.

13 Ibid Sch 2 para 6.

14 Ibid Sch 2 para 7.

15 Ibid Sch 2 para 8.

16 Ibid Sch 2 para 9.

17 Ibid Sch 2 para 10.

18 Ibid Sch 2 para 11.

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### **895. Notification of placements.**

A local authority<sup>1</sup>, so far as practicable, must notify certain persons of a placement decision<sup>2</sup> and details of where the child<sup>3</sup> in question is to be placed<sup>4</sup>. Notice must be given to all the persons whose wishes and feelings have been sought in relation to the decision to place the child<sup>5</sup> and to the following<sup>6</sup>:

- 1752 (1) the primary care trust or the health authority<sup>7</sup> for the area in which the child is living and, if different, for the area in which the child is to be placed<sup>8</sup> (or, in respect of Wales, the health authority for the area in which the child is living)<sup>9</sup>;
- 1753 (2) the local education authority for the area in which the child is living<sup>10</sup> (and, in respect of England, if it is different, for the area in which the child is to be placed)<sup>11</sup>;
- 1754 (3) the child's registered medical practitioner<sup>12</sup> (and, in respect of England, where applicable, any registered medical practitioner with whom the child is to be registered following the placement)<sup>13</sup>;
- 1755 (4) the area authority<sup>14</sup>;
- 1756 (5) any person, not being an officer of a local authority, who has been caring for the child immediately before the placement<sup>15</sup>;
- 1757 (6) where there was a residence order<sup>16</sup> in force in respect of the child immediately before the care order<sup>17</sup> was made, the person in whose favour<sup>18</sup> the residence order was made<sup>19</sup>.

A local authority is not required to give notice in the case of a person whose whereabouts are unknown to the authority, or cannot be readily ascertained, or in any case where the authority determines that to give such notice would not be in accordance with its duty<sup>20</sup> to safeguard and promote the child's welfare<sup>21</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'placement decision' see para 890 note 12 ante.

3 For the meaning of 'child' see para 3 ante.

4 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(1). Where the child is placed with a person other than a parent, the local authority's notice must contain the name and address of the person with whom the child is placed, particulars of arrangements for contact with the child, and any other particulars relating to the care and welfare of the child which it appears to the local authority ought to be supplied: reg 8(2). Any notice required under the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (as amended) is to be in writing and any such notice may be sent by post: reg 1(3).

5 I.e. pursuant to the Children Act 1989 s 22(4): see para 868 ante.

6 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(1).

7 As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

8 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(a) (substituted in relation to England by SI 2002/546; and amended by SI 2002/2469).

- 9 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(a); Health Authorities Act 1995 (Amendment of Transitional Provisions and Modification of References) Order 1996, SI 1996/971, art 3(2) (a), (b).
- 10 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(b). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.
- 11 Ibid reg 8(4)(b) (amended in relation to England by SI 2002/546).
- 12 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(c). As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.
- 13 Ibid reg 8(4)(c) (amended in relation to England by SI 2002/546).
- 14 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(d). For the meaning of 'area authority' see para 894 note 9 ante.
- 15 Ibid reg 8(4)(e). For the meaning of 'placement' see para 890 text and notes 11-12 ante.
- 16 As to residence orders see para 262 ante.
- 17 As to care orders see paras 276-280 ante.
- 18 As to references to a person in whose favour a residence order is in force see para 869 note 11 ante.
- 19 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(4)(f).
- 20 Ie under the Children Act 1989 s 22(3): see para 867 ante.
- 21 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 8(3).

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### **896. Support and supervision of placements.**

A local authority<sup>1</sup> must satisfy itself that the welfare of each child<sup>2</sup> who has been placed by it continues to be appropriately provided for by his placement<sup>3</sup> and for that purpose the authority must give such advice and assistance to the person with whom the child is placed as appears to the authority to be necessary<sup>4</sup>. The authority must make arrangements for a person authorised by it to visit the child from time to time as necessary, but in any event<sup>5</sup>:

- 1758 (1) within one week of the beginning of the placement<sup>6</sup>;
- 1759 (2) at intervals of not more than six weeks during the first year of the placement<sup>7</sup>;
- 1760 (3) thereafter at intervals of not more than three months and also whenever reasonably requested by the child or the person with whom the child is placed<sup>8</sup>.

The persons so authorised should make arrangements, so far as practicable, on each visit to see the child alone<sup>9</sup>. On each occasion on which the child is visited in pursuance of these requirements by any person authorised by the local authority which placed the child, the local authority must cause a written report on the child to be prepared by the visitor<sup>10</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 9(1). For the meaning of 'placement' see para 890 text and notes 11-12 ante.

4 Ibid reg 9(1)(a).

5 Ibid reg 9(1)(b).

6 Ibid reg 9(1)(b)(i).

7 Ibid reg 9(1)(b)(ii).

8 Ibid reg 9(1)(b)(iii).

9 Ibid reg 9(1)(b). As to the visiting requirement when there is a series of short term placements see para 898 post.

10 Ibid reg 9(2).



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### **897. Termination of placements.**

If it appears to a local authority<sup>1</sup> that a placement<sup>2</sup> made by it is no longer in accordance with its duty to safeguard and promote the welfare of the child<sup>3</sup> or that the placement would prejudice the safety of the child, it must terminate the placement and remove the child forthwith from the person with whom he is placed<sup>4</sup>. Where a child has been placed by one local authority within the area of another local authority and it appears to the area authority<sup>5</sup> that it would be detrimental to the welfare of the child if he continued to be so placed, the area authority may remove him forthwith from the person with whom he is placed<sup>6</sup>. Where such removal takes place, the area authority must forthwith notify the other authority of the removal, and the latter must make other arrangements for the care of the child as soon as is practicable<sup>7</sup>.

So far as is reasonably practicable, a local authority must give notice in writing of any decision to terminate the placement, before it is terminated, to:

- 1761 (1) the child, having regard to his age and understanding;
- 1762 (2) the other persons whose wishes and feelings have been sought in relation to the decision to terminate the placement<sup>8</sup>;
- 1763 (3) the person with whom the child is placed; and
- 1764 (4) the other persons required to be notified of the placement<sup>9</sup>.

The authority must also give notice in writing of the termination of the placement to all those persons other than the child and the person with whom the child was placed<sup>10</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'placement' see para 890 text and notes 11-12 ante.

3 ie its duty under the Children Act 1989 s 22(3): see para 867 ante. For the meaning of 'child' see para 3 ante.

4 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 11(1). The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 5.57-5.60 give some assistance in the factors to be taken into account in deciding whether a placement should be terminated. As to the guidance and regulations generally see para 163 ante.

5 For the meaning of 'area authority' see para 894 note 9 ante.

6 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 11(2).

7 Ibid reg 11(3).

8 ie pursuant to the Children Act 1989 s 22(4): see para 868 ante.

9 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 12(a). As to the people who must be notified of a placement decision see reg 8(1), (4); and para 895 ante.

10 Ibid reg 12(b).



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### **898. Short term placements.**

A series of short term, pre-planned placements<sup>1</sup> with the same person, for example for regular staying contact, or to allow the carer or the child<sup>2</sup> to have a break, may be treated as a single placement<sup>3</sup>, if:

- 1765 (1) no single placement is for the duration of more than four weeks; and
- 1766 (2) the total duration of the placements does not exceed 120 days in any period of 12 months<sup>4</sup>.

In such cases, the visits are modified so that a visit may be made on a day when the child is in fact placed ('a placement day') within the first seven placement days of a series of short term placements, and thereafter, if the series of short term placements continues, on placement days falling at intervals of not more than six months or, if the interval between placements exceeds six months, during the next placement<sup>5</sup>.

1 For the meaning of 'placement' see para 890 text and notes 11-12 ante.

2 For the meaning of 'child' see para 3 ante.

3 Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 13(2).

4 See *ibid* reg 13(1) (substituted by SI 1995/2015).

5 See the Placement of Children with Parents etc Regulations 1991, SI 1991/893, reg 9(1)(b); applied by reg 13(3) (substituted by SI 1995/2015).

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### **899. Placements outside England and Wales.**

A local authority<sup>1</sup> may arrange for, or assist in arranging for, any child<sup>2</sup> in its care<sup>3</sup> to live outside England and Wales only with the approval of the court<sup>4</sup>. If a local authority does make arrangements to place a child outside England and Wales in accordance with the statutory provisions<sup>5</sup>, it must take steps to ensure that, so far as is reasonably practicable, requirements corresponding with the requirements of the Placement of Children with Parents etc Regulations 1991<sup>6</sup> are complied with in relation to that child as would be required to be complied with if the child were placed in England and Wales<sup>7</sup>. Where the child is moving to another jurisdiction within the British Islands<sup>8</sup> the effect of the care order<sup>9</sup> may be transferred to the relevant public authority<sup>10</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the meaning of 'in care' see para 867 note 7 ante.

4 Children Act 1989 s 23(9), Sch 2 para 19(1). See further para 875 ante.

5 *Ibid* Sch 2 para 19 (as amended): see para 875 ante.

6 *Ie* the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (as amended).

7 *Ibid* reg 10.

8 For the meaning of 'British Islands' see para 103 note 6 ante.

9 As to care orders see paras 276-280 ante.

10 See the Children Act 1989 s 101; and the Children (Prescribed Orders--Northern Ireland, Guernsey and Isle of Man) Regulations 1991, SI 1991/2032 (amended by SI 1995/756; SI 2006/837). Where the court has determined that a child is at risk of harm and that suitable arrangements have been made for his reception and welfare in the other jurisdiction, it has a duty to make a final care order so that the Placement of Children with Parents etc Regulations 1991, SI 1991/893 (as amended) can be brought into effect: *Cheshire County Council v P* [1993] 2 FCR 397, sub nom *Re P (minors) (interim order)* [1993] 2 FLR 742, CA.

### **UPDATE**

### **899 Placements outside England and Wales**

NOTE 10--SI 1991/2032 further amended: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

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## **B. FOSTERING**

### **900. Introduction.**

A local authority<sup>1</sup> carrying out its duty to provide accommodation and maintenance for a child<sup>2</sup> whom it is looking after may do so by placing him with a family, a relative of his, or any other suitable person<sup>3</sup>. Any person with whom a child has been so placed is described as a 'local authority foster parent' unless he is a parent<sup>4</sup> of the child, a person who is not a parent of the child but who has parental responsibility<sup>5</sup> for the child, or a person in whose favour a residence order was in force<sup>6</sup> immediately before a care order relating to the child was made<sup>7</sup>. The local authority's power to place a child with a family, relative or other suitable person is subject to regulations made by the Secretary of State or the Welsh Ministers<sup>8</sup>. Regulations have accordingly been made to govern the placement<sup>9</sup> of children with local authority foster parents<sup>10</sup>. The regulations provide for a regulatory framework for fostering services<sup>11</sup> and the process by which foster parents<sup>12</sup> are approved by fostering service providers<sup>13</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 23(2)(a). See further para 877 ante. A voluntary organisation has similar power in relation to children accommodated by it: see s 59(1)(a) (as amended); and para 975 post. For the meaning of 'voluntary organisation' see para 248 note 10 ante.

4 As to the meaning of 'parent' see para 248 note 1 ante.

5 For the meaning of 'parental responsibility' see para 134 ante.

6 As to references to a person in whose favour a residence order is in force see para 869 note 11 ante. As to residence orders see para 262 ante.

7 Children Act 1989 ss 23(3), (4), 105(1). As to care orders see paras 276-280 ante. As to the local authority's duty see also *S v Gloucestershire County Council, L v Tower Hamlets London Borough Council* [2001] Fam 313, [2000] 3 All ER 346, [2000] 2 FCR 345, CA; and para 851 ante. It is arguable that a local authority owes a duty of care, in relation to shock in the sense of psychiatric damage, to a foster parent: *W v Essex County Council* [2001] 2 AC 592, [2000] 1 FCR 568, HL.

8 See the Children Act 1989 s 23(2), (5). See also s 59(2), (3); and para 975 post. As to the Secretary of State and the Welsh Ministers see para 155 ante.

9 For these purposes, 'placement' means any placement of a child made by:

681 (1) a local authority under the Children Act 1989 s 23(2)(a) (see the text and notes 1-3 supra) or a voluntary organisation under s 59(1)(a) (see para 975 head(1) post) which is not a placement with a person who falls within s 23(4) (see the text and notes 4-7 supra) or a placement for adoption; and

682 (2) except in the Fostering Services Regulations 2002, SI 2002/57, Pt V (regs 33-40) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Pt V (regs 33-40), includes a placement arranged by an independent fostering agency acting on behalf of a local authority,

and references to a child who is placed are to be construed accordingly: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). As to adoption see para 323 et seq ante.

The registered person in respect of an independent fostering agency must ensure that: (a) the welfare of children placed or to be placed with foster parents is safeguarded and promoted at all times; and (b) before making any decision affecting a child placed or to be placed with foster parents due consideration is given to the child's wishes and feelings in the light of his age and understanding and his religious persuasion, racial origin and cultural and linguistic background: Fostering Services Regulations 2002, SI 2002/57, reg 11; Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 11.

'Registered person', in relation to a fostering agency, means a person who is the registered provider or the registered manager of the fostering agency: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). Where there is more than one registered person in respect of a fostering agency, anything done which is required under the relevant regulations to be done by the registered person, if done by one the registered persons, will not be required to be done by any of the other registered persons: see the Fostering Services Regulations 2002, SI 2002/57, reg 49; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 49. 'Registered manager', in relation to a fostering agency, means any person who is registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended) (see paras 985-986 post) as the registered manager of the fostering agency: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). The 'registered provider', in relation to a fostering agency, means a person who is registered under the Care Standards Act 2000 Pt II (as amended) as the person carrying on a fostering agency: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1).

10 See the Fostering Services Regulations 2002, SI 2002/57 (amended by SI 2002/865; SI 2004/664; SI 2004/865; SI 2006/1738) and the Fostering Services (Wales) Regulations 2003, SI 2003/237 (amended by SI 2003/896; SI 2004/1016; SI 2005/3302; SI 2006/878; SI 2006/3251). Placements are also governed by the provisions of the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended): see para 880 et seq ante. As to transitional provisions see the Fostering Services Regulations 2002, SI 2002/57 (amended by SI 2002/865; SI 2007/603) and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 52 (substituted by SI 2003/896).

11 'Fostering service' means: (1) a fostering agency within the meaning of the Care Standards Act 2000 s 4(4) (see para 983 post); or (2) a local authority fostering service: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). 'Local authority fostering service' means the discharge by a local authority of relevant fostering functions within the meaning of the Care Standards Act 2000 s 43(3)(b) (see para 921 post): Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). Each local authority must appoint one of its officers to manage the local authority fostering service: see the Fostering Services Regulations 2002, SI 2002/57, reg 10 (amended by SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 10.

12 'Foster parent' means:

683 (1) in England, the person with whom a child is or may be placed under the Fostering Services Regulations 2002, SI 2002/57 (as amended), except that in regs 24-40 it does not include a person with whom a child is placed under reg 38(2) (see para 912 post) (Fostering Services Regulations 2002, SI 2002/57, reg 2(1) (definition substituted by SI 2002/865));

684 (2) in Wales, the person with whom a child is or may be placed under the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended), except that in regs 24-40 it does not include a person with whom a child is placed under reg 38(2) (see para 912 post) (Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1)).

13 'Fostering service provider' means: (1) in relation to a fostering agency, a registered person; or (2) in relation to a local authority, a local authority: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). As to the approval of foster parents see paras 905-907 post. As to the fitness of the premises to be used by a fostering service provider see the Fostering Services Regulations 2002, SI 2002/57, reg 23; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 23. As to the situation regarding private fostering see para 1049 et seq post.

## UPDATE

### 900 Introduction

TEXT AND NOTES 1-8--Children Act 1989 s 23 replaced by ss 22A-22F: see PARA 877.

NOTES 3, 8--Children Act 1989 s 23(2)(a), (5) amended: Children and Young Persons Act 2008 Sch 3 para 7(4), (5).

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### **901. Fostering service provider.**

The duties of the fostering service provider include the following<sup>1</sup>. The fostering service provider must:

- 1767 (1) compile, in relation to the fostering service, a written statement (the 'statement of purpose') of the aims and objectives of the fostering service and as to the services and facilities to be provided by the fostering service<sup>2</sup>;
- 1768 (2) produce a written guide to the relevant regulations (the 'children's guide')<sup>3</sup>;
- 1769 (3) prepare and implement a written policy which is intended to safeguard children placed with foster parents<sup>4</sup> from abuse or neglect and sets out the procedure to be followed in the event of any allegation of abuse or neglect<sup>5</sup>;
- 1770 (4) prepare and implement a written policy on acceptable measures of control, restraint and discipline of children placed with foster parents<sup>6</sup>;
- 1771 (5) take all reasonable steps to ensure that no form of corporal punishment is used on any child placed with foster parents, that physical restraint is used only where necessary to prevent injury or serious damage, and that no child placed with foster parents is subject to excessive or unreasonable control, restraint or discipline<sup>7</sup>;
- 1772 (6) prepare and implement a written procedure to be followed when a child is absent from a foster parent's home without permission<sup>8</sup>;
- 1773 (7) promote contact between a child placed with a foster parent and his parents, relatives and friends unless such contact is not reasonably practicable or consistent with the child's welfare<sup>9</sup>;
- 1774 (8) promote the health and development of children placed with foster parents (in particular ensuring registration with a general practitioner, access to medical, dental, nursing, psychological and psychiatric advice)<sup>10</sup>;
- 1775 (9) promote the educational attainment of children placed with foster parents<sup>11</sup>;
- 1776 (10) ensure that any education it provides for any child placed with foster parents who is of a compulsory school age but not attending school is efficient and suitable to the child's age, ability, aptitude and any special educational needs he may have<sup>12</sup>;
- 1777 (11) ensure that the foster parents promote the leisure interests of children placed with them<sup>13</sup>;
- 1778 (12) provide foster parents with such training, advice, information and support as appears necessary in the interests of the children placed with them<sup>14</sup>;
- 1779 (13) take all reasonable steps to ensure that foster parents are familiar with and act in accordance with the policies established in accordance with in heads (3), (4) and (6) above<sup>15</sup>;
- 1780 (14) ensure that a foster parent is given such up to date information as to enable him to provide appropriate care for a the child<sup>16</sup>;
- 1781 (15) ensure there is sufficient number of suitably qualified, competent and experienced persons working for the purposes of the fostering service<sup>17</sup>;
- 1782 (16) maintain and keep up to date the following records:



35. (a) a record in the form of a register containing certain information in respect of each child placed with foster parents<sup>18</sup>;
  36. (b) a record showing certain information in respect of each person working for the fostering service provider<sup>19</sup>;
  37. (c) a record of all accidents occurring to children whilst placed with foster parents<sup>20</sup>.
- .32**

In Wales, the fostering service provider must prepare and follow a complaints procedure for considering complaints made to the fostering service provider by or on behalf of children placed by it or foster parents<sup>21</sup>. In England, the registered person in respect of an independent fostering agency must establish a complaints procedure<sup>22</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante. As to the duties of the fostering service provider in relation to fostering agencies in Wales see also the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 42.

2 See the Fostering Services Regulations 2002, SI 2002/57, reg 3(1); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 3(1).

3 See the Fostering Services Regulations 2002, SI 2002/57, reg 3(3); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 3(3). The fostering service provider must keep the statement of purpose and the children's guide under review and revise them where appropriate: see the Fostering Services Regulations 2002, SI 2002/57, reg 4; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 4.

4 For the meaning of 'foster parent' see para 900 note 12 ante.

5 See the Fostering Services Regulations 2002, SI 2002/57, reg 12; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 12.

6 See the Fostering Services Regulations 2002, SI 2002/57, reg 13(1); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 13(1).

7 See the Fostering Services Regulations 2002, SI 2002/57, reg 13(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 13(2).

8 Fostering Services Regulations 2002, SI 2002/57, reg 13(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 13(3).

9 Fostering Services Regulations 2002, SI 2002/57, reg 14; Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 14. This is subject to the provisions of the foster placement agreement (see para 910 post) and any court order relating to contact.

10 See the Fostering Services Regulations 2002, SI 2002/57, reg 15(1), (2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 15(1), (2). Each child is also to be provided with such individual support as he may require as a result of any particular health needs or disability he may have as well as guidance, support and advice on health, personal care and health promotion issues appropriate to his needs and values: see the Fostering Services Regulations 2002, SI 2002/57, reg 15(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 15(2).

11 Fostering Services Regulations 2002, SI 2002/57, reg 16(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 16(1). In particular the fostering service provider must establish a procedure for monitoring the educational attainment, progress and school attendance of children placed with foster parents, promote the regular school attendance and participation in school activities of such children and provide foster parents with such information and assistance as necessary to meet the child's educational needs: see the Fostering Services Regulations 2002, SI 2002/57, reg 16(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 16(2). Where a child has attained the age to be outside compulsory full time education, the fostering service provider must assist with, and give effect to, the making of arrangements for his education, training and employment: see the Fostering Services Regulations 2002, SI 2002/57, reg 16(5); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 16(5).

12 Fostering Services Regulations 2002, SI 2002/57, reg 16(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 16(3).

13 Fostering Services Regulations 2002, SI 2002/57, reg 16(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 16(4).

14 See the Fostering Services Regulations 2002, SI 2002/57, reg 17(1); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 17(1). This includes support outside office hours.

15 See the Fostering Services Regulations 2002, SI 2002/57, reg 17(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 17(2).

16 See the Fostering Services Regulations 2002, SI 2002/57, reg 17(3); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 17(3). This includes, in particular, information relating to the health and health needs of the child and arrangements for giving consent for the child's medical and dental examination or treatment.

17 See the Fostering Services Regulations 2002, SI 2002/57, reg 19; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 19. The fostering service provider must not employ, or allow to work for the purposes of the fostering service, a person who is unfit to do so: see the Fostering Services Regulations 2002, SI 2002/57, reg 20; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 20. Any person who is employed by a person other than the fostering service provider whose duties bring him into regular contact with children must be appropriately supervised: see the Fostering Services Regulations 2002, SI 2002/57, reg 20(5); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 20(4). As to provisions relating to the employment of staff see the Fostering Services Regulations 2002, SI 2002/57, reg 21; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 21.

18 See the Fostering Services Regulations 2002, SI 2002/57, reg 22(1), Sch 2 para 1; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(1), Sch 2 para 1. Such records are to be kept for at least 15 years: see the Fostering Services Regulations 2002, SI 2002/57, reg 22(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(2).

19 See the Fostering Services Regulations 2002, SI 2002/57, reg 22(1), Sch 2 para 2; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(1), Sch 2 para 2. Such records are to be kept for at least 15 years: see the Fostering Services Regulations 2002, SI 2002/57, reg 22(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(2).

20 See the Fostering Services Regulations 2002, SI 2002/57, reg 22(1), Sch 2 para 3; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(1), Sch 2 para 3. Such records are to be kept for at least 15 years: see the Fostering Services Regulations 2002, SI 2002/57, reg 22(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 22(2).

21 See the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 18, 18A-18D (reg 18 substituted, and regs 18A-18D added, by SI 2006/3251).

22 See the Fostering Services Regulations 2002, SI 2002/57, reg 18.

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## **902. Placement with foster parents.**

Except in the case of an emergency or immediate placement<sup>1</sup>, a responsible authority<sup>2</sup> may only place a child<sup>3</sup> with a foster parent<sup>4</sup> if:

- 1783 (1) the foster parent is approved by the responsible authority proposing to make the placement or, provided certain conditions are satisfied, by another fostering service provider<sup>5</sup>;
- 1784 (2) the terms of his approval are consistent with the proposed placement<sup>6</sup>; and
- 1785 (3) he has entered into a foster care agreement<sup>7</sup>.

The conditions mentioned in head (1) above are:

- 1786 (a) that the fostering service provider by whom the foster parent is approved consents to the placement<sup>8</sup>;
- 1787 (b) that any other responsible authority which already has a child placed with the foster parent consents to the placement<sup>9</sup>;
- 1788 (c) where applicable, that the area authority<sup>10</sup> is consulted, its views are taken into account and it is given notice if the placement is made<sup>11</sup>; and
- 1789 (d) where the foster parent is approved by an independent fostering agency<sup>12</sup>, that the relevant requirements<sup>13</sup> are complied with<sup>14</sup>.

Before making a placement, the responsible authority must enter into a written agreement ('the foster placement agreement') with the foster parent relating to the child<sup>15</sup>.

1    I.e. a placement under the Fostering Services Regulations 2002, SI 2002/57, reg 38 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38: see paras 911-912 post. As to emergency and immediate placements see paras 911-912 post. For the meaning of 'voluntary organisation' see para 248 note 10 ante.

2    'Responsible authority', in relation to a child, means the local authority or voluntary organisation responsible for the child's placement: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). For the meaning of 'local authority' see para 248 note 10 ante.

3    For the meaning of 'child' see para 3 ante.

4    For the meaning of 'foster parent' see para 900 note 12 ante.

5    Fostering Services Regulations 2002, SI 2002/57, reg 34(1)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(1)(a). For the meaning of 'fostering service provider' see para 900 note 13 ante.

6    Fostering Services Regulations 2002, SI 2002/57, reg 34(1)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(1)(b).

7    Fostering Services Regulations 2002, SI 2002/57, reg 34(1)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(1)(c). As to the matters to be covered in a 'foster care agreement' see para 909 post.

8    Fostering Services Regulations 2002, SI 2002/57, reg 34(2)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(2)(a).

9 Fostering Services Regulations 2002, SI 2002/57, reg 34(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(2)(b).

10 'Area authority' means the local authority in whose area a child is placed in any case where that local authority is not the child's responsible authority: Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1).

11 Fostering Services Regulations 2002, SI 2002/57, reg 34(2)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(2)(c).

12 For the meaning of 'independent fostering agency' see para 904 note 2 ante.

13 In the requirements of the Fostering Services Regulations 2002, SI 2002/57, reg 40 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40: see para 916 post.

14 Fostering Services Regulations 2002, SI 2002/57, reg 34(2)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(2)(d).

15 Fostering Services Regulations 2002, SI 2002/57, reg 34(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(3). The foster placement agreement must cover the matters specified in the Fostering Services Regulations 2002, SI 2002/57, Sch 6 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6: see para 910 post.

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### **903. General duty of responsible authority.**

A responsible authority<sup>1</sup> must not place a child<sup>2</sup> with a foster parent<sup>3</sup> unless satisfied that:

- 1790 (1) it is the most suitable way of performing its duty to safeguard and promote the child's welfare and to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case<sup>4</sup>; and  
 1791 (2) placement with the particular foster parent is the most suitable placement having regard to all the circumstances<sup>5</sup>.

1 For the meaning of 'responsible authority' see para 902 note 2 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'foster parent' see para 900 note 12 ante.

4 I.e. the duty under the Children Act 1989 s 22(3) or s 61(1)(a), (b): see paras 867 ante, 977 post.

5 Fostering Services Regulations 2002, SI 2002/57, reg 33; Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 33. As to the matters which should be taken into account in choosing a particular placement see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 4.1-4.5. As to the guidance and regulations generally see para 163 ante.

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#### **904. Fostering agencies.**

A person must not carry on a fostering agency unless he is fit to do so<sup>1</sup>. A person is not fit to carry on a fostering agency in England unless the person:

- 1792 (1) in the case of an independent fostering agency<sup>2</sup>, is an individual who carries on the fostering agency otherwise than in partnership with others where he satisfies the necessary requirements, or who carries on the fostering agency in partnership with others where he and each of his partners satisfies the necessary requirements<sup>3</sup>;
- 1793 (2) is a partnership, and each of the partners satisfies the necessary requirements<sup>4</sup>;
- 1794 (3) is an organisation, and the organisation has given notice of the name, address and position in the organisation of an individual who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the fostering agency and that individual satisfies the necessary requirements<sup>5</sup>.

A person is not fit to carry on a fostering agency in Wales unless the person:

- 1795 (a) in the case of an independent fostering agency, is an individual who carries on the fostering agency<sup>6</sup>; or
- 1796 (b) is an organisation, and the organisation has given notice of the name, address and position in the organisation of an individual who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the fostering agency and the individual satisfies the necessary requirements<sup>7</sup>.

The necessary requirements are that the person is of integrity and good character, that he is physically and mentally fit to carry on the fostering agency, and that full and satisfactory information is available in relation to him in respect of specified matters<sup>8</sup>.

A person must not carry on a fostering agency if he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged and the bankruptcy order has not been annulled or rescinded, or if he has made a composition or arrangement with his creditors and has not been discharged in respect of it<sup>9</sup>.

The registered provider<sup>10</sup> must appoint an individual to manage the fostering agency<sup>11</sup>. The registered provider and the manager must, having regard to the size of the fostering agency, its statement of purpose<sup>12</sup>, the numbers and needs of the children placed by it, and the need to safeguard and promote the welfare of the children placed by the fostering agency, carry on or manage the fostering agency (as the case may be) with sufficient care, competence and skill<sup>13</sup>. The registered provider must carry on the fostering agency in such a manner as is likely to ensure that it will be financially viable for the purpose of achieving the aims and objectives set out in its statement of purpose<sup>14</sup>.

In England, the registered person<sup>15</sup> is responsible for establishing and maintaining a system for monitoring and improving the quality of care provided by the fostering agency<sup>16</sup>. In Wales, the fostering service provider is responsible for establishing and maintaining a system for monitoring, reviewing and improving the quality of care given by the independent fostering agency<sup>17</sup>.

If, in relation to a fostering agency, certain events occur the registered person must without delay notify the relevant persons<sup>18</sup>.

1 Fostering Services Regulations 2002, SI 2002/57, reg 5(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 5(1).

2 'Independent fostering agency' means a fostering agency falling within the Care Standards Act 2000 s 4(4) (a) (see para 985 post): Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1).

3 Fostering Services Regulations 2002, SI 2002/57, reg 5(2)(a).

4 Ibid reg 5(2)(b).

5 Ibid reg 5(2)(c) (amended by SI 2007/603). As to where such a person is convicted of a criminal offence see the Fostering Services Regulations 2002, SI 2002/57, reg 9 (amended by SI 2007/603).

6 Fostering Services (Wales) Regulations 2003, SI 2003/57, reg 5(2)(a).

7 Ibid reg 5(2)(b). As to where such a person is convicted of a criminal offence see reg 9.

8 Fostering Services Regulations 2002, SI 2002/57, reg 5(3) (amended by SI 2002/865); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 5(3). The specified matters mentioned in the text are matters specified in the Fostering Services Regulations 2002, SI 2002/57, Sch 1 (amended by SI 2002/865) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 1.

9 Fostering Services Regulations 2002, SI 2002/57, reg 5(5); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 5(5).

10 For the meaning of 'registered provider' see para 900 note 9 ante.

11 Fostering Services Regulations 2002, SI 2002/57, reg 6(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 6(1). As to the appointment of the manager and the fitness of the manager see the Fostering Services Regulations 2002, SI 2002/57, regs 6(2), (3), 7; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 6(2), 7.

12 As to the statement of purpose see para 901 ante.

13 Fostering Services Regulations 2002, SI 2002/57, reg 8(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 8(1). As to the requirements for training see the Fostering Services Regulations 2002, SI 2002/57, reg 8(2), (3); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 8(2), (3).

14 See the Fostering Services Regulations 2002, SI 2002/57, reg 44 (amended by SI 2002/865; SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 44.

15 For the meaning of 'registered person' see para 900 note 9 ante.

16 See the Fostering Services Regulations 2002, SI 2002/57, reg 42, Sch 7 (amended by SI 2007/603).

17 See the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 42, Sch 7 (reg 42 substituted by SI 2006/3251). A fostering service provider may be required to carry out an assessment of the service provided to children placed by it: see the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 42A (added by SI 2006/3251). As to the issuing of a compliance notice to the fostering service provider see the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 42B (added by SI 2006/3251).

18 See the Fostering Services Regulations 2002, SI 2002/57, reg 43, Sch 8; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 43, Sch 8. The absence of the registered manager from the fostering agency for a continuous period of more than 28 days and certain changes also need to be notified: see the Fostering Services Regulations 2002, SI 2002/57, regs 45, 46 (both amended by SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 45, 46. For the meaning of 'registered manager'

see para 900 note 9 ante. As to notification etc when liquidators have been appointed see the Fostering Services Regulations 2002, SI 2002/57 (amended by SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 47.

## **UPDATE**

### **904 Fostering agencies**

NOTE 8--SI 2003/237 Sch 1 amended: SI 2009/2541. SI 2002/57 Sch 1 amended: SI 2009/1895.



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### **905. Fostering panel.**

The fostering service provider<sup>1</sup> must establish at least one panel, to be known as a fostering panel<sup>2</sup>. The functions of the fostering panel in respect of cases referred to it by the fostering service provider are:

- 1797 (1) to consider each application for approval and to recommend whether or not a person is suitable to act as a foster parent<sup>3</sup>;
- 1798 (2) where it recommends approval of an application, to recommend the terms on which the approval is to be given<sup>4</sup>;
- 1799 (3) to recommend whether or not a person remains suitable to act as a foster parent, and whether or not the terms of his approval remain appropriate: (a) on the first review carried out<sup>5</sup>; and (b) on the occasion of any other review when requested to do so by the fostering service provider<sup>6</sup>; and
- 1800 (4) to consider any case referred to it under certain provisions<sup>7</sup>.

The fostering panel must also:

- 1801 (i) advise on the procedures under which reviews<sup>8</sup> are carried out by the fostering service provider and periodically monitor their effectiveness<sup>9</sup>;
- 1802 (ii) oversee the conduct of assessments carried out by the fostering service provider<sup>10</sup>; and
- 1803 (iii) give advice and make recommendations on such other matters or cases as the fostering service provider may refer to it<sup>11</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 Fostering Services Regulations 2002, SI 2002/57, reg 24(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 24(1). As to the establishment of a fostering panel and the meeting of a fostering panel see further the Fostering Services Regulations 2002, SI 2002/57, regs 24, 25; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 24, 25.

3 Fostering Services Regulations 2002, SI 2002/57, reg 26(1)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(1)(a). 'Recommend' means recommend to the fostering service provider: Fostering Services Regulations 2002, SI 2002/57, reg 26(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(3).

4 Fostering Services Regulations 2002, SI 2002/57, reg 26(1)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(1)(b).

5 Ie the first review carried out in accordance with the Fostering Services Regulations 2002, SI 2002/57, reg 29 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29 (see para 908 post): Fostering Services Regulations 2002, SI 2002/57, reg 26(1)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(1)(c).

6 Ie in accordance with the Fostering Services Regulations 2002, SI 2002/57, reg 29(5) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(5) (see para 908 post): Fostering Services Regulations 2002, SI 2002/57, reg 26(1)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(1)(c).

7 Fostering Services Regulations 2002, SI 2002/57, reg 26(1)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(1)(d). The provisions mentioned in the text are the Fostering Services Regulations 2002, SI 2002/57, reg 28(8) or reg 29(9) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(8) or reg 29(9): see para 909 post.

8 le in accordance with the Fostering Services Regulations 2002, SI 2002/57, reg 29 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29: see para 909 post.

9 Fostering Services Regulations 2002, SI 2002/57, reg 26(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(2)(a).

10 Fostering Services Regulations 2002, SI 2002/57, reg 26(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(2)(b).

11 Fostering Services Regulations 2002, SI 2002/57, reg 26(2)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 26(2)(c).

## **UPDATE**

### **905 Fostering panel**

TEXT AND NOTES 1-7--In considering what recommendation to make under SI 2002/57 reg 26(1), the fostering panel (1) must consider and take into account all of the information passed to it in accordance with reg 27, 28 or 29 (see PARAS 906-908) as the case may be; (2) may request the fostering service provider to obtain any other relevant information which the fostering panel considers necessary or to provide such other assistance as the fostering panel may request; and (3) may obtain such legal advice or medical advice it considers necessary in relation to the case: reg 26(1A) (added by SI 2009/394). The fostering service provider must obtain such information as the fostering panel considers necessary and send that information to the panel, and provide such other assistance as the fostering panel may request, so far as is reasonably practicable: SI 2002/57 reg 26(1B) (added by SI 2009/394).

NOTE 2--SI 2002/57 reg 24 amended: SI 2008/640, SI 2009/394.

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### **906. Assessment of prospective foster parents.**

The fostering service provider<sup>1</sup> must carry out an assessment of any person whom it considers may be suitable to become a foster parent<sup>2</sup> in accordance with the following provisions<sup>3</sup>. If the fostering service provider considers that a person may be suitable to act as a foster parent it must:

- 1804 (1) obtain specified information<sup>4</sup> relating to the prospective foster parent and other members of his household and family, and any other information it considers relevant<sup>5</sup>;
- 1805 (2) interview at least two persons nominated by the prospective foster parent to provide personal references for him and prepare written reports of the interviews<sup>6</sup>;
- 1806 (3) consult with, and take into account the views of, the local authority in whose area the prospective foster parent lives<sup>7</sup>;
- 1807 (4) having regard to these matters consider whether the prospective foster parent is suitable to act as a foster parent and whether his household is suitable for any child in respect of whom approval may be given<sup>8</sup>;
- 1808 (5) prepare a written report on him which includes certain matters<sup>9</sup>; and
- 1809 (6) refer the report to the fostering panel and notify the prospective foster parent accordingly<sup>10</sup>.

A person must not be regarded as suitable to act as a foster parent if he or any member of his household aged 18 or over has been convicted of a specified offence<sup>11</sup> committed at the age of 18 or over<sup>12</sup> or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, he admitted<sup>13</sup>. However, the fostering service provider may regard such a person<sup>14</sup> as suitable to act or to continue to act, as the case may be, as a foster parent in relation to a particular named child or children if the fostering service provider is satisfied that the welfare of that child or those children requires it, and either the person, or a member of his household, is a relative of the child or the person is already acting as a foster parent for the child<sup>15</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 For the meaning of 'foster parent' see para 900 note 12 ante.

3 Fostering Services Regulations 2002, SI 2002/57, reg 27(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(1).

4 The following matters are specified, in respect of the prospective foster parent and other members of his household and family:

685 (1) his full name, address and date of birth (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 1; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 1);

686 (2) details of his health (supported by a medical report), personality and marital status (or, in Wales, his marital or civil partnership status) (including any previous marriage or similar

relationship) (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 2; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 2);

- 687 (3) particulars of the other adult members of his household (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 3; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 3);
- 688 (4) particulars of the children in his family (whether or not members of his household) and any other children in his household (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 4; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 4);
- 689 (5) particulars of his accommodation (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 5; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 5);
- 690 (6) his religious persuasion (and, in Wales, the degree of his religious observance), and his capacity to care for a child from any particular religious persuasion (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 6; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 6);
- 691 (7) his racial origin, his cultural and linguistic background, and his capacity to care for a child from any particular origin or cultural or linguistic background (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 7; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 4 para 7);
- 692 (8) his past and present employment or occupation, his standard of living and leisure activities and interests (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 8; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 8);
- 693 (9) his previous experience (if any) of caring for his own and other children (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 9; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 9);
- 694 (10) his skills, competence and potential relevant to his capacity to care effectively for any child placed with him (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 10; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 10);
- 695 (11) the outcome of any request or application made by him or any other member of his household to foster or adopt children, or for registration for child minding or day care, including particulars of any previous approval or refusal of approval relating to him or to any other member of his household (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 11; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 11);
- 696 (12) the names and addresses of two persons who will provide personal references for the prospective foster parent (Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 12; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 12);
- 697 (13) in England, in respect of the prospective foster parent, either an enhanced criminal record certificate or details of any criminal offences of which the person has been convicted, including any spent convictions, or in respect of which he has been cautioned by a constable and which, at the time the caution was given, he admitted; and in relation to each member of the household aged over 18, details of any criminal offences of which the person has been convicted, including any spent convictions, or in respect of which he has been cautioned by a constable and which, at the time the caution was given, he admitted (see the Fostering Services Regulations 2002, SI 2002/57, Sch 3 para 13); and in Wales, in respect of the prospective foster parent and each member of the household aged 18 or over, an enhanced criminal record certificate (see the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 para 13).

5 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(a).

6 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(b).

7 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(c). However, head (3) in the text does not apply where the fostering service provider is a local authority and the applicant lives in the area of that authority: Fostering Services Regulations 2002, SI 2002/57, reg 27(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(3).

8 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(d).

9 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(e). The matters referred to in the text are: (1) the information required in the Fostering Services Regulations 2002, SI 2002/57, Sch 3 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 3 (see note 4 *supra*); (2) the fostering service provider's assessment of his suitability to act as a foster parent; and (3) the fostering service provider's proposals about the terms and conditions of any approval: Fostering Services Regulations 2002, SI 2002/57, reg 27(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(4).

10 Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(f); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(f).

11 For these purposes, 'a specified offence' means: (1) an offence against a child; (2) an offence specified in the Fostering Services Regulations 2002, SI 2002/57, Sch 4, or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 4; (3) an offence contrary to the Customs and Excise Management Act 1979 s 170 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 1178) in relation to goods prohibited to be imported under the Customs Consolidation Act 1876 s 42 (prohibitions and restrictions relating to pornography: see TRADE AND INDUSTRY vol 97 (2010) PARA 808) where the prohibited goods included indecent photographs of children under the age of 16; (4) any other offence involving bodily injury to a child other than an offence of common assault or battery: Fostering Services Regulations 2002, SI 2002/57, reg 27(7) (amended by SI 2002/865); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(7).

For these purposes, 'offence against a child' has the meaning given to it by the Criminal Justice and Court Services Act 2000 s 26(1) (prospectively repealed) (see para 667 *ante*) except that it does not include an offence contrary to the Sexual Offences Act 1956 s 6 (repealed), s 12 (repealed) or s 13 (repealed) (ie sexual intercourse with a girl aged 13 to 16, buggery, or indecency between men) in a case where the offender was under the age of 20 at the time the offence was committed: Fostering Services Regulations 2002, SI 2002/57, reg 27(7); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(7).

12 Fostering Services Regulations 2002, SI 2002/57, reg 27(5)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(5)(a). In an appropriate case, the court may use its inherent jurisdiction to place children when the regulations would otherwise prevent it: see *W and X (wardship: relatives rejected as foster carers)* [2003] EWHC 2206 (Fam), [2004] 1 FLR 415 (children were made wards of court and placed with the grandchildren; supervision order made). See also *Re F (Mental Health Act: guardianship)* [2000] 1 FCR 11, [2000] 1 FLR 192 (where the Court of Appeal considered wardship to be preferable to a guardianship order under the Matrimonial Homes Act 1983).

13 Fostering Services Regulations 2002, SI 2002/57, reg 27(5)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(5)(b).

14 The one to whom the Fostering Services Regulations 2002, SI 2002/57, reg 27(5) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(5) applies: see the text and notes 12-13 *supra*.

15 Fostering Services Regulations 2002, SI 2002/57, reg 27(6); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(6).

## UPDATE

### 906 Assessment of prospective foster parents

TEXT AND NOTES--The Safeguarding Vulnerable Groups Act 2006 applies to fostering a child, so that it is an offence for a barred person (see PARA 681) to act as a local authority foster carer, foster carer employed by a voluntary organisation, or a person who fosters a child for reward or through the arrangements made by a person other than a member of the child's family: see s 53.

NOTE 4--Head (13). SI 2003/237 Sch 3 para 13 substituted: SI 2009/2541. SI 2002/57 Sch 3 para 13 substituted: SI 2009/1895.

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### **907. Approval of foster parents.**

A fostering service provider<sup>1</sup> must not approve a person who has been approved as a foster parent<sup>2</sup> by another fostering service provider and whose approval has not been terminated<sup>3</sup>. Nor may a fostering service provider approve a person as a foster parent unless it has completed its assessment of his suitability<sup>4</sup> and its fostering panel<sup>5</sup> has considered the application<sup>6</sup>.

In deciding whether to approve a person as a foster parent and as to the terms of any approval, a fostering service provider must take into account the recommendation of its fostering panel<sup>7</sup>.

If a fostering service provider decides to approve a person as a foster parent it must give him notice in writing specifying the terms of the approval, for example, whether it is in respect of a particular named child or children, or number and age range of children, or of placements of any particular kind, or in any particular circumstances<sup>8</sup>. It must also enter into a foster care agreement with the person<sup>9</sup>.

If a fostering service provider considers that a person is not suitable to act as a foster parent it must give him written notice that it proposes not to approve him, together with its reasons and a copy of the fostering panel's recommendation, and invite him to submit any written representations within 28 days of the date of the notice<sup>10</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 For the meaning of 'foster parent' see para 900 note 12 ante.

3 Fostering Services Regulations 2002, SI 2002/57, reg 28(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(1). As to the termination of approval see para 908 post.

4 As to the assessment of suitability of a foster parent see para 906 ante.

5 As to the fostering panel see para 905 ante.

6 Fostering Services Regulations 2002, SI 2002/57, reg 28(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(2).

7 Fostering Services Regulations 2002, SI 2002/57, reg 28(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(3). However, no member of its fostering panel is to take part in any decision made by a fostering service provider under the Fostering Services Regulations 2002, SI 2002/57, reg 28(3) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(3): Fostering Services Regulations 2002, SI 2002/57, reg 28(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(4).

8 Fostering Services Regulations 2002, SI 2002/57, reg 28(5)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(5)(a).

9 Fostering Services Regulations 2002, SI 2002/57, reg 28(5)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(5)(b). As to foster care agreements see para 909 post.

10 Fostering Services Regulations 2002, SI 2002/57, reg 28(6); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(6). If the fostering service provider does not receive any representations within the period referred to, it may proceed to make its decision and, as soon as practicable, notify the prospective foster parent in writing: see the Fostering Services Regulations 2002, SI 2002/57, reg 28(7), (9); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(7), (9). If the fostering service provider receives any written representations within the period referred to, it must refer the case to the fostering panel for further

consideration and make its decision, taking into account any fresh recommendation made by the fostering panel; and, as soon as possible, it must notify the prospective foster parent in writing: see the Fostering Services Regulations 2002, SI 2002/57, reg 28(8), (9); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(8), (9). As far as possible, the reasons for refusal should be explained. A representations procedure should be available for reconsideration of the decision and to deal with an applicant's dissatisfaction with the approval process: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 3.42. A refusal should be notified to any professionals who have contributed to the assessment, such as health visitors or general practitioners: para 3.43. As to the guidance and regulations generally see para 163 ante.

## **UPDATE**

### **907 Approval of foster parents**

TEXT AND NOTES--SI 2002/57 reg 28 substituted: SI 2009/394.

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### **908. Reviews and termination of approval.**

The fostering service provider<sup>1</sup> must review the approval of each foster parent<sup>2</sup> in accordance with the following provisions<sup>3</sup>. A review must take place not more than a year after approval, and thereafter whenever the fostering service provider considers it necessary, but at intervals of not more than a year<sup>4</sup>. When undertaking a review, the fostering service provider must make such enquiries and obtain such information as it considers necessary in order to review whether the person continues to be suitable as to act as a foster parent and his household continues to be suitable<sup>5</sup>. It must also seek and take into account the views of the foster parent, any child placed with the foster parent (subject to the child's age and understanding) and any responsible authority which has within the preceding year placed a child with the foster parent<sup>6</sup>. At the conclusion of the review the fostering service provider must prepare a written report, setting out whether the person continues to be suitable to act as a foster parent, his household continues to be suitable and the terms of his approval continue to be appropriate<sup>7</sup>. The fostering service provider must on the occasion of the first review, and may on any subsequent review, refer its report to the fostering panel<sup>8</sup> for consideration<sup>9</sup>.

If the fostering service provider decides, taking into account any recommendation made by the fostering panel, that the foster parent and his household continue to be suitable and that the terms of his approval continue to be appropriate, it must give written notice to the foster parent of its decision<sup>10</sup>. If, taking into account any recommendation made by the fostering panel, the fostering service provider is no longer satisfied that the foster parent and his household continue to be suitable, or that the terms of the approval are appropriate, it must give written notice to the foster parent that it proposes to terminate, or revise the terms of, his approval as the case may be, together with its reasons, and invite him to submit any written representations within 28 days of the date of the notice<sup>11</sup>.

A foster parent may give notice in writing to the fostering service provider at any time that he no longer wishes to act as a foster parent, and his approval is terminated with effect from 28 days from the date on which the notice is received by the fostering service provider<sup>12</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 For the meaning of 'foster parent' see para 900 note 12 ante.

3 Fostering Services Regulations 2002, SI 2002/57, reg 29(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(1).

4 Fostering Services Regulations 2002, SI 2002/57, reg 29(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(2).

5 Fostering Services Regulations 2002, SI 2002/57, reg 29(3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(3)(a).

6 Fostering Services Regulations 2002, SI 2002/57, reg 29(3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(3)(b). For the meaning of 'responsible authority' see para 902 note 2 ante.

7 Fostering Services Regulations 2002, SI 2002/57, reg 29(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(4).

8 As to the fostering panel see para 905 ante.



9 Fostering Services Regulations 2002, SI 2002/57, reg 29(5); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(5).

10 Fostering Services Regulations 2002, SI 2002/57, reg 29(6); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(6).

11 Fostering Services Regulations 2002, SI 2002/57, reg 29(7); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(7). If the fostering service provider does not receive any representations within the period referred to, it may proceed to make its decision and as soon as practicable give written notice to the foster parent stating, as the case may be, that the foster parent and his household are still suitable and the terms of approval continue to be appropriate, that his approval is terminated as from a given date and the reasons for termination or the revised terms of the approval and the reasons for the revision: see the Fostering Services Regulations 2002, SI 2002/57, reg 29(8), (10); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(8), (10). If the fostering service provider receives any written representations within the period referred to, it must refer the case to the fostering panel for its consideration and make its decision, taking into account any recommendation made by the fostering panel and as soon as practicable provide the foster parent with written notice stating, as the case may be, that the foster parent and his household are still suitable and the terms of approval continue to be appropriate, that his approval is terminated as from a given date and the reasons for termination or the revised terms of the approval and the reasons for the revision: see the Fostering Services Regulations 2002, SI 2002/57, reg 29(9), (10); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(9), (10). A copy of any notice given must be sent to the responsible authority for any child placed with the foster parent (unless the responsible authority is also the fostering service provider) and the area authority: Fostering Services Regulations 2002, SI 2002/57, reg 29(12); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(12). For the meaning of 'area authority' see para 902 note 10 ante.

12 Fostering Services Regulations 2002, SI 2002/57, reg 29(11); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(11). A copy of any notice given must be sent to the responsible authority for any child placed with the foster parent (unless the responsible authority is also the fostering service provider) and the area authority: Fostering Services Regulations 2002, SI 2002/57, reg 29(12); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(12).

## **UPDATE**

### **908 Reviews and termination of approval**

TEXT AND NOTES--SI 2002/57 reg 29 substituted: SI 2009/394.

NOTE 11--As to the information to be sent to an independent review panel where the fostering service provider receives notification from the Secretary of State that a person has applied for a review by an independent panel of a determination see SI 2002/57 reg 29A (added by SI 2009/394).

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### **909. Necessity for foster care agreement.**

A responsible authority<sup>1</sup> must not place any child<sup>2</sup> with a person whom it has approved as a foster parent<sup>3</sup> unless he enters into a written agreement with the authority containing specified terms<sup>4</sup>, for the purpose of providing written information about the terms and conditions of the partnership between the authority and the foster parent, and providing foster parents with written confirmation of matters which should be discussed and agreed during assessment<sup>5</sup>. The matters and obligations which must be included in a foster care agreement are as follows:

- 1810 (1) the terms of the foster parent's approval<sup>6</sup>;
- 1811 (2) the amount of support and training to be given to the foster parents<sup>7</sup>;
- 1812 (3) the procedure for the review of approval of a foster parent<sup>8</sup>;
- 1813 (4) the procedure in connection with the placement of children and the matters to be included in any foster placement agreements and the respective obligations, under any such agreements<sup>9</sup>;
- 1814 (5) the arrangements for meeting any legal liabilities of the foster parent arising by reason of a placement<sup>10</sup>;
- 1815 (6) the procedure available to foster parents for making representations<sup>11</sup>;
- 1816 (7) to give written notice to the fostering service provider forthwith, with full particulars, of any intended change of the foster parent's address or in the composition of his household, any other change in his personal circumstances and any other event affecting either his capacity to care for any child placed or the suitability of his household and any further request or application relating to other applications by him or other members of his household to foster or adopt children or for registration for child minding or day care<sup>12</sup>;
- 1817 (8) not to administer corporal punishment to any child placed with him<sup>13</sup>;
- 1818 (9) to ensure that any information relating to a child placed with him, to the child's family or to any other person, which has been given to him in confidence in connection with the placement, is kept confidential and is not disclosed to any person without the consent of the responsible authority<sup>14</sup>;
- 1819 (10) to comply with the terms of any foster placement agreement<sup>15</sup>;
- 1820 (11) to care for the child placed with the foster parent as if he were a member of the foster parent's family and to promote his welfare having regard to the responsible authorities long and short term plans for the child<sup>16</sup>;
- 1821 (12) to comply with the policies and procedures (in relation to child protection, behaviour management and absence from the foster carer's home<sup>17</sup>) issued by the fostering services provider<sup>18</sup>;
- 1822 (13) to co-operate as reasonably required and allow authorised persons to interview him and visit his home at any reasonable time<sup>19</sup>;
- 1823 (14) to keep the fostering service provider informed about the child's progress and to notify it immediately of any significant events affecting the child<sup>20</sup>;
- 1824 (15) to allow the child to be removed from the foster parent's home by the responsible authority or the area authority where the provisions of the regulations dealing with termination apply<sup>21</sup>.

1 For the meaning of 'responsible authority' see para 902 note 2 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'foster parent' see para 900 note 12 ante.

4 See the Fostering Services Regulations 2002, SI 2002/57, reg 34(1)(c); the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 34(1)(c); and para 902 ante.

5 See the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 3.52. As to the guidance and regulations generally see para 163 ante. Local authorities should ensure that foster parents know the limits of their powers and rights before they take on the task of caring for a child: *Re D, L and LA (care: change of forename)* [2003] 1 FLR 339. As to information to be provided to foster carers see *Lambeth v Cardiff County Court* [2007] EWHC 869 (QB), [2007] 3 FCR 148, [2007] All ER (D) 170 (Apr) (case decided under the Boarding-out of Children (Foster Placement) Regulations 1988, SI 1988/2184 (revoked)).

6 Fostering Services Regulations 2002, SI 2002/57, reg 28(5)(b), Sch 5 para 1; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 1.

7 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 2; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 2.

8 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 3; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 3.

9 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 4; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 4.

10 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 5; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 5.

11 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 6; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 6.

12 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 7; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 7.

13 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 8; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 8.

14 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 9; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 9.

15 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 10; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 10. As to the foster placement agreement see para 910 post.

16 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 11; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 11.

17 The policies and procedures issued under the Fostering Services Regulations 2002, SI 2002/57, regs 12, 13, or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 12, 13: see para 901 ante.

18 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 12; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 12.

19 See the Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 13 (amended by SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 13.

20 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 14; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 14.

21 Fostering Services Regulations 2002, SI 2002/57, Sch 5 para 15; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 5 para 15. As to the provisions for termination of foster placements see the Fostering Services Regulations 2002, SI 2002/57, reg 36; the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36; and para 915 post.

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## **910. Foster placement agreements.**

Before making a placement<sup>1</sup>, the responsible authority<sup>2</sup> and the foster parent<sup>3</sup> must enter into a written agreement (a 'foster placement agreement')<sup>4</sup> relating to that child<sup>5</sup> covering the following matters<sup>6</sup>:

- 1825 (1) a statement by the responsible authority containing all the information which the authority considers necessary to enable the foster parent to care for the child and, in particular, information as to:
- .33
- 38. (a) the authority's arrangements for the child and the objectives of the placement in the context of its plan for the child;
- 39. (b) the child's personal history, religious persuasion and cultural and linguistic background and racial origin;
- 40. (c) the child's state of health and identified health care needs;
- 41. (d) the safety needs of the child, including any need for any special equipment or adaptation;
- 42. (e) the child's educational needs; and
- 43. (f) any needs arising from any disability the child may have<sup>7</sup>;
- .34
- 1826 (2) the responsible authority's arrangements for the financial support of the child during the placement<sup>8</sup>;
- 1827 (3) any arrangements for the giving of consent to the medical or dental examination or treatment of the child<sup>9</sup>;
- 1828 (4) the circumstances in which it is necessary to obtain in advance the approval of the responsible authority for the child to take part in school trips or to stay overnight away from the foster parent's home<sup>10</sup>;
- 1829 (5) the arrangements for visits to the child, in connection with the supervision of the placement, and the frequency of visits and reviews<sup>11</sup>;
- 1830 (6) the arrangements for the child to have contact with his parents and other persons<sup>12</sup>;
- 1831 (7) compliance by the foster parent with the terms of the foster care agreement<sup>13</sup>;
- 1832 (8) co-operation by the foster parent with any arrangements made by the responsible authority for the child<sup>14</sup>.

1 For the meaning of 'placement' see para 900 note 9 ante.

2 For the meaning of 'responsible authority' see para 902 note 2 ante.

3 For the meaning of 'foster parent' see para 900 note 12 ante.

4 As to foster placement agreements see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.11. As to the guidance and regulations generally see para 163 ante.

5 For the meaning of 'child' see para 3 ante.

6 See the Fostering Services Regulations 2002, SI 2002/57, reg 34(3); and para 902 ante. There is a need for communication of essential information if there is to be an effective partnership between parents, authorities and foster parents. In particular, foster parents need to have a full understanding of the background and history of children on whose behalf they are undertaking an exacting and responsible role and who will need their help in coping with living away from home. The foster parent will generally need to know the circumstances leading to the child's being looked after or the child's admission to care and the child's previous experiences. The social worker should discuss with the parents and any previous carers and with children according to their understanding the information which is to be given to a foster parent and why. Where there is a special reason for withholding significant information, the reason should be recorded in the child's case record: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) paras 4.12-4.15.

7 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 1; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 1.

8 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 2; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 2.

9 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 3; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 3.

10 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 4; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 4.

11 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 5; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 5. The reviews mentioned in the text are reviews under the Review of Children's Cases Regulations 1991, SI 1991/895 (as amended; revoked in relation to Wales) (see para 936 et seq post).

12 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 6; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 6.

13 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 7; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 7. As to foster care agreements see para 909 ante.

14 Fostering Services Regulations 2002, SI 2002/57, Sch 6 para 8; Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 6 para 8.

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### **911. Emergency placements.**

Where arrangements have been made for the placement of a child<sup>1</sup> in an emergency, a local authority<sup>2</sup> may place a child for a period not exceeding 24 hours with any foster parent approved by the local authority or any other fostering service provider<sup>3</sup>. Before an emergency placement is made, the authority must satisfy itself that it is the most suitable way of performing its duty to safeguard and promote the child's welfare<sup>4</sup>, and it must obtain a written agreement from the person with whom the child is to be placed that he will carry out specified duties<sup>5</sup>. The duties in question are:

- 1833 (1) to care for the child as if he were a member of that person's family<sup>6</sup>;
- 1834 (2) to permit any person authorised by the local authority or, if different, the area authority<sup>7</sup>, to visit the child at any time<sup>8</sup>;
- 1835 (3) to allow the child to be removed at any time by the local authority or, as the case may be, the area authority, when the provisions relating to the termination of placements<sup>9</sup> apply<sup>10</sup>;
- 1836 (4) to ensure that any information which that person may acquire relating to the child, or to his family or any other person, which has been given in confidence in connection with the placement is kept confidential and is not disclosed except to, or with the agreement of, the local authority<sup>11</sup>; and
- 1837 (5) to allow contact with the child in accordance with the terms of any court order relating to contact or any arrangements made or agreed by the local authority<sup>12</sup>.

Where a local authority makes such a placement outside its area it must notify the area authority<sup>13</sup>.

1 For the meaning of 'child' see para 3 ante.

2 This provision does not extend to voluntary organisations: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.24. As to the guidance and regulations generally see para 163 ante. For the meaning of 'local authority' see para 248 note 10 ante.

3 See the Fostering Services Regulations 2002, SI 2002/57, reg 38(1); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(1).

4 See the Fostering Services Regulations 2002, SI 2002/57, regs 33(a), 38(1)(b); the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 33(a), 38(1)(b); and para 903 ante.

5 See the Fostering Services Regulations 2002, SI 2002/57, reg 38(1)(a); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(1)(a).

6 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(a).

7 For the meaning of 'area authority' see para 902 note 10 ante.

8 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(b).

9     le the Fostering Services Regulations 2002, SI 2002/57, reg 36 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36 (see para 915 post).

10    Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(c).

11    Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(d).

12    Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(e). As to contact orders see para 251 ante; and as to contact with children in care see paras 278-279 ante.

13    Fostering Services Regulations 2002, SI 2002/57, reg 38(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(4).

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## **912. Immediate placements.**

An immediate placement of a child<sup>1</sup> with a person who has not been approved as a foster parent<sup>2</sup> may be made for a period not exceeding six weeks if the local authority<sup>3</sup> is satisfied that an immediate placement is necessary, provided that the local authority has interviewed the person concerned, inspected the accommodation, obtained information about other persons living in the household, and satisfied itself that:

- 1838 (1) the person is a relative<sup>4</sup> or friend of the child;
- 1839 (2) the person has made a written agreement with the local authority to carry out specified duties; and
- 1840 (3) the immediate placement is the most suitable way of performing the authority's duty to safeguard and promote the welfare of the child<sup>5</sup>.

The duties in question are:

- 1841 (a) to care for the child as if he were a member of that person's family<sup>6</sup>;
- 1842 (b) to permit any person authorised by the local authority or, if different, the area authority<sup>7</sup>, to visit the child at any time<sup>8</sup>;
- 1843 (c) to allow the child to be removed at any time by the local authority or, as the case may be, the area authority, when the provisions relating to the termination of placements<sup>9</sup> apply<sup>10</sup>;
- 1844 (d) to ensure that any information which that person may acquire relating to the child, or to his family or any other person, which has been given in confidence in connection with the placement is kept confidential and is not disclosed except to, or with the agreement of, the local authority<sup>11</sup>; and
- 1845 (e) to allow contact with the child in accordance with the terms of any court order relating to contact or any arrangements made or agreed by the local authority<sup>12</sup>.

Where a local authority makes such a placement outside its area it must notify the area authority<sup>13</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'foster parent' see para 900 note 12 ante.

3 This provision does not extend to voluntary organisations: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.24. As to the guidance and regulations generally see para 163 ante. For the meaning of 'local authority' see para 248 note 10 ante.

4 For the meaning of 'relative' see para 249 note 15 ante.

5 Fostering Services Regulations 2002, SI 2002/57, reg 38(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2). As to the requirement for the authority to be satisfied that the placement is the most suitable way of performing its duty to safeguard and promote the welfare of the child see para 903 ante.



These powers are intended to be used exceptionally in unforeseen circumstances and not for an admission to care for which contingency plans could have been made: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.26. Moreover, the authority should in practice make the fullest inquiry possible in the circumstances, including where possible checks with the local police, to satisfy itself that nothing is known to suggest that the relative or friend is not a suitable person to be entrusted with the child; where possible, the parent's views or those of other relatives should be sought: see para 4.25. As to the guidance and regulations generally see para 163 ante.

6 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(a).

7 For the meaning of 'area authority' see para 902 note 10 ante.

8 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(b).

9 Ie the Fostering Services Regulations 2002, SI 2002/57, reg 36 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36 (see para 915 post).

10 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(c).

11 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(d).

12 Fostering Services Regulations 2002, SI 2002/57, reg 38(3)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(3)(e). As to contact orders see para 251 ante; and as to contact with children in care see paras 278-279 ante.

13 Fostering Services Regulations 2002, SI 2002/57, reg 38(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(4).

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### **913. Short term placements.**

Specific provision is made by regulations<sup>1</sup> to cover the position where a responsible authority<sup>2</sup> has arranged to place a child<sup>3</sup> in a series of short term placements with the same foster parent<sup>4</sup> and the arrangement is such that no single placement is to last for more than four weeks and the total duration of the placements is not to exceed 120 days in any period of 12 months<sup>5</sup>. Such placements may be treated as a single placement<sup>6</sup>, with modification of the provisions relating to the timing of visits<sup>7</sup>.

<sup>1</sup> See the Fostering Services Regulations 2002, SI 2002/57 (as amended) and the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended).

<sup>2</sup> For the meaning of 'responsible authority' see para 902 note 2 ante.

<sup>3</sup> For the meaning of 'child' see para 3 ante.

<sup>4</sup> For the meaning of 'foster parent' see para 900 note 12 ante.

<sup>5</sup> Fostering Services Regulations 2002, SI 2002/57, reg 37(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 37(1).

<sup>6</sup> See the Fostering Services Regulations 2002, SI 2002/57, reg 37(2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 37(2).

<sup>7</sup> See the Fostering Services Regulations 2002, SI 2002/57, reg 37(3); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 37(3).

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#### **914. Supervision of placement.**

A responsible authority<sup>1</sup> must satisfy itself that the welfare of each child<sup>2</sup> placed by it continues to be suitably provided for by the placement<sup>3</sup>. For that purpose the authority must make arrangements for a person whom it has authorised to visit the child in the home in which he is placed, from time to time as circumstances may require<sup>4</sup>, and when reasonably requested by the child or the foster parent<sup>5</sup>, and in particular in the first year of the placement, within one week from its beginning and then at intervals of not more than six weeks, and subsequently at intervals of not more than three months<sup>6</sup>. In the case of an immediate placement<sup>7</sup>, the authority must arrange for the child to be visited at least once in each week during the placement<sup>8</sup>. On each occasion on which the child is visited, the authority must cause the authorised person, if considered appropriate, to arrange to see the child alone unless the child, being of sufficient age and understanding to do so, refuses<sup>9</sup> and on each occasion on which a child is visited the responsible authority must cause a written report to be prepared by the person who made the visit<sup>10</sup>.

1 For the meaning of 'responsible authority' see para 902 note 2 ante.

2 For the meaning of 'child' see para 3 ante.

3 Fostering Services Regulations 2002, SI 2002/57, reg 35(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(1). As to the supervision of placement see further the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.19. As to the guidance and regulations generally see para 163 ante.

4 Fostering Services Regulations 2002, SI 2002/57, reg 35(1)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(1)(a).

5 Fostering Services Regulations 2002, SI 2002/57, reg 35(1)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(1)(b). For the meaning of 'foster parent' see para 900 note 12 ante.

6 Fostering Services Regulations 2002, SI 2002/57, reg 35(1)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(1)(c).

7 I.e. a placement under the Fostering Services Regulations 2002, SI 2002/57, reg 38 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38 (see paras 911-912 ante).

8 Fostering Services Regulations 2002, SI 2002/57, reg 35(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(2).

9 Fostering Services Regulations 2002, SI 2002/57, reg 35(3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(3)(a).

10 Fostering Services Regulations 2002, SI 2002/57, reg 35(3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35(3)(b). The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 4.21 sets out the purposes which are served by visiting the child in a foster home. These include a measure of child protection, to talk to the child, to safeguard and reassure a child who may feel isolated and vulnerable who is away from family and friends. It is said that some visits should be unannounced in order to provide a balanced perspective of the quality of life in the foster home. Visits provide an opportunity to evaluate and monitor the achievement of goals, monitor the contact arrangements and give support to the foster parent. As to the guidance and regulations generally see para 163 ante.

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### **915. Termination of placements.**

A responsible authority<sup>1</sup> must not allow the placement of a child<sup>2</sup> with a particular person to continue if it appears to it that the placement is no longer the most suitable way of performing its duty<sup>4</sup> to safeguard and promote the child's welfare and to make such use of services available for children cared for by their own parents as appears to the authority reasonable in the case<sup>5</sup>. Where it appears to the area authority<sup>6</sup> that continuation of the placement will be detrimental to the welfare of the child, the area authority must remove the child forthwith<sup>7</sup>, and must forthwith notify the responsible authority<sup>8</sup>.

1 For the meaning of 'responsible authority' see para 902 note 2 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'foster parent' see para 900 note 12 ante.

4 ie its duty under the Children Act 1989 s 22(3) or s 61(1)(a), (b): see paras 867 ante, 977 post.

5 Fostering Services Regulations 2002, SI 2002/57, reg 36(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36(1).

6 For the meaning of 'area authority' see para 902 note 10 ante.

7 Fostering Services Regulations 2002, SI 2002/57, reg 36(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36(2).

8 Fostering Services Regulations 2002, SI 2002/57, reg 36(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 36(3).

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### **916. Arrangements between local authorities and voluntary organisations as to placements.**

A local authority<sup>1</sup> may make arrangements for certain of its duties<sup>2</sup> to be discharged on its behalf by a registered person<sup>3</sup>. However, no arrangements may be made unless a local authority has entered into a written agreement with the registered person which sets out:

- 1846 (1) which of its duties the local authority proposes to delegate<sup>4</sup>;
- 1847 (2) the services to be provided to the local authority by the registered person<sup>5</sup>;
- 1848 (3) the arrangements for the selection by the local authority of particular foster parents from those approved by the registered person<sup>6</sup>;
- 1849 (4) a requirement for the registered person to submit reports to the local authority on any placement as may be required by the authority and, in particular, following any visit carried out under its duty to supervise placements<sup>7</sup>; and
- 1850 (5) the arrangements for the termination of the agreement<sup>8</sup>.

Where a local authority proposes to make an arrangement in respect of a particular child, the local authority must enter into an agreement with the registered person in respect of that child which sets out:

- 1851 (a) details of the particular foster parent with whom the child is to be placed<sup>9</sup>;
- 1852 (b) details of any services the child is to receive<sup>10</sup>;
- 1853 (c) the terms (including as to payment) of the proposed foster placement agreement<sup>11</sup>;
- 1854 (d) the arrangements for record keeping about the child and for the return of records at the end of the placement<sup>12</sup>;
- 1855 (e) a requirement for the registered person to notify the local authority immediately in the event of any concerns about the placement<sup>13</sup>; and
- 1856 (f) whether and on what basis other children may be placed with the foster parent<sup>14</sup>.

<sup>1</sup> For the meaning of 'local authority' see para 248 note 10 ante.

<sup>2</sup> ie its duties under the Fostering Services Regulations 2002, SI 2002/57, regs 34, 35, 36(1), 37, or as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 34, 35, 36(1), 37 (see paras 902, 913-915 ante).

<sup>3</sup> Fostering Services Regulations 2002, SI 2002/57, reg 40(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(1). For these purposes, 'registered person' means a person who is the registered person in respect of an independent fostering agency: Fostering Services Regulations 2002, SI 2002/57, reg 40(8); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(8). 'Independent fostering agency' means a fostering agency falling within the Care Standards Act 2000 s 4(4)(a) (discharging functions of local authorities in connection with placing of children with foster parents) (see para 985 post): Fostering Services Regulations 2002, SI 2002/57, reg 2(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 2(1). However, no such arrangements may be made in respect of a particular child, unless a local authority has performed its duties under the Fostering Services Regulations 2002, SI 2002/57, reg 33, or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 33 (see para 903 ante): Fostering Services Regulations 2002, SI 2002/57, reg 40(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(2). Where a local

authority makes arrangements with a registered person for the registered person to provide foster parents for the purposes of a short term placement (see para 913 ante) the local authority may also make arrangements for the registered person to perform the local authority's duty under the Fostering Services Regulations 2002, SI 2002/57, reg 33(b) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 33(b) in relation to that placement on its behalf: Fostering Services Regulations 2002, SI 2002/57, reg 40(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(3). A foster parent with whom a child is to be placed in accordance with these provisions is, in relation to that placement, to be treated as a foster parent for the purposes of the Fostering Services Regulations 2002, SI 2002/57, Sch 2 para 12(d) and, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, Sch 2 para 12(d) (see para 901 ante): Fostering Services Regulations 2002, SI 2002/57, reg 40(6); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(6).

4 Fostering Services Regulations 2002, SI 2002/57, reg 40(4)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(4)(a).

5 Fostering Services Regulations 2002, SI 2002/57, reg 40(4)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(b). A local authority must report any concerns it may have about the services provided by a registered person: see the Fostering Services Regulations 2002, SI 2002/57, reg 40(7) (amended by SI 2007/603); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(7).

6 Fostering Services Regulations 2002, SI 2002/57, reg 40(4)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(4)(c).

7 Fostering Services Regulations 2002, SI 2002/57, reg 40(4)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(4)(d). The text refers to the local authority's duty to supervise placements under the Fostering Services Regulations 2002, SI 2002/57, reg 35 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 35: see para 914 ante.

8 Fostering Services Regulations 2002, SI 2002/57, reg 40(4)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(4)(e).

9 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(a).

10 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(b).

11 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(c).

12 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(d).

13 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(e).

14 Fostering Services Regulations 2002, SI 2002/57, reg 40(5)(f); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 40(5)(f).

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### **917. Local authority visits to children placed by voluntary organisations.**

A local authority<sup>1</sup> must arrange for every child<sup>2</sup> who is accommodated with a foster parent<sup>3</sup> in its area by a voluntary organisation to be visited by a person authorised by the local authority, as follows:

- 1857 (1) within 28 days of the placement<sup>4</sup>;
- 1858 (2) within 14 days of the receipt of a request from the voluntary organisation which made the placement<sup>5</sup>;
- 1859 (3) where the authority is informed that the welfare of the child is not being safeguarded or promoted, as soon as reasonably practicable<sup>6</sup>;
- 1860 (4) where the local authority is satisfied, following a visit under these provisions, that the child's welfare is being safeguarded and promoted, at intervals of not more than six months<sup>7</sup>.

The authority must ensure that the a person carrying out a visit in accordance with heads (1) to (4) above:

- 1861 (a) sees the child during the course of the visit or, if the child is not there, makes arrangements to see him as soon as reasonably practicable<sup>8</sup>; and
- 1862 (b) takes steps to discover whether the voluntary organisation has made suitable arrangements to perform its duties<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'foster parent' see para 900 note 12 ante.

4 Fostering Services Regulations 2002, SI 2002/57, reg 41(1)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(1)(a). This is subject to the Fostering Services Regulations 2002, SI 2002/57, reg 37(4) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 37(4) (see para 913 ante).

5 Fostering Services Regulations 2002, SI 2002/57, reg 41(1)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(1)(b).

6 Fostering Services Regulations 2002, SI 2002/57, reg 41(1)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(1)(c).

7 Fostering Services Regulations 2002, SI 2002/57, reg 41(1)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(1)(d). The duty of foster parents to promote the child's welfare is one of the matters dealt with in the foster care agreement: see para 909 ante.

8 Fostering Services Regulations 2002, SI 2002/57, reg 41(2)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(2)(a).

9 Fostering Services Regulations 2002, SI 2002/57, reg 41(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(2)(b). The duties mentioned in the text are those under the Children Act 1989 s 61 (see para 977 post) and the Fostering Services Regulations 2002, SI 2002/57, reg 41 or, as the case may be, the

Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41. A local authority must report any concerns it may have about the voluntary organisation: see the Fostering Services Regulations 2002, SI 2002/57, reg 41(3); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 41(3).



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### **918. Register of foster parents.**

A fostering service provider<sup>1</sup> must enter, in a register<sup>2</sup> kept for the purpose, the following particulars:

- 1863 (1) the name, address, date of birth and sex of the foster parent<sup>3</sup>;
- 1864 (2) the date of his approval and of each review of his approval<sup>4</sup>; and
- 1865 (3) the current terms of the notice of approval<sup>5</sup>.

A local authority fostering service must also enter the following particulars:

- 1866 (a) the name and address of each person with whom it has placed a child under immediate and emergency provisions<sup>6</sup>;
- 1867 (b) the date of the agreement entered into<sup>7</sup> in such a case<sup>8</sup>;
- 1868 (c) the terms of any such agreement currently in force<sup>9</sup>.

The register must be kept securely and may not be disclosed to any person except in accordance with any statutory provision under which such access is authorised or any court order authorising such access<sup>10</sup>.

1 For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 Any entry in the register compiled under the Fostering Services Regulations 2002, SI 2002/57, reg 30(1) or reg 30(4) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(1) or reg 30(4) (see para 919 post) must be retained for at least 10 years from the date on which the person's approval or, as the case may be, the placement, is terminated: see the Fostering Services Regulations 2002, SI 2002/57, reg 32(1), (2); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(1), (2). This requirement may be complied with by retaining the original written records or copies of them or by keeping all or part of the information contained in them in some other accessible form such as a computer record: Fostering Services Regulations 2002, SI 2002/57, reg 32(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(4).

3 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (2)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (2)(a). For the meaning of 'foster parent' see para 900 note 12 ante.

4 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (2)(b). As to the approval of foster parents see para 907 ante.

5 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (2)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (2)(c).

6 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (3)(a). The immediate and emergency provisions mentioned in the text are the Fostering Services Regulations 2002, SI 2002/57, reg 38(2) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2) (see para 912 ante).

7 I.e. the agreement entered into in accordance with the Fostering Services Regulations 2002, SI 2002/57, reg 38(2)(b) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2)(b) (see para 912 ante).

8 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (3)(b).

9 Fostering Services Regulations 2002, SI 2002/57, reg 31(1), (3)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 31(1), (3)(c).

10 Fostering Services Regulations 2002, SI 2002/57, reg 32(5); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(5).

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### **919. Case records.**

The fostering service provider<sup>1</sup> must compile and maintain a case record for each foster parent<sup>2</sup> approved by it which must include the following information<sup>3</sup>:

- 1869 (1) a copy of the notice of approval<sup>4</sup>;
- 1870 (2) a copy of the foster care agreement<sup>5</sup>;
- 1871 (3) a copy of any report of a review of approval<sup>6</sup>;
- 1872 (4) a copy of any notice of termination of approval<sup>7</sup>;
- 1873 (5) a copy of any agreement to carry out duties under an emergency placement<sup>8</sup>;
- 1874 (6) a copy of the assessment report on the suitability of the foster carer<sup>9</sup> and a copy of any other report submitted to the fostering panel<sup>10</sup>;
- 1875 (7) a copy of any recommendation made by the fostering panel<sup>11</sup>;
- 1876 (8) a record of each placement with the foster parent including the name, age and sex of each child, the dates of commencement and termination of the placement and the circumstances of termination<sup>12</sup>;
- 1877 (9) the information obtained by the fostering service provider in relation to the approval and review of termination of the approval<sup>13</sup>.

A local authority must maintain a case record for each person<sup>14</sup> with whom a child is placed under immediate placement provisions<sup>15</sup> which must include in relation to that person:

- 1878 (a) the agreement entered into for the purpose of making the immediate placement<sup>16</sup>;
- 1879 (b) a record in relation to the placement, including the name, age and sex of each child, the dates of commencement and termination of the placement and the circumstances of termination<sup>17</sup>;
- 1880 (c) the information obtained in relation to enquiries carried out in respect of the immediate placement<sup>18</sup>.

The fostering service provider must compile a record for each person<sup>19</sup> whom it does not approve as a foster parent, or who withdraws his application prior to approval, which must include in relation to him:

- 1881 (i) the information in connection with the assessment<sup>20</sup>;
- 1882 (ii) any report submitted to the fostering panel and any recommendations made by the fostering panel<sup>21</sup>; and
- 1883 (iii) any notification given relating to the approval<sup>22</sup>.

The records must be kept securely and may not be disclosed to any person except in accordance with any statutory provision under which such access is authorised or any court order authorising such access<sup>23</sup>.

<sup>1</sup> For the meaning of 'fostering service provider' see para 900 note 13 ante.

2 For the meaning of 'foster parent' see para 900 note 12 ante. The records compiled by a local authority under the Fostering Services Regulations 2002, SI 2002/57, reg 30(1) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(1) must under be kept for at least 10 years from the date on which that person's approval is terminated: Fostering Services Regulations 2002, SI 2002/57, reg 32(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(1). This requirement may be complied with by retaining the original written records or copies of them or by keeping all or part of the information contained in them in some other accessible form such as a computer record: Fostering Services Regulations 2002, SI 2002/57, reg 32(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(4).

3 See the Fostering Services Regulations 2002, SI 2002/57, reg 30(1); and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(1).

4 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(a). The notice of approval referred to in the text is the one given under the Fostering Services Regulations 2002, SI 2002/57, reg 28(5)(a) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28(5)(a) (see para 907 ante).

5 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(b). As to foster care agreements see para 909 ante.

6 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(c). The text refers to a report prepared under the Fostering Services Regulations 2002, SI 2002/57, reg 29(4) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(4) (see para 908 ante).

7 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(d); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(d). A notice of termination of approval referred to in the text is a notice given under the Fostering Services Regulations 2002, SI 2002/57, reg 29(10) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 29(10) (see para 908 note 11 ante).

8 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(e); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(e).

9 Ie a copy of the report prepared under the Fostering Services Regulations 2002, SI 2002/57, reg 27(2)(e) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 27(2)(e) (see para 906 ante).

10 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(f); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(f). As to the fostering panel see para 905 ante.

11 Fostering Services Regulations 2002, SI 2002/57, reg 30(2)(g); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(2)(g).

12 Fostering Services Regulations 2002, SI 2002/57, reg 30(3)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(3)(a).

13 Fostering Services Regulations 2002, SI 2002/57, reg 30(3)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(3)(b).

14 The records compiled by a local authority under the Fostering Services Regulations 2002, SI 2002/57, reg 30(4) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(4) in relation to a person with whom a child is placed under the Fostering Services Regulations 2002, SI 2002/57, reg 38(2) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2) (see para 912 ante) must be retained for at least 10 years from the date on which the placement is terminated: Fostering Services Regulations 2002, SI 2002/57, reg 32(2); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(2). This requirement may be complied with by retaining the original written records or copies of them or by keeping all or part of the information contained in them in some other accessible form such as a computer record: Fostering Services Regulations 2002, SI 2002/57, reg 32(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(4).

15 Ie under the Fostering Services Regulations 2002, SI 2002/57, reg 38(2) or the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2) (see para 912 ante).

16 Fostering Services Regulations 2002, SI 2002/57, reg 30(4)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(4)(a). The agreement referred to in the text is one entered into in accordance with the Fostering Services Regulations 2002, SI 2002/57, reg 38(2)(b) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2)(b) (see para 912 head (2) ante).

17 Fostering Services Regulations 2002, SI 2002/57, reg 30(4)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(4)(b).

18 Fostering Services Regulations 2002, SI 2002/57, reg 30(4)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(4)(c). The enquiries referred to in the text are enquiries carried out under the Fostering Services Regulations 2002, SI 2002/57, reg 38(2) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 38(2) (see para 912 ante).

19 The records compiled by a local authority under the Fostering Services Regulations 2002, SI 2002/57, reg 30(5) or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(5) must be retained for at least three years from the refusal or withdrawal, as the case may be, of the application to become a foster parent: Fostering Services Regulations 2002, SI 2002/57, reg 32(3); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(3). This requirement may be complied with by retaining the original written records or copies of them or by keeping all or part of the information contained in them in some other accessible form such as a computer record: Fostering Services Regulations 2002, SI 2002/57, reg 32(4); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(4).

20 Fostering Services Regulations 2002, SI 2002/57, reg 30(5)(a); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(5)(a).

21 Fostering Services Regulations 2002, SI 2002/57, reg 30(5)(b); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(5)(b).

22 Fostering Services Regulations 2002, SI 2002/57, reg 30(5)(c); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 30(5)(c). The text refers to notification given under the Fostering Services Regulations 2002, SI 2002/57, reg 28 or, as the case may be, the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 28 (see para 907 ante).

23 Fostering Services Regulations 2002, SI 2002/57, reg 32(5); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 32(5).

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## **920. Placements outside England and Wales.**

A voluntary organisation<sup>1</sup>, acting on its own behalf or on behalf of a local authority, may not place a child<sup>2</sup> for whose placement it is responsible outside the British Islands<sup>3</sup>. Where a responsible authority in England<sup>4</sup> makes arrangements to place a child outside England it must ensure that, so far as reasonably practicable, requirements are complied with in relation to the child which would have applied<sup>5</sup> if the child had been placed in England<sup>6</sup>. Where a responsible authority in Wales makes arrangements to place a child outside Wales it must ensure that, so far as reasonably practicable, requirements are complied with in relation to the child which would have applied<sup>7</sup> if the child had been placed in Wales<sup>8</sup>.

1 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 Fostering Services Regulations 2002, SI 2002/57, reg 39(1); Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 39(1). For the meaning of 'British Islands' see para 103 note 6 ante.

4 For the meaning of 'responsible authority' see para 902 note 2 ante.

5 Ie which would have applied under the provisions of the Fostering Services Regulations 2002, SI 2002/57 (as amended) (see paras 900-921 ante).

6 Ibid reg 39(2).

7 Ie which would have applied under the provisions of the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended) (see paras 900-921 ante).

8 Ibid reg 39(2).

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## **921. Regulation of the exercise of relevant fostering functions.**

Regulations<sup>1</sup> may make provision about the exercise by local authorities<sup>2</sup> of relevant fostering functions<sup>3</sup>, and may in particular make provision:

- 1884 (1) as to the persons who are fit to work for local authorities in connection with the exercise of such functions<sup>4</sup>;
- 1885 (2) as to the fitness of premises to be used by local authorities in their exercise of such functions<sup>5</sup>;
- 1886 (3) as to the management and control of the operations of local authorities in their exercise of such functions<sup>6</sup>;
- 1887 (4) as to the numbers of persons, or persons of any particular type, working for local authorities in connection with the exercise of such functions<sup>7</sup>;
- 1888 (5) as to the management and training of such persons<sup>8</sup>;
- 1889 (6) as to the fees or expenses which may be paid to persons assisting local authorities in making decisions in the exercise of such functions<sup>9</sup>.

1 'Regulations', except where provision is made for them to be made by the Secretary of State or the Welsh Ministers, means regulations made by the appropriate minister: Care Standards Act 2000 s 121(1). As to the Secretary of State and the Welsh Ministers see para 155 ante. 'Appropriate minister' means: (1) in relation to England, the Secretary of State; (2) in relation to Wales, the Welsh Ministers; and (3) in relation to England and Wales, the Secretary of State and the Welsh Ministers acting jointly: see s 121(1). Regulations may provide that a contravention of or failure to comply with any specified provision of the regulations is an offence and a person guilty of an offence under the regulations is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 52. As to the standard scale see para 132 note 2 ante. Regulations may require a local authority to make to the registration authority an annual return containing such information with respect to the exercise by the local authority of relevant functions as may be prescribed: s 50(1). Provision may be made by the regulations as to the period in respect of which and date by which the return is to be made: s 50(2).

2 For the meaning of 'local authority' see para 248 note 10 ante; definition applied by *ibid* s 121(1).

3 'Relevant fostering functions' means functions under the Children Act 1989 s 23(2)(a) (see para 900 ante) or regulations under Sch 2 para 12(1)(a), (b) or (d) to (f) (see paras 877-878 ante): Care Standards Act 2000 s 43(3)(b).

4 *Ibid* s 48(1)(a). Such regulations may, in particular, make provision for prohibiting persons from working for local authorities in such positions as may be prescribed unless they are registered in, or in a particular part of, one of the registers maintained under s 56(1) (see SOCIAL SERVICES AND COMMUNITY CARE): s 48(2). 'Prescribed' means prescribed by regulations: s 121(1). As to the regulations that have been made see the Fostering Services Regulations 2002, SI 2002/57 (as amended); the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended); and para 900 et seq ante.

5 Care Standards Act 2000 s 48(1)(b).

6 *Ibid* s 48(1)(c).

7 *Ibid* s 48(1)(d).

8 *Ibid* s 48(1)(e). As to proceedings for offences under s 48 see ss 29, 30 (applied by virtue of s 53); and SOCIAL SERVICES AND COMMUNITY CARE.

9 *Ibid* s 48(1)(f) (added by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 103, 114).





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## **(5) ADVICE AND ASSISTANCE**

### **(i) Advice and Assistance for Certain Children and Young Persons**

#### **922. Persons qualifying for advice and assistance.**

A local authority<sup>1</sup> is under a number of duties in respect of a person qualifying for advice and assistance<sup>2</sup>. 'A person qualifying for advice and assistance' is a person:

- 1890 (1) who has reached the age of 16 but not the age of 21<sup>3</sup>;
- 1891 (2) with respect to whom a special guardianship order<sup>4</sup> is in force (or if he has reached the age of 18, was in force when he reached that age)<sup>5</sup>; and
- 1892 (3) who was, immediately before the making of that order, looked after by a local authority<sup>6</sup>.

However, where heads (1) to (3) above do not apply a person is still a person qualifying for advice and assistance if he:

- 1893 (a) is under 21<sup>7</sup>; and
- 1894 (b) at any time after reaching the age of 16 but while still a child<sup>8</sup> was, but is no longer, looked after, accommodated or fostered<sup>9</sup>.

For the purposes of head (b) above, 'looked after, accommodated or fostered' means<sup>10</sup>:

- 1895 (i) looked after by a local authority<sup>11</sup>;
- 1896 (ii) accommodated by or on behalf of a voluntary organisation<sup>12</sup>;
- 1897 (iii) accommodated in a private children's home<sup>13</sup>;
- 1898 (iv) accommodated for a consecutive period of at least three months<sup>14</sup>: (A) by any local health board, special health authority, primary care trust or local education authority<sup>15</sup>; or (B) in any care home or independent hospital or in any accommodation provided by a national health service trust or an NHS foundation trust<sup>16</sup>; or
- 1899 (v) privately fostered<sup>17</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 See the Children Act 1989 ss 24, 24A-24D (as added and amended); and paras 923-926 post.

3 Ibid s 24(1), (1A)(a) (s 24 substituted by the Children (Leaving Care) Act 2000 s 4(1); and the Children Act 1989 s 24(1) further substituted, and s 24(1A), (1B) added, by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 60(a)).

4 As to special guardianship orders see para 151 ante.

5 Children Act 1989 s 24(1) (as substituted: see note 3 supra), s 24(1A)(b) (as added: see note 3 supra).

6 Ibid s 24(1) (as substituted: see note 3 supra), s 24(1A)(c) (as added: see note 3 supra).

7 Ibid s 24(1) (as substituted: see note 3 supra), s 24(1B)(a) (as added: see note 3 supra).

8 For the meaning of 'child' see para 3 ante.

9 Children Act 1989 s 24(1) (as substituted: see note 3 supra), s 24(1B)(b) (as added: see note 3 supra).

10 Ibid s 24(2) (as substituted (see note 3 supra); and amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 50, 60(b)).

11 Children Act 1989 s 24(2)(a) (as substituted: see note 3 supra). In the case of a person qualifying for advice and assistance by virtue of s 24(2)(a) (as substituted), it is the duty of the local authority which last looked after him to take such steps as it thinks appropriate to contact him at such times as it thinks appropriate with a view to discharging its functions under ss 24A, 24B (as added and amended) (see paras 923-924 post): s 24(4) (as so substituted). In each of ss 24A, 24B (as added and amended), the local authority under the duty or having the power mentioned there ('the relevant authority') is:

698 (1) in the case of a person to whom s 24(1A) (as added) applies, a local authority determined in accordance with regulations made by the Secretary of State or the Welsh Ministers (s 24(5)(za) (s 24 as so substituted; s 24(5)(za) added by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 60(c)));

699 (2) in the case of a person qualifying for advice and assistance by virtue of the Children Act 1989 s 24(2)(a) (as substituted), the local authority which last looked after him (s 24(5)(a) (as so substituted)); or

700 (3) in the case of any other person qualifying for advice and assistance, the local authority within whose area the person is (if he has asked for help of a kind which can be given under s 24A (as added and amended) or s 24B (as added and amended) (s 24(5)(b) (as so substituted))).

In relation to head (1) supra see the Special Guardianship Regulations 2005, SI 2005/1109, reg 22; and the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 13.

12 Children Act 1989 s 24(2)(b) (as substituted: see note 3 supra). For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to the provision of accommodation by a voluntary organisation see para 975 post.

13 Ibid s 24(2)(c) (as substituted: see note 3 supra). For the meaning of 'private children's home' see para 980 note 2 post. As to accommodation in a private children's home see para 980 et seq post.

14 Ibid s 24(2)(d) (as substituted: see note 3 supra). Section 24(2)(d) (as substituted) applies even if the period of three months began before the child reached the age of 16: s 24(3) (as so substituted).

15 Ibid s 24(2)(d)(i) (as substituted (see note 3 supra); and amended by the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(b)). As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74; as to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq; and as to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

16 Children Act 1989 s 24(2)(d)(ii) (as substituted (see note 3 supra); and amended by the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 75, 76). As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. For the meaning of 'care home' see para 985 note 1 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)).

17 Children Act 1989 s 24(2)(e) (as substituted: see note 3 supra). As to the private fostering of children see para 1049 et seq post.

## UPDATE

### 922 Persons qualifying for advice and assistance

NOTE 11--Head (1). Children Act 1989 s 24(5)(za) amended: Children and Young Persons Act 2008 Sch 3 para 12.



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### **923. Relevant authority duty to advise and assist.**

The relevant authority<sup>1</sup> must consider whether the following conditions are satisfied in relation to a person qualifying for advice and assistance<sup>2</sup>. The conditions are that:

- 1900 (1) he needs help of a kind which the authority can give<sup>3</sup>; and
- 1901 (2) in the case of a person who was not being looked after by any local authority<sup>4</sup>, it is satisfied that the person by whom he was being looked after does not have the necessary facilities for advising or befriending him<sup>5</sup>.

If the conditions are satisfied it must advise and befriend him if he is person qualifying for advice and assistance<sup>6</sup> and he was being looked after by a local authority or was accommodated by or on behalf of a voluntary organisation<sup>7</sup>, and in any other case it may do so<sup>8</sup>. Where, as a result of these provisions, a local authority is under a duty, or empowered, to advise and befriend a person, it may also give him assistance<sup>9</sup>. The assistance may be in kind and, in exceptional circumstances, assistance may be given by providing accommodation<sup>10</sup> or in cash<sup>11</sup>. Where such assistance<sup>12</sup> is given it may be unconditional or subject to conditions as to repayment<sup>13</sup>. Before giving any assistance or imposing any conditions the authority must have regard to the means of the child<sup>14</sup> concerned and of each of his parents<sup>15</sup>. No person is liable to make a repayment of assistance or of its value at any time when he is in receipt of income support<sup>16</sup>, of any element of child tax credit other than the family element of working tax credit, or of an income-based jobseeker's allowance<sup>17</sup>.

1 For the meaning of 'relevant authority' see para 922 note 11 ante.

2 Children Act 1989 s 24A(1) (s 24A added by the Children (Leaving Care) Act 2000 s 41). For the meaning of 'person qualifying for advice and assistance' see para 922 ante.

3 Children Act 1989 s 24A(2)(a) (as added: see note 2 supra). The text refers to help given under s 24A (as added and amended) or s 24B (as added and amended) (see para 924 post).

4 For the meaning of 'local authority' see para 248 note 10 ante. As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

5 Children Act 1989 s 24A(2)(b) (as added: see note 2 supra).

6 I.e. a person to whom *ibid* s 24(1A) (as added) or s 24(1B) (as added) (see para 922 ante) applies.

7 *Ibid* s 24A(3)(a) (as added (see note 2 supra); and amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 61(b)). For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to the provision of accommodation by a voluntary organisation see para 975 post.

8 Children Act 1989 s 24A(3) (as added: see note 2 supra).

9 *Ibid* s 24A(4) (as added: see note 2 supra).

10 This applies if in the circumstances assistance may not be given in respect of the accommodation under *ibid* s 24B (as added and amended) (see para 924 post).

11 *Ibid* s 24A(5) (as added (see note 2 supra); and amended by the Adoption and Children Act 2002 s 116(3)).

12 le assistance given under the Children Act 1989 s 24A (as added and amended) or s 24B (as added and amended) (see para 924 post).

13 Ibid s 17(7); applied by s 24A(6) (as added: see note 2 supra).

14 For the meaning of 'child' see para 3 ante.

15 Children Act 1989 s 17(8); applied by s 24A(6) (as added: see note 2 supra).

16 le under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 173 et seq.

17 Children Act 1989 s 17(9) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(a); the Jobseekers Act 1995 s 41(4), Sch 2 para 19(2); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 16(1), (2)); applied by the Children Act 1989 s 24A(6) (as added: see note 2 supra). As from a day to be appointed the Children Act 1989 s 17(9) (as amended) is further amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (2) so that a person in receipt of an income-related employment and support allowance is also not liable to make a repayment. At the date at which this volume states the law no such day had been appointed. For the meaning of 'income-based jobseeker's allowance' see para 535 note 18 ante. The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of the Children Act 1989 Pt III (ss 17-30) (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit: Children Act 1989 s 17(12) (added by the Tax Credits Act 2002 Sch 3 para 16(3)). See the Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077. See further SOCIAL SECURITY AND PENSIONS. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 512 et seq.

## **UPDATE**

### **923 Relevant authority duty to advise and assist**

NOTE 17--Appointed day is 27 October 2008: SI 2008/787.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(i) Advice and Assistance for Certain Children and Young Persons/924. Assistance for employment, education and training.

#### **924. Assistance for employment, education and training.**

The relevant local authority<sup>1</sup> may give assistance to any person who qualifies for advice and assistance<sup>2</sup> by contributing to expenses incurred by him in living near the place where he is, or will be, employed or seeking employment<sup>3</sup>. The relevant local authority may give assistance to a person who:

- 1902 (1) is under 24<sup>4</sup>; and
- 1903 (2) qualifies for advice and assistance<sup>5</sup>, or would have done so if he were under 21<sup>6</sup>.

It may give assistance by: (a) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training<sup>7</sup>; or (b) making a grant to enable him to meet expenses connected with his education or training<sup>8</sup>.

Where a local authority is so assisting a person it may disregard any interruption in his attendance on the course if he resumes it as soon as is reasonably practicable<sup>9</sup>.

Where the local authority is satisfied that such a person who is in full time further or higher education needs accommodation during a vacation because his term-time accommodation is not available to him then, it must give him assistance by providing him with suitable accommodation during the vacation, or paying him enough to enable him to secure such accommodation himself<sup>10</sup>.

Where such assistance<sup>11</sup> is given it may be unconditional or subject to conditions as to repayment<sup>12</sup>. Before giving any assistance or imposing any conditions the authority must have regard to the means of the child<sup>13</sup> concerned and of each of his parents<sup>14</sup>. No person is liable to make a repayment of assistance or of its value at any time when he is in receipt of income support<sup>15</sup>, of any element of child tax credit other than the family element of working tax credit, or of an income-based jobseeker's allowance<sup>16</sup>.

1 For the meaning of 'relevant authority' see para 922 note 11 ante.

2 Ie by virtue of the Children Act 1989 s 24(1A) (as added) or s 24(2)(a) (as substituted): see para 922 ante. For the meaning of 'person qualifying for advice and assistance' see para 922 ante.

3 Ibid s 24B(1) (s 24B added by the Children (Leaving Care) Act 2000 s 4(1); and the Children Act 1989 s 24B(1) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 54, 62).

4 Children Act 1989 s 24B(3)(a) (as added: see note 3 supra).

5 Ie by virtue of ibid s 24(1A) (as substituted and added) or s 24(2)(a) (as substituted): see para 922 ante.

6 Ibid s 24B(3)(b) (as added: see note 3 supra).

7 Ibid s 24B(2)(a) (as added: see note 3 supra).

8 Ibid s 24B(2)(b) (as added: see note 3 supra).

9 Ibid s 24B(4) (as added: see note 3 supra).

10 Ibid s 24B(5) (as added: see note 3 supra). The Secretary of State or the Welsh Ministers may prescribe the meaning of 'full time', 'further education', 'higher education' and 'vacation' for the purposes of s 24B(5) (as added): s 24B(6) (as so added). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). See the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 11(3), by virtue of which 'further education' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 18) save that for these purposes it only includes further education which is provided on a full time residential basis; and 'higher education' means education provided by means of a course of a description referred to in regulations made under the Teaching and Higher Education Act 1998 s 22 (see EDUCATION vol 15(2) (2006 Reissue) para 1046). The Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 11(3) makes corresponding provision in relation to Wales. As to the Secretary of State and the Welsh Ministers see para 155 ante,

11 The assistance given under the Children Act 1989 s 24A (as added and amended) (see para 923 ante) or s 24B (as added and amended).

12 Ibid s 17(7); applied by s 24A(6) (added by the Children (Leaving Care) Act 2000 s 4(1)).

13 For the meaning of 'child' see para 3 ante.

14 Children Act 1989 s 17(8); applied by s 24A(6) (as added: see note 12 supra).

15 The under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 173 et seq.

16 Children Act 1989 s 17(9) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(a); the Jobseekers Act 1995 s 41(4), Sch 2 para 19(2); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 16(1), (2)); applied by the Children Act 1989 s 24A(6) (as added: see note 14 supra). As from a day to be appointed the Children Act 1989 s 17(9) (as amended) is further amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (2) so that a person in receipt of an income-related employment and support allowance is also not liable to make a repayment. At the date at which this volume states the law no such day had been appointed. For the meaning of 'income-based jobseeker's allowance' see para 535 note 18 ante. The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of the Children Act 1989 Pt III (ss 17-30) (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit: Children Act 1989 s 17(12) (added by the Tax Credits Act 2002 Sch 3 para 16(3)). See the Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077. See further SOCIAL SECURITY AND PENSIONS. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 512 et seq.

## UPDATE

### 924 Assistance for employment, education and training

NOTE 10--Children Act 1989 s 24B(6) amended: Children and Young Persons Act 2008 Sch 3 para 13.

NOTE 16--Appointed day is 27 October 2008: SI 2008/787.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(i) Advice and Assistance for Certain Children and Young Persons/925. Duty to inform appropriate local authority.

## **925. Duty to inform appropriate local authority.**

Where it appears to a local authority<sup>1</sup> that a person:

- 1904 (1) with whom it is under a duty to keep in touch<sup>2</sup>; or
- 1905 (2) whom it has been advising and befriending<sup>3</sup>; or
- 1906 (3) to whom it has been giving assistance<sup>4</sup>,

proposes to live, or is living, in the area of another local authority, it must inform that other authority<sup>5</sup>.

Where a child<sup>6</sup> who is accommodated:

- 1907 (a) by a voluntary organisation<sup>7</sup> or in a private children's home<sup>8</sup>;
- 1908 (b) by any local health board, special health authority, primary care trust or local education authority<sup>9</sup>; or
- 1909 (c) in any care home or independent hospital or any accommodation provided by a national health service trust or an NHS foundation trust<sup>10</sup>,

ceases to be so accommodated, after reaching the age of 16, the organisation, authority or (as the case may be) person carrying on the home must inform the local authority within whose area the child proposes to live<sup>11</sup>.

In relation to heads (b) and (c) above the requirement only applies if the accommodation has been provided for a consecutive period of at least three months<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Ie under the Children Act 1989 s 23B (as added) (see para 929 post), s 23C (as added) (see para 930 post) or s 24 (as substituted and amended) (see para 922 ante).

3 Ie under ibid s 24A (as added): see para 923 ante.

4 Ie under ibid s 24B (as added): see para 924 ante.

5 Ibid s 24C(1) (s 24C added by the Children (Leaving Care) Act 2000 s 4(1)).

6 For the meaning of 'child' see para 3 ante.

7 For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to the provision of accommodation by a voluntary organisation see para 975 post.

8 Children Act 1989 s 24C(2)(a) (as added: see note 5 supra). For the meaning of 'private children's home' see para 980 note 2 post.

9 Ibid s 24C(2)(b) (as added (see note 5 supra); and amended by the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(c)). The Children Act 1989 s 24C (as added and amended) is not yet in force so far as it applies to primary care trusts in relation to Wales: see the Children (Leaving Care) Act 2000 (Commencement) (Wales) Order 2001, SI 2001/2191, art 2. As to local health boards and primary care trusts see HEALTH SERVICES vol 54 (2008) PARAS 74, 111 et seq; and as to special health authorities see HEALTH



SERVICES vol 54 (2008) PARA 136 et seq. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

10 Children Act 1989 s 24C(2)(c) (as added (see note 5 supra); and amended by the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 75, 77). For the meaning of 'care home' see para 985 note 1 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 post; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)). As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

11 Children Act 1989 s 24C(2) (as added: see note 5 supra).

12 Ibid s 24C(3) (as added: see note 5 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(i) Advice and Assistance for Certain Children and Young Persons/926. Representations procedure.

## **926. Representations procedure.**

Every local authority<sup>1</sup> must establish a procedure for considering representations, including complaints made to it by<sup>2</sup>:

- 1910 (1) a relevant child<sup>3</sup> or a young person<sup>4</sup>;
- 1911 (2) a person qualifying for advice and assistance<sup>5</sup>; or
- 1912 (3) a person receiving assistance in connection with education or training<sup>6</sup>,

about the discharge of its statutory functions<sup>7</sup> in relation to him<sup>8</sup>. A local authority must comply with regulations made by the Secretary of State or the Welsh Ministers<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Children Act 1989 s 24D(1) (s 24D added by the Children (Leaving Care) Act 2000 s 5).

3 Ie for the purposes of the Children Act 1989 s 23A (as added): see para 928 ante. For the meaning of 'child' see para 3 ante.

4 Ibid s 24D(1)(a) (as added: see note 2 supra). The text refers to a young person falling within s 23C (as added): see para 930 post.

5 Ibid s 24D(1)(b) (as added: see note 2 supra). For the meaning of 'person qualifying for advice and assistance' see para 922 ante.

6 Ibid s 24D(1)(c) (as added: see note 2 supra). The text refers to a person falling within s 24B(2) (as added): see para 924 ante.

7 Ie its functions under the provisions of ibid Pt III (ss 17-30) (as amended), dealing with local authority support for children and families.

8 Ibid s 24D(1) (as added: see note 2 supra). Where a local authority becomes aware that a person or child intends to make representations under s 24D (as added), it must provide the person or child with information about advocacy services and offer him help in obtaining an advocate: Advocacy Services and Representations Procedure (Children) (Amendment) Regulations 2004, SI 2004/719, reg 4(2). A local authority must monitor the steps that it has taken with a view to ensuring compliance with the Advocacy Services and Representations Procedure (Children) (Amendment) Regulations 2004, SI 2004/719: see reg 5.

9 Children Act 1989 s 24D(2) (as added: see note 2 supra). As to the Secretary of State and the Welsh Ministers see para 155 ante. As to the regulations made see the Advocacy Services and Representations Procedure (Children) (Wales) Regulations 2004, SI 2004/1448; the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365; and the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738.

## **UPDATE**

### **926 Representations procedure**

NOTE 9--Children Act 1989 s 24D(2) amended: Children and Young Persons Act 2008 Sch 3 para 13.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(i) Advice and Assistance for Certain Children and Young Persons/927. Representations procedure & advocacy services.

## **927. Representations procedure & advocacy services.**

Every local authority<sup>1</sup> must make arrangements for the provision of assistance to persons who make or intend to make representations<sup>2</sup> and children who make or intend to make representations<sup>3</sup>. The assistance provided under the arrangements must include assistance by way of representation<sup>4</sup>. The arrangements must:

- 1913 (1) secure that a person may not provide assistance if he is a person who is prevented from doing so by regulations; and
- 1914 (2) comply with any other provision made by the regulations in relation to the arrangements<sup>5</sup>.

Every local authority must give such publicity to its arrangements for the provision of assistance as it considers appropriate<sup>6</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 I.e. under the Children Act 1989 s 24D (as added); see para 926 ante.

3 Ibid s 26A(1) (s 26A added by the Adoption and Children Act 2002 s 119). The representations referred to in the text are representations under the Children Act 1989 s 26 (as amended) (see para 936 et seq post).

The duty to provide assistance under the Children Act 1989 s 26A(1) (as added) includes a duty to make arrangements for the provision of assistance where representations under s 24D (as added) (see para 926 ante) or s 26 (as amended) (see paras 936-941, 944 post) are further considered under s 26ZB (as added) (see note 5 infra): s 26A(2A) (s 26A as so added; and s 26A(2A) added by the Health and Social Care (Community Health and Standards) Act 2003 s 116(3)). At the date at which this volume states the law, this provision had effect in relation to Wales, but no order had been made bringing it into force in relation to England.

4 Children Act 1989 s 26A(2) (as added; see note 3 supra). As to the persons who may not provide assistance see the Advocacy Services and Representation Procedure (Children) (Amendment) Regulations 2004, SI 2004/719, reg 3; and the Advocacy Services and Representations Procedure (Children) (Wales) Regulations 2004, SI 2004/1448, reg 3.

5 Children Act 1989 s 26A(3) (as added; see note 3 supra). The Secretary of State or the Welsh Ministers may make regulations requiring local authorities to monitor the steps that they have taken with a view to ensuring that they comply with regulations made for the purposes of s 26A(3) (as added): s 26A(4) (as so added). See the Advocacy Services and Representations Procedure (Children) (Amendment) Regulations 2004, SI 2004/719 reg 5; the Advocacy Services and Representations Procedure (Children) (Wales) Regulations 2004, SI 2004/1448 reg 5; the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365; the Social Services Complaints Procedure (Wales) Regulations 2005, SI 2005/3366; and the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738. The Welsh Ministers may by regulations make provision for the further consideration of representations which have been considered by a local authority in Wales under the Children Act 1989 s 24D (as added): s 26ZB (added by the Health and Social Care (Community Care Health and Standards) Act 2003 s 116(2)). See the Social Services Complaints Procedure (Wales) Regulations 2005, SI 2005/3366. As to the Secretary of State and the Welsh Ministers see para 155 ante.

6 Children Act 1989 s 26A(5) (as added; see note 3 supra). A local authority must provide information about advocacy services and offer help in finding an advocate to a child or young person who is making representations or, when it becomes aware of the fact, who is intending to make representations under s 24D (as added) (see para 926 ante) or s 26(3) (as amended) (see para 944 post): Advocacy Services and Representations Procedure (Children) (Amendment) Regulations 2004, SI 2004/719 reg 4; Advocacy Services

and Representations Procedure (Children) (Wales) Regulations 2004, SI 2004/1448 reg 4 (amended by SI 2005/3365).

**UPDATE**

**927 Representations procedure & advocacy services**

NOTE 5--Children Act 1989 ss 26ZB, 26(3)(a), (4) amended: Children and Young Persons Act 2008 Sch 3 paras 17, 18.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(ii) Additional Functions of Local Authorities in respect of Children Leaving Care/928. The responsible local authority and relevant children.

## **(ii) Additional Functions of Local Authorities in respect of Children Leaving Care**

### **928. The responsible local authority and relevant children.**

The responsible local authority<sup>1</sup> has certain functions<sup>2</sup> in respect of a relevant child<sup>3</sup>. 'Relevant child' means<sup>4</sup> a child who:

- 1915 (1) is not being looked after by any local authority<sup>5</sup>;
- 1916 (2) was, before last ceasing to be looked after, an eligible child<sup>6</sup>;
- 1917 (3) is aged 16 or 17<sup>7</sup>.

The Secretary of State or the Welsh Ministers may also prescribe<sup>8</sup>: (a) additional categories of relevant children<sup>9</sup>; and (b) categories of children who are not to be relevant children despite falling within the above definition<sup>10</sup>. Accordingly for these purposes<sup>11</sup>, a child is also a 'relevant child' if he is aged 16 or 17, he is not subject to a care order, and at the time when he attained the age of 16 he was detained<sup>12</sup> or in hospital<sup>13</sup> and, in relation to England, immediately before he was detained or admitted to hospital he had been looked after by a local authority for a period or periods amounting in all to at least 13 weeks<sup>14</sup>, which began after he reached the age of 14<sup>15</sup> or, in relation to Wales, he had been accommodated by a local authority for a single period of at least 13 weeks<sup>16</sup> ('the single period') or for periods amounting in all to at least 13 weeks ('the aggregate period') where the single period or the first period of the aggregate period began after he reached the age of 14 and the single period or the aggregate period ended immediately before such detention or admission<sup>17</sup>.

1 The 'responsible local authority' is the one which last looked after the child: Children Act 1989 s 23A(4) (s 23A added by the Children (Leaving Care) Act 2000 s 2(1), (4)). For the meaning of 'local authority' see para 248 note 10 ante. For the meaning of 'child' see para 3 ante.

2 I.e. those in the Children Act 1989 s 23B (as added): see para 929 post.

3 Ibid s 23A(1) (as added: see note 1 supra).

4 I.e. subject to ibid s 23A(3) (as added): see the text and notes 8-10 infra.

5 Ibid s 23A(2)(a) (as added: see note 1 supra). As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

A relevant child for the purposes of s 23A (as added) is not entitled to income-based jobseeker's allowance under the Jobseekers Act 1995, or to income support or housing benefit under the Social Security Contributions and Benefits Act 1992: see the Children (Leaving Care) Act 2000 s 6; and SOCIAL SECURITY AND PENSIONS.

6 Children Act 1989 s 23A(2)(b) (as added: see note 1 supra). The text refers to an eligible child for the purposes of Sch 2 para 19B (as added): see para 873 ante. See note 4 supra. Any child who has lived with a person falling within s 23(4) ('a family placement') for a continuous period of six months or more is not to be a relevant child despite falling within s 23A(2) (as added): Children (Leaving Care) (England) Regulations 2001, SI 2001/2871, reg 4(5); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(4) (substituted by SI 2002/1855). This applies whether the period of six months commences before or after a child ceases to be looked after by a local authority: Children (Leaving Care) (England) Regulations 2001, SI 2001/2871, reg 4(6); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(5). However, where a family placement

within the meaning of the Children (Leaving Care) (England) Regulations 2001, SI 2001/2871, reg 4(5) or, as the case may be, the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(4) (as substituted) breaks down and the child ceases to live with the person concerned, the child is to be treated as a relevant child: Children (Leaving Care) (England) Regulations 2001, SI 2001/2871, reg 4(7); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(6) (added by SI 2002/1855).

7 Children Act 1989 s 23A(2)(c) (as added: see note 1 supra). See note 4 supra.

8 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). As to the Secretary of State and the Welsh Ministers see para 155 ante.

9 Ibid s 23A(3)(a) (as added: see note 1 supra). If under head (a) in the text the Secretary of State prescribes or the Welsh Ministers prescribe a category of relevant children which includes children who do not fall within head (2) in the text (eg because they were being looked after by a local authority in Scotland), he or they may in the regulations also provide for which local authority is to be the responsible local authority for those children: s 23A(5) (as so added). See note 4 supra.

10 Ibid s 23A(3)(b) (as added: see note 1 supra).

11 Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 4(1); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(1).

12 'Detained' means detained in a remand centre, a young offenders institution or a secure training centre, or any other institution pursuant to an order of a court: Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 4(4)(a); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(3).

13 In relation to England, 'hospital' means any health service hospital within the meaning of the National Health Service Act 1977 (see HEALTH SERVICES) or a registered establishment within the meaning of the Mental Health Act 1983 s 34(1) (see MENTAL HEALTH vol 30(2) (Reissue) para 421); Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 4(4)(b) (amended by SI 2002/546).

14 In calculating the period of 13 weeks no account is to be taken of any period in which the child was looked after by a local authority in any of a pre-planned series of short term placements, none of which individually exceeded four weeks, where at the end of each such placement the child returned to the care of his parent, or a person who is not a parent but who has parental responsibility for him: Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 4(3).

15 Ibid reg 4(2).

16 In calculating the period of 13 weeks no account is to be taken of any period in which the child was looked after in a series of short term placements, none of which individually exceeded four weeks, where at the end of each such placement the child returned to the care of his parent, or a person who is not a parent but who has parental responsibility for him: Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(2A) (added by SI 2004/1732).

17 Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 4(2).

## **UPDATE**

### **928 The responsible local authority and relevant children**

TEXT AND NOTES 8-10--Children Act 1989 s 23A(3), (5) amended: Children and Young Persons Act 2008 Sch 3 para 8.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(5) ADVICE AND ASSISTANCE/(ii) Additional Functions of Local Authorities in respect of Children Leaving Care/929. Functions of the responsible authority in respect of relevant children.

## **929. Functions of the responsible authority in respect of relevant children.**

It is the duty of each local authority<sup>1</sup>:

- 1918 (1) to take reasonable steps to keep in touch with a relevant child<sup>2</sup> for whom it is the responsible authority<sup>3</sup>, whether he is within its area or not<sup>4</sup>;
- 1919 (2) to appoint a personal adviser for each relevant child, if it has not already done so<sup>5</sup>;
- 1920 (3) in relation to any relevant child who does not already have a pathway plan prepared<sup>6</sup> to carry out an assessment of his needs with a view to determining what advice, assistance and support it would be appropriate for it to provide him under Part III of the Children Act 1989<sup>7</sup> and to prepare a pathway plan for him<sup>8</sup>.

The authority must keep the pathway plan under regular review<sup>9</sup>. The Secretary of State or the Welsh Ministers may by regulations make provision as to assessments for the purposes of head (3) above<sup>10</sup>. The regulations may in particular make provision about:

- 1921 (a) who is to be consulted in relation to an assessment<sup>11</sup>;
- 1922 (b) the way in which an assessment is to be carried out, by whom and when<sup>12</sup>;
- 1923 (c) the recording of the results of an assessment<sup>13</sup>; and
- 1924 (d) the considerations to which the local authority is to have regard in carrying out an assessment<sup>14</sup>.

The responsible local authority must safeguard and promote the child's welfare and, unless it is satisfied that his welfare does not require it, support him by<sup>15</sup>:

- 1925 (i) maintaining him<sup>16</sup>;
- 1926 (ii) providing him with or maintaining him in suitable accommodation<sup>17</sup>; and
- 1927 (iii) providing support of such other descriptions as may be prescribed<sup>18</sup>.

Such support may be in cash<sup>19</sup>. The Secretary of State or the Welsh Ministers may by regulations make provision about the meaning of 'suitable accommodation' and in particular about the suitability of landlords or other providers of accommodation<sup>20</sup>.

If the local authority has lost touch with a relevant child, despite taking reasonable steps to keep in touch, it must without delay consider how to re-establish contact, and take reasonable steps to do so, and while the child is still a relevant child it must continue to take such steps until it succeeds<sup>21</sup>.

Provisions relating to assistance<sup>22</sup> also apply in relation to support given under the above provisions<sup>23</sup>. The factors that must be considered by a local authority before making any decision with respect to a child it is looking after<sup>24</sup> must also be considered in relation to any decision by a local authority for the purposes of the above provisions<sup>25</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'relevant child' see para 928 ante.

3 For the meaning of 'responsible local authority' see para 928 note 1 ante.

4 Children Act 1989 s 23B(1) (s 23B added by the Children (Leaving Care) Act 2000 s 2(1), (4)).

5 Children Act 1989 s 23B(2) (as added: see note 4 supra). The text refers to an appointment already made under Sch 2 para 19C (as added): see para 873 ante.

6 Ie for the purposes of ibid Sch 2 para 19B (as added): see para 873 ante. A reference to a 'pathway plan' is to a plan setting out:

701 (1) in the case of a plan prepared under Sch 2 para 19B (as added): (a) the advice, assistance and support which the local authority intends to provide a child under Pt III (ss 17-30) (as amended) both while it is looking after him and later; and (b) when it might cease to look after him; and

702 (2) in the case of a plan prepared under s 23B (as added), the advice, assistance and support which the local authority intends to provide under Pt III (as amended),

and dealing with such other matters (if any) as may be prescribed (s 23E(1) (s 23E added by the Children (Leaving Care) Act 2000 s 3)).

The Secretary of State or the Welsh Ministers may by regulations make provision about pathway plans and their review: Children Act 1989 s 23E(2) (as so added). For regulations making provision about pathway plans and their review see the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, regs 8, 9; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, regs 8, 9. As to the Secretary of State and the Welsh Ministers see para 155 ante.

7 Ie the Children Act 1989 Pt III (ss 17-30) (as amended).

8 Ibid s 23B(3) (as added: see note 4 supra). The local authority may carry out such an assessment at the same time as any assessment of his needs is made under any enactment referred to in Sch 2 para 3(a)-(c) (as amended) (see para 852 ante), or under any other enactment: s 23B(4) (as so added).

9 Ibid s 23B(7) (as added: see note 4 supra). See the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 9; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 9.

10 Children Act 1989 s 23B(5) (as added: see note 4 supra). As to the involvement of a child or young person in his assessment and in the preparation or review of a pathway plan see the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 6; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 6.

11 Children Act 1989 s 23B(6)(a) (as added: see note 4 supra).

12 Ibid s 23B(6)(b) (as added: see note 4 supra).

13 Ibid s 23B(6)(c) (as added: see note 4 supra). See the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 7; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 7. Records relating to assessments, pathway plans and their review must be retained by the responsible authority until the seventy-fifth anniversary of the date of birth of the child or young person to whom they relate or, if the child dies before attaining the age of 18, for a period of 15 years beginning with the date of his death: Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 10; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 10.

14 Children Act 1989 s 23B(6)(d) (as added: see note 4 supra).

15 Ibid s 23B(8) (as added: see note 4 supra).

16 Ibid s 23B(8)(a) (as added: see note 4 supra).

17 Ibid s 23B(8)(b) (as added: see note 4 supra).

18 Ibid s 23B(8)(c) (as added: see note 4 supra). 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). See the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 11(1); and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 11(1) (which require the authority to provide assistance in order to meet the child's needs in relation to education, training or employment as provided for in his pathway plan).



19 Children Act 1989 s 23B(9) (as added: see note 4 supra).

20 Ibid s 23B(10) (as added: see note 4 supra). For these purposes, suitable accommodation means accommodation: (1) which so far as reasonably practicable is suitable for the child in the light of his needs, including his health needs and any needs arising from any disability; (2) in respect of which the responsible authority has satisfied itself as to the character and suitability of the landlord or other provider; and (3) in respect of which the responsible authority has so far as reasonably practicable taken into account the child's wishes and feelings, and education, training or employment needs: Children (Leaving Care) (England) Regulations 2001, SI 2001/2874 reg 11(2); Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189 reg 11(2).

21 Children Act 1989 s 23B(11) (as added: see note 4 supra).

22 Ie ibid s 17(7)-(9) (as amended): see para 848 ante.

23 Ibid s 23B(12) (as added: see note 4 supra).

24 Ie ibid s 22(4), (5): see para 868 ante.

25 Ibid s 23B(13) (as added: see note 4 supra).

## **UPDATE**

### **929 Functions of the responsible authority in respect of relevant children**

TEXT AND NOTES 6, 9, 10, 20--Children Act 1989 ss 23B(5), (7), (10), 23E(2) amended: Children and Young Persons Act 2008 Sch 3 paras 9, 11.

NOTE 8--The Secretary of State or the Welsh Ministers may by regulations make provision as to assessments under the Children Act 1989 s 23B(3): see s 23E(1B), (1C) (added by Children and Young Persons Act 2008 s 22(5)).

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### **930. Continuing functions in respect of former relevant children.**

Each local authority<sup>1</sup> has the duties listed in heads (a) to (c) below towards:

- 1928 (1) a person who has been a relevant child<sup>2</sup> (and would be one if he were under 18), and in relation to whom it was the last responsible authority<sup>3</sup>; and
- 1929 (2) a person who was being looked after by it<sup>4</sup> when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child<sup>5</sup>.

Such a person is referred to as a 'former relevant child'<sup>6</sup>.

It is the duty of the local authority:

- 1930 (a) to take reasonable steps: (i) to keep in touch with a former relevant child whether he is within its area or not<sup>7</sup>; and (ii) if it loses touch with him, to re-establish contact<sup>8</sup>;
- 1931 (b) to continue: (i) the appointment of a personal adviser for a former relevant child<sup>9</sup>; (ii) to continue to keep his pathway plan under regular review<sup>10</sup>;
- 1932 (c) to give a former relevant child assistance<sup>11</sup>.

The duties set out in heads (a), (b) and (c) above subsist until the former relevant child reaches the age of 21<sup>12</sup>.

If the former relevant child's pathway plan sets out a programme of education or training which extends beyond his twenty-first birthday:

- 1933 (A) the duty of assistance<sup>13</sup> continues to subsist for so long as the former relevant child continues to pursue that programme<sup>14</sup>; and
- 1934 (B) the duties set out in heads (a) and (b) above continue to subsist concurrently with that duty<sup>15</sup>.

For the purposes of head (A) above there must be disregarded any interruption in a former relevant child's pursuance of a programme of education or training if the local authority is satisfied that he will resume it as soon as is reasonably practicable<sup>16</sup>.

Provisions relating to assistance<sup>17</sup> also apply in relation to support given under the above provisions<sup>18</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the purposes of the Children Act 1989 s 23A (as added): see para 928 ante. For the meaning of 'relevant child' see para 928 ante.

3 Ibid s 23C(1)(a) (s 23C added by the Children (Leaving Care) Act 2000 s 2(1), (4)). For the meaning of 'responsible local authority' see para 928 note 1 ante.

4 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

5 Children Act 1989 s 23C(1)(b) (as added: see note 3 supra). There is nothing in the Children Act 1989 or otherwise to suggest that a period that both starts and finishes after the age of 16 does not satisfy the requirements for an eligible child: *R (on the application of Berhe) v Hillingdon London Borough Council* [2003] EWHC 2075 (Admin), [2004] 1 FLR 439.

6 Children Act 1989 s 23C(1) (as added: see note 3 supra).

7 Ibid s 23C(2)(a) (as added: see note 3 supra).

8 Ibid s 23C(2)(b) (as added: see note 3 supra).

9 Ibid s 23C(3)(a) (as added: see note 3 supra).

10 Ibid s 23C(3)(b) (as added: see note 3 supra). As to pathway plans see para 929 ante.

11 Ibid s 23C(4) (as added: see note 3 supra). It is the duty of the local authority to give a former relevant child:

703 (1) assistance of the kind referred to in s 24B(1) (as added) (see para 924 ante), to the extent that his welfare requires it (s 23C(4)(a) (as so added));

704 (2) assistance of the kind referred to in s 24B(2) (as added) (see para 924 ante), to the extent that his welfare and his educational or training needs require it (s 23C(4)(b) (as so added));

705 (3) other assistance, to the extent that his welfare requires it (s 23C(4)(c) (as so added)).

The assistance given under head (3) supra may be in kind or, in exceptional circumstances, in cash: s 23C(5) (as so added).

Section 24B(5) (as added) (see para 924 ante) applies in relation to a person being given assistance under head (2) supra as it applies in relation to a person to whom s 24B(3) (as added) applies: s 23C(9) (as so added).

12 Ibid s 23C(6) (as added: see note 3 supra). This is expressed to be subject to s 23C(7) (as added) (see the text and notes 14-15 infra).

13 Ie the duty of assistance set out in ibid s 23C(4)(b) (as added) (see note 11 head (2) supra).

14 Ibid s 23C(7)(a) (as added: see note 3 supra).

15 Ibid s 23C(7)(b) (as added: see note 3 supra).

16 Ibid s 23C(8) (as added: see note 3 supra).

17 Ie ibid s 17(7)-(9) (as amended) (see para 848 ante).

18 Ibid s 23C(10) (as added: see note 3 supra).

## UPDATE

### 930 Continuing functions in respect of former relevant children

NOTE 11--The assistance given under head (3) does not extend to the provision of accommodation: *R (on the application of O) v Barking and Dagenham LBC* [2010] All ER (D) 36 (Mar).

It is the duty of the local authority, without prejudice to its duty set out in the Children Act 1989 s 23C(4)(b), to pay the relevant amount to a former relevant child who pursues higher education in accordance with a pathway plan prepared for that person: s 23C(5A), (5C) (s 23C(5A)-(5C) added by Children and Young Persons Act 2008 s 21(2) (1989 Act s 23C(5A), (5C) in force in relation to England: SI 2009/268, SI 2009/2273)). The appropriate national authority may by regulations (1) prescribe the relevant amount for the purposes of the Children Act 1989 s 23C(5A); (2) prescribe the meaning of 'higher education' for those purposes; (3) make provision as to the payment of the relevant amount; (4) make provision as to the circumstances in which the relevant

amount, or any part of it, may be recovered by the local authority from a former relevant child to whom a payment has been made: s 23C(5B). See the Children Act 1989 (Higher Education Bursary) (England) Regulations 2009, SI 2009/2274.

Children Act 1989 s 23C(9) amended: Children and Young Persons Act 2008 s 21(3) (in force in relation to England: SI 2009/2273).

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### 931. Personal advisers.

The Secretary of State and the Welsh Ministers<sup>1</sup> may by regulations<sup>2</sup> require local authorities<sup>3</sup> to appoint a personal adviser for children<sup>4</sup> or young persons of a prescribed description<sup>5</sup> who have reached the age of 16 but not the age of 21 who are not<sup>6</sup>:

- 1935 (1) children who are relevant children<sup>7</sup>;
- 1936 (2) former relevant children<sup>8</sup>; or
- 1937 (3) eligible children<sup>9</sup>.

Personal advisers appointed under or by virtue of Part III of the Children Act 1989<sup>10</sup> have, in addition to any other functions<sup>11</sup>, such functions as may be prescribed<sup>12</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 At the date at which this volume states the law no such regulations had been made.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 For the meaning of 'child' see para 3 ante.

5 'Prescribed' means prescribed by regulations made under the Children Act 1989: s 105(1). At the date at which this volume states the law no regulations prescribing such descriptions of young person had been made. The personal adviser should not be an officer of the local authority: *R (on the application of J) v Caerphilly City Borough Council* [2005] EWHC 586 (Admin), [2005] 2 FCR 153.

6 Children Act 1989 s 23D(1) (added by the Children (Leaving Care) Act 2000 s 3).

7 Children Act 1989 s 23D(1)(a) (as added: see note 6 ante). The text refers to relevant children for the purposes of s 23A (as added) (see para 928 ante).

8 Ibid s 23D(1)(b) (as added: see note 6 ante). The text refers to former relevant children for the purposes of s 23C (as added) (see para 930 ante).

9 Ibid s 23D(1)(c) (as added: see note 6 ante). The text refers to the children mentioned in Sch 2 para 19C (as added) (see para 873 ante).

10 Ie ibid Pt III (ss 17-30).

11 As to the meaning of 'functions' see para 156 note 23 ante.

12 Children Act 1989 s 23D(2) (as added: see note 6 ante). See the Children (Leaving Care) (England) Regulations 2001, SI 2001/2874, reg 12; and the Children (Leaving Care) (Wales) Regulations 2001, SI 2001/2189, reg 12. These regulations prescribe the following functions:

- 706 (1) to provide advice (including practical advice) and support;
- 707 (2) where applicable, to participate in the child or young person's assessment and the preparation of his pathway plan;
- 708 (3) to participate in reviews of the pathway plan;
- 709 (4) to liaise with the responsible authority in the implementation of the pathway plan;

- 710 (5) to co-ordinate the provision of services, and to take reasonable steps to ensure that the child or young person makes use of such services;
- 711 (6) to keep informed about his progress and wellbeing; and
- 712 (7) to keep a written record of contacts with him.

## **UPDATE**

### **931 Personal advisers**

TEXT AND NOTES--Children Act 1989 s 23D(1), (2) amended: Children and Young Persons Act 2008 Sch 3 para 10.

TEXT AND NOTES 1-9--Also, head (4) persons to whom the Children Act 1989 s 23CA (further assistance to pursue education or training) applies: Children Act 1989 s 23D(1) (amended by Children and Young Persons Act 2008 s 23(1)(b)).

TEXT AND NOTE 6--For '21' read '25': Children Act 1989 s 23D(1) (amended by Children and Young Persons Act 2008 s 23(1)(a)).

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## **(6) HELP TO BE GIVEN TO LOCAL AUTHORITIES**

### **932. Power to request help.**

If a local authority<sup>1</sup> considers that any of a number of specified authorities<sup>2</sup> could by taking any specified action help in the exercise of certain of the requesting authority's statutory functions<sup>3</sup>, it may request the help of that other authority, specifying the action in question<sup>4</sup>. The authority whose help is so requested must comply with the request if it is compatible with its own statutory or other duties and obligations and does not unduly prejudice the discharge of any of its functions<sup>5</sup>.

The authorities which may be so requested are<sup>6</sup>:

- 1938 (1) any local authority<sup>7</sup>;
- 1939 (2) any local education authority<sup>8</sup>;
- 1940 (3) any local housing authority<sup>9</sup>;
- 1941 (4) any local health board, special health authority, primary care trust or national health service trust or NHS foundation trust<sup>10</sup>; and
- 1942 (5) any person authorised for the purpose by the Secretary of State or the Welsh Ministers<sup>11</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 See heads (1)-(5) in the text.

3 ie its functions under the provisions of the Children Act 1989 Pt III (ss 17-30) (as amended), dealing with local authority support for children and families. As to the meaning of 'functions' see para 156 note 23 ante.

4 Ibid s 27(1) (amended by the Courts and Legal Services Act 1990 s 125(7), Sch 20).

5 Children Act 1989 s 27(2). Nothing in s 27(2) enlarges or otherwise amends the powers or duties of the requested authority under other statutes: *R v Northavon District Council, ex p Smith* [1994] 2 AC 402, [1994] 2 FLR 671, HL. See also *R v Somerset County Council, ex p Prospects Care Services Ltd* [1999] COD 268 (council had power to provide information regarding fostering agencies to placement authorities).

Where a local authority (see head (1) in the text) complies with a request under the Children Act 1989 s 27(2) in relation to any person who is not ordinarily resident in its area, it may recover from the authority in whose area he is ordinarily resident any reasonable expenses incurred by it in respect of that person: s 29(9) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 15; and the Children (Leaving Care) Act 2000 s 7(1), (3)(a)). However, where a local authority ('authority A') complies with any request under the Children Act 1989 s 27(2) from another local authority ('authority B') in relation to a child or other person: (1) whose responsible authority is authority B for the purposes of s 23B (as added) or s 23C (as added) (see para 930 ante); or (2) whom authority B is advising or befriending or to whom it is giving assistance by virtue of s 24(5)(a) (see para 922 ante), authority A may recover from authority B any reasonable expenses incurred by it in respect of that person: s 29(10) (added by the Children (Leaving Care) Act 2000 s 7(1), (3)(b)).

6 Children Act 1989 s 27(3) (amended by the Courts and Legal Services Act 1990 Sch 16 para 14).

7 Children Act 1989 s 27(3)(a).

8 Ibid s 27(3)(b). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

9 Ibid s 27(3)(c). 'Local housing authority' means a district council, a London borough council, the Common Council of the City of London, a Welsh county council or county borough council, or the Council of the Isles of Scilly: Housing Act 1985 s 1 (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5(1)); definition applied by the Children Act 1989 s 105(1). As to local government areas and authorities see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36. As to local housing authorities see HOUSING vol 22 (2006 Reissue) para 8 et seq.

10 Ibid s 27(3)(d) (amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 118(5); the Courts and Legal Services Act 1990 Sch 16 para 14; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (5); the Health and Social Care (Community Health and Standards) Act 2003 Sch 4 para 78; and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(d)). As to local health boards, primary care trusts and NHS foundation trusts see HEALTH SERVICES vol 54 (2008) PARAS 74, 111 et seq, 174 et seq; as to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq; as to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

11 Children Act 1989 s 27(3)(e). As to the Secretary of State and the Welsh Ministers see para 155 ante.

## **UPDATE**

### **932 Power to request help**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 11--Children Act 1989 s 27(3)(e) amended: Children and Young Persons Act 2008 Sch 3 para 19.



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### **933. Assistance to and consultation with local education authorities.**

Where a child<sup>1</sup> is being looked after<sup>2</sup> by a local authority<sup>3</sup>, and the authority proposes to find accommodation for him in an establishment in which education is provided for children who are accommodated there, it must, so far as is reasonably practicable, consult the appropriate local education authority<sup>4</sup> before doing so<sup>5</sup>. Where any such proposal is carried out, the local authority must, as soon as is reasonably practicable, inform the appropriate local education authority of the arrangements that have been made for the child's accommodation<sup>6</sup>. Where the child ceases to be accommodated the local authority must inform the appropriate local education authority<sup>7</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 'Appropriate local education authority' means the local education authority within whose area the local authority's area falls, or where the child has special educational needs and a statement of those needs is maintained under the Education Act 1996 Pt IV (ss 312-349) (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 984 et seq), the local education authority which maintains the statement: Children Act 1989 s 28(4) (amended by the Education Act 1996 s 582(1), Sch 37 para 84). For the meaning of 'special educational needs' see para 296 note 7 ante. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

5 Children Act 1989 s 28(1).

6 Ibid s 28(2).

7 Ibid s 28(3).

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### **934. Recoupment of cost of providing services.**

A local authority<sup>1</sup> may recover<sup>2</sup> from certain persons such charges as it considers reasonable in respect of the provision of services for children in need, their families and others<sup>3</sup> or the provision of day care for pre-school and other children<sup>4</sup>, other than the provision of advice, guidance or counselling<sup>5</sup>. The persons from whom such payment may be recovered are:

- 1943 (1) where the service is provided for a child under 16, each of his parents<sup>6</sup>;
- 1944 (2) where it is provided for a child who has reached the age of 16, the child himself<sup>7</sup>; and
- 1945 (3) where it is provided for a member of the child's family, that member<sup>8</sup>.

However, where the authority is satisfied that the means of the person in question are insufficient for it to be reasonably practicable for him to pay the charge, the authority must not require him to pay more than he can reasonably be expected to pay<sup>9</sup>. No person is liable to pay any such charge<sup>10</sup> at any time when he is in receipt of income support<sup>11</sup>, of any element of child tax credit other than the family element, of working tax credit or of an income-based jobseeker's allowance<sup>12</sup>.

Where a local authority provides any accommodation<sup>13</sup> for a child who, immediately before the authority began to look after<sup>14</sup> him, was ordinarily resident<sup>15</sup> in the area of another local authority, the former authority may recover from the latter any reasonable expenses incurred in providing the accommodation and maintaining him<sup>16</sup>.

Where an authority provides accommodation for a child who is ordinarily resident in the area of another authority and who<sup>17</sup>:

- 1946 (a) has been removed or kept away from home<sup>18</sup>; or
- 1947 (b) is in police protection<sup>19</sup>; or
- 1948 (c) is in custody after being charged with an offence<sup>20</sup>, and the authority is not maintaining him in a community home<sup>21</sup> provided by the authority, in a controlled community home or in a hospital<sup>22</sup> vested in the Secretary of State or Welsh Ministers or a primary care trust<sup>23</sup>, or any other hospital made available pursuant to arrangements made by a strategic health authority, a local health board or a primary care trust<sup>24</sup>,

it may recover from that other authority any reasonable expenses incurred in providing the accommodation and maintaining him<sup>25</sup>.

Where a local authority ('authority A') complies with any request for help from another local authority ('authority B')<sup>26</sup> in relation to a child or other person whose responsible authority is authority B for the purposes of certain authority functions<sup>27</sup> or whom authority B are advising or befriending or to whom they are giving assistance by virtue of certain provisions<sup>28</sup>, authority A may recover from authority B any reasonable expenses incurred by them in respect of that person<sup>29</sup>. However, where this does not apply<sup>30</sup>, an authority may recover its reasonable expenses incurred in responding to a request for help by another local authority in relation to a person not ordinarily resident in the former authority's area<sup>31</sup>.

- 1 For the meaning of 'local authority' see para 248 note 10 ante.
- 2 A charge may, without prejudice to any other method of recovery, be recovered summarily as a civil debt: Children Act 1989 s 29(5).
- 3 *Ie* under *ibid* s 17 (as amended; prospectively further amended).
- 4 *Ie* under *ibid* s 18: see paras 844, 860 ante.
- 5 *Ibid* s 29(1). No person is liable to pay any charge under s 29(1) for a service provided under s 18(2) or (6) (see para 844 ante) at any time when he is in receipt of income support under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 173 et seq), of an element of child tax credit other than the family element, of working tax credit or of an income-based jobseeker's allowance: Children Act 1989 s 29(3A) (added by the Local Government Act 2000 s 103(2)). For the meaning of 'income-based jobseeker's allowance' see para 535 note 18 ante. As from a day to be appointed the Children Act 1989 s 29(3A) (as added) is amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (4) so as to also exclude a person in receipt of an income-related employment and support allowance from being liable to pay for any charge under the Children Act 1989 s 29(1). At the date at which this volume states the law no such day had been appointed. No person is liable to pay any charge under s 29(1) for a service provided under s 18(2) or (6) at any time when he is in receipt of guarantee state pension credit under the State Pension Credit Act 2002 s 1(3)(a) (see SOCIAL SECURITY AND PENSIONS), or he is a member of a couple the other member of which is in receipt of guarantee state pension credit: Children Act 1989 s 29(3B) (added by the State Pension Credit Act 2002 Sch 2 para 30; and amended by the Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order 2005, SI 2005/3129, art 4(4), Sch 4 para 9).
- 6 Children Act 1989 s 29(4)(a). As to the meaning of 'parent' see para 248 note 1 ante.
- 7 *Ibid* s 29(4)(b).
- 8 *Ibid* s 29(4)(c).
- 9 *Ibid* s 29(2).
- 10 *Ie* for a service provided under *ibid* s 17 (as amended) or s 18(1) or (5): see s 29(3) (amended by the Local Government Act 2000 s 103(1)).
- 11 *Ie* under the Social Security Contributions and Benefits Act 1992 Pt VII (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(1) (Reissue) para 173 et seq.
- 12 Children Act 1989 s 29(3) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 108(b); the Jobseekers Act 1995 s 41(4), Sch 2 para 19(3); and the Tax Credits Act 2002 s 47, Sch 3 paras 15, 18, Sch 6). As from a day to be appointed the Children Act 1989 s 29(3) (as amended) is further amended by the Welfare Reform Act 2007 s 28(1), Sch 3 para 6(1), (4) so as to also exclude a person in receipt of an income-related employment and support allowance from being liable to pay for any charge under the Children Act 1989 s 29(1). At the date at which this volume states the law no such day had been appointed. As to the allowances mentioned in the text see note 5 supra; and SOCIAL SECURITY AND PENSIONS.
- 13 *Ie* under the Children Act 1989 s 20(1): see para 863 ante.
- 14 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.
- 15 As to the ordinary residence of a child see para 271 notes 8-9 ante. Any question arising under the Children Act 1989 s 29(7)-(9) (as amended) as to the child's ordinary residence must be determined by agreement between the local authorities concerned or, in default of agreement, by the Secretary of State or the Welsh Ministers: s 30(2). As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.
- 16 *Ibid* s 29(7).
- 17 *Ibid* s 29(8). See note 15 supra.
- 18 *Ie* under *ibid* s 21(1): see para 863 ante.
- 19 *Ie* under *ibid* s 21(2)(a): see para 863 ante.
- 20 *Ie* under *ibid* s 21(2)(b): see para 863 ante.

- 21 As to the meaning of 'community home' see para 967 post.
- 22 For the meaning of 'hospital' see para 283 note 3 ante.
- 23 As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq.
- 24 As to local health boards, strategic health authorities and primary care trusts see HEALTH SERVICES vol 54 (2008) PARAS 74, 94 et seq, 111 et seq.
- 25 Children Act 1989 s 29(8) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 36(3); the Health Authorities Act 1995 s 2(1), Sch 1 para 118(6); the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (6); the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, art 4, Sch 1 Pt 1 para 16(1), (2); and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(e)).
- 26 Ie a request under the Children Act 1989 s 27(2) (see para 932 ante).
- 27 Ie for the purposes of ibid s 23B (as added) or s 23C (as added) (see paras 929-930 ante).
- 28 Ie by virtue of ibid s 24(5)(a) (see para 922 ante).
- 29 Ibid s 29(10) (added by the Children (Leaving Care) Act 2000 s 7(1), (3)(b)).
- 30 Ie where the Children Act 1989 s 29(10) (as added) does not apply.
- 31 See ibid s 29(9) (amended by the Courts and Legal Services Act 1990 s 116, Sch 16 para 15; and the Children (Leaving Care) Act 2000 s 7(1), (3)(a)).

## **UPDATE**

### **934 Recoupment of cost of providing services**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 5, 12--Appointed day is 27 October 2008: SI 2008/787.

TEXT AND NOTES 15, 20-24--Children Act 1989 ss 29(8)(c), 30(2) amended, s 30(2A), (2B) added: Children and Young Persons Act 2008 Sch 3 paras 20, 21.

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### **935. Contribution orders where children are looked after by local authorities.**

Where a local authority<sup>1</sup> is looking after<sup>2</sup> a child<sup>3</sup>, the authority must consider whether it should recover contributions towards the child's maintenance from any person liable to contribute<sup>4</sup>. The collection of such contributions, the making of contribution agreements, and the making and enforcement of contribution orders are governed by statute<sup>5</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 This does not apply in cases where the child is being looked after under the Children Act 1989 s 21 (child in police protection, etc: see para 863 text and notes 14-16 ante) or under an interim care order (see para 288 et seq ante) or under the Powers of Criminal Courts (Sentencing) Act 2000 s 92) (see para 1404 post): Children Act 1989 s 29(6), Sch 2 para 21(7) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 130). For the meaning of 'child' see para 3 ante.

4 Children Act 1989 Sch 2 para 21(1). However, where a local authority is authorised to place a child for adoption or a child who has been placed for adoption by a local authority is less than six weeks old Sch 2 para 21 does not apply: see the Adoption and Children Act 2002 s 53; and the Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(d).

5 See the Children Act 1989 Sch 2 paras 21-25 (as amended); and paras 535-538 ante.

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## **(7) REVIEW OF CASES**

### **936. Requirement to review cases.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may make regulations requiring the case of each child<sup>2</sup> who is being looked after<sup>3</sup> by a local authority<sup>4</sup> to be reviewed in accordance with the provisions of the regulations<sup>5</sup>. Regulations have accordingly been made requiring each responsible authority<sup>6</sup> to review the case of each child while he is being looked after or provided with accommodation<sup>7</sup> by that authority, in accordance with the regulations<sup>8</sup>.

Each responsible authority must monitor the arrangements which it has made with a view to ensuring that it complies with the regulations<sup>9</sup>. Essentially, each responsible authority must appoint an independent reviewing officer in connection with the review of the case of each child who is looked after or for whom accommodation is provided<sup>10</sup>.

Regulations may be made which make provision for a local authority to appoint a person in respect of each case to carry out in the prescribed manner any prescribed function<sup>11</sup> and the following specified functions:

- 1949 (1) participating in the review of the case in question<sup>12</sup>;
- 1950 (2) monitoring the performance of the authority's functions in respect of the review<sup>13</sup>;
- 1951 (3) referring the case to an officer of the Children and Family Court Advisory and Support Service ('CAFCASS') or a Welsh family proceedings officer, if the person appointed considers it appropriate to do so<sup>14</sup>.

The person appointed must be a person of a prescribed description<sup>15</sup>.

In relation to children whose cases are referred to officers of CAFCASS or a Welsh family proceedings officer, regulations may:

- 1952 (a) extend any functions of the officers in respect of family proceedings<sup>16</sup> to other proceedings<sup>17</sup>;
- 1953 (b) require any functions of the officers to be performed in the manner prescribed by the regulations<sup>18</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 For the meaning of 'child' see para 3 ante.

3 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 Children Act 1989 s 26(1). See *Re P (Children Act 1989 ss 22, 26: local authority compliance)* [2000] 2 FLR 910, [2000] Fam Law 792.

6 'Responsible authority' in England means: (1) in relation to a child who is being looked after by a local authority, that authority; (2) in relation to a child who is being provided with accommodation by a voluntary organisation otherwise than on behalf of a local authority, that voluntary organisation; and (3) in relation to a child who is being provided with accommodation in a private children's home otherwise than on behalf of a local authority, that private children's home.

authority or voluntary organisation, the person carrying on that home: Review of Children's Cases Regulations 1991, SI 1991/895, reg 1(2) (revoked in relation to Wales by SI 2007/307). 'Responsible authority' in Wales means: (a) in relation to a placement by a local authority (including one in which the child is accommodated and maintained in a voluntary home or private children's home), the local authority which places the child; (b) in relation to a placement by a voluntary organisation of a child who is not looked after by a local authority, the voluntary organisation which places the child; and (c) in relation to a placement in a private children's home of a child who is neither looked after by a local authority nor accommodated in such a home by a voluntary organisation, the person carrying on the home: Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 1(2). For the meaning of 'voluntary organisation' see para 248 note 10 ante. As to the provision of accommodation by a voluntary organisation see para 975 post. As to accommodation in a registered children's home see para 983 et seq post.

7 As to the provision of accommodation by local authorities see the Children Act 1989 ss 20-22 (as amended); and paras 863-868 ante.

8 Review of Children's Cases Regulations 1991, SI 1991/895, reg 2; Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 2. The regulations do not apply in the case of a child:

- 713 (1) who is being provided with accommodation, otherwise than by a local authority or voluntary organisation in a school which is a children's home within the meaning of the Care Standards Act 2000 s 1(6) (see para 983 post) (Review of Children's Cases Regulations 1991, SI 1991/895, reg 13 (added by SI 1993/3969; renumbered by virtue of SI 1997/649; amended by SI 2002/546; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 14(1)); or
- 714 (2) who is placed for adoption (although in England this only applies to those placed for adoption under the Adoption Act 1976) (Review of Children's Cases Regulations 1991, SI 1991/895, reg 13A (added by SI 1997/649; revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 14(2)).

Nothing in the Review of Children's Cases Regulations 1991, SI 1991/895 (as amended) or, as the case may be, the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(5) prevents the carrying out of any review under the regulations and any other review, assessment or consideration under any other provision at the same time: Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(5) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(5).

The Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) gives guidance about the implementation of the regulations and about how local authorities may give effect to the principle that reviews form part of a continuous planning process, reviewing decisions to date and planning future work. The purpose of the review is to ensure that the child's welfare is safeguarded and promoted in the most effective way throughout the period the child is looked after or accommodated: see para 8.1. As to the guidance and regulations generally see para 163 ante.

9 Children Act 1989 s 26(2)(j); Review of Children's Cases Regulations 1991, SI 1991/895, reg 9 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 10.

10 See the Review of Children's Cases Regulations 1991, SI 1991/895, reg 2A (added in relation to England by SI 2004/1419; added in relation to Wales by SI 2004/1449; amended by SI 2004/2253; SI 2005/774; and revoked in relation to Wales by SI 2007/307); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 3.

11 Children Act 1989 s 26(2)(k) (added by the Adoption and Children Act 2002 s 118(1)(c)).

12 Children Act 1989 s 26(2A)(a) (s 26(2A) added by the Adoption and Children Act 2002 s 118(2)). An adoption agency which is a local authority, or a registered adoption society which is a voluntary organisation providing accommodation for a child, must appoint a person ('the independent reviewing officer') in respect of the case of each child authorised to be placed for adoption by the agency to carry out the functions mentioned in the Children Act 1989 s 26(2A) (as added): Adoption Agencies Regulations 2005, SI 2005/389, reg 37(1); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(1). In England, the independent reviewing officer must be registered as a social worker in a register maintained by the General Social Care Council or by the Care Council for Wales under the Care Standards Act 2000 s 56 (see SOCIAL SERVICES AND COMMUNITY CARE) or in a corresponding register maintained under the law of Scotland or Northern Ireland and must, in the opinion of the adoption agency, have sufficient relevant social work experience to undertake the functions in relation to the case: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(2), (3). In Wales, the independent reviewing officer must have significant experience in social work and hold a diploma in social work or a social work degree or an equivalent qualification recognised by the Care Council for Wales: Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(2). A person who is an employee of the adoption agency may not be appointed as an independent reviewing officer in a case if he is involved in the management of the case or is under the direct management of: (1) a person involved in the management of the case; (2) a person with management

responsibilities in relation to a person mentioned in head (1) above; or (3) a person with control over the resources allocated to the case: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(4); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(3).

The independent reviewing officer must as far as is reasonably practicable attend any meeting held in connection with the review of the child's case and chair any such meeting that he attends: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(5); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(4). He must also, as far as is reasonably practicable, take steps to ensure that the review is conducted in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 36 or, as the case may be, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36 (see para 445 ante) and in particular to ensure: (a) that the child's views are understood and taken into account; (b) that the persons responsible for implementing any decision taken in consequence of the review are identified; and (c) that any failure to review the case in accordance with the Adoption Agencies Regulations 2005, SI 2005/389, reg 36 or, as the case may be, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 36 (see para 445 ante) or to take proper steps to make the arrangements agreed at the review is brought to the attention of persons at an appropriate level of seniority within the adoption agency: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(6); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(5).

If the child whose case is reviewed wishes to take proceedings on his own account (eg to apply to the court for revocation of a placement order), it is the function of the independent reviewing officer to assist the child to obtain legal advice or to establish whether an appropriate adult is able and willing to provide such assistance or bring the proceedings on the child's behalf: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(7); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(6). The adoption agency must inform the independent reviewing officer of any significant failure to make the arrangements agreed at a review and any significant change in the child's circumstances after a review: Adoption Agencies Regulations 2005, SI 2005/389, reg 37(8); Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 38(7).

13 Children Act 1989 s 26(2A)(b) (as added: see note 12 supra).

14 Ibid s 26(2A)(c) (as added: see note 12 supra). As to CAFCASS generally see para 230 ante. In relation to children whose cases are referred to officers under s 26(2A)(c) (as added) regulations may: (1) extend any functions of the officers in respect of family proceedings (within the meaning of the Criminal Justice and Court Services Act 2000 s 12: see para 239 ante), or (as the case may be) of Welsh family proceedings officers, to other proceedings; (2) require any functions of the officers to be performed in the manner prescribed by the regulations: see the Children Act 1989 s 26(2C), (2D) (s 26(2C) added by the Adoption and Children Act 2002 s 118(2); and the Children Act 1989 s 26(2D) added by the Children Act 2004 s 40, Sch 3 paras 5, 8(1), (3).

15 Children Act 1989 s 26(2B) (s 26(2B) added by the Adoption and Children Act 2002 s 118(2)).

16 Ie within the meaning of the Criminal Justice and Court Services Act 2000 s 12 (see para 239 note 1 ante).

17 Children Act 1989 s 26(2C)(a) (as added: see note 14 supra). As to regulations made under s 26(2C) (as added) see the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004, SI 2004/2187 (amended by SI 2005/605).

18 Children Act 1989 s 26(2C)(b) (as added: see note 14 supra).

## UPDATE

### 936 Requirement to review cases

TEXT AND NOTES 5, 14--Children Act 1989 ss 26(1), (2)(d) amended: Children and Young Persons Act 2008 Sch 3 para 16.

TEXT AND NOTES 11-18--Replaced. Children Act 1989 ss 25A-25C added, s 26(2)(k), (2A)-(2D) repealed: Children and Young Persons Act 2008 s 10 (not yet in force except as stated below).

If a local authority is looking after a child, it must appoint an individual as the independent reviewing officer for that child's case: Children Act 1989 s 25A(1). The initial appointment must be made before the child's case is first reviewed in accordance with regulations made under s 26, and if a vacancy arises in respect of a child's case, the authority must make another appointment as soon as is practicable: s 25A(2), (3). An appointee must be of a description prescribed in regulations made by the appropriate national authority: s 25A(4) (in force for the purpose of making



regulations: SI 2009/2273 (England), SI 2010/1329 (Wales)). 'The appropriate national authority' means, in relation to England, the Secretary of State and, in relation to Wales, the Welsh Ministers: Children Act 1989 s 30A (added by Children and Young Persons Act 2008 Sch 3 para 22).

The independent reviewing officer must (1) monitor the performance by the local authority of its functions in relation to the child's case; (2) participate, in accordance with regulations made by the appropriate national authority, in any review of the child's case; (3) ensure that any ascertained wishes and feelings of the child concerning the case are given due consideration by the authority; (4) perform any other function prescribed in regulations made by the appropriate national authority: Children Act 1989 s 25B(1) (heads (2), (4) in force for the purpose of making regulations: SI 2009/2273 (England), SI 2010/1329 (Wales)). An independent reviewing officer's functions must be performed (a) in such manner, if any, as may be prescribed in regulations made by the appropriate national authority (in force for the purpose of making regulations: SI 2009/2273 (England), SI 2010/1329 (Wales); and (b) having regard to such guidance as the appropriate national authority may issue in relation to the discharge of those functions: Children Act 1989 s 25B(2). If the independent reviewing officer considers it appropriate to do so, the child's case may be referred by that officer to an officer of the Children and Family Court Advisory and Support Service (see generally PARA 230 et seq), or to a Welsh family proceedings officer: s 25B(3). If the independent reviewing officer is not an officer of the local authority, it is the duty of the authority to co-operate with that individual and to take all such reasonable steps as that individual may require of the authority to enable that individual's functions under s 25B to be performed satisfactorily: s 25B(4).

In relation to children whose cases are referred to officers under s 25B(3), the Lord Chancellor may by regulations (i) extend any functions of the officers in respect of family proceedings (within the meaning of the Criminal Justice and Court Services Act 2000 s 12: see PARA 239) to other proceedings; (ii) require any functions of the officers to be performed in the manner prescribed by the regulations: s 25C(1). The power to make regulations in s 25C is exercisable in relation to functions of Welsh family proceedings officers only with the consent of the Welsh Ministers: s 25C(2).

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### **937. Time for review.**

Each case must first be reviewed within four weeks of the date on which a child<sup>1</sup> begins to be looked after<sup>2</sup> or provided with accommodation<sup>3</sup> by a responsible authority<sup>4</sup>. The second review must be carried out not more than three months after the first<sup>5</sup>. Thereafter, subsequent reviews must be carried out not more than six months after the date of the previous review<sup>6</sup>. Transitional provision is made relating to the time at which the cases of certain children accommodated before certain dates<sup>7</sup> are to be reviewed<sup>8</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 As to the provision of accommodation by local authorities see the Children Act 1989 ss 20-22 (as amended); and paras 863-868 ante.

4 Ibid s 26(2)(c); Review of Children's Cases Regulations 1991, SI 1991/895, reg 3(1) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4(1). For the meaning of 'responsible authority' see para 936 note 6 ante.

5 Review of Children's Cases Regulations 1991, SI 1991/895, reg 3(2) (revoked in relation to Wales by SI 2007/307); Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4(2).

6 Review of Children's Cases Regulations 1991, SI 1991/895, reg 3(2) (revoked in relation to Wales by SI 2007/307); Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4(2).

7 In England, this relates to children accommodated before 14 October 1991: see the Review of Children's Cases Regulations 1991, SI 1991/895, reg 12 (added by SI 1991/2033). In Wales, it relates to children accommodated before 1 July 2007: see the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 13.

8 See the Review of Children's Cases Regulations 1991, SI 1991/895, reg 12 (added by SI 1991/2033); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 13.

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### **938. Conduct of reviews.**

Each responsible authority<sup>1</sup> must set out in writing its arrangements governing the manner in which the case of each child<sup>2</sup> is to be reviewed<sup>3</sup>. It must draw those arrangements to the attention of specified persons<sup>4</sup>, and must, unless it is not reasonably practicable to do so, before conducting any review seek and take into account the views<sup>5</sup> of those persons<sup>6</sup>. The persons so specified are:

- 1954 (1) the child<sup>7</sup>;
- 1955 (2) his parents<sup>8</sup>;
- 1956 (3) any person who is not a parent but has parental responsibility for him<sup>9</sup>; and
- 1957 (4) any other person whose views the authority considers to be relevant<sup>10</sup>.

In relation to Wales, where a child is placed in a children's home, the child's link worker is also a person so specified<sup>11</sup>.

The responsible authority looking after<sup>12</sup> or providing accommodation<sup>13</sup> for a child must make arrangements to co-ordinate the carrying out of all aspects of the review of that child's case<sup>14</sup>, and it must appoint one of its officers to assist the authority in the co-ordination of all aspects of the review<sup>15</sup>. As far as practicable the manner in which a case is reviewed must include the following elements<sup>16</sup>:

- 1958 (a) keeping informed of the arrangements for looking after the child and any relevant change in his circumstances<sup>17</sup>;
- 1959 (b) keeping informed of the name and address of any person whose views should be taken into account in the course of the review<sup>18</sup>;
- 1960 (c) making necessary preparations and providing any relevant information to the participants in any meeting of the responsible authority which considers the child's case in connection with any aspect of the review<sup>19</sup>;
- 1961 (d) initiating meetings of relevant personnel of the authority and other relevant persons to consider the review<sup>20</sup>;
- 1962 (e) explaining to the child any steps which he may take under the Children Act 1989<sup>21</sup>;
- 1963 (f) making decisions or taking steps following review decisions arising out of or resulting from the review<sup>22</sup>.

So far as is reasonably practicable the responsible authority must involve the persons whose views have been sought in the review including, where it considers appropriate, the attendance of those persons at part or all of any meeting which is to consider the child's case in connection with any aspect of the review of that case<sup>23</sup>.

1 For the meaning of 'responsible authority' see para 936 note 6 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 26(2)(a); Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(1) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(1). The regulations seek to give effect to the policy that the review system should provide for the full

participation of both children and parents in the decision-making process; a structured, co-ordinated approach to the planning of child care work in individual cases; and a monitoring system for checking the operation of the review process: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 8.8. As to the guidance and regulations generally see para 163 ante.

4 Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(1) (revoked in relation to Wales); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(1). As to the specified persons see heads (1)-(4) in the text.

5 This includes, in particular, the views of those persons in relation to any particular matter which is to be considered in the course of the review: Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(1); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1).

6 Children Act 1989 s 26(2)(d); Review of Children's Cases regulations 1991, SI 1991/895, reg 7(1); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1). 'Any other person' may include the child's current carer (foster parent or residential social worker); the independent visitor (if one has been appointed) (see para 871 ante); the relevant health care professionals of the district health authority; the child's general medical practitioner; the appropriate local authority where it is proposed, or is already the case, that the child will be looked after in its area; the local education authority; the child's teacher (in relevant cases) and others, such as representatives from a voluntary agency, police child protection liaison officer, housing officer or community leader: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 8.11.

7 Review of Children's Cases regulations 1991, SI 1991/895, reg 7(1)(a) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1)(a).

8 Review of Children's Cases regulations 1991, SI 1991/895, reg 7(1)(b) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1)(b).

9 Review of Children's Cases regulations 1991, SI 1991/895, reg 7(1)(c) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1)(c). For the meaning of 'parental responsibility' see para 134 ante.

10 Review of Children's Cases regulations 1991, SI 1991/895, reg 7(1)(d) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1)(e).

11 Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(1)(d).

12 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

13 As to the provision of accommodation by local authorities see the Children Act 1989 ss 20-22 (as amended); and paras 863-868 ante.

14 Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(2) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(2).

15 Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(3) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(3).

16 Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(4) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(4).

17 Review of Children's Cases Regulations 1991, SI 1991/895, reg 4(4), Sch 1 para 1 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 5(4), Sch 1 para 1.

18 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 2 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 1 para 2.

19 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 3 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 1 para 3.

20 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 4 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 1 para 4.

21 Children Act 1989 s 26(2)(g); Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI

2007/307, Sch 1 para 5. This includes, where appropriate, his right to apply with leave for a contact order, prohibited steps order, residence order or specific issue order (see para 247 et seq ante), and (where he is in care) his right to apply for the discharge of the care order (see para 293 ante), and also the availability to him of the procedure for considering representations (see para 944 et seq post): Children Act 1989 s 26(2)(g); Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 1 para 5. As to contact orders see para 251 ante; as to prohibited steps orders see para 261 ante; as to residence orders see para 262 ante; as to specific issue orders see para 263 ante; and as to care orders see paras 276-280 ante.

The authority should also work in suitable cases towards bringing a care order to an end through rehabilitation of the child under the Children Act 1989 s 23(6) (see para 869 ante); the authority should prepare for his rehabilitation by advising, assisting and befriending him (see s 24 (as substituted and amended); and 922 ante) and, if appropriate, by encouraging increased contact with the person or persons concerned (applying if necessary for variation of an order made under s 34 (as amended): see para 279 ante). The court does not have power to postpone discharge of a care order to allow for a gradual return of the child to his family over a period of time. However, it can encourage the process of rehabilitation by varying the contact provisions consistent with a plan for return. It can also make a residence order with appropriate directions and conditions under s 11(7) (see para 250 ante) coupled with a supervision order: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 1 Court Orders* (HMSO, 1991) para 3.57.

22 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 1 para 6 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 1 para 6.

23 Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(2) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(2).

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### **939. General considerations on review.**

A responsible authority<sup>1</sup>, so far as is reasonably practicable in reviewing each case, must have regard to the following general considerations<sup>2</sup>:

- 1964 (1) in the case of a child<sup>3</sup> who is in care<sup>4</sup>: (a) to keep the care plan for the future care of the child<sup>5</sup> under review and, if it is of the opinion that some change is required, to revise the plan or make a new plan accordingly; and (b) to consider whether an application should be made to discharge the care order<sup>6</sup>;
- 1965 (2) where the responsible authority is a local authority<sup>7</sup>, whether it should seek a change in the child's legal status<sup>8</sup>;
- 1966 (3) arrangements for contact, and whether there is any need for changes in the arrangements in order to promote contact with the child's family and others so far as it is consistent with his welfare<sup>9</sup>;
- 1967 (4) any special arrangements that have been made or need to be made for the child, including the carrying out of assessments either by a local authority or by other persons, such as those in respect of special educational needs<sup>10</sup>;
- 1968 (5) the responsible authority's immediate and long term arrangements for looking after the child or providing him with accommodation<sup>11</sup>, whether a change in those arrangements is needed and consideration of alternative courses of action<sup>12</sup>;
- 1969 (6) where the responsible authority is a local authority, whether an independent visitor<sup>13</sup> should be appointed if one has not already been appointed<sup>14</sup>;
- 1970 (7) the child's educational needs, progress and development<sup>15</sup>;
- 1971 (8) whether arrangements need to be made for the time when the child will no longer be looked after or provided with accommodation by the responsible authority<sup>16</sup>;
- 1972 (9) whether plans need to be made to find a permanent substitute family for the child<sup>17</sup>;
- 1973 (10) in the case of a child in accommodation provided by the authority: (a) if there is no plan for the future care of the child, to prepare one; (b) if there is such a plan for the child, to keep it under review and, if it is of the opinion that some change is required, to revise the plan or make a new plan, accordingly; (c) to consider whether the accommodation accords with the relevant requirements<sup>18</sup>;
- 1974 (11) in relation to Wales, whether the responsible authority has complied with the requirements of the Placement of Children (Wales) Regulations 2007<sup>19</sup>;
- 1975 (12) in relation to Wales, where a child is placed outside the area in which he is normally resident, whether the child's case should be referred to a panel<sup>20</sup>.

1 For the meaning of 'responsible authority' see para 936 note 6 ante.

2 Children Act 1989 s 26(2)(b); Review of Children's Cases Regulations 1991, SI 1991/895, reg 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 6.

3 For the meaning of 'child' see para 3 ante.

4 As to the meaning of 'in care' see para 867 note 7 ante.

5 ie the plan prepared under the Children Act 1989 s 31A (as added) (see para 275 ante).

6 Ibid s 26(2)(e) (amended by the Adoption and Children Act 1989 s 118(1)(a)); Review of Children's Cases Regulations 1991, SI 1991/895, reg 5, Sch 2 para 1 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 6, Sch 2 para 1. As to care orders see paras 276-280 ante. As to the discharge of care orders see para 293 ante.

7 For the meaning of 'local authority' see para 248 note 10 ante.

8 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 2 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 2.

9 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 3 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 3.

10 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 4 (amended by SI 2002/2935; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 4. For the meaning of 'special educational needs' see para 296 note 7 ante. As to children with special educational needs see the Education Act 1996; and EDUCATION vol 15(2) (2006 Reissue) para 984 et seq.

11 The arrangements made pursuant to the provisions of the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended) (see para 880 et seq ante) or, as the case may be the Placement of Children (Wales) Regulations 2007, SI 2007/310 (see para 879 et seq ante).

12 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 5.

13 'Independent visitor' means an independent visitor appointed under the Children Act 1989 Sch 2 para 17 (see para 871 ante); Review of Children's Cases Regulations 1991, SI 1991/895, reg 1(2) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 2(1). As to independent visitors see para 871 ante.

14 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 6 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 7.

15 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 7 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 8.

16 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 8 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 10.

17 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 2 para 9 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 11.

18 Children Act 1989 s 26(2)(f) (amended by the Adoption and Children Act 2002 s 118(1)(b)). The text refers to the requirements of the Children Act 1989 Pt III (ss 17-30) (as amended).

19 Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 6. This applies, in particular, to the Placement of Children (Wales) Regulations 2007, SI 2007/310, regs 4, 8.

20 Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 2 para 9.

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#### **940. Health considerations on review; health reviews.**

A responsible authority<sup>1</sup>, so far as is reasonably practicable in reviewing each case, must have regard to the following health considerations<sup>2</sup>:

- 1976 (1) the child's<sup>3</sup> state of health including his physical (and, in Wales, oral), emotional and mental health<sup>4</sup>;
- 1977 (2) his health history, including, as far as practicable, his family health history<sup>5</sup>;
- 1978 (3) the effect of his health and health history on his development<sup>6</sup>;
- 1979 (4) existing arrangements for the child's medical and dental care and treatment and health and dental surveillance (and in particular, in Wales, where a child has been assessed as requiring mental health services, whether the child receives those services)<sup>7</sup>;
- 1980 (5) the possible need for an appropriate course of action which should be identified to assist necessary change of such care, treatment or surveillance<sup>8</sup>;
- 1981 (6) the possible need for preventive measures such as vaccination and immunisation and screening for vision and hearing, including the possible need for advice and guidance on health (which, in Wales, includes mental health and oral health), personal care and health promotion issues appropriate to the child's needs<sup>9</sup>;
- 1982 (7) in Wales, whether the responsible authority has complied with particular requirements of the Placement of Children (Wales) Regulations 2007<sup>10</sup>;
- 1983 (8) in Wales, whether the transfer of relevant medical records has, where applicable, taken place<sup>11</sup>.

A responsible authority is also required to make arrangements for a child who continues to be looked after<sup>12</sup> or provided with accommodation<sup>13</sup> by it to be examined by a registered medical practitioner<sup>14</sup> or registered nurse (or, in England, a registered midwife acting under the supervision of a registered medical practitioner) and for a written assessment on the state of health of the child and his need for health care to be made at least once in every period of six months before his second birthday, and at least once in every period of 12 months after his second birthday unless he is of sufficient understanding and he refuses to submit to the examination<sup>15</sup>.

1 For the meaning of 'responsible authority' see para 936 note 6 ante.

2 Children Act 1989 s 26(2)(b); Review of Children's Cases Regulations 1991, SI 1991/895, reg 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 6.

3 For the meaning of 'child' see para 3 ante.

4 Review of Children's Cases Regulations 1991, SI 1991/895, reg 5, Sch 3 para 1 (amended by SI 2002/546; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 6, Sch 3 para 1.

5 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 3 para 2 (amended by SI 2002/546; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 2.



- 6 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 3 para 3 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 3.
- 7 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 3 para 4 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 4.
- 8 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 3 para 5 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 7.
- 9 Review of Children's Cases Regulations 1991, SI 1991/895, Sch 3 para 6 (amended by SI 2002/546; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 8.
- 10 Ibid Sch 3 para 5. The requirements mentioned in the text are the requirements of the Placement of Children (Wales) Regulations 2007, SI 2007/310, regs 6, 8 (see paras 883, 885-886 ante).
- 11 Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, Sch 3 para 6.
- 12 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.
- 13 As to the provision of accommodation by local authorities see the Children Act 1989 ss 20-22 (as amended); and paras 863-868 ante.
- 14 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.
- 15 See the Review of Children's Cases Regulations 1991, SI 1991/895, reg 6 (substituted by SI 2002/546; and revoked in relation to Wales by SI 2007/307); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 7. As to the child's right to consent or refuse to submit to medical treatment see para 4 note 12 ante.

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#### **941. Results of the review.**

A responsible authority<sup>1</sup>, so far as is reasonably practicable, must notify<sup>2</sup> details of the results of a review and of any decision taken by it in consequence of the review to<sup>3</sup>:

- 1984 (1) the child<sup>4</sup>;
- 1985 (2) his parents<sup>5</sup>;
- 1986 (3) any person who is not a parent of his but who has parental responsibility for him<sup>6</sup>;
- 1987 (4) any other person whom the authority considers ought to be notified<sup>7</sup>; and
- 1988 (5) in relation to Wales, where the child is placed in a children's home, the child's link worker<sup>8</sup>.

The authority must also make arrangements itself or with other persons to implement any decision which it proposes to make in the course, or as a result, of the review of a child's case<sup>9</sup>. The responsible authority must inform the independent reviewing officer<sup>10</sup> of any significant failure to make such arrangements<sup>11</sup> or any significant change of circumstances occurring after the review that affects those arrangements<sup>12</sup>.

1 For the meaning of 'responsible authority' see para 936 note 6 ante.

2 Any notice must be given in writing and may be sent by post: Review of Children's Cases Regulations 1991, SI 1991/895, reg 1(3) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 1(3).

3 Children Act 1989 s 26(2)(i); Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(3) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(3).

4 Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(3)(a) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(3)(a). For the meaning of 'child' see para 3 ante.

5 Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(3)(b) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(3)(b).

6 Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(3)(c) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 8(3)(c). For the meaning of 'parental responsibility' see para 134 ante.

7 Review of Children's Cases Regulations 1991, SI 1991/895, reg 7(3)(d) (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 7(3)(e).

8 Ibid reg 7(3)(d).

9 Children Act 1989 s 26(2)(h); Review of Children's Cases Regulations 1991, SI 1991/895, reg 8 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 9(1).

10 As to the independent reviewing officer see para 936 ante.

11 Ie arrangements in accordance with the Review of Children's Cases Regulations 1991, SI 1991, 895, reg 8 or, as the case may be, the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 9(1).

12     Review of Children's Cases Regulations 1991, SI 1991/895, reg 8A (added in relation to England by SI 2004/1419; added in relation to Wales by SI 2004/1449; and revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 9(2).

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#### **942. Recording review information.**

Each responsible authority<sup>1</sup> must ensure that information obtained in respect of the review of a child's<sup>2</sup> case, details of the proceedings at any meeting arranged by the authority at which the child's case is considered in connection with any aspect of the review of that case, and details of any decisions made in the course of or as a result of the review are recorded in writing<sup>3</sup>.

1 For the meaning of 'responsible authority' see para 936 note 6 ante.

2 For the meaning of 'child' see para 3 ante.

3 Review of Children's Cases Regulations 1991, SI 1991/895, reg 10 (revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 11.

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### **943. Application of provisions to short periods.**

Specific provision is made by the Review of Children's Cases Regulations 1991 and the Review of Children's Cases (Wales) Regulations 2007<sup>1</sup>, for cases in which a responsible authority<sup>2</sup> has arranged that a child<sup>3</sup> should be looked after<sup>4</sup> or provided with accommodation<sup>5</sup> for a series of short periods at the same place and the arrangement is such that no single period is to last for more than four weeks and the total duration of the periods is not to exceed 120 days in any period of 12 months<sup>6</sup>. Each such case is first to be reviewed within three months of the beginning of the first of the short periods<sup>7</sup>. If the case continues, the second review must be carried out not more than six months after the first<sup>8</sup>. Thereafter, if the case continues, subsequent reviews must be carried out not more than six months after the date of the previous review<sup>9</sup>.

1    In the Review of Children's Cases Regulations 1991, SI 1991/895 (as amended; revoked in relation to Wales) and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307.

2    For the meaning of 'responsible authority' see para 936 note 6 ante.

3    For the meaning of 'child' see para 3 ante.

4    As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

5    As to the provision of accommodation by local authorities see the Children Act 1989 ss 20-22 (as amended); and paras 863-868 ante.

6    Review of Children's Cases Regulations 1991, SI 1991/895, reg 11(1) (substituted by SI 1995/2015; revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 12(1). The Review of Children's Cases Regulations 1991, SI 1991/895, reg 3 (see para 937 ante) does not apply to a case to which reg 11 (as substituted) applies (reg 11(2) (as so substituted; revoked in relation to Wales by SI 2007/307)); and the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 4 (see para 880 ante) does not apply to a case to which reg 12 applies (reg 12(2)). For the purposes of the Review of Children's Cases Regulations 1991, SI 1991/895, reg 6 (see para 940 ante), a child must be treated as continuing to be looked after or provided with accommodation throughout the period that reg 11 (as substituted) applies to his case: reg 11(3) (as so substituted; revoked in relation to Wales by SI 2007/307). For the purposes of the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 7 (see paras 938, 941 ante), a child must be treated as continuing to be looked after or provided with accommodation throughout the period that reg 12 applies to his case: reg 12(3). As to direct payments for disabled children see para 861 ante.

7    Review of Children's Cases Regulations 1991, SI 1991/895, reg 11(2)(a) (as substituted (see note 6 supra); revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 12(2)(a).

8    Review of Children's Cases Regulations 1991, SI 1991/895, reg 11(2)(b) (as substituted (see note 6 supra); revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 12(2)(b).

9    Review of Children's Cases Regulations 1991, SI 1991/895, reg 11(2)(c) (as substituted (see note 6 supra); revoked in relation to Wales by SI 2007/307); Review of Children's Cases (Wales) Regulations 2007, SI 2007/307, reg 12(2)(c).

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Requirement to establish procedures.

## **(8) REPRESENTATIONS PROCEDURES**

### **(i) In general**

#### **944. Requirement to establish procedures.**

Every local authority<sup>1</sup> must establish a procedure for considering any representations (including any complaint) about the discharge by the authority<sup>2</sup> of any of its qualifying functions in relation to a child<sup>3</sup>, made by<sup>4</sup>:

- 1989 (1) any child<sup>5</sup> who is being looked after<sup>6</sup> by it or who is not being looked after by it but is in need<sup>7</sup>;
- 1990 (2) a parent of his<sup>8</sup>;
- 1991 (3) any person who is not a parent of his but who has parental responsibility<sup>9</sup> for him<sup>10</sup>;
- 1992 (4) any local authority foster parent<sup>11</sup>; and
- 1993 (5) such other person as it considers has a sufficient interest in the child's welfare to warrant the consideration of his representations<sup>12</sup>.

The above duty<sup>13</sup> extends to representations (including complaints):

- 1994 (a) about the discharge by the authority of such functions under the Adoption and Children Act 2002 as are specified in regulations<sup>14</sup>, made by:
  - .35
  - 44. (i) any person mentioned in the provisions relating to meeting the needs of specified persons in relation to adoption<sup>15</sup> and any other person to whom arrangements for the provisions of adoption support services extend<sup>16</sup>;
  - 45. (ii) such other person as the authority considers has sufficient interest in a child who is or may be adopted to warrant his representations being considered by it<sup>17</sup>;
- .36
- 1995 (b) about the discharge by the authority of such functions under the Children Act 1989 regarding special guardianship support services<sup>18</sup> as are specified in regulations<sup>19</sup>, made by:
  - .37
  - 46. (i) a child with respect to whom a special guardianship order is in force<sup>20</sup>;
  - 47. (ii) a special guardian or a parent of such a child<sup>21</sup>;
  - 48. (iii) any other person the authority considers has a sufficient interest in the welfare of such a child to warrant his representations being considered by it<sup>22</sup>;
  - 49. (iv) any person who has applied for an assessment for special guardianship support services<sup>23</sup>.
- .38

In carrying out any consideration of representations a local authority must comply with regulations<sup>24</sup> made for the purpose of regulating the procedures to be followed<sup>25</sup>.

The Children Act 1989 contains provisions empowering the Secretary of State and the Welsh Ministers to make regulations:

- 1996 (A) requiring any voluntary organisation which is providing accommodation for a child to consider representations (including complaints)<sup>26</sup>;
- 1997 (B) making provision similar to that made<sup>27</sup> in respect of private children's homes<sup>28</sup>; and
- 1998 (C) requiring local authorities to consider representations (including complaints) about the discharge of their functions in respect of exempting persons from the usual fostering limit for certain purposes<sup>29</sup>.

Representations procedures are also required by direction made under the Local Authority Social Services Act 1970<sup>30</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the application of these provisions to voluntary organisations and private children's homes see the text and notes 26-30 infra.

3 The following are qualifying functions for the purposes of the Children Act 1989 s 26(3) (as amended): (1) functions under Pt III (ss 17-30) (as amended); (2) such functions under Pt IV (ss 31-42) (as amended) or Pt V (ss 43-52) (as amended) as are specified in regulations: s 26(3A) (added by the Adoption and Children Act 2002 s 117(2), (3)). The following functions have been so specified by regulations as qualifying functions for the purposes of the Children Act 1989 s 26(3) (as amended):

715 (a) in relation to England, functions under ss 31(1), 33(3), (4), (6)-(9), 34(6), (8), 35(1), (2), 43(1), 44(1), (10), (11) (see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 3); and

716 (b) in relation to Wales, functions under the Children Act 1989 ss 31, 33, 34, 35, 43, 44, 47 (see the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 7).

4 Children Act 1989 s 26(3) (amended by the Adoption and Children Act 2002 s 117(2), (3)). See also *R v Brent London Borough Council, ex p S* [1994] 2 FCR 996, [1994] 1 FLR 203, CA.

It is intended that local authorities may be able to use common structures for handling representations, but an important feature of the procedure under the Children Act 1989 is that it involves an independent person at each stage of consideration of a representation or complaint: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 10.2. As to the guidance and regulations generally see para 163 ante.

5 For the meaning of 'child' see para 3 ante.

6 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

7 Children Act 1989 s 26(3)(a). As to the meaning of 'child in need', and as to the duty to provide for such children, see para 851 ante.

8 Ibid s 26(3)(b).

9 For the meaning of 'parental responsibility' see para 134 ante.

10 Children Act 1989 s 26(3)(c).

11 Ibid s 26(3)(d). As to the meaning of 'local authority foster parent' see para 900 ante.

12 Ibid s 26(3)(e). As to the action to be taken by a local authority where representations are made under s 26(3)(e) see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 12 (see para 951 post); and the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 13 (see para 961 post).

13 Ie the duty under the Children Act 1989 s 26(3) (as amended).

14 For the purposes of *ibid* s 26(3B) (as added), the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 4 specifies the following functions in relation to England:

- 717 (1) the provision of adoption support services as prescribed in the Adoption Support Services Regulations 2005, SI 2005/691, reg 3 (see para 394 ante) (but the provision of services prescribed in reg 3(1)(b) is only a specified function for these purposes in so far as it is to enable groups of adoptive children to discuss matters relating to adoption and for these purposes 'adoptive child' has the meaning given in reg 2 (see para 394 note 9 ante));
- 718 (2) functions under Pt 4 (regs 13-18) (assessment and plans) (see paras 411-422 ante) and Pt 5 (regs 19-20) (reviews) (see paras 410-413, 424-426 ante) in so far as they relate to the adoption support services referred to in head (1) *supra*;
- 719 (3) functions under the Adoption and Children Act 2002 ss 18-29 (placement of children by adoption agency for adoption: see para 329 et seq ante);
- 720 (4) functions under ss 30-35 (removal of children who are or may be placed by adoption agencies: see paras 342-351 ante);
- 721 (5) functions under ss 36-40 (removal of children in non-agency cases) (see paras 352-356 ante);
- 722 (6) functions under the Adoption Agencies Regulations 2005, SI 2005/389, Pt 3 (regs 12-20A) (as amended) (duties of adoption agency where the agency is considering adoption for a child: see paras 371, 432-434, 447 ante), Pt 5 (reg 31-34) (duties of adoption agency in respect of a proposed placement of child with prospective adopter: see paras 442-444, 447 ante), Pt 6 (regs 35-38) (placement and reviews: see paras 331, 332, 371, 937 ante), Pt 7 (regs 39-44) (case records: see paras 449-450 ante) in so far as those functions relate to a child's case record as defined in regs 12, 46 and 47 (see paras 477, 340, 339 ante);
- 723 (7) functions under the Adoptions with a Foreign Element Regulations 2005, SI 2005/392, reg 10 (requirements applicable in respect of giving parental responsibility prior to adoption abroad: see para 502 ante) and Pt 3 Ch 3 (regs 52-59) (miscellaneous provisions).

15 *Ie* the persons mentioned in the Adoption and Children Act 2002 s 3(1) (see paras 393-394, 415 ante).

16 Children Act 1989 s 26(3B)(a) (s 26(3B) added by the Adoption and Children Act 2002 s 2004/3202).

17 Children Act 1989 s 26(3B)(b) (as added: see note 16 *supra*). As to the action to be taken by a local authority where representations are made under s 26(3B)(b) (as added) see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 12; and para 951 post.

18 *Ie* functions under the Children Act 1989 s 14F (as added) (see para 154 ante).

19 As to functions so specified see the Special Guardianship (Wales) Regulations 2005, SI 2005/1513, reg 14; and the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 5.

20 Children Act 1989 s 26(3C)(a) (s 26(3C) added by the Health and Social Care (Community Health and Standards) Act 2003 s 117(1)).

21 Children Act 1989 s 26(3C)(b) (as added: see note 20 *supra*).

22 *Ibid* s 26(3C)(c) (as added: see note 20 *supra*). As to the action to be taken by a local authority where representations are made under s 26(3C)(c) (as added) see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 12; and para 951 post.

23 Children Act 1989 s 26(3C)(d) (as added: see note 20 *supra*).

24 As to such regulations see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738; and the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365. These regulations regulate the procedure which local authorities are to follow in the consideration of representations made to them about the discharge of certain functions under the Children Act 1989 and under the Adoption and Children Act 2002. The regulations specify some of the matters about which a person may make representations using this procedure. They also apply the procedure, with modifications, to representations made to voluntary organisations providing accommodation for children and about fostering limits.

25 Children Act 1989 s 26(5). Regulations made under s 26(5) may provide that s 26(4) (see para 946 post) does not apply in relation to any consideration or discussion which takes place as part of a procedure for which



provision is made by the regulations for the purpose of resolving informally the matters raised in the representations: s 26(5A) (added by the Adoption and Children Act 2002 s 117(2), (7)). The Secretary of State or the Welsh Ministers may make regulations requiring local authorities to monitor the arrangements that they have made with a view to ensuring that they comply with any regulations made for the purposes of the Children Act 1989 s 26(5): s 26(6). Where any representation has been considered under the procedure established by a local authority under s 26 (as amended), the authority must: (1) have due regard to the findings of those considering the representation; and (2) take such steps as are reasonably practicable to notify (in writing) the person making the representation, the child (if the authority considers that he has sufficient understanding) and such other persons (if any) as appear to the authority to be likely to be affected, of the authority's decision in the matter and its reasons for taking that decision and of any action which it has taken, or proposes to take: s 26(7). As to such regulations see the Representations Procedure (England) Regulations 2006, SI 2006/1738 (see para 949 et seq post); and the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365 (see para 956 et seq post). Guidance on the representations procedure is given in the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) Ch 10. As to the guidance and regulations generally see para 163 ante.

26 Children Act 1989 s 59(4)(b).

27 le made by regulations under *ibid* s 26 (as amended).

28 See *ibid* s 63(11), Sch 6 para 10(2)(l) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (11)(b)). For the meaning of 'private children's home' see para 980 note 2 post.

29 See the Children Act 1989 s 63(12), Sch 7 para 6; and para 966 post. Schedule 7 has effect for the purpose of setting out the circumstances in which a person may foster more than three children without being treated, for the purposes of the Children Act 1989 and the Care Standards Act 2000, as carrying on a children's home: Children Act 1989 s 63(12) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (11)(c)). See the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365; and the Children Act Representations Procedure (England) Regulations 2006, SI 2006/1738.

30 As to representations procedures required by direction made under the Local Authority Social Services Act 1970 s 7B (as added and amended; prospectively repealed) see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1011.

## UPDATE

### 944 Requirement to establish procedures

TEXT AND NOTES 3, 14, 20-25--Children Act 1989 s 26(3A), (3B), (3C), (5), (6) amended: Children and Young Persons Act 2008 Sch 3 para 16(4).

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#### **945. Subject matter of complaints.**

Representations and complaints may relate to the discharge of any of the functions dealt with under Part III of the Children Act 1989<sup>1</sup> including, for example, complaints about:

- 1999 (1) day care<sup>2</sup>;
- 2000 (2) services to support a children within his family home<sup>3</sup>;
- 2001 (3) the accommodation of a child<sup>4</sup>;
- 2002 (4) after-care<sup>5</sup>, and decisions relating to the placement of a child<sup>6</sup> or the handling of a child's case<sup>7</sup>.

Although local authority and private foster parents<sup>8</sup> are not entitled to use the representations procedures on their own behalf except in connection with the decisions about the usual fostering limit<sup>9</sup>, the local authority<sup>10</sup> may wish to consider allowing foster parents to make complaints on their own behalf about other matters; an authority should allow representations made about matters which affect a group of children rather than an individual child to be dealt with under its complaints procedure<sup>11</sup>.

1 See para 945 et seq ante. The text refers to the Children Act 1989 Pt III (ss 17-30) (as amended).

2 As to day care see para 860 ante.

3 See para 851 et seq ante.

4 See para 863 et seq ante.

5 See para 910 et seq ante.

6 See para 878 et seq ante.

7 Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 10.8. As to the guidance and regulations generally see para 163 ante. See further the Children Act 1989 s 63(12) (as amended), Sch 7 (as amended); and para 966 post.

8 As to the meaning of 'local authority foster parent' see para 900 ante; and as to privately fostered children see para 1049 et seq post.

9 As to the usual fostering limit see para 966 ante.

10 For the meaning of 'local authority' see para 248 note 10 ante.

11 Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 10.9. An example given by the guidance is inappropriate restrictions on the lives of children in foster care or residential care, such as preventing children's activities for the convenience of staff, fixing meal times to suit staff rather than to fit in with the normal needs of children, or preventing children's normal activities outside the home: para 10.9.

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Requirement for independent person.

**946. Requirement for independent person.**

The representations procedure established by a local authority<sup>1</sup> must ensure that at least one person who is not a member or officer of the authority takes part in the consideration and in any discussions which are held by the authority about the action (if any) to be taken in relation to the child<sup>2</sup> in the light of the consideration<sup>3</sup>.

1 As to the requirement to establish such a procedure see para 944 ante. For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 26(4). As to the appointment of an independent person for initial consideration of a representation see the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 17 (see para 953 post); and the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 17 (see para 963 post).

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**947. Publicity.**

Every local authority<sup>1</sup> must give such publicity to its representations procedure<sup>2</sup> as it considers appropriate<sup>3</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the representations procedure see para 949 et seq ante.

3 Children Act 1989 s 26(8). This information should be available in the form of leaflets and posters; and it would be good practice to ensure that the information on the representations procedure forms part of an information pack made available prior to a first review of the child's case or at the time a decision is issued in respect of approval of a foster parent. It is said that all material should present a positive view of the use of the procedure and seek to diminish fears that invoking the procedure will cause problems for a complainant in day to day contact with the authority's staff: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 3 Family Placements* (HMSO, 1991) para 10.16. As to the guidance and regulations generally see para 163 ante.

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#### **948. Time limits.**

Regulations may be made by the Secretary of State<sup>1</sup> or the Welsh Ministers<sup>2</sup> imposing time limits on the making of representations<sup>3</sup>.

1 As to the Secretary of State see para 155 ante.

2 As to the Welsh Ministers see para 155 ante.

3 Children Act 1989 s 26(4A) (added by the Adoption and Children Act 2002 s 117(2), (6)). As to such regulations see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 9; and para 950 post.

#### **UPDATE**

#### **948 Time limits**

TEXT AND NOTES--Children Act 1989 s 26(4A) amended: Children and Young Persons Act 2008 Sch 3 para 16(4).

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## **(ii) Representations Procedure in England**

### **949. Representations not to be considered.**

A local authority<sup>1</sup> must not consider, or further consider, representations<sup>2</sup> to the extent that the representations concern any matter in relation to which:

- 2003 (1) the complainant<sup>3</sup> has stated in writing to the local authority that he is taking, or intends to take, proceedings in any court or tribunal<sup>4</sup>;
- 2004 (2) the local authority is taking or proposing to take disciplinary proceedings against any person<sup>5</sup>;
- 2005 (3) the local authority has been notified that any person is conducting an investigation in contemplation of criminal proceedings<sup>6</sup>; or
- 2006 (4) the local authority has been notified that criminal proceedings are pending<sup>7</sup>,

and the local authority decides that consideration, or further consideration, of the representations would prejudice the conduct of any proceedings or investigation falling under heads (1) to (4) above<sup>8</sup> (referred to for these purposes as a 'concurrent consideration'<sup>9</sup>).

Where a local authority decides that it should not consider, or further consider, representations, the local authority must, as soon as possible, give notice in writing to the complainant explaining the reasons for its decision and specifying the relevant concurrent consideration<sup>10</sup>.

Where the concurrent consideration specified in such a notice has been discontinued or completed, the complainant to whom the notice was given may resubmit to the local authority the representations to which the notice relates and, subject to the relevant time limit<sup>11</sup>, the local authority must consider them in accordance with the relevant provisions<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Representations may be made in writing or orally: Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 6.

3 For these purposes, 'complainant' means a person making representations to a local authority under the Children Act 1989 s 24D (as added) (see para 926 ante) or s 26 (as amended) (see para 936 et seq ante): Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 2(1).

4 Ibid reg 8(1)(a).

5 Ibid reg 8(1)(b).

6 Ibid reg 8(1)(c).

7 Ibid reg 8(1)(d).

8 Ibid reg 8(1).

9 Ibid reg 8(2).

10 Ibid reg 8(3).

11 Where a complainant resubmits representations in accordance with *ibid* reg 8(4), he must do so no later than one year after the concurrent consideration is discontinued or completed; and accordingly reg 9(1) (time limit on making representations) (see para 950 post) does not apply: reg 8(5).

12 *Ibid* reg 8(4). The relevant provisions are regs 9-20 (see paras 950-954 post).

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### **950. Time limit on making representations.**

A complainant<sup>1</sup> must make his representations<sup>2</sup> about a matter no later than one year after the grounds to make the representations arose<sup>3</sup>. However, a local authority<sup>4</sup> may consider any representations which have been made outside the time limit if, having regard to all the circumstances, it concludes that it would not be reasonable to expect the complainant to have made the representations within the time limit and notwithstanding the time that has passed it is still possible to consider the representations effectively and fairly<sup>5</sup>.

1 For the meaning of 'complainant' see para 949 note 3 ante.

2 Representations may be made in writing or orally: Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 6.

3 Ibid reg 9(1).

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 9(2).



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### **951. Local authority action.**

A local authority<sup>1</sup> must:

- 2007 (1) appoint one of its officers as a complaints manager to assist the authority in the co-ordination of all aspects of its consideration of representations<sup>2</sup>;
- 2008 (2) take all reasonable steps to see that everyone involved in the handling and consideration of representations is familiar with the procedure set out in the Children Act 1989 Representations Procedure (England) Regulations 2006<sup>3</sup>; and
- 2009 (3) deal expeditiously in the handling and consideration of representations under those regulations<sup>4</sup>.

As soon as possible after having received representations a local authority must: (a) provide the complainant<sup>5</sup> with details of its procedure for considering representations and where relevant, information about advocacy services<sup>6</sup>; and (b) offer to the complainant assistance and guidance on following the representations procedure or advice on where he may obtain such assistance and guidance and, where relevant, help in obtaining an advocate<sup>7</sup>.

Where a local authority receives representations from a person falling within certain provisions of the Children Act 1989<sup>8</sup>, it must as soon as possible decide whether that person has a sufficient interest in the welfare of the child concerned to warrant his representations being considered by it<sup>9</sup>. In reaching such a decision the local authority must take into account the views of the child if it considers it appropriate to do so<sup>10</sup>. If the local authority decides that the person does have sufficient interest then it must consider the representations<sup>11</sup>. However, if it decides that the person does not have sufficient interest, then it must notify him of its decision and tell him no further action will be taken in respect of his representations<sup>12</sup>. The local authority must tell the child concerned of its decision if it considers it appropriate to do so<sup>13</sup>.

Every local authority must monitor the arrangements that it has made with a view to ensuring compliance with the Children Act 1989 Representations Procedure (England) Regulations 2006<sup>14</sup> in so far as they regulate the procedure for the consideration of representations relating to the requirement to review cases<sup>15</sup>. Local authorities must monitor those arrangements by keeping a record of each representation received<sup>16</sup>, the outcome of each such representation and whether there was compliance with the time limits specified in the regulations<sup>17</sup>. For the purposes of such monitoring, every local authority must as soon as possible after the end of each financial year<sup>18</sup> compile a report on the operation in that year of the procedure set out in the regulations<sup>19</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 10(a). Representations may be made in writing or orally: reg 6.

3 Ibid reg 10(b). The regulations mentioned in the text are the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738.

4 Ibid reg 10(c).

5 For the meaning of 'complainant' see para 949 note 3 ante.

6 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 11(1). For the meaning of 'advocacy services' see para 952 note 7 ante.

7 Ibid reg 11(2). For the meaning of 'advocate' see para 952 note 7 ante.

8 Ie under the Children Act 1989 s 26(3)(e), (3B)(b), (3C)(c) (s 16(3B), (3C) as added) (see para 944 ante).

9 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 12(1).

10 Ibid reg 12(2).

11 Ibid reg 12(3).

12 Ibid reg 12(4).

13 Ibid reg 12(5).

14 Ie the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738.

15 Ibid reg 13(1). The text refers to the procedure for the consideration of representations under the Children Act 1989 s 26 (as amended).

16 Ie received under ibid s 26 (as amended).

17 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 13(2).

18 'Financial year' means the period beginning with 1 September 2006 and ending with 31 March 2007 and each successive period of 12 months ending with 31 March: ibid reg 13(4).

19 Ibid reg 13(3).

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## **952. Local resolution.**

Where a local authority<sup>1</sup> has received representations<sup>2</sup> from a complainant<sup>3</sup> then unless the complainant and the local authority agree that the representations should not be considered in accordance with these provisions<sup>4</sup>, the local authority must consider and try to resolve the representations as soon as is reasonably practicable and in any event within 10 working days of the start date<sup>5</sup>. The procedure followed by the local authority in considering such representations need not include the appointment of an independent person<sup>6</sup>.

Where the local authority and the complainant have resolved matters then the local authority must as soon as possible provide the complainant and, where one has been appointed, his advocate<sup>7</sup> with written details of the terms of the resolution<sup>8</sup>.

Where the local authority and the complainant have not resolved matters under the above provisions then the complainant or, where one has been appointed, his advocate may request orally or in writing that the representations be considered under provisions involving the appointment of an independent person<sup>9</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Representations may be made in writing or orally: Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 6.

3 For the meaning of 'complainant' see para 949 note 3 ante.

4 Ie under the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 14.

5 Ibid reg 14(1). For these purposes, the 'start date' means: (1) in the case where representations are received from a person falling within the Children Act 1989 s 26(3)(e), (3B)(b) or (3C)(c) (s 26(3B), (3C) as added) (see para 944 ante), the date on which the local authority decides that the person making the representations has a sufficient interest to warrant his representations being considered by it; (2) in the case where the complainant has asked for an advocate but as at the date on which the representations were received by the local authority an advocate had not been appointed for him, the date on which an advocate is appointed; (3) in any other case, the date on which the representations were received by the local authority: reg 14(3). However, the start date may, at the request of the complainant, be a date after that defined in heads (1)-(3) supra that the complainant agrees with the local authority: reg 14(4). The local authority may extend the period for considering representations under reg 14 by a maximum of 10 working days where it considers the representations to be complex: reg 14(5).

6 Ibid reg 14(2). For the meaning of 'independent person' see para 953 note 7 post.

7 'Advocate' means a person who provides assistance under arrangements made by a local authority under the Children Act 1989 s 26A(1) (as added) (see para 927 ante); and 'advocacy services' means assistance provided under such arrangements: see the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 2(1).

8 Ibid reg 15(1).

9 Ibid reg 15(2). The provisions mentioned in the text are those of reg 17 (see para 953 post).

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### **953. Investigation of representations.**

Where the complainant<sup>1</sup> and the local authority<sup>2</sup> have agreed that the representations<sup>3</sup> should not be considered in accordance with the provisions relating to local resolution<sup>4</sup> or where matters have failed to be resolved under those provisions and the complainant has made a request that representations be considered under the provisions set out below<sup>5</sup>, then the local authority must consider the representations in accordance with those provisions<sup>6</sup>.

The procedure followed by the local authority in considering representations must include the appointment of an independent person<sup>7</sup>. The local authority must consider the representations with the independent person and send notice<sup>8</sup> of its response to the complainant and, where one has been appointed, to his advocate within 25 working days of the start date<sup>9</sup>. The independent person must take part in any discussions which are held by the local authority about the action that the local authority will take in light of the matters which have been found in the consideration of the representations and the conclusions that the local authority draws from them<sup>10</sup>.

Representations may be withdrawn orally or in writing at any time by the complainant or, where one has been appointed, by his advocate<sup>11</sup>. The local authority must write to the complainant and, where one has been appointed, to his advocate to confirm the withdrawal of the representations<sup>12</sup>.

1 For the meaning of 'complainant' see para 949 note 3 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 Where the complainant has made his representations orally and he has agreed with the local authority that his representations should not be considered in accordance with the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 14 or made a request in accordance with reg 15(2) (see para 952 ante), the local authority must as soon as possible after reaching an agreement with the complainant or receiving a request from him prepare a written record of the representations, invite the complainant's comments on it and amend it as it considers necessary in light of the complainant's comments on its accuracy: reg 16(1), (2). The final written record prepared is treated as the representations for the purpose of regs 17-24: reg 16(3).

4 Ie in accordance with *ibid* reg 14 (see para 952 ante).

5 Ie the complainant has made a request under *ibid* reg 15(2) (see para 952 ante).

6 *Ibid* reg 17(1).

7 *Ibid* reg 17(2). 'Independent person' means a person who is neither a member nor an officer of the local authority to which the representations have been made, nor the spouse or civil partner or such a person: reg 2(1). As to the review panel see para 954 post.

8 The notice of the local authority's response sent in accordance with *ibid* reg 17(3) (see the text to note 9 *infra*) must include information about the complainant's right under reg 18 (see para 954 post) to request that the representations be further considered by a panel in accordance with reg 19 (see para 954 post) and the procedure for making such a request: reg 17(8).

9 *Ibid* reg 17(3). For these purposes, the 'start date' means the date on which: (1) the local authority and the complainant agreed in accordance with reg 14(1) (see para 952 ante) that the representations should not be considered under that regulation; or (2) the local authority received the complainant's request under reg 15(2) (see para 952 ante): reg 17(4). However, where the complainant made his representations orally then the 'start

date' means the date on which the local authority produces the final written record of the representations in accordance with reg 16 (see note 3 supra): reg 17(5). If the local authority is not able to comply with the time limit provided for in reg 17(3) then it must, before that time limit has passed, tell the complainant in writing the reason for its failure to comply with the time limit, and the date, being no later than 65 working days from the start date, by which it will have concluded its consideration and sent notice of its response: reg 17(6).

10 Ibid reg 17(7).

11 Ibid reg 7(1).

12 Ibid reg 7(2).

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#### **954. Review panel.**

Where the complainant<sup>1</sup> is dissatisfied with the outcome of the investigation of his representations<sup>2</sup>, the complainant or, where one has been appointed, his advocate<sup>3</sup> may request<sup>4</sup> that the representations be further considered by a review panel<sup>5</sup>.

Where the local authority<sup>6</sup> has received such a request it must appoint a review panel to consider the representations<sup>7</sup>. The panel must consist of three independent persons<sup>8</sup>, one of whom will chair the panel<sup>9</sup>. The panel must meet within 30 working days of the local authority receiving a request<sup>10</sup>. At its meeting the panel must consider any oral or written submissions made by the complainant or, where one has been appointed, by his advocate on his behalf, the local authority and such other person as the panel considers has sufficient interest in the representations to warrant his submissions being considered by it<sup>11</sup>. It must also consider any oral or written submissions which the independent person<sup>12</sup> wishes to make<sup>13</sup>.

If the complainant attends the meeting of the panel he may be accompanied throughout the meeting by his advocate, where one has been appointed, and by another person of his choice, and may nominate the advocate or that other person to speak on his behalf<sup>14</sup>.

After the meeting the panel must decide on its recommendations and compile a written report which must set out a brief summary of the representations and the panel's recommendations for the resolution of the issues raised in the representations<sup>15</sup>. Within five working days of the meeting the panel must send its report to the local authority, the complainant and, where one has been appointed, his advocate, the independent person and any other person whom the panel considers has sufficient interest in the case to warrant receiving such a notice<sup>16</sup>. Within 15 working days of receiving the panel's recommendations the local authority must, together with the independent person, consider the recommendations and determine how the authority will respond to them and what it proposes to do in the light of them, and send to the complainant its response and proposals, along with information about making a complaint to a Local Commissioner<sup>17</sup>.

1 For the meaning of 'complainant' see para 949 note 3 ante.

2 Ie under the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 17 (see para 953 ante). As to representations for these purposes see para 953 note 3 ante.

3 For the meaning of 'advocate' see para 952 note 7 ante.

4 The request must be made within 20 working days of the date on which the complainant received the notice of the local authority's response and must set out the reasons for the complainant's dissatisfaction with the outcome of the investigations: Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 18(2).

5 Ibid reg 18(1).

6 For the meaning of 'local authority' see para 248 note 10 ante.

7 Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 19(1).

8 For the meaning of 'independent person' see para 953 note 7 ante. The independent person must not be a member of the review panel: ibid reg 19(3).

- 9 Ibid reg 19(2).
- 10 Ibid reg 19(4).
- 11 Ibid reg 19(5)(a).
- 12 Ie the person appointed in accordance with ibid reg 17(2) (see para 953 ante).
- 13 Ibid reg 19(5)(b).
- 14 Ibid reg 19(6).
- 15 Ibid reg 20(1).
- 16 Ibid reg 20(2).
- 17 Ibid reg 20(3).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(ii) Representations Procedure in England/955. Representations to voluntary organisations about fostering limits.

### **955. Representations to voluntary organisations about fostering limits.**

Every voluntary organisation who is providing accommodation for a child is required to consider any representations<sup>1</sup> (including any complaint) made to it by:

- 2010 (1) any child, other than one who is looked after by a local authority, who is being provided with accommodation by it<sup>2</sup>;
- 2011 (2) any parent of his<sup>3</sup>;
- 2012 (3) any person who is not a parent of his but who has parental responsibility for him<sup>4</sup>;
- 2013 (4) such other person as it considers has a sufficient interest in the child's welfare to warrant his representations being considered by it<sup>5</sup>.

1 It is required to consider the representations in accordance with the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, reg 22 which modified regs 2, 6-12 and 14-20. See also the modifications made by reg 23. As to representations for these purposes see para 953 note 3 ante.

2 Ibid reg 21(a).

3 Ibid reg 21(b).

4 Ibid reg 21(c).

5 Ibid reg 21(d).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/956. General principles.

### **(iii) Representations Procedure in Wales**

#### **956. General principles.**

Any representations procedure set up under the Children Act 1989 must be operated in accordance with the principle that where representations<sup>1</sup> are made by a person to whom certain provisions of the Children Act 1989 apply<sup>2</sup> the welfare of the complainant<sup>3</sup> should be safeguarded and promoted<sup>4</sup>. Account should be taken of the ascertainable wishes and feelings of the complainant<sup>5</sup>.

1 'Representations' means representations under the Children Act 1989 s 24D (as added) (see para 926 ante) or s 26 (as amended) (see para 936 et seq ante) or Sch 7 para 6(2) (see para 944 ante): Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 2(1).

2 Ie the Children Act 1989 s 24D (as added) (see para 926 ante) or s 26(3)(a) (see para 944 ante).

3 'Complainant' means a person making representations under ibid s 24D (as added) (see para 926 ante) or a person falling within s 26(3)(a)-(e) (see para 944 ante) or a person making representations under Sch 7 para 6 (see para 944 ante): Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 2(1). This provision refers to the Children Act 1989 s 26(a)-(e), but it is submitted it should be a reference to s 26(3)(a)-(e).

4 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 3(1).

5 Ibid reg 3(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/957. Setting up and monitoring of representations procedure.

### **957. Setting up and monitoring of representations procedure.**

Each local authority<sup>1</sup> must designate a senior officer to be responsible for seeking to ensure compliance with the arrangements made<sup>2</sup> by the local authority<sup>3</sup>.

Each local authority must appoint a complaints officer, to manage the procedures for handling and considering representations<sup>4</sup> and in particular:

- 2014 (1) to perform the functions of the complaints officer under the Representations Procedure (Children) (Wales) Regulations 2005<sup>5</sup>;
- 2015 (2) to perform such other functions in relation to representations as the local authority may require; and
- 2016 (3) to co-operate with such other persons or bodies as may be necessary in order to investigate representations<sup>6</sup>.

The functions of the complaints officer may be performed by any person authorised by the local authority to act on behalf of the complaints officer<sup>7</sup>. A complaints officer may be a person who is not an employee of the local authority and may be appointed as complaints officer for more than one body<sup>8</sup>.

Each local authority must ensure that its staff are informed about and appropriately trained in the operation of the representations procedure<sup>9</sup>.

Each local authority must monitor the arrangements that it has made with a view to ensuring that the local authority complies with the Representations Procedure (Children) (Wales) Regulations 2005<sup>10</sup> by keeping a record of each representation received, the outcome of each representation, and whether there was compliance with the time limits<sup>11</sup>.

Each local authority must prepare an annual report on its performance in handling and consideration of representations for the purposes of:

- 2017 (a) monitoring compliance with the Representations Procedure (Children) (Wales) Regulations 2005<sup>12</sup>; and
- 2018 (b) improving the handling and consideration of representations<sup>13</sup>.

1 'Local authority' means a county council or county borough council: Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 2(1). as to local government areas and authorities in Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

2 ie the arrangements made under the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365.

3 Ibid reg 4.

4 For the meaning of 'representations' see para 956 note 1 ante.

5 ie under the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365.

6 Ibid reg 5(1).

7 Ibid reg 5(2).

8 Ibid reg 5(3).

9 Ibid reg 6.

10 Ie under the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365.

11 Ibid reg 19. The time limits mentioned in the text are the time limits in reg 15 (see para 962 post) and reg 18 (see para 964 post).

12 Ie under the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365.

13 Ibid reg 20(1). The first report had to be compiled within 12 months of 1 April 2006: reg 20(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/958. Representations subject to concurrent consideration.

### **958. Representations subject to concurrent consideration.**

Where representations<sup>1</sup> relate to any matter:

- 2019 (1) about which the complainant<sup>2</sup> has stated in writing that he intends to take proceedings in any court or tribunal<sup>3</sup>; or
- 2020 (2) about which the local authority<sup>4</sup> is taking or is proposing to take disciplinary proceedings<sup>5</sup>; or
- 2021 (3) about which the local authority has been notified that an investigation is being conducted by any person or body in contemplation of criminal proceedings<sup>6</sup>; or
- 2022 (4) about which a meeting involving other bodies including the police has been convened to discuss issues relating to the protection of children<sup>7</sup>; or
- 2023 (5) about which the local authority has been notified that there are current investigations in contemplation of proceedings in relation to removal from the register<sup>8</sup>,

the local authority must consider, in consultation with the complainant and any other person or body which it considers appropriate to consult, how the representations should be handled<sup>9</sup>. Such representations are for these purposes known as 'representations subject to concurrent consideration'<sup>10</sup>.

The consideration of representations subject to concurrent consideration may be discontinued if at any time it appears to the local authority that to continue would compromise or prejudice the other consideration<sup>11</sup>. However, where the local authority discontinues the consideration of any representations, it may at any time resume consideration of them<sup>12</sup>. Where the consideration of a complaint has been discontinued the local authority must ascertain the progress of the concurrent consideration and notify the complainant when it has been concluded<sup>13</sup>.

The local authority must resume consideration of any representations where the concurrent consideration is discontinued or completed and the complainant requests that the representations be considered<sup>14</sup>.

1 For the meaning of 'representations' see para 956 note 1 ante.

2 For the meaning of 'complainant' see para 956 note 3 ante.

3 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 8(1)(a).

4 For the meaning of 'local authority' see para 957 note 1 ante.

5 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 8(1)(b). 'Disciplinary proceedings' means any procedure for disciplining employees adopted by a local authority: reg 2(1).

6 Ibid reg 8(1)(c).

7 Ibid reg 8(1)(d).

8 Ibid reg 8(1)(e). The text refers to proceedings under the Care Standards Act 2000 s 59 (see SOCIAL SERVICES AND COMMUNITY CARE).

9 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 8(1).

10 Ibid reg 8(1).

11 Ibid reg 8(2). Where the local authority decides to discontinue the consideration of a complaint under reg 8(2), the local authority must give notice of that decision to the complainant: reg 8(3). The notice is to be given in writing and sent by post: see reg 2(2).

12 Ibid reg 8(4).

13 Ibid reg 8(5).

14 Ibid reg 8(6).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/959. Representations falling to be considered by more than one local authority.

**959. Representations falling to be considered by more than one local authority.**

Where representations<sup>1</sup> would fall to be considered by more than one local authority<sup>2</sup>, they must be considered by:

2024 (1) the authority which is or was looking after the child or former child concerned in the representations<sup>3</sup>; or

2025 (2) where no authority has or had that responsibility, by the authority within whose area the child is or was last ordinarily resident<sup>4</sup>.

1 For the meaning of 'representations' see para 956 note 1 ante.

2 For the meaning of 'local authority' see para 957 note 1 ante.

3 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 9(a).

4 Ibid reg 9(b).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/960. Handling of care standards representations.

## **960. Handling of care standards representations.**

In any case<sup>1</sup> where representations<sup>2</sup> relate wholly or partly to services provided by an establishment or agency in respect of which a person is registered<sup>3</sup>, the local authority<sup>4</sup> receiving such representations must, within two working days of receipt:

- 2026 (1) send details of the whole of the representations or that part of any representation which relates to the registered service to the person registered as provider in respect of that establishment or agency<sup>5</sup>;
- 2027 (2) request the person to whom details are sent under head (1) above to notify the authority within 10 working days of receipt of the outcome of its consideration of the representations<sup>6</sup>; and
- 2028 (3) inform the complainant of the action taken under heads (1) and (2) above<sup>7</sup>.

However, heads (1) to (3) above do not apply where:

- 2029 (a) representations have already been considered by the registered person<sup>8</sup>; or
- 2030 (b) the local authority is of the opinion that to proceed under heads (1) to (3) above would be likely to compromise or prejudice an investigation of the representations<sup>9</sup>.

<sup>1</sup> I.e. except where the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 10(2) applies (see the text and notes 8-9 infra).

<sup>2</sup> For the meaning of 'representations' see para 956 note 1 ante.

<sup>3</sup> I.e. under the Care Standards Act 2000 or Children Act 1989.

<sup>4</sup> For the meaning of 'local authority' see para 957 note 1 ante.

<sup>5</sup> Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 10(1)(a). As to the offices to be notified see also reg 10(3).

<sup>6</sup> Ibid reg 10(1)(b).

<sup>7</sup> Ibid reg 10(1)(c).

<sup>8</sup> Ibid reg 10(2)(a).

<sup>9</sup> See ibid reg 10(2)(b).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/961. Handling and consideration of representations.

## **961. Handling and consideration of representations.**

Representations<sup>1</sup> may be made orally or in writing (including electronically)<sup>2</sup>. As soon as possible after receiving the representations the local authority<sup>3</sup> must:

- 2031 (1) provide the complainant with details of the procedure set out in the Representations Procedure (Children) (Wales) Regulations 2005<sup>4</sup> and, where appropriate, information about advocacy services<sup>5</sup>;
- 2032 (2) offer the complainant assistance and guidance on following the procedure or advice on where he may obtain it and, where appropriate, help in obtaining an advocate<sup>6</sup>.

Where a local authority receives representations from a complainant falling within certain provisions of the Children Act 1989<sup>7</sup>, it must as soon as possible decide whether that person has a sufficient interest in the welfare of the child concerned to warrant the representations being considered by the local authority<sup>8</sup>. In reaching such a decision the local authority must take into account the ascertainable views of the child concerned<sup>9</sup>. If the local authority decides that the complainant does have sufficient interest then it must consider the representations<sup>10</sup>. However, if the local authority decides that the complainant does not have sufficient interest then it must notify the complainant of the decision and that no further action will be taken to consider the representations<sup>11</sup>.

Representations may be withdrawn orally or in writing at any time by the complainant or by an advocate<sup>12</sup>. The local authority must as soon as possible write to the complainant and any advocate to confirm the withdrawal of the representation<sup>13</sup>.

1 For the meaning of 'representations' see para 956 note 1 ante.

2 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 11.

3 For the meaning of 'local authority' see para 957 note 1 ante.

4 Ie the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365.

5 Ibid reg 12(1)(a).

6 Ibid reg 12(1)(b). 'Advocate' means a person who provides assistance under arrangements made by a local authority under the Children Act 1989 s 26A(1) (as added) (see para 927 ante): Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 2(1).

7 Ie under the Children Act 1989 s 26(3)(e) (see para 944 ante).

8 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 13(1). The local authority must notify the child concerned of the decision made under reg 13(1) if it considers it appropriate to do so having regard to the understanding of the child: reg 13(5).

9 Ibid reg 13(2).

10 Ibid reg 13(3).

11 Ibid reg 13(4).



12 Ibid reg 14(1).

13 Ibid reg 14(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/962. Local resolution.

## **962. Local resolution.**

The local authority<sup>1</sup> must take all reasonable steps to resolve the representations<sup>2</sup> as soon as is reasonably practicable and within 10 working days<sup>3</sup> beginning:

- 2033 (1) in the case of representations falling within certain provisions of the Children Act 1989<sup>4</sup>, on the date on which the local authority decides the complainant has a sufficient interest to warrant the representations being considered<sup>5</sup>;
- 2034 (2) in any other case, on the date on which the representations were received by the local authority<sup>6</sup>.

The procedure followed by the local authority in trying to resolve matters need not involve an independent person<sup>7</sup>. The local authority may in any case where it would be appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the representation<sup>8</sup>.

Where the representation is resolved the local authority must confirm in writing to the complainant the agreed resolution<sup>9</sup>. Where the representations have not been resolved within 20 working days, the local authority must, as soon as practicable, notify the complainant in writing of:

- 2035 (a) the complaint's right to request that the representations be formally considered<sup>10</sup>;
- 2036 (b) the procedure for requesting such further consideration<sup>11</sup>; and
- 2037 (c) the date by which such a request must be made having regard to the fact that the complainant may request orally or in writing that the representations be formally considered<sup>12</sup> at any time within 30 working days of the date on which the representations were first made<sup>13</sup>.

1 For the meaning of 'local authority' see para 957 note 1 ante.

2 For the meaning of 'representations' see para 956 note 1 ante.

3 This period may, however, be extended on request by the complainant or with the complaint's agreement by up to a further 10 working days: Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 15(2). For the meaning of 'complainant' see para 956 note 3 ante. It may also be extended by the local authority where a complainant has requested an advocate provided that: (1) the local authority notifies the complainant of the extension; (2) the local authority notifies the complainant of the steps taken to date to arrange an advocate and the complainant's right to have the representations considered without involvement of an advocate: reg 15(4). For the meaning of 'advocate' see para 961 note 6 ante.

4 I.e. the Children Act 1989 s 26(3)(e) (see para 944 ante).

5 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 15(1)(a).

6 Ibid reg 15(1)(b).

7 Ibid reg 15(3).

- 8 Ibid reg 15(5).
- 9 Ibid reg 15(6).
- 10 Ibid reg 15(7)(a).
- 11 Ibid reg 15(7)(b).
- 12 Ie under ibid reg 16 (see para 963 post).
- 13 Ibid reg 15(7)(c), (8).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/963. Formal consideration.

### **963. Formal consideration.**

Where the complainant<sup>1</sup> has requested formal consideration of the representations<sup>2</sup>, the local authority<sup>3</sup> must investigate the representations to the extent necessary and in the manner which appears to the authority most appropriate to resolve the representations speedily and efficiently<sup>4</sup>.

The local authority must compile a formal written record of the representations as soon as is reasonably practicable and send it to the complainant with an invitation to the complainant to comment on its accuracy<sup>5</sup>. The local authority must consider any comments made by the complainant and in the light of those comments make any amendments to the record which are necessary to ensure it is, in the opinion of the authority, an accurate record of the representations<sup>6</sup>.

Except where such arrangements have already been made<sup>7</sup>, the local authority may in any case where it would be appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the representations<sup>8</sup>.

The local authority must:

- 2038 (1) explain to the complainant how the representations will be investigated<sup>9</sup>;  
and
- 2039 (2) send a copy of the representations to any person who is the subject of the representations unless this has already been done or notification at that time would prejudice the consideration of the representations<sup>10</sup>.

The local authority may invite the complainant and any other person whom the authority considers may be able to assist with the resolution of the representations to be interviewed<sup>11</sup> and take such advice as appears to the complaints officer to be required<sup>12</sup>.

The local authority must take all reasonable steps to keep the complainant informed about the progress of its formal consideration of the representations<sup>13</sup>.

An independent person must be appointed who must take part in any consideration of the representations by the local authority<sup>14</sup> and any discussions which are held by the local authority about the action to be taken in light of its findings in relation to the representations and conclusions it draws from them<sup>15</sup>.

1 For the meaning of 'complainant' see para 956 note 3 ante.

2 For the meaning of 'representations' see para 956 note 1 ante.

3 For the meaning of 'local authority' see para 957 note 1 ante.

4 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 16(1). This is expressed as being subject to regs 8-10 (see paras 958-960 ante).

5 Ibid reg 16(2).

6 Ibid reg 16(3).

7     Ie under ibid reg 15(5) (see para 962 ante).

8     Ibid reg 16(4).

9     Ibid reg 16(5)(a).

10    Ibid reg 16(5)(b).

11    Ibid reg 16(6)(a). Where any person is interviewed in accordance with reg 16(6)(a), the local authority must: (1) send a copy of the draft record of the interview to the person interviewed; (2) invite that person to comment on the accuracy of the draft record; (3) consider any comments made by the person; and (4) in the light of those comments make any amendments to the record which, in the opinion of the authority, are necessary to ensure that the record is accurate: reg 16(7).

12    Ibid reg 16(6)(b). 'Complaints officer' means the person appointed under reg 5 (see para 957 ante): reg 2(1).

13    Ibid reg 16(8).

14    Ie under ibid reg 16.

15    See ibid reg 17. An 'independent person' means a person, being neither a member nor an officer of the local authority, who takes part in the consideration of the representations and in any subsequent discussions, in accordance with the Children Act 1989 s 26(4) (see para 946 ante): Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 2(1).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(8) REPRESENTATIONS PROCEDURES/(iii) Representations Procedure in Wales/964. Response.

#### **964. Response.**

The local authority<sup>1</sup> must prepare a written response to the representations<sup>2</sup> which:

- 2040 (1) summarises the nature and substance of the representations<sup>3</sup>;
- 2041 (2) describes the investigation for formal consideration<sup>4</sup> and summarises the conclusions<sup>5</sup>;
- 2042 (3) explains what action will be taken to resolve the representations<sup>6</sup>;
- 2043 (4) where appropriate, contains an apology to the complainant<sup>7</sup>; and
- 2044 (5) identifies what other action, if any, will be taken in the light of the representations<sup>8</sup>.

The response must be sent to the complainant within 25 working days beginning on the date on which the local authority received the request from the complainant for formal consideration<sup>9</sup>.

However, if, in the case of:

- 2045 (a) any representations where there has been difficulty in the determination of their nature or substance<sup>10</sup>;
- 2046 (b) representations which have been treated as subject to concurrent consideration<sup>11</sup>; or
- 2047 (c) any other representations where the complainant has agreed to a later response<sup>12</sup>,

it is not possible for the response to be sent within 25 working days, the local authority must notify the complainant of the reason for the delay and the date by which it expects to send the response; and it must send that response as soon as reasonably practicable<sup>13</sup>.

1 For the meaning of 'local authority' see para 957 note 1 ante. The response must include information about: (1) the complainant's right to request that the representations be further considered by an independent panel in accordance with provisions in regulations made under the Children Act 1989 s 26ZB (as added) (see para 927 ante); (2) the procedure for requesting such further consideration; and (3) the time within which such request must be made: Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 18(4).

2 For the meaning of 'representations' see para 956 note 1 ante.

3 Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 18(1)(a).

4 Ie the investigation under *ibid* reg 16 (see para 963 ante).

5 *Ibid* reg 18(1)(b).

6 *Ibid* reg 18(1)(c).

7 *Ibid* reg 18(1)(d).

8 *Ibid* reg 18(1)(e).

9 Ibid reg 18(2). This is expressed as being subject to reg 13 (see para 961 ante) and reg 18(3) (see text and notes 10-13 infra). Copies of the response prepared in accordance with reg 18(1) must be sent to: (1) the complainant's advocate; (2) the independent person appointed under reg 17 (see para 963 ante); (3) any person who was the subject of the representations; (4) where the representations are care standards representations mentioned in reg 10 (see para 960 ante), the person registered under the Care Standards Act 2000 or the Children Act 1989 as provider in respect of the establishment or agency: Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, reg 18(5). For the meaning of 'advocate' see para 961 note 6 ante.

10 Ibid reg 18(3)(a).

11 Ibid reg 18(3)(b). The text refers to concurrent consideration under reg 8: see para 958 ante.

12 Ibid reg 18(3)(c).

13 Ibid reg 18(3).

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## **(9) CHILDREN'S HOMES**

### **(i) Introduction to the Legislation**

#### **965. The provision of homes under the Children Act 1989 and the Care Standards Act 2000.**

The registration and regulation of children's homes is now governed largely by the Care Standards Act 2000, although certain provisions of the Children Act 1989 relevant to such homes remain in force<sup>1</sup>.

There are three categories of children's home:

- 2048 (1) community homes, including controlled and assisted community homes<sup>2</sup>;
- 2049 (2) voluntary homes, provided by non-profit making organisations<sup>3</sup>; and
- 2050 (3) private children's homes<sup>4</sup>.

The regulation of these homes is governed by the Care Standards Act 2000, as part of a wider system of regulation of residential establishments and agencies<sup>5</sup>. The Act also governs care homes and residential family centres<sup>6</sup>.

1 See the Children Act 1989 Pt VI (ss 53 and 55-58) (as amended); and paras 967-968, 971-974 post.

2 See *ibid* ss 53, 55-58 (as amended); and paras 967-974 post.

3 See *ibid* ss 59-62 (as amended); and paras 975-979 post.

4 See *ibid* ss 63-65A (as amended); the Care Standards Act 2000 s 11 (as amended); and para 980 et seq post.

5 See *ibid* ss 11-42 (as amended); paras 983-1025 post; and SOCIAL SERVICES AND COMMUNITY CARE.

6 As to the meaning of 'care home' see para 985 note 1 post; and as to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1042 et seq. As to residential family centres see para 1202 et seq post.



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### **966. The usual fostering limit.**

The Children Act 1989 makes provision limiting the number of foster children that foster parents may have before being deemed to be running a children's home<sup>1</sup>. In general, a person may not foster<sup>2</sup> more than three children, and this is known as the usual fostering limit<sup>3</sup>. A person ceases to be treated as fostering and is treated<sup>4</sup> as carrying on a children's home if<sup>5</sup>:

- 2051 (1) he exceeds the usual fostering limit<sup>6</sup>; or
- 2052 (2) where he is exempted by a local authority<sup>7</sup> he fosters any child not named in the exemption, and in so doing, he exceeds the usual fostering limit<sup>8</sup>.

However, a person may exceed the usual fostering limit if:

- 2053 (a) the children concerned are all siblings with respect to each other<sup>9</sup>; or
- 2054 (b) the local authority within whose area he lives exempts him from the limit<sup>10</sup>.

In considering whether to exempt a person, a local authority must have regard, in particular, to<sup>11</sup>:

- 2055 (i) the number of children whom he proposes to foster<sup>12</sup>;
- 2056 (ii) the arrangements which he proposes for the care and accommodation of the fostered children<sup>13</sup>;
- 2057 (iii) the intended and likely relationship between the person and the fostered children<sup>14</sup>;
- 2058 (iv) the period of time for which he proposes to foster the children<sup>15</sup>; and
- 2059 (v) whether the welfare of the fostered children (and of any other children who are or will be living in the accommodation) will be safeguarded and promoted<sup>16</sup>.

Where a local authority does exempt a person from the usual fostering limit, it must inform him by notice in writing that he is so exempted, of the children, described by name, whom he may foster<sup>17</sup>, and of any condition to which the exemption is subject<sup>18</sup>. A local authority may at any time by notice in writing vary or cancel an exemption, or impose, vary or cancel a condition; and, in considering whether to do so, it must have regard in particular to heads (i) to (v) above<sup>19</sup>.

The Secretary of State or the Welsh Ministers<sup>20</sup> may make regulations amplifying or modifying these provisions in order to provide for cases where children need to be placed with foster parents as a matter of urgency<sup>21</sup>.

Every local authority must establish procedures for considering representations (including complaints) about the discharge of its functions in relation to exemptions from the usual fostering limit<sup>22</sup>.

1 See the Children Act 1989 s 63(12), Sch 7 (amended).

2 A person fosters a child if: (1) he is a local authority foster parent (see paras 249 note 13, 900 et seq ante) in relation to the child; (2) he is a foster parent with whom the child has been placed by a voluntary organisation (see paras 900 et seq ante, 975 post); or (3) he fosters the child privately (see para 1049 post): ibid Sch 7 para 1. For the meaning of 'child' see para 3 ante; and for the meaning of 'voluntary organisation' see para 248 note 10 ante.

3 Ibid Sch 7 para 2.

4 Ie for the purposes of the Care Standards Act 2000.

5 Children Act 1989 Sch 7 para 5(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (26)). For the meaning of 'children's home' see para 983 ante.

6 Children Act 1989 Sch 7 para 5(1)(a).

7 Ie under ibid Sch 7 para 4: see the text and notes 9-21 infra. For the meaning of 'local authority' see para 248 note 10 ante.

8 Ibid Sch 7 para 5(1)(b).

9 Ibid Sch 7 paras 3, 5(2).

10 Ibid Sch 7 para 4(1). As to appeals against a refusal to grant such exemption see para 1068 post.

11 Ibid Sch 7 para 4(2).

12 Ibid Sch 7 para 4(2)(a).

13 Ibid Sch 7 para 4(2)(b).

14 Ibid Sch 7 para 4(2)(c).

15 Ibid Sch 7 para 4(2)(d).

16 Ibid Sch 7 para 4(2)(e).

17 See ibid Sch 7 para 5 (as amended); and the text and notes 4-8 supra.

18 Ibid Sch 7 para 4(3).

19 Ibid Sch 7 para 4(4). As to appeals against a condition, or against the variation or cancellation of an exemption see para 1068 post.

20 As to the Secretary of State and the Welsh Ministers see para 155 ante.

21 Children Act 1989 Sch 7 para 4(5). At the date at which this volume states the law no such regulations had been made.

22 See ibid Sch 7 para 6(1). In considering such representations the authority must comply with the provisions of regulations: see Sch 7 para 6(2). In exercise of Sch 7 para 6, the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, and the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365, have been made: see para 944 et seq ante.

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## **(ii) Community Homes**

### **967. Provision of community homes.**

A local authority<sup>1</sup> may provide accommodation and maintenance for any child whom it is looking after<sup>2</sup> by maintaining him in an appropriate children's home<sup>3</sup>. A voluntary organisation<sup>4</sup> may provide accommodation for a child by maintaining him in an appropriate children's home<sup>5</sup>. Such a home may be a community home<sup>6</sup>.

Every local authority must make such arrangements as it considers appropriate for securing that community homes are available<sup>7</sup>:

- 2060 (1) for the care and accommodation of children looked after by it<sup>8</sup>; and
- 2061 (2) for purposes connected with the welfare of children (whether or not looked after by it)<sup>9</sup>,

and may do so jointly with one or more other local authorities<sup>10</sup>. In making arrangements for securing that community homes are available, a local authority must have regard to the need for ensuring the availability of accommodation of different descriptions and which is suitable for different purposes and the requirements of different descriptions of children<sup>11</sup>.

A community home may be a home<sup>12</sup>:

- 2062 (a) provided, equipped, maintained<sup>13</sup> and managed by a local authority<sup>14</sup>; or
- 2063 (b) provided by a voluntary organisation<sup>15</sup>.

A local authority may make arrangements for the management by another person of accommodation provided by the local authority for the purpose of restricting the liberty of children<sup>16</sup>. In the case of head (b) above the local authority and the organisation may propose that:

- 2064 (i) in accordance with an instrument of management the equipment, maintenance and<sup>17</sup> management of the home are the responsibility of the local authority<sup>18</sup>; or
- 2065 (ii) the management, equipment and maintenance of the home are the responsibility of the voluntary organisation<sup>19</sup>.

Where a local authority is to be responsible for the management of a community home provided by a voluntary organisation, the local authority may, with the consent of the body of managers constituted by the instrument of management for the home, make arrangements for the management by another person of accommodation provided for the purpose of restricting the liberty of children<sup>20</sup>.

Where a local authority is to be responsible for the management of a community home provided by a voluntary organisation, the authority must designate the home as a controlled community home<sup>21</sup>. Where a voluntary organisation is to be responsible for the management of

a community home provided by the organisation, the local authority must designate the home as an assisted community home<sup>22</sup>.

- 1 For the meaning of 'local authority' see para 248 note 10 ante.
- 2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'child' see para 3 ante.
- 3 Children Act 1989 s 59(1)(aa) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (8)(a)). As to references to accommodation provided by or on behalf of a local authority see para 863 note 2 ante. For the meaning of 'appropriate children's home' see para 877 note 9 ante.
- 4 For the meaning of 'voluntary organisation' see para 248 note 10 ante.
- 5 Children Act 1989 s 59(1)(aa) (as added: see note 3 supra).
- 6 A community home is a home which local authorities either provide directly or for which a local authority shares responsibility with a voluntary organisation or trust: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 1.9. As to the guidance and regulations generally see para 163 ante.
- 7 Children Act 1989 s 53(1).
- 8 Ibid s 53(1)(a).
- 9 Ibid s 53(1)(b).
- 10 Ibid s 53(1).
- 11 Ibid s 53(2).
- 12 The definition of 'community home' in ibid s 53 (as amended) is extended to the Care Standards Act 2000: s 121(1).
- 13 Ie subject to the Children Act 1989 s 53(3A) (as added): see the text to note 16 infra.
- 14 Ibid s 53(3)(a) (amended by the Criminal Justice and Public Order Act 1994 s 22(2)(a)). The function conferred on a local authority by the Children Act 1989 s 53(3)(a) (as amended) of managing a community home may be exercised by, or by the employees of, such person (if any) as may be authorised in that behalf by a local authority: Contracting Out (Management Functions in relation to certain Community Homes) Order 1996, SI 1996/586, art 2(1). However, this does not apply to the function of managing a community home, or any part of a community home, which is provided for the purpose of restricting the liberty of children under the age of 18: art 2(2). Where the function of managing a community home is exercised in accordance with art 2(1) otherwise than by a local authority, that home remains a community home within the Children Act 1989 s 53(3)(a) (as amended): Contracting Out (Management Functions in relation to certain Community Homes) Order 1996, SI 1996/586, art 3.
- 15 Children Act 1989 s 53(3)(b).
- 16 Ibid s 53(3A) (added by the Criminal Justice and Public Order Act 1994 s 22(2)(b)).
- 17 Ie subject to the Children Act 1989 s 53(3B) (as added): see the text to note 20 infra.
- 18 Ibid s 53(3)(b)(i) (amended by the Criminal Justice and Public Order Act 1994 s 22(2)(a)).
- 19 Children Act 1989 s 53(3)(b)(ii).
- 20 Ibid s 53(3B) (added by the Criminal Justice and Public Order Act 1994 s 22(2)(b)).
- 21 Children Act 1989 s 53(4).
- 22 Ibid s 53(5).

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**968. Management and conduct of community homes: the instrument of management.**

The Secretary of State and the Welsh Ministers<sup>1</sup> may make by order an instrument of management providing for the constitution of a body of managers for any home which is designated as a controlled or assisted community home<sup>2</sup>. A single instrument of management may be made constituting one body of managers for two or more homes<sup>3</sup> designated as controlled community homes or as assisted community homes<sup>4</sup>, provided that those homes are, or are to be, provided by the same voluntary organisation<sup>5</sup> and the same local authority<sup>6</sup> is to be represented on the body of managers for those homes<sup>7</sup>.

The number of persons who in accordance with an instrument of management constitute the body of managers for a home must be such a number, being a multiple of three, as may be specified in the instrument<sup>8</sup>. The instrument must provide that the local authority specified in the instrument is to appoint, in the case of a controlled community home, two-thirds of the managers, and in the case of an assisted community home, one-third of them<sup>9</sup>. It must also provide that the foundation managers<sup>10</sup> are to be appointed in such manner and by such persons as may be specified in the instrument<sup>11</sup>:

- 2066 (1) so as to represent the interests of the voluntary organisation by which the home is, or is to be, provided<sup>12</sup>; and
- 2067 (2) for the purpose of securing, so far as is practicable, that the character of the home will be preserved<sup>13</sup> and that the terms of any trust deed relating to the home are observed<sup>14</sup>.

The instrument of management may contain such provisions as the Secretary of State considers or the Welsh Ministers consider appropriate<sup>15</sup>, but nothing in it affects the purposes for which the premises comprising the home are held<sup>16</sup>. It may contain provisions<sup>17</sup>:

- 2068 (a) specifying the nature and purpose of the home or each of the homes to which it relates<sup>18</sup>;
- 2069 (b) requiring a specified number or proportion of the places in that home or those homes to be made available to local authorities and to any other body specified in the instrument<sup>19</sup>; and
- 2070 (c) relating to the management of that home or those homes and the charging of fees with respect to children placed there or places made available to any local authority or other body<sup>20</sup>.

In the event of any inconsistency between the provisions of any trust deed and an instrument of management, the instrument of management prevails over the provisions of the trust deed in so far as they relate to the home concerned<sup>21</sup>.

The Secretary of State or the Welsh Ministers, after consultation with the voluntary organisation concerned and with the local authority specified in the instrument of management, may by order vary or revoke any provisions of the instrument of management<sup>22</sup>.

An instrument of management comes into force on such date as it may specify<sup>23</sup>, and when an instrument is in force the home is known as a 'controlled community home' or 'assisted community home', according to its designation<sup>24</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 Children Act 1989 s 53(6), Sch 4 para 1(1) (Sch 4 para 1 amended by the Courts and Legal Services Act 1990 ss 116, 125(7), Sch 16 para 28, Sch 20). Such orders are local and as such are not set out in this work. As to designation as a controlled or assisted community home see para 967 ante.

3 Children Act 1989 Sch 4 para 1(3).

4 Ibid Sch 4 para 1(2) (as amended: see note 2 supra).

5 Ibid Sch 4 para 1(3)(a). For the meaning of 'voluntary organisation' see para 248 note 10 ante.

6 For the meaning of 'local authority' see para 248 note 10 ante.

7 Children Act 1989 Sch 4 para 1(3)(b).

8 Ibid Sch 4 para 1(4) (as amended: see note 2 supra).

9 Ibid Sch 4 para 1(5) (as amended: see note 2 supra).

10 'Foundation managers' means those managers of the home who are not appointed by a local authority in accordance with ibid Sch 4 para 1(5) (as amended) (see the text to note 9 supra): Sch 4 para 1(9) (as amended: see note 2 supra).

11 Ibid Sch 4 para 1(6).

12 Ibid Sch 4 para 1(6)(a).

13 Ibid Sch 4 para 1(6)(b)(i) (as amended: see note 2 supra).

14 Ibid Sch 4 para 1(6)(b)(ii). This is expressed to be subject to the provisions of Sch 4 para 2(3): see the text and notes 18-20 infra. 'Trust deed', in relation to a voluntary home, means any instrument, other than an instrument of management, regulating the maintenance, management or conduct of the home, or the constitution of a body of managers or trustees of the home: s 55(6).

15 Ibid Sch 4 para 2(1).

16 Ibid Sch 4 para 2(2).

17 This is expressed to be without prejudice to the generality of Sch 4 para 2(1): see the text and note 15 supra.

18 Ibid Sch 4 para 2(3)(a).

19 Ibid Sch 4 para 2(3)(b).

20 Ibid Sch 4 para 2(3)(c).

21 Ibid Sch 4 para 2(4). This is expressed to be subject to the provisions of Sch 4 para 2(1), (2): see the text and notes 15-16 supra.

22 Ibid Sch 4 para 2(5).

23 Ibid Sch 4 para 1(7).

24 Ibid Sch 4 para 1(8) (as amended: see note 2 supra).

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### **969. Management of controlled and assisted community homes.**

The management, equipment and maintenance of a controlled community home<sup>1</sup> is the responsibility of the local authority<sup>2</sup> specified in its instrument of management<sup>3</sup>, whereas the management, equipment and maintenance of an assisted community home<sup>4</sup> is the responsibility of the voluntary organisation<sup>5</sup> by which the home is provided<sup>6</sup>.

The functions of the home's responsible body<sup>7</sup> are exercised through the managers, except in so far as any of the accommodation is to be managed by another person<sup>8</sup>. Anything done, liability incurred or property acquired by a home's managers is done, incurred or acquired by them as agents of the responsible body<sup>9</sup>; but matters may be reserved for the decision of a home's responsible body<sup>10</sup> by the instrument of management or by the service by the responsible body on the managers or any of them of a notice reserving any matter<sup>11</sup>. In such a case, the matter must be dealt with by the responsible body and not by the managers<sup>12</sup>.

Where the instrument of management of a controlled community home so provides, the responsible body may enter into arrangements with the voluntary organisation by which the home is provided whereby, in accordance with such terms as may be agreed, persons who are not in the employment of the responsible body will undertake duties at that home<sup>13</sup>.

Where the responsible body for an assisted community home proposes to engage any person to work at that home or to terminate without notice the employment of any person at that home, it must consult the local authority specified in the instrument of management and, if that authority so directs, the responsible body must not carry out its proposal without the authority's consent<sup>14</sup>. Furthermore, the local authority may after consultation with the responsible body require the body to terminate the employment of any person at that home<sup>15</sup>. These provisions do not apply, however, in such cases or circumstances as may be specified by notice in writing given by the local authority to the responsible body or in relation to the employment of any persons or class of persons specified in the home's instrument of management<sup>16</sup>.

The accounting year of the managers is such as may be specified by the responsible body<sup>17</sup>. Before such date in each accounting year as may be so specified, the managers must submit to the responsible body estimates, in such form as the responsible body may require, of expenditure and receipts in respect of the next accounting year<sup>18</sup>. The managers of a home must keep proper accounts with respect to the home and proper records in relation to the accounts<sup>19</sup>. Expenses incurred by the managers of a home with the approval of the responsible body must be defrayed by that body<sup>20</sup>.

1 As to designation as a controlled community home see para 967 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 Children Act 1989 s 53(6), Sch 4 para 3(1).

4 As to designation as an assisted community home see para 967 ante.

5 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

6 Children Act 1989 Sch 4 para 3(2).

7 'Responsible body', in relation to a home, means the local authority or, as the case may be, the voluntary organisation responsible for its management, equipment and maintenance: *ibid* Sch 4 para 3(3). 'Home' means a controlled community home or, as the case may be, an assisted community home: Sch 4 para 3(3).

8 *Ibid* Sch 4 para 3(4) (amended by the Criminal Justice and Public Order Act 1994 s 22(3)). The text refers to accommodation managed by another person under the Children Act 1989 s 53(3B) (as added): see para 967 ante. 'The managers', in relation to a home, means the managers constituted by the instrument of management: Sch 4 para 3(3).

9 *Ibid* Sch 4 para 3(5). Similarly, to the extent that a contract so provides, anything done, liability incurred or property acquired by a person by whom, under s 53(3B) (as added) (see para 967 ante), any of the accommodation is to be managed is done, incurred or acquired by him as agent of the responsible body: see Sch 4 para 3(5) (amended by the Criminal Justice and Public Order Act 1994 s 22(3)).

10 The employment of persons at a home is by statute a matter reserved for the decision of the responsible body: Children Act 1989 Sch 4 para 3(8).

11 *Ibid* Sch 4 para 3(6).

12 *Ibid* Sch 4 para 3(6). In dealing with any matter so reserved, the responsible body must have regard to any representations made to it by the managers: Sch 4 para 3(7).

13 *Ibid* Sch 4 para 3(9).

14 *Ibid* Sch 4 para 3(10)(a).

15 *Ibid* Sch 4 para 3(10)(b).

16 *Ibid* Sch 4 para 3(11).

17 *Ibid* Sch 4 para 3(12).

18 *Ibid* Sch 4 para 3(13).

19 *Ibid* Sch 4 para 3(15). Where an instrument of management relates to more than one home, one set of accounts and records may be kept in respect of all the homes to which it relates: Sch 4 para 3(16).

20 *Ibid* Sch 4 para 3(14).



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## **970. Regulations.**

The Secretary of State and the Welsh Ministers<sup>1</sup> may make regulations as to the placing of children<sup>2</sup> in community children's homes<sup>3</sup>. Regulations have been made in pursuance of this power<sup>4</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 53(6), Sch 4 para 4(1)(a). As to the meaning of 'community home' see para 967 ante.

4 See the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended; revoked in relation to Wales) (see para 879 et seq ante), the Children (Secure Accommodation) Regulations 1991, SI 1991/1505 (as amended) (see para 1040 et seq post) and the Placement of Children (Wales) Regulations 2007, SI 2007/310 (see para 879 et seq ante).

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### **971. Determination of disputes relating to controlled and assisted community homes.**

Where there is a dispute relating to a controlled community home<sup>1</sup> between the local authority<sup>2</sup> specified in the home's instrument of management<sup>3</sup> and the voluntary organisation<sup>4</sup> by which the home is provided or any other local authority which has placed or desires to place or is required to place in the home a child who is looked after<sup>5</sup> by it, the dispute may be referred by either party to the Secretary of State or the Welsh Ministers<sup>6</sup> for his or their determination<sup>7</sup>. There is similar provision where a dispute arises relating to an assisted community home<sup>8</sup> between the voluntary organisation by which the home is provided and a local authority<sup>9</sup>.

Where a dispute is referred to the Secretary of State or the Welsh Ministers he or they may give such directions as he thinks or they think fit to the local authority or voluntary organisation concerned in order to give effect to the determination<sup>10</sup>. These provisions apply even though the matter in dispute may be one which is reserved for the decision of, or is the responsibility of, the local authority specified in the instrument of management or the voluntary organisation by which the home is provided<sup>11</sup>. However, where any trust deed<sup>12</sup> relating to a controlled or assisted community home contains provision whereby a bishop or any other ecclesiastical or denominational authority has power to decide questions relating to religious instruction given in the home, no dispute which is capable of being dealt with in accordance with that provision may be referred to the Secretary of State or Welsh Ministers<sup>13</sup>.

1 As to designation as a controlled community home see para 967 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 As to the instrument of management see para 968 ante.

4 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

5 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'child' see para 3 ante.

6 As to the Secretary of State and the Welsh Ministers see para 155 ante.

7 Children Act 1989 s 55(1).

8 As to designation as an assisted community home see para 967 ante.

9 See the Children Act 1989 s 55(2).

10 Ibid s 55(3).

11 Ibid s 55(4). As to the matters which are the responsibility of, or are reserved for the decision of, those bodies see s 53(6), Sch 4 Pt II (as amended); and para 969 ante.

12 For the meaning of 'trust deed' see para 968 note 14 ante.

13 Children Act 1989 s 55(5). See also ECCLESIASTICAL LAW.

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**972. Discontinuance by voluntary organisation of controlled or assisted community home.**

A voluntary organisation<sup>1</sup> which provides a controlled or assisted community home<sup>2</sup> must not cease to provide the home except after giving to the Secretary of State or the Welsh Ministers<sup>3</sup> and the local authority<sup>4</sup> specified in the home's instrument of management<sup>5</sup> not less than two years' notice in writing of its intention to do so<sup>6</sup>. Where such a notice is given and not withdrawn before the specified date, the instrument of management ceases to have effect on that date, and the home then ceases to be a controlled or assisted community home<sup>7</sup>. Where such notice is given and the home's managers give notice in writing to the Secretary of State or the Welsh Ministers that they are unable or unwilling to continue as its managers until the date specified in the notice, the Secretary of State or the Welsh Ministers may by order<sup>8</sup>:

- 2071 (1) revoke the instrument of management<sup>9</sup>; and
- 2072 (2) require the local authority which was specified in that instrument to conduct the home until that date, or such earlier date as may be specified for the purpose in the order,

as if it were a community home provided by the local authority<sup>10</sup>.

Where a local authority is required to conduct the home under these provisions:

- 2073 (a) nothing in the trust deed<sup>11</sup> for the home affects the conduct of the home by the local authority<sup>12</sup>;
- 2074 (b) the Secretary of State or the Welsh Ministers may by order direct that for the purposes of any provision specified in the direction and made by or under any enactment relating to community homes<sup>13</sup> the home, until the date or earlier date specified as mentioned above, must be treated as a controlled or assisted community home<sup>14</sup>;
- 2075 (c) except in so far as the Secretary of State or the Welsh Ministers may direct to the contrary, the home must until that date be treated for the purposes of any such enactment as a community home provided by the local authority<sup>15</sup>; and
- 2076 (d) on that date or the earlier date specified as mentioned above the home will cease to be a community home<sup>16</sup>.

1 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

2 As to the designation of controlled or assisted community homes see para 967 ante.

3 As to the Secretary of State and the Welsh Ministers see para 155 ante.

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 As to the instrument of management see para 968 ante.

6 Children Act 1989 s 56(1). Such notice must specify the date from which the voluntary organisation intends to cease to provide the home as a community home: s 56(2). As to the meaning of 'community home' see para 967 ante.

- 7 Ibid s 56(3).
- 8 Ibid s 56(4). As to the managers of a controlled or assisted community home see para 969 ante.
- 9 Ibid s 56(4)(a).
- 10 Ibid s 56(4)(b).
- 11 For the meaning of 'trust deed' see para 968 note 14 ante.
- 12 Children Act 1989 s 56(5)(a).
- 13 Ie other than ibid s 56.
- 14 See ibid s 56(5)(b).
- 15 Ibid s 56(5)(c).
- 16 Ibid s 56(5)(d).

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### **973. Closure by local authority of controlled or assisted community home.**

The local authority<sup>1</sup> specified in the instrument of management<sup>2</sup> for a controlled or assisted community home<sup>3</sup> may give the Secretary of State or the Welsh Ministers<sup>4</sup> and the voluntary organisation<sup>5</sup> by which the home is provided not less than two years' notice in writing of its intention to withdraw the designation of the home as a controlled or assisted community home<sup>6</sup> from a specified date<sup>7</sup>. If the home's managers<sup>8</sup> give notice in writing to the Secretary of State or the Welsh Ministers that they are unable or unwilling to continue as managers until that date and the managers' notice is not withdrawn, the Secretary of State or the Welsh Ministers may by order revoke the home's instrument of management from such date earlier than the specified date as may be specified in the order<sup>9</sup>, but before doing so he or they must consult the local authority and the voluntary organisation<sup>10</sup>. Where a notice of withdrawal of designation has been given and is not withdrawn, the instrument of management ceases to have effect on<sup>11</sup>:

- 2077 (1) the specified date<sup>12</sup>; or
- 2078 (2) where an earlier date has been specified in accordance with the provisions set out above<sup>13</sup>, that earlier date<sup>14</sup>,

and the home then ceases to be a community home<sup>15</sup>.

- 1 For the meaning of 'local authority' see para 248 note 10 ante.
- 2 As to the instrument of management see para 968 ante.
- 3 As to the designation of controlled or assisted community homes see para 967 ante.
- 4 As to the Secretary of State and the Welsh Ministers see para 155 ante.
- 5 For the meaning of 'voluntary organisation' see para 248 note 10 ante.
- 6 Children Act 1989 s 57(1).
- 7 Ibid s 57(2).
- 8 As to the managers of a controlled or assisted community home see para 969 ante.
- 9 Children Act 1989 s 57(3).
- 10 Ibid s 57(4).
- 11 Ibid s 57(5).
- 12 Ibid s 57(5)(a).
- 13 Ie under ibid s 57(3): see the text and notes 8-9 supra.
- 14 Ibid s 57(5)(b).
- 15 Ibid s 57(5). As to the meaning of 'community home' see para 967 ante.

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**974. Financial provisions on cessation of controlled or assisted community home.**

The proprietor<sup>1</sup> of a controlled or assisted community home<sup>2</sup> is liable to pay compensation<sup>3</sup>:

- 2079 (1) where the instrument of management<sup>4</sup> for the home is revoked or ceases to have effect<sup>5</sup>; and  
 2080 (2) where any premises<sup>6</sup> used for the purposes of such a home are at any time after 13 January 1987 disposed of<sup>7</sup> or put to use otherwise than for those purposes<sup>8</sup>.

Where the instrument of management in force at the relevant time related to a controlled community home, or to an assisted community home which at any time before the instrument came into force was a controlled community home, the appropriate compensation is a sum equal to that part of the value of the premises attributable to expenditure incurred by the authority which was then the responsible authority<sup>9</sup> in relation to the premises while the home was a controlled community home<sup>10</sup>. Where the instrument of management in force at the relevant time relates to an assisted community home or to a controlled community home which at any time before the instrument came into force was an assisted community home, the appropriate compensation is a sum equal to that part of the value of the premises attributable to the expenditure of money provided by way of grant under certain statutory provisions<sup>11</sup>.

Where the home is conducted in premises which formerly were used as an approved school or were an approved probation hostel or home, the appropriate compensation is a sum equal to that part of the value of the premises attributable to the expenditure of sums paid under statutory provisions relating to approved schools and probation hostels<sup>12</sup>.

The compensation is payable:

- 2081 (a) where the instrument of management related to a controlled community home, or to an assisted community home which at any time before the instrument came into force was a controlled community home, to the authority which was the responsible authority<sup>13</sup>; and  
 2082 (b) in any other case, to the Secretary of State or the Welsh Ministers<sup>14</sup>.

The amount of sums payable by way of compensation must be determined in accordance with arrangements agreed between the voluntary organisation by which the home is provided at the relevant time and the responsible authority or, as the case may be, the Secretary of State or the Welsh Ministers; or in default of agreement it must be as may be determined in accordance with arrangements made by the Secretary of State or the Welsh Ministers<sup>15</sup>.

Liability to pay compensation may be discharged, with the agreement of the responsible authority or, as the case may be, the Secretary of State or the Welsh Ministers, in whole or in part by the transfer of any premises<sup>16</sup>.

1 'Proprietor' means the voluntary organisation by which the home is at the relevant time provided, or if the premises are not at the relevant time vested in that organisation, the persons in whom they are vested: Children Act 1989 s 58(6). For the meaning of 'voluntary organisation' see para 248 note 10 ante. 'Relevant time' means the time immediately before the liability to pay compensation arises: s 58(6).

- 2 As to the designation of controlled or assisted community homes see para 967 ante.
- 3 Children Act 1989 s 58(1). These provisions take effect regardless of any trust deed for a controlled or assisted community home or the provisions of any enactment or instrument governing the disposition of the property of a voluntary organisation: s 58(10). For the meaning of 'trust deed' see para 968 note 14 ante.
- 4 As to the instrument of management see para 968 ante.
- 5 Children Act 1989 s 58(1)(a). The text refers to the revocation or cessation of that instrument under s 56(3) or (4)(a) or s 57(3) or (5) (see paras 972-973 ante): s 58(1)(a) (amended by the Care Standards Act 2000 s 117(2), Sch 6).
- 6 'Premises' means any premises or part of premises, including land, used for purposes of the home and belonging to the proprietor: Children Act 1989 s 58(6).
- 7 'Disposal' includes the grant of a tenancy and any other conveyance, assignment, transfer, grant, variation or extinguishment of an interest in or right over land, whether made by instrument or otherwise: *ibid* s 58(6).
- 8 *Ibid* s 58(1)(b). An event of this kind is taken to have occurred, in the case of a disposal, on the date on which the disposal was completed (or in the case of a disposal which is effected by a series of transactions, the date on which the last of those transactions was completed); and, in the case of premises which are put to different use, on the date on which they first began to be put to their new use: s 58(7).
- 9 'Responsible authority' means the local authority specified in the instrument of management in question: *ibid* s 58(6). For the meaning of 'local authority' see para 248 note 10 ante.
- 10 *Ibid* s 58(2).
- 11 *Ibid* s 58(3). The statutory provisions referred to are the Children Act 1989 s 82 (as amended) (see paras 157-158 ante), the Children and Young Persons Act 1969 s 65 (as amended) and the Childcare Act 1980 s 82 (repealed): Children Act 1989 s 58(3).
- 12 *Ibid* s 58(4). The statutory provisions referred to are the Children and Young Persons Act 1933 s 104 (repealed), the Powers of Criminal Courts Act 1973 s 51(3)(c) (repealed) and the Probation Service Act 1993 s 20(1)(c) (repealed): Children Act 1989 s 58(4) (amended by the Probation Service Act 1993 s 32, Sch 3 para 9(2)).
- 13 Children Act 1989 s 58(5)(a).
- 14 *Ibid* s 58(5)(b). As to the Secretary of State and the Welsh Ministers see para 155 ante.
- 15 *Ibid* s 58(8).
- 16 *Ibid* s 58(9).

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### **(iii) Voluntary Organisations and Voluntary Homes**

#### **975. Provision of accommodation by voluntary organisations.**

A local authority<sup>1</sup> may provide accommodation and maintenance for any child whom it is looking after<sup>2</sup> by maintaining him in an appropriate children's home<sup>3</sup>.

Where a voluntary organisation<sup>4</sup> provides accommodation for a child it must do so by<sup>5</sup>:

- 2083 (1) placing him<sup>6</sup> with a family, a relative<sup>7</sup> of his, or any other suitable person on such terms as to payment by the organisation and otherwise as the organisation may determine<sup>8</sup>;
- 2084 (2) maintaining him in an appropriate children's home<sup>9</sup>; or
- 2085 (3) making such other arrangements<sup>10</sup> as seem appropriate<sup>11</sup>.

The Secretary of State or the Welsh Ministers may make regulations requiring any voluntary organisation who is providing accommodation for a while to review his case and to consider any representations (including any complaint) made by any person falling within a prescribed class of person, in accordance with the provisions of the regulations<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 23(2)(aa) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (3)(a)). For the meaning of 'appropriate children's home' see para 877 note 9 ante.

4 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

5 Children Act 1989 s 59(1).

6 This is subject to *ibid* s 59(2), whereby the Secretary of State has or the Welsh Ministers have the power to make regulations as to the placing of children with foster parents by voluntary organisations. Such regulations may, in particular, make provision which (with any necessary modifications) is similar to the provision that may be made under s 23(2)(a) (see paras 877-878 ante): s 59(2). As to such regulations see the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended; revoked in relation to Wales) (see para 879 et seq ante), the Fostering Services Regulations 2002, SI 2002/57 (as amended) (see para 900 et seq ante), the Fostering Services (Wales) Regulations 2003, SI 2003/237 (as amended) (see para 900 et seq ante) and the Placement of Children (Wales) Regulations 2007, SI 2007/310 (see para 879 et seq ante). As to the Secretary of State and the Welsh Ministers see para 155 ante.

Regulations made under the Children Act 1989 s 59(2)-(4) may provide that any person who, without reasonable excuse, contravenes or fails to comply with a regulation is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 59(6). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

7 For the meaning of 'relative' see para 249 note 15 ante.

8 Children Act 1989 s 59(1)(a). This is subject to the Children Act 2004 s 49, whereby the Secretary of State or the Welsh Ministers may by order make provision as to the payments to be made by a voluntary organisation



to any person with whom any child is placed by that organisation under the Children Act 1989 s 59(1)(a): see the Children Act 2004 s 49(1)(b), (2). As to placements generally see para 878 et seq ante.

9 Children Act 1989 s 59(1)(aa) (added by the Care Standards Act 2000 Sch 4 para 14(8)). Where, under the Children Act 1989 s 59(1)(aa) (as added), a local authority maintains a child in a home provided, equipped and maintained by the Secretary of State or the Welsh Ministers under s 82(5) (see para 158 ante), it must do so on such terms as the Secretary of State or the Welsh Ministers may from time to time determine: s 59(1A) (added by the Care Standards Act 2000 Sch 4 para 14(1), (8)(b)).

10 This is subject to the Children Act 1989 s 59(3), whereby the Secretary of State or the Welsh Ministers may make regulations as to the arrangements which may be made under s 59(1)(f): s 59(3). Such regulations may, in particular, make provision which (with any necessary modifications) is similar to the provision that may be made under s 23(2)(f) (see paras 877-878 ante): s 59(3). As to such regulations see the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended; revoked in relation to Wales); the Placement of Children (Wales) Regulations 2007, SI 2007/310; and para 879 et seq ante.

Regulations made under the Children Act 1989 s 59(2)-(4) may provide that any person who, without reasonable excuse, contravenes or fails to comply with a regulation is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 59(6).

11 Ibid s 59(1)(f).

12 Ibid s 59(4). Such regulations may in particular make provision which (with any necessary modifications) is similar to the provision that may be made under s 26 (see para 936 ante): s 59(5). As to such regulations see the Adoption Agencies Regulations 2005, SI 2005/389 (as amended) (see para 427 et seq ante), the Adoption Agencies Regulations 2005, SI 2005/1313 (as amended) (see para 427 ante) and the Representations Procedure (Children) (Wales) Regulations 2005, SI 2007/307 (see para 936 et seq ante).

Regulations made under the Children Act 1989 s 59(2)-(4) may provide that any person who, without reasonable excuse, contravenes or fails to comply with a regulation is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 59(6).

## **UPDATE**

### **975 Provision of accommodation by voluntary organisations**

TEXT AND NOTES 1-3--Children Act 1989 s 59 replaced by ss 22A-22F: see PARA 877.

NOTES 6, 9, 10, 12--Children Act 1989 s 59A(1A), (2), (3), (4) amended, s 59(7) added: Children and Young Persons Act 2008 Sch 3 para 23.

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## **976. Regulations.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may make regulations as to the placing of children in voluntary homes<sup>2</sup>. Regulations have been made in pursuance of this power<sup>3</sup>.

1 As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 Children Act 1989 s 60(4), Sch 5 para 7(1)(a). For the meaning of 'child' see para 3 ante. 'Voluntary home' means a children's home which is carried on by a voluntary organisation but does not include a community home: s 60(3) (substituted by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (9)(b)).

3 See the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (as amended; revoked in relation to Wales); the Placement of Children (Wales) Regulations 2007, SI 2007/310; and para 879 et seq ante.

## **UPDATE**

## **976 Regulations**

TEXT AND NOTE 1--Children Act 1989 Sch 5 para 7 amended: Children and Young Persons Act 2008 Sch 3 para 28.

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### **977. Duties of voluntary organisation concerning accommodation of children.**

Where a child<sup>1</sup> is accommodated by or on behalf of a voluntary organisation<sup>2</sup>, it is the duty of the organisation to<sup>3</sup>:

- 2086 (1) safeguard and promote his welfare<sup>4</sup>;
- 2087 (2) make such use of the services and facilities available for children cared for by their own parents as appears to the organisation reasonable in his case<sup>5</sup>; and
- 2088 (3) advise, assist and befriend him with a view to promoting his welfare when he ceases to be so accommodated<sup>6</sup>.

Before making any decision with respect to any such child, the organisation must so far as is reasonably practicable ascertain the wishes and feelings, regarding the matter to be decided, of the child, his parents, any person who is not a parent of his but who has parental responsibility<sup>7</sup> for him, and any other person whose wishes and feelings the organisation considers to be relevant<sup>8</sup>. In making any such decision the organisation must give due consideration:

- 2089 (a) having regard to the child's age and understanding, to such wishes and feelings of his<sup>9</sup>;
- 2090 (b) to such other wishes and feelings of those other persons, as it has been able to ascertain<sup>10</sup>; and
- 2091 (c) to the child's religious persuasion, racial origin and cultural and linguistic background<sup>11</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

3 Children Act 1989 s 61(1). However, where a registered adoption society is authorised to place a child for adoption, or a child who has been placed for adoption is less than six weeks old, s 61 (or in Wales s 61(1)(a)) applies whether or not the child is accommodated by or on behalf of the society, s 61(2)(b) does not apply, and s 61(2)(c) applies as if there were inserted 'any prospective adopter with whom the registered adoption society has placed the child for adoption': see the Adoption Agencies Regulations 2005, SI 2005/389, reg 45(3), (4) (amended by SI 2005/3482); and the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 46(3), (4).

4 Children Act 1989 s 61(1)(a).

5 Ibid s 61(1)(b).

6 Ibid s 61(1)(c).

7 For the meaning of 'parental responsibility' see para 134 ante.

8 Children Act 1989 s 61(2).

9 Ibid s 61(3)(a).

10 Ibid s 61(3)(b).

11 Ibid s 61(3)(c).



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### **978. Disqualification in relation to voluntary homes.**

A person who is disqualified from fostering a child privately<sup>1</sup> must not carry on, or be otherwise concerned in the management of, or have any financial interest in, any children's home<sup>2</sup> unless he has disclosed to the appropriate authority<sup>3</sup> the fact that he is so disqualified, and obtained its written consent<sup>4</sup>. No person may employ a person so disqualified in a voluntary home unless he has disclosed to the appropriate authority the fact that that person is so disqualified, and obtained its written consent<sup>5</sup>.

Where the appropriate authority refuses to give its consent in either case, it must inform the person carrying on or intending to carry on the voluntary home by a written notice which states the reason for the refusal, the right to appeal against the refusal<sup>6</sup>, and the time within which he may do so<sup>7</sup>.

Contravention of either of the above prohibitions is an offence, punishable on summary conviction with imprisonment or a fine or both<sup>8</sup>.

1    Ie under the Children Act 1989 s 68 (as amended): see paras 1063-1064 post. For the meaning of 'child' see para 3 ante. As to private fostering generally see paras 1049-1069 post. As to the grounds for disqualification see the Disqualification from Caring for Children Regulations 2002, SI 2002/635, reg 2; and the Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, reg 4.

2    For the meaning of 'children's home' see para 983 post.

3    'Appropriate authority' means, in relation to England, Her Majesty's Chief Inspector of Education, Children's Services and Skills: Children Act 1989 s 65(6)(a) (s 65(6) added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (13)(d); and amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 9, 12). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. The Children Act 1989 s 65(6)(b) (as so added) provides that, in relation to Wales, the 'appropriate authority' means the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.

4    Children Act 1989 s 65(1) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (13)(a)).

5    Children Act 1989 s 65(2) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (13)(b)). Where a person contravenes the Children Act 1989 s 65(2) (as amended) he is not guilty of an offence if he proves that he did not know, and had no reasonable grounds for believing, that the person whom he was employing was disqualified under s 68 (as amended) (see paras 1063-1064 post): s 65(5).

6    An appeal against a decision of an appropriate authority under *ibid* s 65 (as amended) lies to the Tribunal established under the Protection of Children Act 1999 s 9 (as amended) (see para 708 ante): Children Act 1989 s 65A(1) (s 65A added by the Care Standards Act 2000 Sch 4 para 14(1), (14)). On an appeal, the Tribunal may confirm the authority's decision or direct it to give the consent in question: Children Act 1989 s 65A(2) (as so added).

7    *Ibid* s 65(3) (amended by the Care Standards Act 2000 Sch 4 para 14).

8    See the Children Act 1989 s 65(4). A person guilty of such an offence is liable to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both: see s 65(4). As to the standard scale see para 132 note 2 ante.

### **UPDATE**

**978 Disqualification in relation to voluntary homes**

NOTES 6, 7--Appeals now lie to the First-tier Tribunal: see the Children Act 1989 ss 65(3), 65A(1) (amended by SI 2008/2833).

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### **979. Local authority duties in respect of children accommodated by voluntary organisations.**

Every local authority<sup>1</sup> must satisfy itself that any voluntary organisation<sup>2</sup> providing accommodation within the authority's area for any child<sup>3</sup>, or outside that area for any child on behalf of the authority, is satisfactorily safeguarding and promoting the welfare of such children<sup>4</sup>. The authority must arrange for children who are accommodated within its area by or on behalf of voluntary organisations to be visited, from time to time, in the interests of their welfare<sup>5</sup>. Regulations may be made requiring every child who is accommodated within a local authority's area, by or on behalf of a voluntary organisation, to be visited by an officer of the authority in prescribed circumstances and on specified occasions or within specified periods<sup>6</sup>.

If a local authority is not satisfied that the welfare of any child who is accommodated by or on behalf of a voluntary organisation is being satisfactorily safeguarded or promoted, it must<sup>7</sup>:

- 2092 (1) unless it considers that it would not be in the best interests of the child to do so, take such steps as are reasonably practicable to secure that the care and accommodation of the child is undertaken by a parent of his, any person who is not a parent of his but who has parental responsibility<sup>8</sup> for him, or a relative<sup>9</sup> of his<sup>10</sup>; and
- 2093 (2) consider the extent to which, if at all it should exercise any of its functions with respect to the child<sup>11</sup>.

Any person authorised by the local authority may: (a) enter and inspect premises in which children are being accommodated<sup>12</sup>; (b) inspect any children there<sup>13</sup>; and (c) require any person to furnish him with records of a kind required to be kept<sup>14</sup> (in whatever form they are held), or allow him to inspect such records, as he may at any time direct<sup>15</sup>. Any person exercising such a power must on request produce some duly authenticated document showing his authority to do so<sup>16</sup>. Any person authorised to exercise the power to inspect records is entitled at any reasonable time to have access to and inspect and check the operation of any computer and any associated apparatus or material which is or has been used in connection with the records in question, and may require persons connected with the operation of the computer to assist him<sup>17</sup>. Intentional obstruction of a person authorised to enter premises or inspect records is an offence punishable on summary conviction with a fine<sup>18</sup>.

The Secretary of State or the Welsh Ministers may make regulations imposing requirements to be met by any local authority or its officer carrying out functions under the provisions described above<sup>19</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children Act 1989 s 62(1). Section 62 (as amended) does not apply in relation to any voluntary organisation which is an institution within the further education sector, as defined in the Further and Higher

Education Act 1992 s 91(3) (see EDUCATION vol 15(2) (2006 Reissue) para 580), or a school: Children Act 1989 s 62(10) (added by the Care Standards Act 2000 s 105(5)).

5 Children Act 1989 s 62(2). This does not apply in relation to community homes: s 62(4). As to the meaning of 'community home' see para 967 ante.

6 Ibid s 62(3)(a). In exercise of this power the Fostering Services Regulations 2002, SI 2002/57 (as amended) (see para 917 ante), and the Children's Homes Regulations 2001, SI 2001/3967 (as amended) (see para 983 et seq post) have been made.

7 Children Act 1989 s 62(5).

8 For the meaning of 'parental responsibility' see para 134 ante.

9 For the meaning of 'relative' see para 249 note 15 ante.

10 Children Act 1989 s 62(5)(a).

11 Ibid s 62(5)(b).

12 Ibid s 62(6)(a).

13 Ibid s 62(6)(b).

14 The records of a kind required to be kept by regulations made under the Care Standards Act 2000 s 22 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE): Children Act 1989 s 62(6)(c) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14).

15 Children Act 1989 s 62(6)(c). If such a person is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: s 102(1), (6)(a). As to the application for, and grant of, such a warrant see s 102(2)-(5); and para 285 ante. As to the keeping of records see the Children's Homes Regulations 2001, SI 2001/3967, regs 28, 29, Schs 3, 4; and paras 1017-1018 post.

16 Children Act 1989 s 62(7).

17 See ibid s 62(8).

18 Ibid s 62(9). The fine must not exceed level 3 on the standard scale: see s 62(9). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

19 Ibid s 62(3)(b). See the regulations in note 6 supra. As to the Secretary of State and the Welsh Ministers see para 155 ante.

## UPDATE

### **979 Local authority duties in respect of children accommodated by voluntary organisations**

TEXT AND NOTES 6, 19--Children Act 1989 s 62(3) amended: Children and Young Persons Act 2008 Sch 3 para 24.



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#### **(iv) Private Homes for Children**

##### **980. Welfare of children.**

Where a child<sup>1</sup> is accommodated in a private children's home<sup>2</sup> it is the duty of the person carrying on the home to<sup>3</sup>:

- 2094 (1) safeguard and promote the child's welfare<sup>4</sup>;
- 2095 (2) make such use of the services and facilities available for children cared for by their own parents as appears to that person reasonable in the case of the child<sup>5</sup>; and
- 2096 (3) advise, assist and befriend him with a view to promoting his welfare when he ceases to be so accommodated<sup>6</sup>.

Before making any decision with respect to any such child, the person carrying on the home must, so far as is reasonably practicable, ascertain the wishes and feelings, regarding the matter to be decided, of<sup>7</sup>: (a) the child<sup>8</sup>; (b) his parents<sup>9</sup>; (c) any other person who is not a parent of his but who has parental responsibility for him<sup>10</sup>; and (d) any person whose wishes and feelings the person carrying on the home considers to be relevant<sup>11</sup>. In making any such decision the person concerned must give due consideration<sup>12</sup>:

- 2097 (i) having regard to the child's age and understanding, to such wishes and feelings of his as he has been able to ascertain<sup>13</sup>;
- 2098 (ii) to such other wishes and feelings of the other persons mentioned in heads (a) to (d) above as he has been able to ascertain<sup>14</sup>; and
- 2099 (iii) to the child's religious persuasion, racial origin and cultural and linguistic background<sup>15</sup>.

1 For the meaning of 'child' see para 3 ante.

2 'Private children's home' means a children's home in respect of which a person is registered under the Care Standards Act 2000 Pt II (ss 11-42) (not fully in force), which is not a community home or a voluntary home: Children Act 1989 s 105(1) (added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (23)(a)(vii)).

3 Children Act 1989 s 64(1) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (11)).

4 Children Act 1989 s 64(1)(a).

5 Ibid s 64(1)(b).

6 Ibid s 64(1)(c).

7 Ibid s 64(2).

8 Ibid s 64(2)(a).

9 Ibid s 64(2)(b).

10 Ibid s 64(2)(c). For the meaning of 'parental responsibility' see para 134 ante.

- 11 Ibid s 64(2)(d).
- 12 Ibid s 64(3).
- 13 Ibid s 64(3)(a).
- 14 Ibid s 64(3)(b).
- 15 Ibid s 64(3)(c).

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### **981. Duty of local authority to supervise children's homes.**

The requirement imposed on a local authority<sup>1</sup> to satisfy itself that voluntary organisations<sup>2</sup> providing accommodation within its area are satisfactorily safeguarding and promoting the welfare of the children concerned<sup>3</sup>, applies<sup>4</sup> in relation to any person who is carrying on a private children's home<sup>5</sup> as it applies in relation to any voluntary organisation<sup>6</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'voluntary organisation' see para 248 note 10 ante.

3 Ie the requirement imposed by the Children Act 1989 s 62 (as amended): see para 979 ante.

4 Ie except for ibid s 62(4), which refers to community homes, but including the provision as to the grant of a warrant: see s 102(1), (6)(a); and para 979 ante. As to the application for, and grant of, such a warrant see s 102(2)-(5). As to the meaning of 'community home' see para 967 ante.

5 For the meaning of 'private children's home' see para 980 note 2 ante.

6 Children Act 1989 s 64(4) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (11)).

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## **982. Disqualification from carrying on or being employed in children's homes.**

A person who is disqualified from fostering a child privately<sup>1</sup> may not carry on, or be otherwise concerned in the management of, or have any financial interest in, a private children's home<sup>2</sup> unless he has disclosed to the appropriate authority<sup>3</sup> the fact that he is disqualified, and obtained its written consent<sup>4</sup>. Furthermore, no person may employ a person who is so disqualified in a private children's home unless he has disclosed to the responsible authority the fact that that person is so disqualified, and obtained its written consent<sup>5</sup>. Where an authority refuses consent under these provisions, it must inform the applicant by a written notice which states the reason for the refusal, the applicant's right of appeal against the refusal<sup>6</sup> and the time within which such an appeal may be made<sup>7</sup>.

It is an offence to contravene these provisions<sup>8</sup>.

1    le a person disqualified under the Children Act 1989 s 68 (as amended): see paras 1063-1064 post. For the meaning of 'child' see para 3 ante. As to private fostering generally see paras 1049-1069 post. As to the grounds for disqualification see the Disqualification from Caring for Children Regulations 2002, SI 2002/635, reg 2; and the Disqualification for Caring for Children (Wales) Regulations 2004, SI 2004/2695, reg 4.

2    For the meaning of 'private children's home' see para 980 ante.

3    For the meaning of 'appropriate authority' see para 978 note 3 ante.

4    Children Act 1989 s 65(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (13)(a)).

5    Children Act 1989 s 65(2) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (13)(b)). Where a person contravenes the Children Act 1989 s 65(2) (as amended) he is not guilty of an offence if he proves that he did not know, and had no reasonable grounds for believing, that the person whom he was employing was disqualified under s 68 (as amended) (see paras 1063-1064 post): s 65(5).

6    An appeal against a decision of an appropriate authority under *ibid* s 65 (as amended) lies to the Tribunal established under the Protection of Children Act 1999 s 9 (as amended) (see para 708 ante); and on such an appeal the Tribunal may confirm the authority's decision or direct it to give the consent in question: Children Act 1989 s 65A(1), (2) (added by the Care Standards Act 2000 Sch 4 para 14(1), (14)).

7    Children Act 1989 s 65(3) (amended by the Care Standards Act 2000 Sch 4 para 14).

8    See the Children Act 1989 s 65(4). The offence is punishable on summary conviction by imprisonment for a term not exceeding six months or by a fine not exceeding level 5 on the standard scale, or both: s 65(4). As to the standard scale see para 132 note 2 ante. However, it is a defence to a charge of employing a person in breach of s 65(2) (as amended) (see the text and note 5 *supra*) that the accused did not know, and had no reasonable ground for believing, that the person concerned was disqualified: s 65(5). As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

## **UPDATE**

## **982 Disqualification from carrying on or being employed in children's homes**

NOTES 6, 7--Appeals now lie to the First-tier Tribunal: see Children Act 1989 ss 65(3), 65A(1) (amended by SI 2008/2833).

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## **(v) Registered Children's Homes under the Care Standards Act 2000**

### **983. Meaning of 'children's home'.**

An establishment is a children's home if it provides care and accommodation wholly or mainly for children<sup>1</sup>. However, an establishment is not a children's home:

- 2100 (1) merely because a child is cared for and accommodated there by a parent<sup>2</sup> or relative<sup>3</sup> of his or by a foster parent<sup>4</sup>;
- 2101 (2) if it is a health service hospital<sup>5</sup>, an independent hospital<sup>6</sup>, an independent clinic<sup>7</sup>, a residential family centre<sup>8</sup> or of a description excepted by regulations<sup>9</sup>;
- 2102 (3) if it is a school<sup>10</sup>.

However, a school is a children's home at any time if at that time accommodation is provided for children at the school and either:

- 2103 (a) in each year<sup>11</sup> that fell within the period of two years ending at that time, accommodation was provided for children, either at the school or under arrangements made by the proprietor<sup>12</sup> of the school, for more than 295 days<sup>13</sup>; or
- 2104 (b) it is intended to provide accommodation for children, either at the school or under arrangements made by the proprietor of the school, for more than 295 days in any year<sup>14</sup>.

1 Care Standards Act 2000 s 1(1), (2). 'Child' means a person under the age of 18: s 121(1).

2 'Parent', in relation to a child, includes any person who is not a parent of his but who has parental responsibility for him: *ibid* s 121(1). For the meaning of 'parental responsibility' see para 134 ante; definition applied by s 121(1).

3 For the meaning of 'relative' see para 249 note 15 ante; definition applied by *ibid* s 121(1).

4 *Ibid* s 1(3). For this purpose, a person is a foster parent in relation to a child if: (1) he is a local authority foster parent in relation to the child; (2) he is a foster parent with whom a child has been placed by a voluntary organisation under the Children Act 1989 s 59(1)(a) (see para 975 ante); or (3) he fosters the child privately: Care Standards Act 2000 s 1(7). As to the meaning of 'local authority foster parent' see para 249 note 13 ante; definition applied by s 121(1). For the meaning of 'voluntary organisation' see para 395 note 3 ante; definition applied by the Care Standards Act 2000 s 121(1) (amended by Adoption and Children Act 2002 s 104). For the meaning of 'foster a child privately' see para 1049 ante; definition applied by the Care Standards Act 2000 s 121(1).

5 *Ibid* s 1(4)(a). For these purposes, 'health service hospital' has the same meaning as in the National Health Service Act 2006 or the National Health Service (Wales) Act 2006 (see HEALTH SERVICES vol 54 (2008) PARA 21): Care Standards Act 2000 s 121(1) (definition amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 198, 200).

6 A hospital which is not a health service hospital is an 'independent hospital': Care Standards Act 2000 s 2(1), (2). 'Hospital' (except in the expression 'health service hospital') means:

- 724 (1) an establishment, the main purpose of which is to provide medical or psychiatric treatment for illness or mental disorder or palliative care, or in which (whether or not other services are also provided) any of the following listed services are provided (s 2(3)(a)):

22. (a) medical treatment under anaesthesia or sedation (s 2(7)(a));
23. (b) dental treatment under general anaesthesia (s 2(7)(b));
24. (c) obstetric services and, in connection with childbirth, medical services (s 2(7)(c));
25. (d) termination of pregnancies (s 2(7)(d));
26. (e) cosmetic surgery (other than ear and body piercing, tattooing, the subcutaneous injection of a substance or substances into the skin for cosmetic purposes and the removal of hair roots or small blemishes on the skin by the application of heat using an electric current) (s 2(7)(e) (amended by the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 3(4); and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 3(4)));
27. (f) treatment using prescribed techniques or prescribed technology (Care Standards Act 2000 s 2(7)(f)); and
- 725 (2) any other establishment in which treatment or nursing (or both) are provided for persons liable to be detained under the Mental Health Act 1983 (see MENTAL HEALTH) (Care Standards Act 2000 s 2(3)(b)).

References to a person liable to be detained under the Mental Health Act do not include a person absent in pursuance of leave granted under s 17 (see MENTAL HEALTH vol 30(2) (Reissue) para 506); Care Standards Act 2000 s 2(6). 'Prescribed' means prescribed by regulations: s 121(1). As to techniques and technology prescribed for the purposes of s 2 see the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 3(1) and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 3(1). As to techniques and technology not included as 'listed services' for the purposes of the Care Standards Act 2000 s 2 (as amended) see the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 3(2) and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 3(2). As to establishments excepted for the purposes of the Care Standards Act 2000 s 2 (as amended) from being independent hospitals: see s 2(8)(a); the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 3(3) (amended by SI 2004/865); and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 3(3).

7 Care Standards Act 2000 s 1(4)(b). 'Independent clinic' means an establishment of a prescribed kind (not being a hospital) in which services are provided by medical practitioners (whether or not any services are also provided for the purposes of the establishment elsewhere): s 2(4). As to establishments that have been prescribed for the purposes of s 2(4) see the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 4 (amended by SI 2004/865); and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 4. An establishment in which, or for the purposes of which, services are provided by medical practitioners in pursuance of the National Health Service Act 2006 or the National Health Service (Wales) Act 2006 is not an independent clinic: Care Standards Act 2000 s 2(4) (amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 198, 199).

8 Care Standards Act 2000 s 1(4)(c). 'Residential family centre' means, subject to s 4(6), any establishment at which: (1) accommodation is provided for children and their parents; (2) the parents' capacity to respond to the children's needs and to safeguard their welfare is monitored or assessed; and (3) the parents are given such advice, guidance or counselling as is considered necessary (s 4(1), (2)), but does not include any description of establishment, undertaking or organisation excepted from the definition by regulations (s 4(6)). At the date at which this volume states the law no such regulations had been made. For the purposes of s 4(2), 'parent', in relation to a child, includes any person who is looking after him: s 4(2).

9 Ibid s 1(4). Establishments of the following descriptions are excepted from being a children's home:

- 726 (1) any institution within the further education sector as defined by the Further and Higher Education Act 1992 s 91(3) (see EDUCATION vol 15(2) (2006 Reissue) para 579) (Children's Homes Regulations 2001, SI 2001/3967, reg 3(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(a));
- 727 (2) any establishment providing accommodation to children for less than 28 days in any 12 month period for the purposes of a holiday or recreational, sporting, cultural or educational activities, subject to certain exceptions set out in the regulations (Children's Homes Regulations

2001, SI 2001/3967, reg 3(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(b));

- 728 (3) any premises which provides day care for less than 28 days in any 12 month period in relation to any child, subject to certain exceptions set out in the regulations (Children's Homes Regulations 2001, SI 2001/3967, reg 3(1)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(c));
- 729 (4) any establishment providing accommodation to children aged 16 or over, to enable them to undergo training or apprenticeship, for the purpose of a holiday, or for recreational, sporting, cultural or educational purposes, subject to certain exceptions set out in the regulations (Children's Homes Regulations 2001, SI 2001/3967, reg 3(1)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(d));
- 730 (5) any approved bail hostel or approved probation hostel (Children's Homes Regulations 2001, SI 2001/3967, reg 3(1)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(e));
- 731 (6) any institution provided for young offenders under or by virtue of the Prison Act 1952 s 43(1) (see PRISONS vol 36(2) (Reissue) para 701) (Children's Homes Regulations 2001, SI 2001/3967, reg 3(1)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 3(1)(f)).

For the meaning of 'day care' see para 1072 note 3 post. As to the making of regulations see para 921 note 1 ante.

10 Care Standards Act 2000 s 1(5). This is expressed to be subject to s 1(6): see the text and notes 11-14 infra. For the meaning of 'school' see para 271 note 8 ante; definition applied by s 121(1).

11 'Year' means a period of 12 months: *ibid* s 1(6).

12 'Proprietor' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 60); definition applied by the Care Standards Act 2000 s 121(1).

13 *Ibid* s 1(6)(a). Accommodation is not, for the purposes of head (a) in the text, to be regarded as provided to children for a number of days unless there is at least one child to whom it is provided for that number of days; and head (b) in the text must be construed accordingly: s 1(6).

14 *Ibid* s 1(6)(b).

## UPDATE

### 983 Meaning of 'children's home'

NOTE 6--SI 2001/3968 reg 3(1)-(3) amended, reg 3(4) omitted, reg 3(5) added: SI 2008/2352. SI 2002/325 reg 3(3) amended: SI 2007/2332.

SI 2001/3968 reg 3(2) and SI 2002/325 reg 3(1) amended: SI 2009/1892.

NOTE 7--SI 2001/3968 reg 4 further amended: SI 2008/2352. SI 2002/325 reg 4 amended: SI 2007/2332.

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#### **984. Registration authorities.**

For the purposes of the Care Standards Act 2000, the registration authority in England, in the case of children's homes, residential family centres, fostering agencies, voluntary adoption agencies<sup>1</sup> and adoption agencies, is Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup>.

<sup>1</sup> This is subject to the Care Standards Act 2000 s 36A (as added) (see SOCIAL SERVICES AND COMMUNITY CARE): s 5(2) (added by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 103, 105).

<sup>2</sup> Care Standards Act 2000 s 5(1)(a)(iii) (s 5(1) renumbered by the Adoption and Children Act 2002 Sch 3 paras 103, 105; and the Care Standards Act 2000 s 5(1)(a)(iii) added by the Education and Inspections Act 2006 s 157, Sch 14 paras 38, 39). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the duty of the Office for Standards in Education, Children's Services and Skills to have regard to the need to safeguard and promote the rights and welfare of children while performing its functions see the Education and Inspections Act 2006 s 117; and EDUCATION. The previous registration authority under the Care Standards Act 2000 s 5 (as amended) was the Commission for Social Care Inspection, which continues to have a duty when exercising its functions under that Act to have particular regard to the need to safeguard and promote the rights and welfare of children: see s 5B(6) (as added); and SOCIAL SERVICES AND COMMUNITY CARE. As to transitional provisions for the preparation of the exercise of the functions by the Chief Inspector of Education, Children's Services and Skills see the Office for Standards in Education, Children's Services and Skills (Transitional Provisions) Regulations 2006, SI 2006/2991.

The Care Standards Act 2000 s 5(1)(b) (as so renumbered) provides that, in relation to Wales, 'registration authority' means the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.



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### **985. Requirement to register under the Care Standards Act 2000.**

Any person who carries on or manages an establishment (including a children's home)<sup>1</sup> or agency<sup>2</sup> of any description<sup>3</sup> without being registered under Part II of the Care Standards Act 2000<sup>4</sup> in respect of it (as an establishment or, as the case may be, agency of that description) is guilty of an offence<sup>5</sup>. A person guilty of such an offence is liable on summary conviction<sup>6</sup> to a fine<sup>7</sup>. If:

- 2105 (1) the person was registered in respect of the establishment or agency at a time before the commission of the offence but the registration was cancelled before the offence was committed<sup>8</sup>; or
- 2106 (2) the conviction is a second or subsequent conviction of the offence and the earlier conviction, or one of the earlier convictions, was of an offence in relation to an establishment or agency of the same description<sup>9</sup>,

the person guilty of the offence is liable on summary conviction to imprisonment or to a fine or to both<sup>10</sup>.

Registration may be granted, refused or granted subject to conditions<sup>11</sup>.

The registration authority may cancel the registration on the ground that the registered person or any other relevant person has been convicted of a relevant offence; or that the conduct of the home is being, or has at any time been, carried on otherwise than in accordance with regulations; or on any ground specified in regulations<sup>12</sup>.

The registration authority must give the applicant written notice of the proposal to grant or refuse registration, and of any proposed conditions<sup>13</sup>. Any notice must inform the recipient of his right of appeal<sup>14</sup>. A decision of which notice must be served, takes effect at the end of 28 days after service of the notice or after the determination or abandonment of any appeal<sup>15</sup>.

1 For the purposes of the Care Standards Act 2000, any reference to a description of establishment is a reference to a children's home, a children's home providing accommodation for the purpose of restricting liberty, an independent hospital, an independent hospital in which treatment or nursing (or both) are provided for persons liable to be detained under the Mental Health Act 1983 (see MENTAL HEALTH), an independent clinic, a care home or a residential family centre; and a reference to any establishment is a reference to an establishment of any of those descriptions: Care Standards Act 2000 s 4(8) (amended by the Health and Social Care (Community Health and Standards) Act 2003 s 107(1)). For the meaning of 'children's home' see para 983 ante; for the meaning of 'independent hospital' see para 983 note 6 ante; and for the meaning of 'independent clinic' see para 983 note 7 ante. For the meaning of 'hospital' see para 983 note 6 ante. An establishment is a care home if it provides accommodation, together with nursing or personal care, for: (1) persons who are or have been ill; (2) persons who have or have had a mental disorder; (3) persons who are disabled or infirm; (4) persons who are or have been dependent on alcohol or drugs (Care Standards Act 2000 s 3(1), (2)). However, an establishment is not a care home if it is: (a) a hospital; (b) an independent clinic; (c) a children's home; or (d) of a description excepted by regulations: s 3(3). As to excepted establishments see the Care Homes Regulations 2001, SI 2001/3965, reg 3 (amended by SI 2003/1845; SI 2004/696; SI 2004/2071); and the Care Homes (Wales) Regulations 2002, SI 2002/324, reg 3 (amended by SI 2004/1756; SI 2006/3251). An establishment is not a care home for the purposes of the Care Standards Act 2000 unless the care which it provides includes assistance with bodily functions where such assistance is required: s 121(9). 'Personal care' does not include any prescribed activity: s 121(3). 'Prescribed' means prescribed by regulations: s 121(1). 'Illness' includes any injury: s 121(1). Until a day to be appointed, 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind (s 121(1)); however, as from a day to be appointed, 'mental disorder' has the same meaning as in the Mental Health Act 1983 (see

MENTAL HEALTH) (Care Standards Act 2000 s 121(1) (prospectively substituted by the Mental Health Act 2007 s 1(4), Sch 1 Pt 2 para 22)). A person is disabled if: (i) his sight, hearing or speech is substantially impaired; (ii) he has a mental disorder; or (iii) he is physically substantially disabled by any illness, any impairment present since birth, or otherwise: Care Standards Act 2000 s 121(2). As to residential family centres see para 1202 et seq post.

2 Where the activities of an agency are carried on from two or more branches, each of those branches must be treated as a separate agency for the purposes of *ibid* Pt II (ss 11-42) (as amended): s 11(2). For the purposes of the Care Standards Act 2000 generally, any reference to a description of agency is a reference to an independent medical agency, a domiciliary care agency, a nurses agency, a fostering agency, a voluntary adoption agency or an adoption support agency; and a reference to any agency is a reference to an agency of any of those descriptions: s 4(9) (amended by the Adoption and Children Act 2002 s 8(3)(b)). However, the reference in the Care Standards Act 2000 s 11(1), (2) to an agency does not include a reference to a voluntary adoption agency: s 11(3) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 103, 106).

'Voluntary adoption agency' means an adoption society within the meaning of the Adoption and Children Act 2002, which is a voluntary organisation within the meaning of the Adoption and Children Act 2002 (see para 395 note 3 ante): Care Standards Act 2000 s 4(7) (amended by the Adoption and Children Act 2002 Sch 3 paras 103, 104).

For the meaning of 'adoption support agency' see para 385 note 12 ante; definition applied by virtue of the Care Standards Act 2000 s 4(7A) (added by the Adoption and Children Act 2002 s 8(3)(a)).

'Independent medical agency' means an undertaking (not being an independent clinic or an independent hospital) which consists of or includes the provision of services by medical practitioners: Care Standards Act 2000 s 2(5) (amended by the Health and Social Care (Community Health and Standards) Act 2003 s 106). However, if any of the services are provided for the purposes of an independent clinic, or by medical practitioners in pursuance of the National Health Service Act 2006 or the National Health Service (Wales) Act 2006 (see HEALTH SERVICES), it is not an independent medical agency: Care Standards Act 2000 s 2(5) (amended by the National Health Service (Consequential Provisions) Act 2006 s 8(2)). Regulations may except any description of undertaking from the definition 'independent medical agency': Care Standards Act 2000 s 2(8)(b). As to such exceptions see the Private and Voluntary Health Care (England) Regulations 2001, SI 2001/3968, reg 5; and the Private and Voluntary Health Care (Wales) Regulations 2002, SI 2002/325, reg 4A (added by SI 2006/1703). References in the Care Standards Act 2000 to a person who carries on an establishment or agency include references to a person who carries it on otherwise than for profit: s 121(5).

'Domiciliary care agency' means an undertaking which consists of or includes arranging the provision of personal care in their own homes for persons who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance, but does not include any description of establishment, undertaking or organisation excepted from this definition by regulations: s 4(3), (6).

'Nurses agency' means an employment agency or employment business, being (in either case) a business which consists of or includes supplying, or providing services for the purpose of supplying, registered nurses or registered midwives, but does not include any description of establishment, undertaking or organisation excepted from this definition by regulations: s 4(5), (6) (s 4(5) amended by the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1771, art 3, Schedule Pt 1 para 2(a)).

'Fostering agency' means an undertaking which consists of or includes discharging functions of local authorities in connection with the placing of children with foster parents, or a voluntary organisation which places children with foster parents under the Children Act 1989 s 59(1) (as amended) (see para 975 ante), but does not include any description of establishment, undertaking or organisation excepted from this definition by regulations: Care Standards Act 2000 s 4(4), (6).

3 Regulations may be made imposing any requirements in relation to establishments and agencies which the appropriate minister thinks fit (see *ibid* s 22(1); and SOCIAL SERVICES AND COMMUNITY CARE), and the minister may prepare and publish statements of national minimum standards applicable to establishments or agencies (see s 23; and SOCIAL SERVICES AND COMMUNITY CARE). As to the default powers of the appropriate minister see s 113; and SOCIAL SERVICES AND COMMUNITY CARE. The appropriate minister has power to make such additional provision as he considers necessary to give full effect to the provisions of the Care Standards Act 2000: see s 119; and SOCIAL SERVICES AND COMMUNITY CARE. For general provision regarding the making of subordinate legislation see s 118.

Regulations may also require the person carrying on an establishment or agency to make an annual return to the registration authority, may require certain persons to give notice of their appointment to the registration authority, and may make provision in respect of the death of registered persons: see ss 33-35; and SOCIAL SERVICES AND COMMUNITY CARE.

4 *le ibid* Pt II (as amended); and SOCIAL SERVICES AND COMMUNITY CARE. As to the registration of children's homes under the Care Standards Act 2000 see ss 12-21; and SOCIAL SERVICES AND COMMUNITY CARE. As to the registration authorities see s 5 (as amended); and para 984 ante. The Secretary of State may by regulations make provision about the keeping of registers by the Commission for Healthcare Audit and Inspection, the Commission for

Social Care Inspection or the Chief Inspector of Education, Children's Services and Skills for the purposes of Pt II (as amended): s 11(4) (amended by the Health and Social Care (Community Health and Standards) Act 2003 s 147, Sch 9 paras 16, 20; and the Education and Inspections Act 2006 s 157, Sch 4 paras 38, 42). As to the Commission for Healthcare Audit and Inspection see Health and Social Care (Community Health and Standards) Act 2003 s 41; and SOCIAL SERVICES AND COMMUNITY CARE. As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

The appropriate minister may cause an inquiry to be held into any matter connected with a service provided in or by an establishment or agency: Care Standards Act 2000 s 10(2). Before an inquiry is begun, the person causing the inquiry to be held may direct that it must be held in private: s 10(3). Where no direction has been given, the person holding the inquiry may if he thinks fit hold it, or any part of it, in private: s 10(4). The provisions of the Local Government Act 1972 s 250(2)-(5) (powers in relation to local inquiries: see LOCAL GOVERNMENT vol 69 (2009) PARA 105) apply in relation to an inquiry under the Care Standards Act 2000 s 10 (as amended) as they apply in relation to a local inquiry under the Local Government Act 1972 s 250 (as amended): see the Care Standards Act 2000 s 10(5). As to the application of the provisions of s 10(3), (4) in relation to an inquiry under the Government of Wales Act 1998 s 35 (repealed) see the Care Standards Act 2000 s 10(6) (amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 38, 41)).

The report of the person who held the inquiry must, unless the minister who caused the inquiry to be held considers that there are exceptional circumstances which make it inappropriate to publish it, be published in a manner which that minister considers appropriate: Care Standards Act 2000 s 10(7).

5 Ibid s 11(1). For the offences under Pt II (as amended) see ss 24-30; and SOCIAL SERVICES AND COMMUNITY CARE. Inspections of premises used as an establishment or an agency may be carried out by persons authorised by the registration authority: see ss 31, 32 (both as amended); and SOCIAL SERVICES AND COMMUNITY CARE. As to the information to be contained in the register see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 8 (amended by SI 2002/865; SI 2003/369; SI 2004/2071; SI 2007/603); National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 7 (amended by SI 2003/369; SI 2004/2071; SI 2005/2720).

6 Care Standards Act 2000 s 11(5).

7 Ibid s 11(5)(a). The fine must not exceed level 5 on the standard scale: see s 11(5)(a). As to the standard scale see para 132 note 2 ante.

8 Ibid s 11(6)(a).

9 Ibid s 11(6)(b).

10 Ibid s 11(5)(b). A person guilty of such an offence is liable to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: see s 11(5)(b).

11 See ibid s 13; and SOCIAL SERVICES AND COMMUNITY CARE.

12 See ibid s 14; and SOCIAL SERVICES AND COMMUNITY CARE.

13 See ibid s 19; and SOCIAL SERVICES AND COMMUNITY CARE.

14 See ibid s 19(4); and SOCIAL SERVICES AND COMMUNITY CARE. As to the appeal procedure see s 21; and SOCIAL SERVICES AND COMMUNITY CARE.

15 See ibid s 19(5); and SOCIAL SERVICES AND COMMUNITY CARE.

## UPDATE

### 985 Requirement to register under the Care Standards Act 2000

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--SI 2002/324 reg 3 further amended: SI 2009/1824. SI 2001/3965 further amended: SI 2009/2895. Day appointed in relation to definition of 'mental disorder' is 3 November 2008: SI 2008/1900.

NOTE 2--SI 2001/3968 reg 5 substituted: SI 2008/2352. SI 2002/325 reg 4A amended: SI 2007/2332.

NOTE 4--Care Standards Act 2000 s 10(6) repealed: Health and Social Care Act 2008 Sch 5 para 9, Sch 15 Pt 1.

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### **986. The application to register.**

A person seeking to be registered<sup>1</sup> must make an application to the registration authority<sup>2</sup>. The application must contain prescribed information about prescribed matters, give any other information which the registration authority reasonably requests the applicant to give and be accompanied by the relevant fee<sup>3</sup>.

The applicant must attend for interview for the purpose of enabling the registration authority to determine whether he is fit to carry on or manage a children's home<sup>4</sup>.

If the registration authority is satisfied that the home complies or will comply with such requirements as may be prescribed<sup>5</sup> and with such other requirements (if any) as appear to the authority to be appropriate, the authority must grant the application either unconditionally or subject to conditions<sup>6</sup>.

Where an application for registration is granted, the authority must notify the applicant that the home has been registered as from a date specified in the notice and state any conditions<sup>7</sup>. If the application is refused, the decision must indicate the right of appeal<sup>8</sup>.

1    Ie registered under the Care Standards Act 2000 Pt 11 (ss 11-42) (as amended).

2    Ibid s 12(1). As to the registration authorities see s 5 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE.

3    See ibid s 12(2) (amended by the Social Care (Community Health and Standards) Act 2003 s 105(1), (3); and the Education and Inspections Act 2006 s 157, Sch 14 paras 38, 43). As to the information to be provided see para 987 et seq post. A person who applies for registration as the manager of an establishment or agency must be an individual: Care Standards Act 2000 s 12(3). A person who carries on or manages, or wishes to carry on or manage, more than one establishment or agency must make a separate application in respect of each of them: s 12(4). The application must also be accompanied by a recent photograph of the responsible person: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(1)(c); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(1)(c).

4    See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 5 (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 6.

5    Ie the requirements under the Care Standards Act 2000 s 22: see SOCIAL SERVICES AND COMMUNITY CARE.

6    Ibid s 13(3). If an application does not meet the specified requirements it must be refused: see s 13(1), (2); and SOCIAL SERVICES AND COMMUNITY CARE. As to the application to have a condition varied or revoked see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 12 (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 12.

7    See the Care Standards Act 2000 s 19(1), (2); and SOCIAL SERVICES AND COMMUNITY CARE.

8    See ibid s 19(3); and SOCIAL SERVICES AND COMMUNITY CARE.

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### **987. Information to be provided about the individual.**

A person seeking to be registered as a person who carries on an establishment or agency must provide to the registration authority<sup>1</sup>:

- 2107 (1) the name, date of birth, address and telephone number of the applicant<sup>2</sup>;
- 2108 (2) the qualifications and experience (if any) held by the applicant which are relevant to his suitability to carry on the home<sup>3</sup>;
- 2109 (3) details of his employment history, including the name and address of his present employer and of any previous employers<sup>4</sup>;
- 2110 (4) the names and addresses of two persons who are willing and able to give a reference as to the suitability of the applicant to carry on a children's home<sup>5</sup>;
- 2111 (5) details of any business he carries on or has carried on<sup>6</sup>.

In England, where the applicant is a partnership the applicant must provide information regarding the name and address of the partnership and the information in relation to each partner as is required from an individual applicant in heads (1) to (5) above<sup>7</sup>.

The particulars required about the applicant, where the applicant is an organisation are:

- 2112 (a) the name of the organisation and the address of its registered or principal office<sup>8</sup>;
- 2113 (b) the full name, date of birth, address and telephone number of the responsible individual<sup>9</sup>;
- 2114 (c) details of the professional and technical qualifications of the responsible individual and his experience of carrying on an establishment or agency of a similar description, so far as is relevant<sup>10</sup>;
- 2115 (d) if the organisation is a subsidiary of a holding company, the name and address of the registered or principal office of the holding company and of any other subsidiary of that holding company<sup>11</sup>.

The following further particulars about the applicant are required in all cases<sup>12</sup>:

- 2116 (i) a reference from a bank expressing an opinion as to the applicant's financial standing<sup>13</sup>;
- 2117 (ii) a statement as to whether the responsible person has been adjudged bankrupt or sequestration of his estate has been ordered, or he has made a composition or arrangement with, or granted a trust deed for, his creditors<sup>14</sup>;
- 2118 (iii) a statement as to the applicant's ability to ensure the financial viability of the establishment or agency for the purposes of achieving its aims and objectives as set out in its statement of purpose<sup>15</sup>;
- 2119 (iv) a business plan in respect of the establishment or agency<sup>16</sup>;
- 2120 (v) details as to cash-flow in respect of the establishment or agency<sup>17</sup>.

The applicant is also required to provide to the registration authority certain documents<sup>18</sup>.

- 1 As to the registration authorities see s 5 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE.
- 2 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(2)(a), Sch 1 para 1(b); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(2)(a), Sch 1 para 1(a). Any change of the name or address of the applicant occurring before or after the application for registration is made and before it is determined must be notified to the registration authority in writing: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 6(a) (amended by SI 2007/603).
- 3 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 1(c); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 1(b) (amended by SI 2003/237). Any change of the name or address of any responsible person occurring before or after the application for registration is made and before it is determined must be notified to the registration authority in writing: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 6(a) (amended by SI 2007/603); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 7(a).
- 4 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 1(d); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 1(c).
- 5 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 1(f); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 1(e) (amended by SI 2003/237).
- 6 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 1(e); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 1(d).
- 7 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 paras 1(a), (b), 2 (Sch 1 para 2 amended by SI 2002/865). Any change of membership of the partnership occurring before or after the application for registration is made and before it is determined must be notified to the registration authority in writing: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 6(b) (amended by SI 2007/603).
- 8 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 3(a); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 2(a).
- 9 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 3(b); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 2(b). Any change in the director, manager, secretary or other person responsible for the management of the organisation occurring before or after the application for registration is made and before it is determined must be notified to the registration authority in writing: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 6(c) (amended by SI 2007/603); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 7(b).
- 10 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 3(c); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 2(c) (amended by SI 2003/237).
- 11 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 3(d); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 2(d).
- 12 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3.
- 13 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4(a); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3(a).
- 14 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4(b); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3(b).

15 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4(c); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3(c) (amended by SI 2003/237). The 'statement of purpose' in relation to a children's home is the written statement required to be prepared in accordance with the Children's Homes Regulations 2001, SI 2001/3967, reg 4(1) or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(1) (see para 999 post): National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 2(1); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 2(1). As to reports where the establishment or agency is likely to cease to be financially viable see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 13 (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 13 (amended by SI 2003/237).

16 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4(d); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3(d) (amended by SI 2003/237).

17 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 4(e); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 3(e).

18 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(2)(b) (amended by SI 2002/865); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(2)(b). As to the documents to be provided in respect of the individual see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 2 paras 1-9 or, as the case may be, the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 2 paras 1-9A (amended by SI 2002/2622; SI 2003/237).

## **UPDATE**

### **987 Information to be provided about the individual**

NOTE 12--SI 2002/919 Sch 1 para 3 amended: SI 2009/1824.

NOTE 18--SI 2002/919 Sch 2 para 8 amended: SI 2009/1824. SI 2002/919 Sch 2 paras 4, 9A substituted: SI 2009/2541. SI 2001/3969 Sch 2 para 4 substituted: SI 2009/1895.



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**988. Information to be provided about the establishment or agency.**

A person seeking to be registered as a person who carries on an establishment or agency must provide to the registration authority<sup>1</sup> the following information about the children's home:

- 2121 (1) the name, address, telephone number, facsimile number and electronic mail address (if any) of the establishment or agency in respect of which registration is sought<sup>2</sup>;
- 2122 (2) a description of the establishment or agency in respect of which the applicant seeks to be registered<sup>3</sup>;
- 2123 (3) a statement as to the accommodation, facilities and services which are to be provided by the establishment or agency including the extent and, where appropriate, location of such accommodation, facilities and services<sup>4</sup>;
- 2124 (4) the date on which the establishment or agency was established or is to be established<sup>5</sup>;
- 2125 (5) the statement of purpose of the establishment or agency<sup>6</sup>;
- 2126 (6) details of the scale of charges payable by the service users<sup>7</sup>;
- 2127 (7) in respect of the premises to be used, a description of the premises, including whether they are purpose-built or have been converted<sup>8</sup>, a description of the area in which they are located<sup>9</sup>, a statement as to whether the premises will be used for the purposes of achieving the aims and objectives set out in the statement of purpose<sup>10</sup> and for providing facilities and services in accordance with the statement of purpose, without the need for planning permission, building works or conversion<sup>11</sup>;
- 2128 (8) a statement as to the security arrangements including arrangements for the purposes of safeguarding access to information held by the establishment or agency, and restricting access from adjacent premises or, when the premises form part of a building, from other parts of the building<sup>12</sup>;
- 2129 (9) the name and address of any other relevant establishment or agency<sup>13</sup> in which the applicant has or has had a business or financial interest or at which he has been employed, and the details of such interest or employment<sup>14</sup>;
- 2130 (10) whether any other business is or will be carried on in the premises<sup>15</sup>.

<sup>1</sup> As to the registration authorities see the Care Standards Act 2000 s 5 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE.

<sup>2</sup> National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(2)(a), Sch 1 para 5; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(2)(a), Sch 1 para 4 (amended by SI 2003/237).

<sup>3</sup> See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 6; and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 5 (amended by SI 2003/237).

<sup>4</sup> National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 8; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 7 (amended by SI 2003/237).

- 5 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 9; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 8 (amended by SI 2003/237).
- 6 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 7; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 6 (amended by SI 2003/237). As to the 'statement of purpose' see para 987 note 15 ante.
- 7 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 10; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 9.
- 8 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 11(a); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 10(a) (amended by SI 2003/237).
- 9 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 11(b); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 10(b).
- 10 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 12(a); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 11(a) (amended by SI 2003/237).
- 11 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 12(b); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 11(b). In the event that the premises are not capable of such use at the date of the application, details of the permission, works or conversion needed must be provided: see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 12; and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 11.
- 12 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 13; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 12 (amended by SI 2003/237).
- 13 Is an establishment or agency of a description specified in the Care Standards Act 2000 s 4(8)(a) or s 4(9)(a): see para 985 ante.
- 14 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 14; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 13 (amended by SI 2003/237).
- 15 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 15; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 14 (amended by SI 2003/237).

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### **989. Information to be provided about staff.**

A person who is seeking to be registered as a person who carries on an establishment or agency must provide in respect of any person, other than the applicant, who works at or is intended to work at the establishment or for the agency, the person's name, sex and date of birth and the person's duties and responsibilities in respect of his work<sup>1</sup>.

If the registration authority<sup>2</sup> so requests, the applicant must provide, in relation to any person specified for this purpose by the registration authority who works, or is intended to work, at the establishment or for the purposes of the agency, full information in respect of the following matters<sup>3</sup>:

- 2131 (1) whether the person is or is intended to be resident in the premises used as the establishment or for the purposes of the agency<sup>4</sup>;
- 2132 (2) if he is a relative of the applicant, his relationship to the applicant<sup>5</sup>;
- 2133 (3) whether the person works or is intended to work full or part time and, if the latter, the number of hours to be worked each week<sup>6</sup>;
- 2134 (4) the date on which employment commenced or is intended to commence<sup>7</sup>;
- 2135 (5) information as to the person's qualifications, experience and skills insofar as relevant<sup>8</sup>;
- 2136 (6) a statement by the applicant that he is satisfied as to the authenticity of the qualifications and has verified the skills and experience<sup>9</sup>;
- 2137 (7) a statement as to the suitability of the person's qualifications, whether he has the necessary skills for the work he is to perform and as to his fitness to work and have contact with, service users<sup>10</sup>;
- 2138 (8) a statement by the person as to his physical and mental health<sup>11</sup>;
- 2139 (9) a statement by the applicant that the person is physically and mentally fit for the work he is to perform<sup>12</sup>;
- 2140 (10) a statement by the applicant as to whether he is satisfied as to the person's identity, the means by which he has satisfied himself and whether he has obtained a copy of the person's birth certificate<sup>13</sup>;
- 2141 (11) confirmation by the applicant that he has a recent photograph of the person<sup>14</sup>;
- 2142 (12) a statement by the applicant that he has obtained two references relating to the person and that he is satisfied as to the authenticity of those references<sup>15</sup>;
- 2143 (13) details of any criminal offences of which the person has been convicted<sup>16</sup>;
- 2144 (14) details of any offences for which the person has been cautioned<sup>17</sup>;
- 2145 (15) in relation to Wales, whether the person is registered with the Care Council for Wales and, if so, their registration details<sup>18</sup>.

The applicant is also required to provide to the registration authority certain documents in respect of staff<sup>19</sup>.

1 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(2)(a), Sch 1 para 16; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(2)(a), Sch 1 para 15 (amended by SI 2003/237). Where an applicant applies for registration as a person who carries on an establishment or agency, and before the application is determined, engages a person to work at

the establishment or for the purposes of the agency, he must, in respect of each person so engaged, obtain the information specified in the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 paras 16, 17 and the documents in Sch 2 para 10 or, as the case may be in the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 paras 15, 16 and the documents in Sch 2 para 10: see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 7 (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 8 (amended by SI 2003/237).

2 As to the registration authorities see s 5 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE.

3 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(5) (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(5).

4 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(a); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(a) (amended by SI 2003/237). See note 1 supra.

5 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(b); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(b).

6 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(c); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(c).

7 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(d); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(d) (amended by SI 2003/237).

8 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(e); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(e).

9 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(f) (amended by SI 2002/865); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(f).

10 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(g); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(g).

11 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(h); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(h).

12 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(i); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(i).

13 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(j); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(j).

14 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(k); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(k).

15 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(l); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(l).

16 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(m); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(m). Details of spent convictions must be provided in writing: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 4 (amended by SI 2007/603); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 5.

17 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 1 para 17(n); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 1 para 16(n).

18 Ibid Sch 1 para 16(ea) (added by SI 2007/311).

19 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(2)(b) (amended by SI 2002/865); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(2)(b). As to the documents to be provided in respect of staff see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 2 para 10 (as amended); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 2 para 10 (as amended). See note 1 *supra*.

## **UPDATE**

### **989 Information to be provided about staff**

NOTE 1--SI 2001/3969 Sch 2 para 10 amended: SI 2009/1895.

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**990. Information to be provided on an application in respect of the children to be accommodated.**

A person who is seeking to be registered in respect of a children's home must provide the following information in respect of the children who are intended to be accommodated in the children's home<sup>1</sup>:

- 2146 (1) their age range, sex, maximum number and whether they are to be selected by reference to criteria other than their age or sex<sup>2</sup>;
- 2147 (2) the organisational structure of the children's home<sup>3</sup>;
- 2148 (3) the facilities and services to be provided within the children's home for the children<sup>4</sup>;
- 2149 (4) the arrangements for protecting and promoting the health of the children accommodated<sup>5</sup>;
- 2150 (5) the arrangements for religious observance<sup>6</sup>;
- 2151 (6) the arrangements for contact between a child and his parents, relatives and friends<sup>7</sup>;
- 2152 (7) details as to the use of restraint and discipline<sup>8</sup>;
- 2153 (8) the procedure for dealing with unauthorised absence of a child from the children's home<sup>9</sup>;
- 2154 (9) the arrangements for allowing children in the children's home to raise issues and the procedure for dealing with complaints<sup>10</sup>;
- 2155 (10) the arrangements for the education of any child accommodated<sup>11</sup>;
- 2156 (11) the arrangements for dealing with reviews of the placement plans of any children accommodated<sup>12</sup>;
- 2157 (12) fire precautions and emergency procedures<sup>13</sup>.

1 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(4); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(4).

2 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 1; and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 1.

3 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 2; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 2.

4 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 3; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 3.

5 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 4; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 4.

6 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 6; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 6.

7 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 7; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 7.

8 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 8; and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 8.

9 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 9; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 9.

10 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 10; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 10.

11 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 11; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 11.

12 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 12; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 12.

13 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 5 para 5; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 5 para 5.

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### **991. Registration as a manager in respect of a children's home.**

A person who wishes to be registered as a manager of a children's home must provide to the registration authority<sup>1</sup> the following information:

- 2158 (1) the applicant's full name, date of birth, address and telephone number<sup>2</sup>;
- 2159 (2) details of the applicant's professional or technical qualifications and experience of managing an establishment or agency so far as such qualifications and experience are relevant to providing services for persons for whom services are to be provided at the establishment or by the agency<sup>3</sup>;
- 2160 (3) details of the applicant's professional training relevant to carrying on or managing an establishment or agency<sup>4</sup>;
- 2161 (4) details of the applicant's employment history, including the name and address of his present employer and of any previous employers<sup>5</sup>;
- 2162 (5) details of any business the applicant carries on or manages or has carried on or managed<sup>6</sup>;
- 2163 (6) the name and addresses of two referees who are not relatives of the applicant, each of whom is able to provide a reference as to the applicant's competence to carry on an establishment or agency of the same description as the establishment or agency and one of whom has employed the applicant for a period of at least three months<sup>7</sup>;
- 2164 (7) the name, address, telephone number, facsimile number, and electronic mail address (if any) of the establishment or agency<sup>8</sup>;
- 2165 (8) in Wales, details of the applicant's registration with the Care Council for Wales<sup>9</sup>.

A person who wishes to be registered as a manager of a children's home must provide to the registration authority the following documents:

- 2166 (a) the applicant's birth certificate<sup>10</sup>;
- 2167 (b) certificates or other suitable evidence relating to the applicant's professional or technical qualifications, so far as such qualifications are relevant to providing services for persons for whom services are to be provided at the establishment or by the agency<sup>11</sup>;
- 2168 (c) a report by a general medical practitioner as to whether the applicant is physically and mentally fit to carry on (or in Wales, manage) an establishment or agency of the same description as the establishment or agency<sup>12</sup>;
- 2169 (d) a criminal record certificate<sup>13</sup>;
- 2170 (e) an enhanced criminal record certificate<sup>14</sup>.

<sup>1</sup> As to the registration authority see the Care Standards Act 2000 s 5 (as amended); and SOCIAL SERVICES AND COMMUNITY CARE.

<sup>2</sup> National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 3(3), Sch 3 para 1; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 4(3), Sch 3 para 1.



- 3 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 2; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 2 (amended by SI 2003/237).
- 4 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 3; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 3 (amended by SI 2003/237).
- 5 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 4; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 4.
- 6 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 5; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 5.
- 7 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 6; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 6 (amended by SI 2003/237). However, the requirement for the name and address of a referee who has employed the applicant for a period of at least three months does not apply where it is impracticable to obtain a reference from a person who fulfils that requirement: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 6; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 6.
- 8 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 7; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 7 (amended by SI 2003/237).
- 9 Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 2A (added by SI 2007/311).
- 10 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 9 (reg 3(3) amended by SI 2002/865); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 9.
- 11 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 10; Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 10 (amended by SI 2003/237).
- 12 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 11A(1) (renumbered as such by SI 2002/865); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 11. This is subject to the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 11A(2) (as added) or, as the case may be, the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 11(2), whereby where the applicant is unable to obtain the report referred to in head (c) in the text, the applicant should provide a statement as to the state of his physical and mental health: National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 11A(2) (as so renumbered); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 11(2).
- 13 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 12 (amended by SI 2002/865; SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 12 (amended by SI 2002/2622). As to other documentation to be provided in Wales where a responsible person has applied for a certificate mentioned in head (d) or head (e) in the text but the certificate has not been issued see the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 13A (added by SI 2002/2622).
- 14 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, Sch 3 para 13 (amended by SI 2002/865; SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, Sch 3 para 13 (amended by SI 2002/2622). See note 13 supra.

## UPDATE

### 991 Registration as a manager in respect of a children's home

NOTES 13, 14--SI 2002/919 Sch 3 para 12 revoked, Sch 3 paras 13, 13A substituted: SI 2009/2541. SI 2001/3969 Sch 3 para 12 revoked, Sch 3 para 13 substituted: SI 2009/2541.



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## **992. Certificates of registration.**

When an application is granted, the registration authority<sup>1</sup> must issue a certificate<sup>2</sup> and ensure that the certificate contains specified information<sup>3</sup>.

The registration may be cancelled by the registration authority on certain grounds<sup>4</sup>. If the registration of a person is cancelled he must return the certificate to the registration authority<sup>5</sup>. Failure to do so is an offence<sup>6</sup>.

1 As to the registration authority see the Care Standards Act 2000 s 5 (as amended); and para 984 ante.

2 See *ibid* s 13(4); and SOCIAL SERVICES AND COMMUNITY CARE.

3 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 9 (amended by SI 2003/369; SI 2004/2071; SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 9 (amended by SI 2003/237; SI 2004/219).

4 See the Care Standards Act 2000 s 14; the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 14 (amended by SI 2007/603); the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 14 (amended by SI 2003/237; SI 2006/878); and SOCIAL SERVICES AND COMMUNITY CARE. As to the application for cancellation see the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 15 (amended by SI 2002/2469; SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 15 (amended by SI 2003/237).

5 See the National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 10 (amended by SI 2007/603); and the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 10 (amended by SI 2003/237).

6 National Care Standards Commission (Registration) Regulations 2001, SI 2001/3969, reg 11 (amended by SI 2002/865; SI 2007/603); Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 11.

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### **993. National minimum standards.**

The appropriate minister<sup>1</sup> may prepare and publish statements of national minimum standards applicable to local authorities<sup>2</sup> in their exercise of relevant functions<sup>3</sup>. The appropriate minister must keep the standards set out in the statements under review and may publish amended statements whenever he considers it appropriate to do so<sup>4</sup>. Before issuing a statement, or an amended statement which in the opinion of the appropriate minister effects a substantial change in the standards, the appropriate minister must consult any persons he considers appropriate<sup>5</sup>.

1 For the meaning of 'appropriate minister' see para 921 note 1 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante; definition applied by the Care Standards Act 2000 s 121(1).

3 Ibid s 23(1) (see SOCIAL SERVICES AND COMMUNITY CARE); applied by s 49(1). 'Relevant functions', in relation to a local authority, means relevant adoption functions and relevant fostering functions: s 43(2). In relation to a local authority, 'relevant adoption functions' means functions under the Adoption and Children Act 2002 of making or participating in arrangements for the adoption of children or the provision of adoption support services (as defined in the Adoption and Children Act 2002 s 2(6): see para 394 ante): Care Standards Act 2000 s 43(3) (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 103, 112). For the meaning of 'relevant fostering functions' see para 921 note 3 ante.

4 Care Standards Act 2000 s 23(2) (see SOCIAL SERVICES AND COMMUNITY CARE); applied by s 49(1).

5 Ibid s 23(3) (see SOCIAL SERVICES AND COMMUNITY CARE); applied by s 49(1).

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#### **994. Annual returns.**

Regulations<sup>1</sup> may require a local authority<sup>2</sup> to make to the registration authority<sup>3</sup> an annual return containing such information with respect to the exercise by the local authority of relevant functions<sup>4</sup> as may be prescribed<sup>5</sup>. Provision may be made by the regulations as to the period in respect of which and date by which the return is to be made<sup>6</sup>.

1 As to the making of regulations see para 921 note 1 ante.

2 For the meaning of 'local authority' see para 248 note 10 ante; definition applied by the Care Standards Act 2000 s 121(1).

3 As to the registration authority see *ibid* s 5 (as amended); and para 984 ante.

4 For the meaning of 'relevant functions' see para 993 note 3 ante.

5 Care Standards Act 2000 s 50(1). 'Prescribed' means prescribed by regulations: s 121(1). See the Care Standards Act 2000 and the Children Act 1989 (Regulatory Reform and Complaints) (Wales) Regulations 2006, SI 2006/3251; and the Local Authority Adoption Service (Wales) Regulations 2007, SI 2007/1357.

6 Care Standards Act 2000 s 50(2).

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### **995. Offences.**

Regulations<sup>1</sup> under Part III of the Care Standards Act 2000<sup>2</sup> may provide that a contravention of or failure to comply with any specified provision of the regulations is an offence<sup>3</sup>. A person guilty of an offence under the regulations is liable on summary conviction to a fine<sup>4</sup>.

1 As to the making of regulations see para 921 note 1 ante.

2 Ie the Care Standards Act 2000 Pt III (ss 43-53) (as amended).

3 Ibid s 52(1). Failure to comply with the Fostering Services Regulations 2002, SI 2002/57, regs 3-23, 42-46 and the Fostering Services (Wales) Regulations 2003, SI 2003/237, regs 3-23, 44-46 is an offence: see the Fostering Services Regulations 2002, SI 2002/57, reg 48; and the Fostering Services (Wales) Regulations 2003, SI 2003/237, reg 48.

4 Care Standards Act 2000 s 52(2). The fine must not exceed level 4 on the standard scale: see s 52(2). As to the standard scale see para 132 note 2 ante.

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#### **996. Proceedings for offences.**

Proceedings in respect of an offence under Part III of the Care Standards Act 2000<sup>1</sup> or regulations<sup>2</sup> made under it must not, without the written consent of the Attorney General<sup>3</sup>, be taken by any person other than<sup>4</sup>:

- 2171 (1) the Commission for Healthcare Audit and Inspection<sup>5</sup>, the Commission for Social Care Inspection<sup>6</sup> or Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>7</sup> (as appropriate) or, in relation to any functions of either the Commission for Healthcare Audit and Inspection or the Commission for Social Care Inspection which the Secretary of State<sup>8</sup> is for the time being discharging<sup>9</sup>, the Secretary of State<sup>10</sup>; or
- 2172 (2) the Welsh Ministers<sup>11</sup>.

Proceedings for an offence under Part III of the Care Standards Act 2000 or regulations made under it may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge; but no such proceedings may be brought by virtue of this provision more than three years after the commission of the offence<sup>12</sup>.

1    Ie the Care Standards Act 2000 Pt III (ss 43-53) (as amended).

2    As to the making of regulations see para 921 note 1 ante.

3    As to the Attorney General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 529.

4    See the Care Standards Act 2000 s 29(1) (as amended); applied by s 53.

5    As to the Commission for Healthcare Audit and Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 41; and SOCIAL SERVICES AND COMMUNITY CARE.

6    As to the Commission for Social Care Inspection see *ibid* s 42; and SOCIAL SERVICES AND COMMUNITY CARE.

7    As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

8    As to the Secretary of State see para 155 ante.

9    Ie by virtue of the Care Standards Act 2000 s 113.

10   Ibid s 29(1)(a) (amended by the Health and Social Care (Community Health and Standards) Act 2003 s 147, Sch 9 paras 6, 12; and the Education and Inspections Act 2006 s 157, Sch 14 paras 38, 47); applied by the Care Standards Act 2000 s 53.

11   Ibid s 29(1)(b); applied by s 53. As to the Welsh Ministers see para 155 ante.

12   Ibid s 29(2); applied by s 53.

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### **997. Offences by bodies corporate.**

Where any offence under Part III of the Care Standards Act 2000<sup>1</sup> or regulations<sup>2</sup> made under it is committed by a body corporate<sup>3</sup>, if the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of<sup>4</sup>:

- 2173 (1) any director, manager, or secretary of the body corporate<sup>5</sup>; or
- 2174 (2) any person who was purporting to act in any such capacity<sup>6</sup>,

he, as well as the body corporate, is guilty of the offence and is liable to be proceeded against and punished accordingly<sup>7</sup>.

1 In the Care Standards Act 2000 Pt III (ss 43-53) (as amended).

2 As to the making of regulations see para 921 note 1 ante.

3 Care Standards Act 2000 s 30(1); applied by s 53. As to bodies corporate see generally COMPANIES vol 14 (2009) PARA 1; CORPORATIONS.

4 Ibid s 30(2); applied by s 53.

5 Ibid s 30(2)(a); applied by s 53. The reference to a director, manager or secretary of a body corporate includes a reference to any other similar officer of the body; and, where the body is a local authority, to any officer or member of the authority; s 30(3); applied by s 53. For the meaning of 'local authority' see para 248 note 10 ante; definition applied by s 121(1).

6 Ibid s 30(2)(b); applied by s 53.

7 Ibid s 30(2); applied by s 53.



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## **(vi) Conduct and Administration of Children's Homes**

### **998. Directions as to the conduct and administration of children's homes.**

Regulations may be made to ensure the fitness of those providing or managing children's homes<sup>1</sup> and to ensure that the registered person promotes the welfare of children accommodated there<sup>2</sup>.

<sup>1</sup> For the meaning of 'children's home' see para 983 ante.

<sup>2</sup> See the Care Standards Act 2000 s 22; and SOCIAL SERVICES AND COMMUNITY CARE. As to such regulations see the Children's Homes Regulations 2001, SI 2001/3967; the Children's Homes (Wales) Regulations 2002, SI 2002/327; and para 999 et seq post.

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### **999. Statement of purpose and function of children's homes.**

The registered person<sup>1</sup> must compile a written statement ('a statement of purpose') of specified particulars relating to the children's home<sup>2</sup>; and he must ensure that the children's home is at all times conducted in a manner which is consistent with its statement of purpose<sup>3</sup>.

The following particulars must be included in the statement:

- 2175 (1) a statement of the overall aims of the children's home, and the objectives to be attained with regard to children accommodated there<sup>4</sup>;
  - 2176 (2) a statement of the facilities and services to be provided for the children accommodated in the children's home<sup>5</sup>;
  - 2177 (3) the name and address of the registered provider and of the registered manager, if applicable<sup>6</sup>;
  - 2178 (4) the relevant qualifications and experience of the registered provider and, if applicable, the registered manager<sup>7</sup>;
  - 2179 (5) the number, relevant qualifications and experience of persons working at the home and, if all of one sex, a description of the means whereby the home will promote appropriate role models of both sexes<sup>8</sup>;
  - 2180 (6) the arrangements for the supervision, training and development of employees<sup>9</sup>;
  - 2181 (7) the organisational structure of the children's home<sup>10</sup>;
  - 2182 (8) the following particulars:
- .39**
- 50. (a) the age range, sex and numbers of children for whom it is intended that accommodation is to be provided;
  - 51. (b) whether it is intended to accommodate children who are disabled, have special needs or other special characteristics; and
  - 52. (c) the range of needs (other than those mentioned in head (b) above) that the home is intended to meet<sup>11</sup>;
- .40**
- 2183 (9) any admissions criteria, including the policy and procedures for emergency admissions, if provided<sup>12</sup>;
  - 2184 (10) if the children's home provides or is intended to provide accommodation for more than six children, a description of the positive outcomes intended for children in a home of such a size and the homes strategy for countering any adverse effects, arising from its size, on the children accommodated there<sup>13</sup>;
  - 2185 (11) a description of the children's home's underlying ethos and philosophy, and where this is based on any theoretical or therapeutic model, a description of that model<sup>14</sup>;
  - 2186 (12) the arrangements made to protect and promote the health of the children<sup>15</sup>;
  - 2187 (13) the arrangements for the promotion of education including facilities for private study<sup>16</sup>;
  - 2188 (14) the arrangements to promote children's participation in recreational, sporting and cultural activities (and in Wales, hobbies)<sup>17</sup>;

- 2189 (15) the arrangements made for consultation with the children accommodated about the operation of the children's home<sup>18</sup>;
- 2190 (16) the arrangements made for the control, restraint and discipline of children<sup>19</sup>;
- 2191 (17) the arrangements made for child protection and to counter bullying<sup>20</sup>;
- 2192 (18) the procedure for dealing with any unauthorised absence of a child from the children's home<sup>21</sup>;
- 2193 (19) details of any surveillance of children which may be used in the children's home<sup>22</sup>;
- 2194 (20) the fire precautions and associated emergency procedures<sup>23</sup>;
- 2195 (21) the arrangements made for the children's religious instruction and observance<sup>24</sup>;
- 2196 (22) the arrangements made for contact between a child and his parents, relatives and friends<sup>25</sup>;
- 2197 (23) the arrangements for dealing with complaints<sup>26</sup>;
- 2198 (24) the arrangements for dealing with reviews of placement plans<sup>27</sup>;
- 2199 (25) the type of accommodation, including the sleeping accommodation, provided and, where applicable, how children are to be grouped and in what circumstances they are to share bedrooms<sup>28</sup>;
- 2200 (26) details of any specific therapeutic techniques used and the arrangements for supervision<sup>29</sup>;
- 2201 (27) a description of the children's home policy in relation to anti-discriminatory practices as respects children and children's rights<sup>30</sup>.

The statement must be made available for inspection to the following persons: (i) any person working in the children's home<sup>31</sup>; (ii) the children accommodated in the children's home<sup>32</sup>; (iii) the parent of any child accommodated there<sup>33</sup>; (iv) the placing authority of any child accommodated in the home<sup>34</sup>; (v) in the case of a qualifying school, the Secretary of State and Her Majesty's Inspector of Education, Children's Services and Skills<sup>35</sup> or, as the case may be Her Majesty's Chief Inspector of Education and Training in Wales and any person exercising a function of the Welsh Ministers under the education legislation in relation to the school<sup>36</sup>.

The registered person must keep the statement of purpose under review and revise it where appropriate<sup>37</sup>.

1 'Registered person' in relation to a children's home means any person who is the registered provider or the registered manager of the home: Children's Homes Regulations 2001, SI 2001/3967, reg 2(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1). 'Registered provider' means the person registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE) as carrying on the home: Children's Homes Regulations 2001, SI 2001/3967, reg 2(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1). As to the fitness of the registered provider see para 1001 post. 'Registered manager' means a person who is registered under the Care Standards Act 2000 Pt II (as amended) as the manager of the children's home: Children's Homes Regulations 2001, SI 2001/3967, reg 2(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1). As to the appointment of a manager where there is no registered manager in respect of a children's home see para 1002 post. Where there is more than one registered person in respect of a children's home, anything which is required under the Children's Homes Regulations 2001, SI 2001/3967 (as amended) or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327 (as amended) to be done by the registered person must, if done by one of the registered persons, not be required to be done by any of the other registered persons: Children's Homes Regulations 2001, SI 2001/3967, reg 42; Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 41.

2 For the meaning of 'children's home' see para 983 ante.

3 See the Children's Homes Regulations 2001, SI 2001/3967, reg 4(1), (6); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(1), (7). Nothing in the Children's Homes Regulations 2001, SI 2001/3967, reg 4(6) or reg 31 or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(7) or reg 31 may require or authorise the registered person to contravene or not comply with any other provision of those regulations or the conditions for the time being in force in relation to the registration of the registered person under the Care Standards Act 2000 Pt II (as amended): Children's Homes Regulations 2001, SI

2001/3967, reg 4(7); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(8). In Wales, the registered person may be required to undertake an assessment of the service provided to children accommodated in the children's home (see reg 33A (added by SI 2006/3251)) and may be issued with a compliance notification to ensure compliance with the Care Standards Act 2000 and any regulations made under it (see the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 33B (added by SI 2006/3251)).

4 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 1; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 1. For the meaning of 'child' see para 3 ante.

5 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 2; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 2.

6 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 3; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 3.

7 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 4; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 4.

8 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 5.

9 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 6; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 6.

10 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 7; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 7.

11 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 8; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 8.

12 See the Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 9; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 9.

13 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 10; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 10.

14 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 11; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 11.

15 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 12; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 12.

16 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 13; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 13.

17 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 14; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 14.

18 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 15; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 15.

19 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 16; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 16.

20 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 17; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 17.

21 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 18; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 18. The registered person must prepare and implement as required a written policy for the prevention of bullying in the children's home, which must in particular set out the procedure for dealing with an allegation of bullying and a procedure to be followed when any child accommodated in a children's home is absent without permission: Children's Homes Regulations 2001, SI 2001/3967, reg 16(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(3).

22 See the Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 19; and the Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 19. As to surveillance at a children's home see para 1020 post.

23 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 20; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 20.

24 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 21; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 21.

25 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 22; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 22. For the meaning of 'relative' see para 249 note 15 ante.

26 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 23; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 23.

27 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 24; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 24.

28 See the Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 25; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 25.

29 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 26; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 26.

30 Children's Homes Regulations 2001, SI 2001 3967, Sch 1 para 27; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 1 para 27.

31 Children's Homes Regulations 2001, SI 2001 3967, reg 4(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(a).

32 Children's Homes Regulations 2001, SI 2001 3967, reg 4(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(b). References in the Children's Homes Regulations 2001, SI 2001 3967, reg 4(2) or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2) to a child who is accommodated in a children's home include a child in respect of whom accommodation in the children's home is being considered: Children's Homes Regulations 2001, SI 2001 3967, reg 4(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2).

33 Children's Homes Regulations 2001, SI 2001 3967, reg 4(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(c). See note 32 supra. In relation to Wales, the registered person must not comply with reg 4(2)(c) in relation to a child if there is a court order that restricts or limits contact between the child and his parent and it is necessary to restrict the availability of the statement, or any part of, for the purpose of safeguarding or promoting the welfare of the child: reg 4(3).

34 Children's Homes Regulations 2001, SI 2001 3967, reg 4(2)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(d). See note 32 supra.

35 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

36 Children's Homes Regulations 2001, SI 2001 3967, reg 4(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(e). See note 32 supra. 'Education legislation' means the Education Acts as defined by the Education Act 1996 s 578 (see EDUCATION vol 15(1) (2006 Reissue) para 1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(4).

37 See the Children's Homes Regulations 2001, SI 2001/3967, reg 5; and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 5.

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### **1000. Staffing.**

The registered person<sup>1</sup> must ensure that there are at all times, having regard to:

- 2202 (1) the size of the home, the statement of purpose and the number and needs of the children accommodated there; and
- 2203 (2) the need to safeguard and promote the welfare of the children accommodated in the children's home,

a sufficient number of suitably qualified, competent and experienced persons working in the children's home<sup>2</sup>.

The registered person must ensure that the employment of any persons on a temporary basis at the children's home will not prevent children from receiving such continuity of care as is reasonable to meet their needs<sup>3</sup>. The registered person must make a copy of the statement of the purpose available on request for inspection by any person who works in each children's home<sup>4</sup>.

The registered person must not employ a person to work at the children's home unless that person is fit to work at a children's home<sup>5</sup>. A person is not fit to work at a children's home unless:

- 2204 (a) he is of integrity and good character<sup>6</sup>;
- 2205 (b) he has the necessary qualifications, skills and experience<sup>7</sup>;
- 2206 (c) he is physically and mentally fit for the work he is to perform<sup>8</sup>; and
- 2207 (d) full and satisfactory information (or, in Wales, information or documentation) is available in relation to him<sup>9</sup>.

The registered person must not allow a person employed by someone other than the registered person to work at the children's home in a position in which he may in the course of his duties have regular contact with children accommodated there unless that person is fit to do so<sup>10</sup>. In Wales, the registered person must not allow a volunteer to work at the children's home unless that person is fit to do so<sup>11</sup>.

The registered person is required to ensure that anyone not falling within the above provisions who is working at the children's home is appropriately supervised<sup>12</sup>.

The registered person must ensure that any offer of employment is subject to the relevant full and satisfactory information being obtained<sup>13</sup> and that no person starts work until then<sup>14</sup>. The registered person must ensure that all permanent positions are subject to the satisfactory completion of a period of probation and must provide all employees with a job description outlining their responsibilities<sup>15</sup>. They must also operate a disciplinary procedure providing for suspension of an employee (and, in Wales, the taking of action short of suspension) where necessary in the interests of the safety or welfare of the children accommodated in the home and provide that failure on the part of an employee to report an incident of abuse or suspected abuse of a child accommodated in the home to an appropriate person<sup>16</sup> is a ground on which disciplinary proceedings may be instituted<sup>17</sup>.

The registered person must also ensure that all persons employed by him receive appropriate training, supervision and appraisal and are enabled from time to time to obtain further qualifications appropriate to the work they perform<sup>18</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 25(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 25(1). In complying with the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 25(1), the registered person must ensure that at all times after 1 July 2010, or such later date as may in exceptional circumstances be agreed, not less than 80% of the care staff at the children's home hold a relevant qualification: reg 25(1A) (added by SI 2007/311). For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 25(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 25(2). For the meaning of 'child' see para 3 ante. In complying with the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 25(2), the registered person must ensure that at all times after 1 March 2008, or such later date as may be agreed in exceptional circumstances, not less than 90% of care staff working at the children's home are permanent employees: reg 25(2A) (added by SI 2007/311).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 4(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(2)(a).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 26(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(1)(a). However, the registered person may permit a person to start work at a children's home notwithstanding the Children's Homes Regulations 2001, SI 2001/3967, reg 26(1) or reg 26(4) (b) or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(1) or reg 26(4) (b) under certain circumstances: see the Children's Homes Regulations 2001, SI 2001/3967, reg 26(6); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(5), (5A) (s 26(5) amended, and s 26(5A) added, by SI 2002/2622).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 26(3)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(2)(a).

7 See the Children's Homes Regulations 2001, SI 2001/3967, reg 26(3)(b); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(2)(b). In Wales, in relation to the care staff of a children's home, a reference to qualifications and experience in reg 26(2)(b) includes a requirement that that person must hold a qualification in a list maintained for these purposes: see reg 26(2A)-(2G) (added by SI 2007/311).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 26(3)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(2)(c).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 26(3)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(2)(d).

The information that is required to be available in relation to England is: (1) proof of identity including a recent photograph; (2) an appropriate criminal record certificate; (3) two written references, including one from the person's most recent employer, if any; (4) where a person has previously worked in a position in which his duties involved working with children or vulnerable adults, verification of the reason why the employment or position ended; (5) documentary evidence of any relevant qualifications; (6) a full employment history, together with a satisfactory written explanation of any gaps in employment: Children's Homes Regulations 2001, SI 2001/3967, Sch 2 (amended by SI 2002/865).

The information or documentation (as the case may be) that is required to be available in relation to Wales is: (a) proof of identity including a recent photograph; (b) either an appropriate criminal record certificate or a police check of all criminal offences (including spent convictions and cautions) as required by the regulations; (c) two written references, including one from the person's most recent employer, if any; (d) where a person has previously worked in a position in which his duties involved working with children or vulnerable adults, verification of the reason why the employment or position ended; (e) documentary evidence of any relevant qualifications; (f) documentary evidence of registration with the Care Council of Wales; (g) a full employment history, together with a satisfactory written explanation of any gaps in employment: see the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(3), Sch 2 (amended by SI 2002/2622; SI 2004/2424; SI 2007/311).

10 See the Children's Homes Regulations 2001, SI 2001/3967, reg 26(1)(b), (2); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(1)(c). As to when a person is fit to work at a children's home see note 9 supra.

11 Ibid reg 26(1)(b). As to when a person is fit to work at a children's homes see note 9 supra.

12 See the Children's Homes Regulations 2001, SI 2001/3967, reg 26(6); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(6).

13 See the Children's Homes Regulations 2001, SI 2001/3967, reg 26(3)(d) or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(2)(d): see head (d) in the text.

14 See the Children's Homes Regulations 2001, SI 2001/3967, reg 26(5); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 26(4).

15 Children's Homes Regulations 2001, SI 2001/3967, reg 27(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 27(1).

16 In relation to England, an appropriate person for these purposes is the registered person, an officer of the Commission for Social Care Inspection or the local authority in whose area the home is situated, or a police officer: Children's Homes Regulations 2001, SI 2001/3967, reg 27(3). As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE. As to the appropriate person in relation to Wales see the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 27(3).

17 Children's Homes Regulations 2001, SI 2001/3967, reg 27(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 27(2).

18 Children's Homes Regulations 2001, SI 2001/3967, reg 27(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 27(4). In Wales, where a person's fitness to be employed by the registered person depends on their obtaining a relevant qualification within a specified time, the registered person must, so far as is practicable, enable him to obtain the qualification within the time specified: reg 27(4A) (added by SI 2007/311).

## **UPDATE**

### **1000 Staffing**

NOTE 5--SI 2002/327 reg 26(5) further amended: SI 2009/2541.

NOTE 7--SI 2002/327 reg 26(2)(d) substituted: SI 2009/2541.

NOTE 9--SI 2002/327 Sch 2 further amended: SI 2009/2541. SI 2001/3967 Sch 2 further amended: SI 2009/1895.

NOTE 14--SI 2002/327 reg 26(4) amended: SI 2009/2541.



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### **1001. Fitness of registered provider.**

A person must not carry on a children's home<sup>1</sup> unless he is fit to do so<sup>2</sup>. A person is not fit to carry on a children's home unless the person:

- 2208 (1) is an individual who carries on the children's home and he satisfies the necessary requirements set out below<sup>3</sup>; or
- 2209 (2) is an organisation which has given notice to the Commission for Social Care Inspection<sup>4</sup> or, as the case may be, the appropriate office of the National Assembly, of the name, address and position in the organisation of an individual ('the responsible individual') who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the children's home and that individual satisfies the requirements set out below<sup>5</sup>; or
- 2210 (3) in relation to England, is in partnership with others, and he and each of his partners satisfies the necessary requirements set out below<sup>6</sup>.

The requirements are that he is of integrity and good character, is physically and mentally fit to carry on the children's home and full and satisfactory information is available in relation to him in relation to specified matters<sup>7</sup>.

A person must not carry on a children's home if:

- 2211 (a) he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged and the bankruptcy order has not been annulled or rescinded<sup>8</sup>; or
- 2212 (b) he has made a composition or arrangement with his creditors and has not been discharged in respect of it<sup>9</sup>.

The registered provider must, having regard to the size of the children's home, the statement of purpose of the children's home and the number and needs (including any disability) of the children accommodated there, carry on the home with sufficient care, competence and skill<sup>10</sup>.

If the registered provider is:

- 2213 (i) an individual, he must undertake from time to time such training as is appropriate to ensure that he has the experience and skills necessary for carrying on the children's home<sup>11</sup>;
- 2214 (ii) an organisation, it must ensure that the responsible individual undertakes from time to time such training as is appropriate to ensure that he has the experience and skills necessary for carrying on the children's home<sup>12</sup>;
- 2215 (iii) in England, a partnership, it must ensure that one of the partners undertakes from time to time such training as is appropriate to ensure that he has the experience and skills necessary for carrying on the children's home<sup>13</sup>.

<sup>1</sup> For the meaning of 'children's home' see para 983 ante.

- 2 Children's Homes Regulations 2001, SI 2001/3967, reg 6(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(1).
- 3 Children's Homes Regulations 2001, SI 2001/3967, reg 6(2)(a)(i); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(2)(a).
- 4 As to the Commission for Social Care Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 42; and SOCIAL SERVICES AND COMMUNITY CARE.
- 5 Children's Homes Regulations 2001, SI 2001/3967, reg 6(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(2)(b).
- 6 Children's Homes Regulations 2001, SI 2001/3967, reg 6(2)(a), (b).
- 7 Ibid reg 6(3) (amended by SI 2002/865); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(3) (amended by SI 2002/2622). The specified matters mentioned in the text that are to be made available in relation to England are the matters specified in the Children's Homes Regulations 2001, SI 2001/3967, Sch 2 (see para 1000 note 9 supra): reg 6(3)(c). The specified matters that are to be made available in relation to Wales are: (1) except where an individual has applied for a certificate referred to in the Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 2 para 2 (see para 1000 note 9 supra) but the certificate has not been issued, each matter specified in Sch 2 paras 1-6 (see para 1000 note 9 supra); (2) where an individual has applied for a certificate referred to in Sch 2 para 2 but the certificate has not been issued, each matter referred to in Sch 2 paras 1, 3-7 (see para 1000 note 9 supra) and in a written report of a check on lists maintained pursuant to the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) (see para 648 ante) and regulations made under the Education Reform Act 1988 s 218 (as amended; prospectively repealed) (see EDUCATION); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(3)(c), (4) (reg 6(3) amended, and reg 6(4) substituted, by SI 2002/2622).
- 8 Children's Homes Regulations 2001, SI 2001/3967, reg 6(5)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(5)(a).
- 9 Children's Homes Regulations 2001, SI 2001/3967, reg 6(5)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 6(5)(b).
- 10 Children's Homes Regulations 2001, SI 2001/3967, reg 9(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 9(1). For the meaning of 'registered provider' see para 999 note 1 ante.
- 11 Children's Homes Regulations 2001, SI 2001/3967, reg 9(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 9(2)(a).
- 12 Children's Homes Regulations 2001, SI 2001/3967, reg 9(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 9(2)(b).
- 13 Children's Homes Regulations 2001, SI 2001/3967, reg 9(2)(c).

## **UPDATE**

### **1001 Fitness of registered provider**

NOTE 7--SI 2002/327 reg 6(3)(c) substituted, reg 6(4) revoked: SI 2009/2541.

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## **1002. Appointment and fitness of manager.**

The registered provider<sup>1</sup> must appoint an individual to manage the children's home<sup>2</sup> if there is no registered manager<sup>3</sup> in respect of the children's home and the registered provider is an organisation or a partnership, is not a fit person to manage a children's home or is not, or does not intend to be, in full time day to day charge of the children's home<sup>4</sup>.

Where the registered provider appoints a person to manage the children's home, he must forthwith give notice to the Commission for Social Care Inspection<sup>5</sup> or, as the case may be, the appropriate office of the National Assembly of the name of the person so appointed and the date on which the appointment is to take effect<sup>6</sup>.

A person must not manage a children's home unless he is fit to do so<sup>7</sup>. A person is not fit to manage a children's home unless:

- 2216 (1) he is of integrity and good character<sup>8</sup>;
- 2217 (2) having regard to the size of the children's home, its statement of purpose<sup>9</sup>, and the number and needs (including any needs arising from any disability) of the children accommodated there, he has the qualifications, skills and experience<sup>10</sup> necessary for managing the children's home and he is physically and mentally fit to manage the children's home<sup>11</sup>; and
- 2218 (3) full and satisfactory information is available in relation to him in respect of specified matters<sup>12</sup>.

The registered manager must, having regard to the size of the children's home, the statement of purpose of the children's home, and the number and needs (including any disability) of the children accommodated there, manage the home with sufficient care, competence and skill<sup>13</sup>. The registered manager (or, in Wales, the individual managing the home) must undertake from time to time such training as is appropriate to ensure that he has the experience and skills necessary for managing the children's home<sup>14</sup>.

1 For the meaning of 'registered provider' see para 999 note 1 ante.

2 For the meaning of 'children's home' see para 983 ante.

3 For the meaning of 'registered manager' see para 999 note 1 ante.

4 Children's Homes Regulations 2001, SI 2002/3967, reg 7(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 7(1).

5 As to the Commission for Social Care Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 42; and SOCIAL SERVICES AND COMMUNITY CARE.

6 Children's Homes Regulations 2001, SI 2002/3967, reg 7(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 7(2).

7 Children's Homes Regulations 2001, SI 2002/3967, reg 8(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(1).

8 Children's Homes Regulations 2001, SI 2002/3967, reg 8(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2)(a).

9 As to the statement of purpose see para 999 ante.

10 In Wales, this reference to qualifications and experience includes a requirement that he must hold a relevant qualification (unless the manager was appointed before 1 July 2007) and must have worked for not less than five years in the field of children's residential care: Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2A), (2C) (reg 6(2A)-(2D) added by SI 2007/311). Where a manager who does not hold a relevant qualification was appointed before 1 July 2007, that person is not fit to manage a children's home unless he obtains a relevant qualification not later than 1 November 2007 or such later date as the National Assembly may, in exceptional circumstances, agree: Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2B) (as so added). These provisions do not affect any requirement for a manager to possess other qualifications, skills or experience relevant: see reg 8(2D) (as so added).

11 Children's Homes Regulations 2001, SI 2002/3967, reg 8(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2)(b).

12 Children's Homes Regulations 2001, SI 2002/3967, reg 8(2)(c) (amended by SI 2002/865); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2)(c). The specified matters mentioned in the text that are to be made available in relation to England are the matters specified in the Children's Homes Regulations 2001, SI 2001/3967, Sch 2 (see para 1000 note 9 supra): reg 8(3)(c) (as so amended). The specified matters that are to be made available in relation to Wales are: (1) except where an individual has applied for a certificate referred to in the Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 2 para 2 (see para 1000 note 9 supra) but the certificate has not been issued, each matter specified in Sch 2 paras 1-6 (see para 1000 note 9 supra); (2) where an individual has applied for a certificate referred to in the Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 2 para 2 but the certificate has not been issued, each matter referred to in Sch 2 paras 1, 3-7 (see para 1000 note 9 supra) and in a written report of a check on lists maintained pursuant to the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) (see para 648 ante) and regulations made under the Education Reform Act 1988 s 218 (as amended; prospectively repealed) (see EDUCATION): Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2)(c), (3) (reg 8(2) amended, and reg 8(3) substituted, by SI 2002/2622).

In Wales, a person is not to manage a children's home unless he is registered as a manager with the Care Council for Wales not later than 1 November 2007 or such later date as the National Assembly may, in exceptional circumstances, agree: Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 8(2E) (added by SI 2007/311).

13 Children's Homes Regulations 2001, SI 2001/3967, reg 9(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 9(1).

14 Children's Homes Regulations 2001, SI 2001/3967, reg 9(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 9(3).

## **UPDATE**

### **1002 Appointment and fitness of manager**

NOTE 12--SI 2002/327 reg 8(2)(c), (2E) substituted, reg 8(3) revoked: SI 2009/2541.

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### **1003. Notification of offences.**

Where the registered person<sup>1</sup> or the responsible individual<sup>2</sup> is convicted of any criminal offence,<sup>3</sup> whether in Wales or elsewhere, he must forthwith give notice in writing to the Commission of for Social Care Inspection<sup>4</sup> or, as the case may be, the appropriate office of the National Assembly of:

- 2219 (1) the date and place of the conviction<sup>5</sup>;
- 2220 (2) the offence of which he was convicted<sup>6</sup>; and
- 2221 (3) the penalty imposed on him in respect of the offence<sup>7</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 For the meaning of 'responsible individual' see para 1001 ante.

3 In Wales, where the registered person is charged with any offence in respect of which an order may be made under the Criminal Justice and Court Services Act 2000 Pt II (ss 26-42) (prospectively amended) (protection of children: see para 667 et seq ante) he must forthwith give notice in writing to the appropriate office of the National Assembly of the offence charged and the date and place of charge: Children's Home (Wales) Regulations 2002, SI 2002/327, reg 10(2).

4 As to the Commission for Social Care Inspection see the Health and Social Care (Community Health and Standards) Act 2003 s 42; and SOCIAL SERVICES AND COMMUNITY CARE.

5 Children's Homes Regulations 2001, SI 2001/3967, reg 10(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 10(a).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 10(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 10(b).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 10(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 10(c).

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**1004. Duty to promote the welfare of children accommodated in children's homes.**

The registered person must ensure that the children's home<sup>1</sup> is so conducted as to promote and make proper provision for the welfare of children accommodated there<sup>2</sup> and must make proper provision for the care, education, supervision and, where appropriate, treatment, of children accommodated there<sup>3</sup>.

The registered person must make suitable arrangements to ensure that the home is conducted:

2222 (1) in a manner which respects the privacy and dignity of children accommodated there<sup>4</sup>; and

2223 (2) with due regard to the sex, religious persuasion, racial origin, and cultural and linguistic background and any disability of children accommodated there<sup>5</sup>.

In Wales, the registered person must also designate a member of staff to be the link worker for each child<sup>6</sup>.

1 For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 11(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 11(1)(a).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 11(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 11(1)(b).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 11(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 11(2)(a).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 11(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 11(2)(b).

6 Ibid reg 11(3) (added by SI 2007/311). 'Link worker' means a member of a children's home staff of appropriate seniority with particular responsibility for protecting and promoting the health and educational welfare of an individual child and for liaison with education and health care providers on that child's behalf: Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1) (definition added by SI 2007/311).

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### **1005. Child's placement plan.**

The registered person must, before providing accommodation for a child in a children's home, or if that is not reasonably practicable, as soon as possible thereafter, prepare a written plan ('the placement plan') for the child<sup>1</sup>. The plan must be prepared in consultation with the child's placing authority<sup>2</sup> and must set out, in particular:

- 2224 (1) how, on a day to day basis, the child will be cared for and his welfare safeguarded and promoted<sup>3</sup>;
- 2225 (2) the arrangements for his health care and education (which, in Wales, also includes the name and contact details of the child's link worker)<sup>4</sup>;
- 2226 (3) any arrangements for contact with his parents, relatives and friends<sup>5</sup>.

The registered person must keep the placement plan under review and revise it as necessary<sup>6</sup>.

In preparing or reviewing the placement plan, the registered person must, so far as is reasonably practicable:

- 2227 (a) ensure that the plan is consistent with any plan for the care of the child prepared by his placing authority<sup>7</sup>; and
- 2228 (b) comply with requests by the placing authority to either provide it with information relating to the child or provide a suitable representative to attend any meetings it may hold concerning the child<sup>8</sup>.

In preparing or reviewing the plan, the registered person must also, so far as practicable, take account of the views of the child, having regard to his age and understanding<sup>9</sup>.

1 Children's Homes Regulations 2001, SI 2001/3967 reg 12(1); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 12(1). For the meaning of 'children's home' see para 983 ante.

2 'Placing authority' means: (1) in the case of a child looked after by a local authority, that local authority; (2) in the case of a child not looked after by a local authority: (a) if he is being provided with accommodation by a voluntary organisation, that organisation; (b) if he is accommodated in a qualifying school by a local education authority or local authority, that local education authority or local authority, as the case may be; (c) in any other case, the child's parent: Children's Homes Regulations 2001, SI 2001/3967, reg 2(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 12(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(1)(a).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 12(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(1)(b) (amended by SI 2007/311). For the meaning of 'link worker' see para 1004 note 6 ante.

5 Children's Homes Regulations 2001, SI 2001/3967, reg 12(1)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(1)(c).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 12(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(2).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 12(4)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(4)(a).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 12(4)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(4)(b).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 12(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 12(3).



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### **1006. Children's guide.**

The registered person must produce a guide to the children's home<sup>1</sup> ('the children's guide') which must include:

- 2229 (1) a summary of the home's statement of purpose<sup>2</sup>;
- 2230 (2) a summary of the complaints procedure<sup>3</sup>; and
- 2231 (3) the address and telephone number of the Commission for Social Care Inspection<sup>4</sup>.

In England the children's guide must be produced in a form appropriate to the age, understanding and communication needs of the children to be accommodated in the home and a copy must be supplied, on admission, by the Commission for Social Care Inspection to each child accommodated in the home<sup>5</sup>.

In Wales, the registered person must:

- 2232 (a) provide a copy of the first children's guide to the appropriate office of the National Assembly<sup>6</sup>;
- 2233 (b) provide a copy of the current version of the children's guide to each child and to the child's placing authority when the child is first accommodated in the home<sup>7</sup>; and
- 2234 (c) subsequent to the provision described in head (b) provide further copies at the request of the child or the placing authority<sup>8</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 4(3)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(5)(a).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 4(3)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(5)(b). The text refers to the complaints procedure established under the Children's Homes Regulations 2001, SI 2001/3967, reg 24 or, as the case may be the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24: see para 1032 post.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 4(3)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(5)(c).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 4(4), (5).

6 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 4(6)(a).

7 Ibid reg 4(6)(b).

8 Ibid reg 4(6)(c).

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### **1007. Arrangements for the protection of children.**

The registered person must prepare and implement a written policy which is intended to safeguard children accommodated in children's homes from abuse or neglect<sup>1</sup> and sets out the procedure to be followed in the event of any allegation of abuse or neglect<sup>2</sup>.

The procedure must provide for:

- 2235 (1) liaison and co-operation with any local authority which is, or may be, making child protection enquiries in relation to any child accommodated in the children's home<sup>3</sup>;
- 2236 (2) the prompt referral to the relevant local authority of any allocation of abuse or neglect affecting any child in the home<sup>4</sup>;
- 2237 (3) notification<sup>5</sup> of the instigation and outcome of any child protection enquiry involving any child accommodated in the children's home to the Commission for Social Care Inspection (or, in Wales, to the appropriate office of the National Assembly) and to the child's placing authority<sup>6</sup>;
- 2238 (4) the keeping of written records of any such allegation and of the action taken in response<sup>7</sup>;
- 2239 (5) consideration to be given to the measures which may be necessary to protect children following an allegation of abuse or neglect<sup>8</sup>;
- 2240 (6) a requirement<sup>9</sup> for persons working in the home to report any concerns<sup>10</sup> as to the welfare or safety of a child accommodated there<sup>11</sup>;
- 2241 (7) for persons working in the home, and children accommodated there, to have access at all times and in appropriate form to information which would enable them to contact the local authority or the Commission for Social Care Inspection (or, in Wales, the appropriate office of the National Assembly) concerning the welfare and safety of children accommodated in the home<sup>12</sup>.

1 Children's Homes Regulations 2001, SI 2001/3967, reg 16(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(1)(a). For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 16(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(1)(b).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(a). 'Child protection enquiries' means any enquiries carried out by a local authority in the exercise of its functions conferred by or under the Children Act 1989 relating to the protection of children: Children's Homes Regulations 2001, SI 2001/3967, reg 16(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(b).

5 I.e. notification in accordance with the Children's Homes Regulations 2001, SI 2001/3967, reg 30 or, as the case may be the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 29: see para 1019 post.

6 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(c).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(d).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(e).

9 le, in relation to Wales, in accordance with *ibid* reg 27: see para 1000 *ante*.

10 As to the person to whom the concerns should be reported see the Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(f); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(f).

11 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(f).

12 Children's Homes Regulations 2001, SI 2001/3967, reg 16(2)(g); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 16(2)(g).

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### **1008. Control and discipline.**

No measure of control, restraint or discipline which is excessive or unreasonable may be used at any time on children accommodated in a children's home<sup>1</sup>. The following must not be used as disciplinary measures:

- 2242 (1) any form of corporal punishment<sup>2</sup>;
- 2243 (2) any punishment relating to the consumption or deprivation of food or drink<sup>3</sup>;
- 2244 (3) any restriction on a child's contact<sup>4</sup> with his parents, relatives and family<sup>5</sup>; visits by him to his parents, relatives or friends<sup>6</sup>; his communications with specified persons<sup>7</sup>; or his access to any telephone helpline providing counselling for children<sup>8</sup>;
- 2245 (4) any requirement to wear distinctive or inappropriate clothes<sup>9</sup>;
- 2246 (5) the use or withholding of medication or medical or dental treatment<sup>10</sup>;
- 2247 (6) the intentional deprivation of sleep<sup>11</sup>;
- 2248 (7) the imposition of fines, except by way of reparation<sup>12</sup>;
- 2249 (8) any intimate physical examination of the child<sup>13</sup>;
- 2250 (9) the withholding of any aids or equipment needed by a disabled child<sup>14</sup>;
- 2251 (10) any measure which involves a child in the imposition of any measure against any other child or the punishment of a group of children for the behaviour of an individual child<sup>15</sup>.

However, this does not prevent:

- 2252 (a) the taking of any action by, or in accordance with the instructions of, a registered medical or dental practitioner which is necessary to protect the health of a child<sup>16</sup>; or
- 2253 (b) the imposition of requirements that a child wear distinctive clothing for sporting purposes or for purposes connected with his education or with any organisation the members of which customarily wear uniform in connection with its activities<sup>17</sup>.

Nor does it prevent, in England, the taking of any action immediately necessary to prevent injury to any person or serious damage to property<sup>18</sup>.

The registered person must prepare and implement a written policy ('the behaviour management policy') which sets out:

- 2254 (i) the measures of control, restraint and discipline which may be used in the children's home<sup>19</sup>; and
- 2255 (ii) the means whereby appropriate behaviour is to be promoted in the home<sup>20</sup>.

The registered person must keep under review and revise where appropriate the behaviour management policy<sup>21</sup>.

The registered person must ensure that, within 24 hours of the use of any measure of control, restraint or discipline in a children's home, a written record is made in a book kept for that purpose<sup>22</sup>.

1 Children's Homes Regulations 2001, SI 2001/3967, reg 17(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(1). This is without prejudice to the Children's Homes Regulations 2001, SI 2001/3967, reg 17(5) or, as the case may be, Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5): see the text and notes 2-15 *infra*. For the meaning of 'children's home' see para 983 *ante*.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(a).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(b).

4 le other than a restriction imposed in accordance with the Children's Homes Regulations 2001, SI 2001/3967, reg 15 or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15: see para 1025 *post*.

5 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(c)(i); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(c)(i).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(c)(ii); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(c)(ii).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(c)(iii); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(c)(iii). As to the specified persons see the Children's Homes Regulations 2001, SI 2001/3967, reg 15; the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15; and para 1025 *post*.

8 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(c)(iv); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(c)(iv).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(d).

10 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(e).

11 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(f).

12 See the Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(g); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(g).

13 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(h); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(h).

14 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(i); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(i).

15 Children's Homes Regulations 2001, SI 2001/3967, reg 17(5)(j); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(j).

16 Children's Homes Regulations 2001, SI 2001/3967, reg 17(6)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(6)(a). 'General practitioner' means:

732 (1) in England, a person who: (a) provides primary medical services pursuant to the National Health Service Act 1977 Pt I (ss 1-28Y) (as amended) (see HEALTH SERVICES vol 54 (2008) PARA 241 *et seq*); or (b) provides services which correspond to primary medical services provided under Pt I (as amended), otherwise than in pursuance of that Act (Children's Homes Regulations 2001, SI 2001/3967, reg 2(1) (definition amended by SI 2004/865));

733 (2) in Wales, a registered medical practitioner who: (a) provides primary medical services pursuant to the National Health Service Act 1977 Pt II (ss 29-56) (as amended) (see HEALTH SERVICES vol 54 (2008) PARA 241 *et seq*); (b) performs personal medical services in connection with a pilot scheme under the National Health Service (Primary Care) Act 1997 (see HEALTH

SERVICES vol 54 (2008) PARA 419 et seq); or (c) provides services which correspond to services provided under the National Health Service Act 1977 Pt II (as amended), otherwise than in pursuance of that Act (Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1)).

As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq. 'Registered dental practitioner' means a person registered in the dentists register kept under the Dentists Act 1984 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 417 et seq): Children's Homes Regulations 2001, SI 2001/3967, reg 2(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 2(1).

17 Children's Homes Regulations 2001, SI 2001/3967, reg 17(6)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(5)(b).

18 Children's Homes Regulations 2001, SI 2001/3967, reg 17(6)(b). In relation to Wales, it is declared (for the avoidance of doubt) that any rule of law relating to duress or necessity may be relied on, as well as the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(6), if it is alleged that reg 17 has not been complied with: reg 17(7).

19 Children's Homes Regulations 2001, SI 2001/3967, reg 17(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(2)(a).

20 Children's Homes Regulations 2001, SI 2001/3967, reg 17(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(2)(b).

21 See the Children's Homes Regulations 2001, SI 2001/3967, reg 17(3); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(3).

22 See the Children's Homes Regulations 2001, SI 2001/3967, reg 17(4); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 17(4).

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### **1009. Storage and administration of medicines in children's homes.**

The registered person<sup>1</sup> must make suitable arrangements for the recording, handling, safekeeping, safe administration and disposal of any medicines received into the children's home<sup>2</sup>.

In particular, the registered person must ensure that any medicine kept in a children's home<sup>2</sup> is stored in a secure place to prevent any child<sup>3</sup> accommodated there having access to it except under the supervision of a member of staff of the home<sup>4</sup>. The registered person of a children's home must ensure that any medicine which is prescribed<sup>5</sup> for a child is administered as prescribed, to the child for whom it is prescribed and to no other child<sup>6</sup>. A written record must be kept of the administration of any medicine to any child<sup>7</sup>.

The above provisions do not apply, however, in relation to a medicine which is stored by the child for whom it is provided in such a way as to prevent others using it, and which may safely be self-administered by that child<sup>8</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 21(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(1). For the meaning of 'children's home' see para 983 ante.

3 For the meaning of 'child' see para 3 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 21(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(2)(a).

5 'Prescribed' means:

734 (1) in relation to England: (a) ordered for a patient for provision to him under or by virtue of the National Health Service Act 1977 s 41 (see HEALTH SERVICES vol 54 (2008) PARA 339) or the Health and Social Care (Community Health and Standards) Act 2003 s 176(3) (see SOCIAL SERVICES AND COMMUNITY CARE); or (b) prescribed for a patient under the Medicines Act 1968 s 58 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) para 140) (Children's Homes Regulations 2001, SI 2001/3967, reg 21(4) (amended by SI 2004/865));

735 (2) in relation to Wales: (a) ordered for a patient for provision to him under or by virtue of the National Health Service Act 1977 s 41 or as part of the performance of personal medical services in connection with a pilot scheme under the National Health Service (Primary Care) Act 1997; or (b) prescribed for a patient under the Medicines Act 1968 s 58 (Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(4)).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 21(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(2)(b).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 21(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(2)(c).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 21(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 21(3).

### **UPDATE**

### **1009 Storage and administration of medicines in children's homes**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.



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### **1010. Health needs of children.**

The registered person<sup>1</sup> must promote and protect the health of the children accommodated in a children's home<sup>2</sup>.

In particular the registered person must ensure that:

- 2256 (1) each child is registered with a general practitioner<sup>3</sup> (and, in Wales, placed under the care of a registered dental practitioner)<sup>4</sup>;
- 2257 (2) each child has access to such medical, dental, nursing, psychological and psychiatric advice, treatment and services as he may require<sup>5</sup>;
- 2258 (3) each child is provided with such individual support, aids and equipment as he may require in the light of any particular health needs or disability he may have<sup>6</sup>;
- 2259 (4) each child is provided with guidance, support and advice on health and personal care issues appropriate to his needs and wishes<sup>7</sup>;
- 2260 (5) at all times, at least one person on duty at the home has a suitable first aid qualification<sup>8</sup>;
- 2261 (6) any person appointed to the position of nurse at the children's home is a registered nurse<sup>9</sup>;
- 2262 (7) in Wales, a child's link worker<sup>10</sup> participates in any review involving consideration of any aspect of a child's health, whether conducted under the Review of Children's Cases (Wales) Regulations 2007<sup>11</sup> or otherwise<sup>12</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 20(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(1). For the meaning of 'children's home' see para 983 ante.

3 For the meaning of 'general practitioner' see para 1008 note 16 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(a) (amended by SI 2007/311). For the meaning of 'registered dental practitioner' see para 1008 note 16 ante.

5 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(b).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(c).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(d).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(e).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 20(2)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(f).

10 For the meaning of 'link worker' see para 1004 note 6 ante.

11 Ie the Review of Children's Cases (Wales) Regulations 2007, SI 2007/307: see para 936 et seq ante.

- 12 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 20(2)(g) (added by SI 2007/311).

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### **1011. Education, employment and leisure activity.**

The registered person must promote the educational attainment of children accommodated in a children's home<sup>1</sup>, in particular ensuring that:

- 2263 (1) the children make use of educational facilities appropriate to their age<sup>2</sup>;
- 2264 (2) the routine of the home is organised so as to further children's participation in education, including private study<sup>3</sup>;
- 2265 (3) effective links are maintained with any schools attended by children accommodated in the home<sup>4</sup>; and
- 2266 (4) in Wales, a child's link worker<sup>5</sup> participates in any review involving consideration of the child's educational progress, whether conducted under the under the Review of Children's Cases (Wales) Regulations 2007<sup>6</sup> or otherwise<sup>7</sup>.

The registered person must ensure that children accommodated in the home are encouraged to develop and pursue appropriate leisure pursuits and that they are provided with appropriate leisure facilities and activities<sup>8</sup>.

Where a child has reached the age where he is no longer required to receive compulsory full time education<sup>9</sup>, the registered person<sup>10</sup> must assist with the making of, and give effect to, arrangements made for him in respect of his education, training and employment<sup>11</sup>.

1 Children's Homes Regulations 2001, SI 2001/3967, reg 18(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(1). For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 18(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(1)(a).

3 Children's Homes Regulations 2001, SI 2001/3967, reg 18(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(1)(b) (amended by SI 2007/311).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 18(1)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(1)(c).

5 For the meaning of 'link worker' see para 1004 note 6 ante.

6 ie under the Children's Homes (Wales) Regulations 2002, SI 2002/327 (as amended).

7 Ibid reg 18(1)(d) (added by SI 2007/311).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 18(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(2).

9 See EDUCATION vol 15(1) (2006 Reissue) para 15.

10 For the meaning of 'registered person' see para 999 note 1 supra.

11 Children's Homes Regulations 2001, SI 2001/3967, reg 18(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 18(3).

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### **1012. Food provided for children.**

The registered person<sup>1</sup> must ensure that children<sup>2</sup> accommodated in a children's home<sup>3</sup> are provided with food, in adequate quantities and at appropriate intervals<sup>4</sup>, which is properly prepared, wholesome and nutritious<sup>5</sup>, suitable for their needs and meets their reasonable preferences<sup>6</sup> and is sufficiently varied<sup>7</sup>. Children must be provided at all times with access to fresh drinking water<sup>8</sup>. The registered person must ensure that any special dietary need of a child, due to his health, religious persuasion, racial origin or cultural background, is met<sup>9</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'children's home' see para 983 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 13(1)(a)(i); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(1)(a)(i).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 13(1)(a)(ii); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(1)(a)(ii).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 13(1)(a)(iii); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(1)(a)(iii).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 13(1)(a)(iv); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(1)(a)(iv).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 13(1)(b); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(1)(b).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 13(2); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 13(2).

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### **1013. Fire precautions.**

The registered person<sup>1</sup> must, after consultation with the fire and rescue authority<sup>2</sup>:

- 2267 (1) take adequate precautions against the risk of fire, including the provision of suitable fire equipment<sup>3</sup>;
- 2268 (2) provide a means of escape<sup>4</sup>; and
- 2269 (3) made adequate arrangements for detecting, containing and extinguishing fires; for giving warnings of fires; for evacuation in the event of fire; for the maintenance of all fire equipment; and for reviewing the precautions and testing equipment at suitable intervals<sup>5</sup>.

The registered person must also make arrangements for persons working in the children's home to receive suitable training in fire prevention; and he must ensure<sup>6</sup>, by means of drills and practices at suitable intervals, that the persons working at the home and, as far as practicable, the children accommodated there, are aware of the procedures<sup>7</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 999 note 1 ante.

<sup>2</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1) (amended by SI 2005/1541); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(f) (amended by SI 2005/2929). Where the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541 (see FIRE SERVICES) applies to the children's home, the Children's Homes Regulations 2001, SI 2001/3967, reg 32(1) and the Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1) do not apply and the registered person must ensure that the requirements of the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, and any regulations made under it, except for art 23 (duties of employees), are complied with in respect of the home: Children's Homes Regulations 2001, SI 2001/3967, reg 32(1A) (added by SI 2005/1541); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1A) (added by SI 2005/1541). 'Fire and rescue authority' means the fire and rescue authority under the Fire and Rescue Services Act 2004 for the area in which a children's home is situated: Children's Homes Regulations 2001, SI 2001/3967, reg 32(2) (substituted by SI 2004/3168); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(2) (substituted by SI 2005/2929). For the meaning of 'children's home' see para 983 ante.

<sup>3</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1)(a); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(a).

<sup>4</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1)(b); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(b).

<sup>5</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1)(c); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(c).

<sup>6</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1)(d); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(d).

<sup>7</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 32(1)(e); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 31(1)(e).

## **UPDATE**

### **1013 Fire precautions**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **1014. Hazards and safety.**

The registered person<sup>1</sup> must ensure that:

- 2270 (1) all parts of the children's home to which children have access are so far as reasonably practicable free from hazards to their safety<sup>2</sup>;
- 2271 (2) any activities in which children participate are so far as reasonably practicable free from avoidable risks<sup>3</sup>;
- 2272 (3) unnecessary risks to the health or safety of children accommodated in the home are identified and so far as possible eliminated<sup>4</sup>; and
- 2273 (4) suitable arrangements are made for persons working in the home to be trained in first aid<sup>5</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 999 note 1 ante.

<sup>2</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 23(a); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 23(a). For the meaning of 'children's home' see para 983 ante.

<sup>3</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 23(b); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 23(b).

<sup>4</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 23(c); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 23(c).

<sup>5</sup> See the Children's Homes Regulations 2001, SI 2001/3967, reg 23; and the Children's Home (Wales) Regulations 2002, SI 2002/327, reg 23(d).

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**1015. Provision of clothing, pocket money and personal necessities.**

The registered person<sup>1</sup> must ensure that the needs and reasonable preferences of each child accommodated in a children's home for clothing, including footwear and personal necessities, are met<sup>2</sup>. The registered person must also provide children accommodated in the home with such sums of pocket money as are appropriate to their age and understanding<sup>3</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 14(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 14(1). For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 14(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 14(2).



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**1016. Religious observance.**

The registered person<sup>1</sup> must ensure that each child<sup>2</sup> accommodated in the children's home<sup>3</sup> is enabled, so far as practicable, to attend the services of, to receive instruction in, and to observe any requirement (whether as to dress, diet or otherwise) of the religious persuasion to which he belongs<sup>4</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'children's home' see para 983 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 19; Children's Home (Wales) Regulations 2002, SI 2002/327, reg 19.

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### **1017. Children's case records.**

The registered person must keep in respect of each child accommodated in a children's home<sup>1</sup>, a record in permanent form, containing the following particulars with regard to that child<sup>2</sup>:

- 2274 (1) the child's name and any name by which the child has previously been known other than a name used by the child prior to adoption<sup>3</sup>;
- 2275 (2) the child's sex and date of birth<sup>4</sup>;
- 2276 (3) the child's religious persuasion, if any<sup>5</sup>;
- 2277 (4) a description of the child's racial origin, cultural and linguistic background<sup>6</sup>;
- 2278 (5) the address the child came from immediately before he was accommodated in the home<sup>7</sup>;
- 2279 (6) the name, address and telephone number of the child's placing authority<sup>8</sup>;
- 2280 (7) the statutory provision, if any, under which he is provided with accommodation<sup>9</sup>;
- 2281 (8) the name, address and telephone number and the religious persuasion, if any, of the child's parents<sup>10</sup>;
- 2282 (9) the name, address and telephone number of any social worker for the time being assigned to the child by the placing authority<sup>11</sup>;
- 2283 (10) the date and circumstances of all absences of the child from the home including whether the absence was authorised and where the child went during the period of absence<sup>12</sup>;
- 2284 (11) the date and reasons for any visit to the child whilst in the home<sup>13</sup>;
- 2285 (12) a copy of any statement of special educational needs<sup>14</sup> maintained in relation to the child, with details of any such needs<sup>15</sup>;
- 2286 (13) the date and circumstances of any measures of control, restraint or discipline used on the child<sup>16</sup>;
- 2287 (14) any special dietary or health needs of the child<sup>17</sup>;
- 2288 (15) the name and address of any school or college attended by the child, and of any employer of the child<sup>18</sup>;
- 2289 (16) every school report received by the child while accommodated in the home<sup>19</sup>;
- 2290 (17) arrangements for, including any restrictions on, contact between the child and his parents or any other person<sup>20</sup>;
- 2291 (18) a copy of any plan for the care of the child prepared by his placing authority, and of the placement plan<sup>21</sup>;
- 2292 (19) the date and result of any review of the placing authority's plan for the care of the child, or of his placement plan<sup>22</sup>;
- 2293 (20) the name and address of the medical practitioner with whom the child is registered, and of the child's registered dental practitioner<sup>23</sup>;
- 2294 (21) details of any accident or serious illness involving the child<sup>24</sup>;
- 2295 (22) details of any immunisation, allergy, or medical examination of the child and of any medical or dental need or treatment of the child<sup>25</sup>;
- 2296 (23) details of any health examination or developmental test conducted with respect to the child at or in connection with his school<sup>26</sup>;

- 2297 (24) details of all medicines taken by the child while in the home and by whom they were administered, including those which the child was permitted to administer to himself<sup>27</sup>;
- 2298 (25) the date on which any money or valuables are deposited by or on behalf of a child for safekeeping, and the dates on which such money is withdrawn, and any valuables are returned<sup>28</sup>;
- 2299 (26) where the child goes to when he ceases to be accommodated in the home<sup>29</sup>;
- 2300 (27) in Wales, any record required to be kept<sup>30</sup> regarding allegations of abuse or neglect in relation to the child<sup>31</sup>.

The records referred to in heads (1) to (27) above must not be disclosed to any person except in accordance with any enactment or court order under which access to such records is authorised<sup>32</sup>. The records must be kept securely in the children's home so long as the child to whom they relate is accommodated there and, thereafter, retained in a place of security<sup>33</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 28(1)(a); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 28(1)(a). For the meaning of 'child' see para 3 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 1; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 1.

4 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 2; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 2.

5 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 3; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 3.

6 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 4; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 4.

7 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 5; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 5.

8 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 6; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 6.

9 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 7; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 7.

10 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 8; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 8.

11 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 9; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 9.

12 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 10; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 11.

13 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 11; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 12.

14 Ie under the Education Act 1996 s 324 (as amended): see EDUCATION vol 15(2) (2006 Reissue) para 996.

15 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 12; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 13.

16 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 13; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 14.

17 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 14; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 15.

18 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 15; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 16.

19 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 16; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 17.

20 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 17; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 18.

21 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 18; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 19.

22 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 19; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 20.

23 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 20; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 21. For the meanings of 'dental practitioner' and 'medical practitioner' see para 1008 note 16 ante.

24 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 21; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 22.

25 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 22; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 23.

26 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 23; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 24.

27 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 24; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 25.

28 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 25; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 26.

29 Children's Homes Regulations 2001, SI 2001/3967, Sch 3 para 26; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 3 para 27.

30 le under the Children's Home (Wales) Regulations 2002, SI 2002/327, reg 16(2)(d): see para 901 ante.

31 Ibid Sch 3 para 10.

32 Children's Homes Regulations 2001, SI 2001/3967, reg 28(2); Children's Home (Wales) Regulations 2002, SI 2002/3967, reg 28(2).

33 Children's Homes Regulations 2001, SI 2001/3967, reg 28(3); Children's Home (Wales) Regulations 2002, SI 2002/3967, reg 28(3). In England, such records must be retained for at least 75 years from the child's birth, or, if he dies before attaining 18, for 15 years from his death: Children's Homes Regulations 2001, SI 2001/3967, reg 28(3).

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### **1018. Other records.**

The registered person must maintain in each children's home<sup>1</sup> the following records relating to the conduct of the home, and must ensure that they are kept up to date<sup>2</sup>:

- 2301 (1) a record showing:
- .41**
- 53. (a) the date on which each child was first accommodated in the children's home;
  - 54. (b) the date on which any child ceased to be accommodated in the children's home;
  - 55. (c) the child's address immediately before he was accommodated in the children's home;
  - 56. (d) the address to which each child who had ceased to be accommodated went when he left the children's home;
  - 57. (e) the identity of his placing authority;
  - 58. (f) the statutory provision (if any) under which he was accommodated<sup>3</sup>;
- .42**
- 2302 (2) a record of all persons at the children's home showing:
- .43**
- 59. (a) the full names;
  - 60. (b) the sex;
  - 61. (c) the date of birth;
  - 62. (d) home address;
  - 63. (e) the qualifications relevant to, and experience of work involving children;
  - 64. (f) whether he works full time or part time (whether paid or not) and if part time the average number of hours worked per week;
  - 65. (g) whether he resides at the home;
  - 66. (h) in Wales, whether he is registered with the Care Council for Wales<sup>4</sup>;
- .44**
- 2303 (3) a record of all those persons resident at the children's home, other than the persons mentioned heads (1) or (2) above and children accommodated in the home<sup>5</sup>;
- 2304 (4) a record of accidents occurring in the home<sup>6</sup>;
- 2305 (5) a record of the receipt, disposal and administration of any medicine to any child in the home<sup>7</sup>;
- 2306 (6) a record of every fire drill or fire alarm test conducted, with details of any deficiency in either the procedure or the equipment concerned, together with details of the steps taken to remedy that deficiency<sup>8</sup>;
- 2307 (7) a record of all money deposited by a child for safekeeping, together with the date on which that money was withdrawn, or the date of its return<sup>9</sup>;
- 2308 (8) a record of all valuables deposited by a child and the date of their return<sup>10</sup>;
- 2309 (9) records of all accounts kept in the children's home<sup>11</sup>;
- 2310 (10) a record of menus<sup>12</sup>;
- 2311 (11) a copy of the staff duty rosters<sup>13</sup>;
- 2312 (12) a daily log of events occurring in the home<sup>14</sup>;
- 2313 (13) a record of all visitors to the home and to children accommodated in the home, including the names of the visitors and the reasons for their visit<sup>15</sup>;

2314 (14) in Wales, a record<sup>16</sup>, of every disciplinary measure imposed on a child<sup>17</sup>.

The records referred to in heads (1) to (9) and (11) to (14) above must be retained for at least 15 years<sup>18</sup>. Records of menus referred to in head (10) above need only be kept for one year<sup>19</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

2 See the Children's Homes Regulations 2001, SI 2001/3967, reg 29(1); and the Children's Home (Wales) Regulations 2002, SI 2002/327, reg 28(4), (5).

3 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 1; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 1.

4 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 2; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 2 (amended by SI 2007/311).

5 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 3; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 3.

6 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 4; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 4.

7 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 5; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 5.

8 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 6; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 6.

9 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 7; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 7.

10 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 8; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 8.

11 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 9; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 9.

12 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 10; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 10.

13 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 11; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 12.

14 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 12; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 13.

15 Children's Homes Regulations 2001, SI 2001/3967, Sch 4 para 13; Children's Home (Wales) Regulations 2002, SI 2002/327, Sch 4 para 14.

16 *Ie* in accordance with *ibid* reg 17(4).

17 *Ibid* Sch 4 para 11.

18 Children's Homes Regulations 2001, SI 2001/3967, reg 28(5); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 29(2).

19 Children's Homes Regulations 2001, SI 2001/3967, reg 28(5); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 29(2).

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### **1019. Notification of significant events.**

Where any of the events in heads (1) to (10) below occurs, the registered person<sup>1</sup> in relation to a children's home<sup>2</sup> must forthwith notify the persons mentioned in heads (a) to (e) below<sup>3</sup>. The events are:

- 2315 (1) death of a child<sup>4</sup> accommodated at the home<sup>5</sup>;
- 2316 (2) referral to the Secretary of State for inclusion on a list following disciplinary action etc<sup>6</sup> of any individual working in the home<sup>7</sup>;
- 2317 (3) serious illness or serious accident sustained by a child accommodated in the home<sup>8</sup>;
- 2318 (4) the outbreak in the home of any infectious disease which, in the opinion of a registered medical practitioner attending children at the home, is sufficiently serious to be so notified<sup>9</sup>;
- 2319 (5) any allegation that a child accommodated at the home has committed a serious offence<sup>10</sup>;
- 2320 (6) the involvement or suspected involvement in prostitution of a child accommodated at the home<sup>11</sup>;
- 2321 (7) any serious incident necessitating calling the police to the home<sup>12</sup>;
- 2322 (8) absconding by a child accommodated at the home<sup>13</sup>;
- 2323 (9) any serious complaint about the home or any person working there<sup>14</sup>;
- 2324 (10) the instigation and outcome of any child protection enquiry involving a child accommodated at the home<sup>15</sup>.

The persons to be notified<sup>16</sup> are as follows:

- 2325 (a) the child's placing authority is to be notified in all cases<sup>17</sup>;
- 2326 (b) the Commission for Social Care Inspection or, in the case of Wales, the appropriate office of the National Assembly is to be notified in all cases except heads (5) and (8) above<sup>18</sup>;
- 2327 (c) the police are to be informed where there is an allegation that a child has committed a serious offence or has been involved in or is suspected to have been involved in prostitution<sup>19</sup>;
- 2328 (d) the local authority is to be informed in the case of the death of a child and where there is involvement or suspected involvement by a child in prostitution<sup>20</sup>;
- 2329 (e) in England, the Secretary of State and the primary care trust are to be informed in the case of the death of a child<sup>21</sup>.

The registered person must also, without delay, notify the parent of any child accommodated in the home of any significant incident affecting the child's welfare, unless this is not reasonably practicable or would place the child's welfare at risk<sup>22</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 30(1); Children's Home (Wales) Regulations 2002, SI 2002/327, reg 29(1). In relation to Wales, the notification must include a child's name only if that is necessary: reg 29(2).

4 For the meaning of 'child' see para 3 ante.

5 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

6 The referral to the Secretary of State pursuant to the Protection of Children Act 1999 s 2(1)(a): see paras 650-651 ante.

7 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

8 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

9 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5. As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.

10 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

11 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

12 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

13 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

14 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

15 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5. For the meaning of 'child protection enquiries' see para 1007 note 3 ante.

16 Any notification made in accordance with the Children's Homes Regulations 2001, SI 2001/3967, reg 30 or the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 29 which is given orally must be confirmed in writing: Children's Homes Regulations 2001, SI 2001/3967, reg 30(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 29(4).

17 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5. For the meaning of 'placing authority' see para 1005 note 2 ante.

18 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

19 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

20 Children's Homes Regulations 2001, SI 2001/3967, Sch 5; Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5.

21 Children's Homes Regulations 2001, SI 2001/3967, Sch 5 (amended by SI 2002/2469). For the meaning of 'Secretary of State' see para 155 ante.

22 Children's Homes Regulations 2001, SI 2001/3967, reg 30(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 29(3).



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### **1020. Use of surveillance.**

Subject to any requirements imposed by a court under any enactment, the registered person must ensure that electronic or mechanical monitoring devices for the surveillance of children are only used for the purpose of safeguarding and promoting the welfare of the child concerned, or other children accommodated in the children's home<sup>1</sup>. Before such surveillance is used, the following conditions must be satisfied:

- 2330 (1) the child's placing authority consents to the use of the measure in question<sup>2</sup>;
- 2331 (2) it is provided for in the child's placement plan<sup>3</sup>;
- 2332 (3) so far as is practicable in the light of his age and understanding, the child is informed in advance of the intention to use surveillance<sup>4</sup>; and
- 2333 (4) the measure is no more restrictive than necessary, having regard to the child's need for privacy<sup>5</sup>.

<sup>1</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 22; Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 22. For the meaning of 'children's home' see para 983 ante.

<sup>2</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 22(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 22(a).

<sup>3</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 22(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 22(b).

<sup>4</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 22(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 22(c).

<sup>5</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 22(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 22(d).

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### **1021. Absence of person in charge of voluntary or registered children's home.**

Where the registered provider<sup>1</sup> (if he is the person in day to day charge of the children's home<sup>2</sup>) or the registered manager<sup>3</sup> proposes to be absent from the home for a continuous period of 28 days or more, the registered provider must give at least one month's notice, or such notice as has been agreed, to the Commission for Social Care Inspection or, as the case may be, the appropriate office of the National Assembly of the proposed absence<sup>4</sup>. However, where such absence arises because of an emergency, the registered person must give notice of the absence within one week of its occurrence<sup>5</sup>. Where the absence has been for 28 days or more and the Commission or, as the case may be, the appropriate office, has not been notified, the registered person must give the notice without delay<sup>6</sup>.

The notice must specify:

- 2334 (1) the length or expected length of the absence<sup>7</sup>;
- 2335 (2) the reason for the absence<sup>8</sup>;
- 2336 (3) the arrangements made for the running of the home<sup>9</sup>;
- 2337 (4) the name, address and qualifications of the person who will be responsible for the children's home during the absence<sup>10</sup>; and
- 2338 (5) in the case of the absence of the registered manager, the arrangements made or proposed to be made for appointing another person to manage the children's home during the absence (including the proposed date of the appointment)<sup>11</sup>.

The registered provide must notify the Commission or, as the case may be, the appropriate office, of the return to duty of the registered provider or, as the case may be, the registered manager, not later than seven days after the date of his return<sup>12</sup>.

1 For the meaning of 'registered provider' see para 999 note 1 ante.

2 For the meaning of 'children's home' see para 983 ante.

3 For the meaning of 'registered manager' see para 999 note 1 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 37(1), (2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(1), (2).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 37(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(3).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 37(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(4).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 37(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(2)(a).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 37(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(2)(b).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 37(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(2)(c).

10 Children's Homes Regulations 2001, SI 2001/3967, reg 37(2)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(2)(d).

11 Children's Homes Regulations 2001, SI 2001/3967, reg 37(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(2)(e).

12 Children's Homes Regulations 2001, SI 2001/3967, reg 37(5); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 36(5).

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## **1022. Accountability and visiting on behalf of registered provider.**

Where the registered provider<sup>1</sup> of a children's home<sup>2</sup> is an individual but is not the person in day to day charge of the home, he must visit the home at least once a month; and the visits may be unannounced<sup>3</sup>. Where the registered provider is an organisation or a partnership, the home must be visited by:

- 2339 (1) the responsible individual or one of the partners, as the case may be;
- 2340 (2) another of the directors or other persons responsible for the management of the organisation or partnership; or
- 2341 (3) an employee of the organisation or partnership who is not directly connected with the running of the home<sup>4</sup>.

The person carrying out the visit must:

- 2342 (a) interview (with their consent) such children accommodated there, their parents, relatives and persons working at the home as appears necessary;
- 2343 (b) inspect the premises, its daily log of events; and
- 2344 (c) prepare a written report on the conduct of the home<sup>5</sup>.

A copy of the report must be supplied:

- 2345 (i) to the registered manager<sup>6</sup>;
- 2346 (ii) in the case of a registered provider which is an organisation, to each director or other person responsible for the management of the organisation<sup>7</sup>;
- 2347 (iii) in a case where the registered provider is a partnership, to each partner<sup>8</sup>; and
- 2348 (iv) in England, to the Commission for Social Care Inspection<sup>9</sup>.

1 For the meaning of 'registered provider' see para 999 note 1 ante.

2 For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 33(1), (3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(1), (3).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 33(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(2).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 33(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(4).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 33(5)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(5)(a).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 33(5)(c)(i); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(5)(b).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 33(5)(c)(ii); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 32(5)(b).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 33(5)(a).

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### **1023. Review of quality of care.**

The registered person<sup>1</sup> must establish and maintain a system for monitoring (and, in Wales, reviewing) the quality of care at appropriate intervals, and improving the quality of care provided in a children's home<sup>2</sup>. The registered person is required to monitor the following matters:

- 2349 (1) in respect of each child accommodated in the children's home, compliance with the placing authority's care plan for the child (where applicable) and the placement plan<sup>3</sup>;
- 2350 (2) the deposit and issue of money and other valuables handed in for safekeeping<sup>4</sup>;
- 2351 (3) daily menus<sup>5</sup>;
- 2352 (4) all accidents and injuries sustained in the home by children accommodated there<sup>6</sup>;
- 2353 (5) any illnesses of children accommodated in the home<sup>7</sup>;
- 2354 (6) complaints in relation to children accommodated in the home and their outcomes<sup>8</sup>;
- 2355 (7) any allegations or suspicions of abuse in respect of children accommodated in the home and the outcome of any investigation<sup>9</sup>;
- 2356 (8) staff recruitment records and conduct of required checks for new workers in the home<sup>10</sup>;
- 2357 (9) visitors to the home and to children in the home<sup>11</sup>;
- 2358 (10) notifications of events required to be notified<sup>12</sup>;
- 2359 (11) any unauthorised absence from the home of a child accommodated there<sup>13</sup>;
- 2360 (12) the use of measures of control, restraint and discipline in respect of children accommodated in the home<sup>14</sup>;
- 2361 (13) risk assessment for health and safety purposes and subsequent action taken<sup>15</sup>;
- 2362 (14) medicines, medical treatment and first aid administered to any child accommodated in the home<sup>16</sup>;
- 2363 (15) in the case of a qualifying school, the standards of education provided<sup>17</sup>;
- 2364 (16) duty rosters of persons working at the home and the rosters actually worked<sup>18</sup>;
- 2365 (17) the home's daily log of events<sup>19</sup>;
- 2366 (18) fire drills and tests of alarms and of fire equipment<sup>20</sup>;
- 2367 (19) records of appraisals of employees<sup>21</sup>;
- 2368 (20) minutes of staff meetings<sup>22</sup>.

The system must provide for consultation with: (a) children accommodated in the home; (b) their parents; (c) placing authorities; and (d) in Wales, the staff<sup>23</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 999 note 1 ante.

2 See the Children's Homes Regulations 2001, SI 2001/3967, reg 34(1); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 33(1) (reg 33 substituted by SI 2006/3251). In Wales, the quality of care must be reviewed at least annually: Children's Homes Regulations 2002, SI 2002/327, reg 33(2)(a) (as so substituted).

In England, the registered person must supply to the Commission for Social Care Inspection a report in respect of any review conducted by him for the purposes of the Children's Homes Regulations 2001, SI 2001/3967, reg 34(1) and make a copy of the report available on request to children accommodated in the home, their parents and placing authorities: reg 34(2). In Wales, following a review of the quality of care, the registered person must within 28 days prepare a report of that review and make a copy of the available report in an appropriate format when requested by: (1) service users; (2) the parents of any child accommodated in the children's home; (3) the placing authority; (4) staff employed at the children's home; and (5) the National Assembly: Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 33(4) (as so substituted; and amended by SI 2007/311). However, in Wales, the registered person must not comply with the Children's Home (Wales) Regulations 2002, SI 2002/327, reg 33(2)(c)(ii) (see head (b) in the text) or reg 33(4)(b) (see head (2) *supra*) in relation to a child if there is a court order that restricts or limits contact between the child and his parents and it is necessary to restrict communication for the purpose of safeguarding or promoting the welfare of the child: reg 33(3) (as so substituted). For the meaning of 'children's home' see para 983 *ante*. As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 34(1)(a), Sch 6 para 1; Children's Homes Regulations 2002, SI 2002/327, reg 33(2)(b), Sch 6 para 1 (reg 33(2)(b) as substituted: see note 2 *supra*). For the meaning of 'placing authority' see para 1005 note 2 *ante*. As to the placement plan see para 1005 *ante*.

4 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 2; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 2.

5 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 3; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 3.

6 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 4; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 4.

7 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 5; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 5.

8 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 6; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 6.

9 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 7; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 7.

10 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 8; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 8.

11 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 9; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 9.

12 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 10; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 10. Events required to be notified are those under the Children's Homes Regulations 2001, SI 2001/3967, Sch 5 or, as the case may be, the Children's Homes (Wales) Regulations 2002, SI 2002/327, Sch 5: see para 1019 *ante*.

13 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 11; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 11.

14 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 12; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 12.

15 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 13; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 13.

16 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 14; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 14.

17 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 15; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 15.

18 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 16; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 16.

19 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 17; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 17.

20 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 18; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 18.

21 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 19; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 19.

22 Children's Homes Regulations 2001, SI 2001/3967, Sch 6 para 20; Children's Homes Regulations 2002, SI 2002/327, Sch 6 para 20.

23 See the Children's Homes Regulations 2001, SI 2001/3967, reg 34(3); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 33(2)(c). See note 2 *supra*.



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#### **1024. Fitness of premises.**

The registered person must not use premises for the purposes of a children's home<sup>1</sup> unless they are in a location and of a physical design and layout which are suitable for the purpose of achieving the aims and objectives set out in the home's statement of purpose<sup>2</sup>.

The registered person must ensure that all parts of the children's home used by children are:

- 2369 (1) adequately lit, heated and ventilated<sup>3</sup>;
- 2370 (2) secure from unauthorised access<sup>4</sup>;
- 2371 (3) suitably furnished and equipped<sup>5</sup>;
- 2372 (4) of sound construction and kept in good structural repair externally and internally<sup>6</sup>;
- 2373 (5) kept clean and reasonably decorated and maintained<sup>7</sup>; and
- 2374 (6) equipped with what is reasonably necessary, and adapted as necessary, in order to meet the needs arising from his disability of any disabled child accommodated in the home so as to enable him to live as normal a life as possible<sup>8</sup>.

The registered person must ensure that the children's home is kept free from offensive odours and make suitable arrangements for the disposal of general and clinical waste<sup>9</sup>.

The registered person must ensure that there are within the children's home for use by children accommodated there in conditions of appropriate privacy a sufficient number of wash basins, baths and showers supplied with hot and cold running water, and a sufficient number of lavatories, for the number and sex of children accommodated<sup>10</sup>.

The registered person must provide for the number and needs of children accommodated in the children's home:

- 2375 (a) sufficient and suitable kitchen equipment, crockery, cutlery and utensils<sup>11</sup>;
- 2376 (b) adequate facilities for the preparation and storage of food<sup>12</sup>; and
- 2377 (c) so far as is practicable, adequate facilities for children to prepare their own food if they so wish, and are of an age and ability to do so<sup>13</sup>.

The registered person must ensure that there are within a children's home adequate facilities for laundering linen and clothing and, for children wishing to do so, to wash, dry and iron their own clothes<sup>14</sup>.

The registered person must ensure that there is provided within a children's home adequate communal space for sitting, recreation and dining and such facilities for private study as are appropriate to the age and educational needs of the children accommodated<sup>15</sup>.

The registered person must ensure that each child is provided with sleeping accommodation which is suitable to his needs including his need for privacy and which is equipped with furniture, storage facilities, lighting, bedding and other furnishings including window and floor coverings suitable to his needs<sup>16</sup>.

The registered person must also ensure that no child shares a bedroom with an adult, nor (except in the case of siblings) a child who is of the opposite sex or of a significantly different age to him<sup>17</sup>.

The registered person must provide for persons working at the children's home:

- 2378 (i) suitable facilities and accommodation, other than sleeping accommodation, including facilities for the purpose of changing and storage facilities<sup>18</sup>;
- 2379 (ii) sleeping accommodation where the provision of such accommodation is needed in connection with their work at the home<sup>19</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/2967, reg 31(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(1). As to the statement of purpose see para 999 ante.

3 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(a).

4 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(b).

5 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(c).

6 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(d).

7 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(e).

8 Children's Homes Regulations 2001, SI 2001/2967, reg 31(2)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(2)(f).

9 Children's Homes Regulations 2001, SI 2001/2967, reg 31(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(3).

10 Children's Homes Regulations 2001, SI 2001/2967, reg 31(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(4).

11 Children's Homes Regulations 2001, SI 2001/2967, reg 31(5)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(5)(a).

12 Children's Homes Regulations 2001, SI 2001/2967, reg 31(5)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(5)(b).

13 Children's Homes Regulations 2001, SI 2001/2967, reg 31(5)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(5)(c).

14 Children's Homes Regulations 2001, SI 2001/2967, reg 31(6); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(6).

15 Children's Homes Regulations 2001, SI 2001/2967, reg 31(7); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(7).

16 Children's Homes Regulations 2001, SI 2001/2967, reg 31(8); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(8).

17 Children's Homes Regulations 2001, SI 2001/2967, reg 31(9); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(9).

18 Children's Homes Regulations 2001, SI 2001/2967, reg 31(10)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(10)(a).

19 Children's Homes Regulations 2001, SI 2001/2967, reg 31(10)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 30(10)(b).

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### **1025. Contact and access to communications.**

The registered person<sup>1</sup> must promote the contact of each child with his parents, relatives and friends in accordance with the arrangements set out in his placement plan<sup>2</sup> and ensure that suitable facilities are provided at the children's home<sup>3</sup> for any child accommodated there to meet privately at any reasonable time with:

- 2380 (1) his parents, relatives and friends<sup>4</sup>;
- 2381 (2) any solicitor, other adviser or advocate acting for the child<sup>5</sup>;
- 2382 (3) any officer of the Children and Family Court Advisory Service ('CAFCASS') (or, in Wales, any officer of the Children and Family Court Advisory Service or the Welsh family proceedings officer appointed for the child<sup>6</sup>;
- 2383 (4) any social worker for the time being assigned to the child by his placing authority<sup>7</sup>;
- 2384 (5) any person appointed in respect of any requirement of specified procedures<sup>8</sup>;
- 2385 (6) any person appointed as a visitor for the child<sup>9</sup>;
- 2386 (7) any person authorised by the Commission for Social Care Inspection, or in Wales any person authorised by the National Assembly to inspect undertakings regulated under Part II of the Children Act 1989<sup>10</sup>;
- 2387 (8) any person authorised by the local authority for the area<sup>11</sup>;
- 2388 (9) any person authorised<sup>12</sup> to carry out an inspection of the children's home and the children there<sup>13</sup>.

The registered person must ensure that children accommodated in the home are provided at all reasonable times with access to the following facilities which they may use without reference to persons working in the home:

- 2389 (a) a telephone on which to receive and make calls in private<sup>14</sup>; and
- 2390 (b) facilities to send and receive post and, if the necessary facilities are provided for the use of children accommodated in the home, electronic mail, in private<sup>15</sup>.

The registered person must ensure that any disabled child accommodated in the home is provided with access to such aids and equipment which he may require as a result of his disability in order to facilitate his communication with others<sup>16</sup>.

The registered person may, with the consent of the child's placing authority, impose such restriction, prohibition or condition on a child's contact with any person<sup>17</sup> or on access to communications which he is satisfied is necessary for the purpose of safeguarding or promoting the child's welfare<sup>18</sup>. However, no such measure may be imposed by the registered person unless the child's placing authority consents to the imposition of the measure or the measure is imposed in an emergency and full details are given to the placing authority within 24 hours of its imposition<sup>19</sup>.

The above provisions are subject to any relevant order of the court relating to contact between the child and any person<sup>20</sup>.

- 1 For the meaning of 'registered person' see para 999 note 1 ante.
- 2 Children's Homes Regulations 2001, SI 2001/3967, reg 15(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(1)(a). As to the placement plan see para 1005 ante.
- 3 In the case of a home in respect of which a certificate under the Children Act 1989 s 51 (see para 609 ante) is in force, the facilities may be at a different address: Children's Homes Regulations 2001, SI 2001/3967, reg 15(3); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(3). For the meaning of 'children's home' see para 983 ante.
- 4 Children's Homes Regulations 2001, SI 2001/3967, reg 15(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(1)(b).
- 5 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(a).
- 6 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(b) (amended by SI 2005/774).
- 7 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(c).
- 8 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(d) (amended by SI 2006/1738); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(d). The specified procedures are, in relation to England, procedures specified in the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738, and in relation to Wales, those specified in the Representations Procedure (Children) (Wales) Regulations 2005, SI 2005/3365: see para 944 et seq ante.
- 9 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(e). The text refers to a person appointed as a visitor for the child under the Children Act 1989 Sch 2 para 17: see para 871 ante.
- 10 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(f). The text refers to a person authorised by the National Assembly under the Care Standards Act 2000 s 31: see SOCIAL SERVICES AND COMMUNITY CARE.
- 11 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(g); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(g).
- 12 Is authorised by the Children Act 1989 s 80(2): see para 156 ante.
- 13 Children's Homes Regulations 2001, SI 2001/3967, reg 15(2)(h); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(2)(h).
- 14 Children's Homes Regulations 2001, SI 2001/3967, reg 15(4)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(4)(a).
- 15 Children's Homes Regulations 2001, SI 2001/3967, reg 15(4)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(4)(b).
- 16 Children's Homes Regulations 2001, SI 2001/3967, reg 15(5); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(5).
- 17 In Wales, restrictions, prohibitions or conditions may be placed on a child's meeting privately in the home with those persons: see *ibid* reg 15(6).
- 18 Children's Homes Regulations 2001, SI 2001/3967, reg 15(6); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(6). In relation to Wales, it is declared (for the avoidance of doubt) that any rule of law relating to duress or necessity may be relied on if it is alleged that the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15 (as amended) has not been complied with: reg 15(9).
- 19 Children's Homes Regulations 2001, SI 2001/3967, reg 15(7); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(7).
- 20 Children's Homes Regulations 2001, SI 2001/3967, reg 15(8); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 15(8).



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### **1026. Regulations and national minimum standards.**

The registered person<sup>1</sup> must ensure that a copy of the Children's Homes Regulations 2001<sup>2</sup> or, as the case may be, the Children's Homes (Wales) Regulations 2002<sup>3</sup> (and of any amendments to them) and the national minimum standards applicable to children's homes<sup>4</sup> are kept in the home and made available on request to any person working in the home, any child accommodated in the home and the parent of any child accommodated in the home<sup>5</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Ie the Children's Homes Regulations 2001, SI 2001/3967 (as amended).

3 Ie the Children's Homes (Wales) Regulations 2002, SI 2002/327 (as amended).

4 Ie the national minimum standards applicable to children's homes published under the Care Standards Act 2000 s 23(1): see para 993 ante. For the meaning of 'children's home' see para 983 ante.

5 Children's Homes Regulations 2001, SI 2001/3967, reg 35; Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 34.

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### **1027. Financial position.**

The registered provider must carry on the children's home<sup>1</sup> in such manner as is likely to ensure that the home will be financially viable for the purpose of achieving the aims and objectives set out in its statement of purpose<sup>2</sup>.

The registered person<sup>3</sup> must ensure that adequate accounts are maintained and kept up to date in respect of a children's home and supply a copy of the accounts to the Commission for Social Care Inspection or, as the case may, the National Assembly, at its request<sup>4</sup>.

The registered person must provide the Commission or, as the case may be, the National Assembly with such information as it may require for the purpose of considering the financial viability of the children's home, including:

- 2391 (1) the annual accounts of the home certified by an accountant<sup>5</sup>;
- 2392 (2) a reference from a bank expressing an opinion as to the registered provider's financial standing<sup>6</sup>;
- 2393 (3) information as to the financing and financial resources of the home<sup>7</sup>;
- 2394 (4) where the registered provider is a company, information as to any of its associated companies<sup>8</sup>; and
- 2395 (5) a certificate of insurance for the registered provider in respect of liability which may be incurred by him in relation to the home in respect of death, injury, public liability, damage or other loss<sup>9</sup>.

1 For the meaning of 'registered provider' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 36(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(1).

3 For the meaning of 'registered person' see para 999 note 1 ante.

4 Children's Homes Regulations 2001, SI 2001/3967, reg 36(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(2).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 36(3)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(3)(a).

6 Children's Homes Regulations 2001, SI 2001/3967, reg 36(3)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(3)(b).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 36(3)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(3)(c).

8 Children's Homes Regulations 2001, SI 2001/3967, reg 36(3)(d); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(3)(d). For these purposes, a company is an associated company of another if one of them has control of the other or both are under the control of the same person: Children's Homes Regulations 2001, SI 2001/3967, reg 36(4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(4).

9 Children's Homes Regulations 2001, SI 2001/3967, reg 36(3)(e); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 35(3)(e).



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### **1028. Notices of changes.**

The registered person must give notice in writing to the Commission for Social Care Inspection<sup>1</sup> or, as the case may be, the appropriate office of the National Assembly as soon as it is practicable to do so if any of the following events take place or are proposed to take place:

- 2396 (1) a person other than the registered person carries on or manages (or, in Wales, carries on or manages, or proposes to carry on or manage) the children's home<sup>2</sup>;
  - 2397 (2) a person ceases (or, in Wales, ceases or proposes to cease) to carry on or manage the home<sup>3</sup>;
  - 2398 (3) where the registered provider<sup>4</sup> is an individual, he changes (or, in Wales, changes or proposes to change) his name<sup>5</sup>;
  - 2399 (4) where the registered provider is an organisation:
- .45**
- 67. (a) the name or address of the organisation changes (or, in Wales, changes or is proposed to be changed)<sup>6</sup>;
  - 68. (b) there is (or, in Wales, there is or is proposed to be) any change of director, manager, secretary or other similar officer of the organisation<sup>7</sup>;
  - 69. (c) there is to be (or, in Wales, there is or is proposed to be) any change in the identity of the responsible individual<sup>8</sup>;
- .46**
- 2400 (5) where the registered provider is an individual, a trustee in bankruptcy is (or, in Wales, is or is likely to be) appointed, or a composition or arrangement is (or, in Wales, is or is to be) made with creditors<sup>9</sup>;
  - 2401 (6) where the registered provider is a company, a receiver, manager, liquidator or provisional liquidator is (or, in Wales, is or is likely to be) appointed<sup>10</sup>;
  - 2402 (7) the premises of the home are (or, in Wales, are or are proposed to be) significantly altered or extended, or additional premises are (or, in Wales, are or are proposed to be) acquired<sup>11</sup>; or
  - 2403 (8) where the registered provider is a partnership<sup>12</sup>:
- .47**
- 70. (a) in England, there is any change in the membership of the partnership<sup>13</sup>;
  - 71. (b) in Wales, a receiver or manager is, or is likely to be, appointed for the partnership<sup>14</sup>.
- .48**

<sup>1</sup> For the meaning of 'registered person' see para 999 note 1 ante. As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

<sup>2</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 38(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(a). For the meaning of 'children's home' see para 983 ante.

<sup>3</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 38(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(b).

<sup>4</sup> For the meaning of 'registered provider' see para 999 note 1 ante.

- 5 Children's Homes Regulations 2001, SI 2001/3967, reg 38(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(c).
- 6 Children's Homes Regulations 2001, SI 2001/3967, reg 38(e)(i); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(d)(i).
- 7 Children's Homes Regulations 2001, SI 2001/3967, reg 38(e)(ii); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(d)(ii).
- 8 Children's Homes Regulations 2001, SI 2001/3967, reg 38(e)(iii); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(d)(iii).
- 9 Children's Homes Regulations 2001, SI 2001/3967, reg 38(f); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(e).
- 10 Children's Homes Regulations 2001, SI 2001/3967, reg 38(g); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(f).
- 11 Children's Homes Regulations 2001, SI 2001/3967, reg 38(h); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(h).
- 12 Ibid reg 37(g) refers, in relation to Wales, to a partnership whose business includes carrying on a children's home.
- 13 Children's Homes Regulations 2001, SI 2001/3967, reg 38(d).
- 14 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 37(g).

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### **1029. Appointment of liquidators etc.**

Any person appointed as:

- 2404 (1) the receiver or manager of the property of a company or partnership which is a registered provider<sup>1</sup> of a children's home<sup>2</sup>;
- 2405 (2) a liquidator or provisional liquidator of a company which is the registered provider of a children's home<sup>3</sup>; or
- 2406 (3) the trustee in bankruptcy of a registered provider of a children's home<sup>4</sup>,

must:

- 2407 (a) forthwith notify the Commission for Social Care Inspection or, as the case may be, the appropriate office of the National Assembly of his appointment indicating the reasons for it<sup>5</sup>;
- 2408 (b) appoint a manager to take full time day to day charge of the children's home in any case where there is no registered manager<sup>6</sup>; and
- 2409 (c) not more than 28 days after his appointment notify the Commission or, as the case may be, the National Assembly of his intentions regarding the future operation of the home<sup>7</sup>.

In relation to Wales, heads (a) to (c) above also apply to the receiver or manager of the property of a partnership whose business includes carrying on a children's home<sup>8</sup>.

1 For the meaning of 'registered provider' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 39(2)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(2)(a). For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 39(2)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(2)(b).

4 Children's Homes Regulations 2001, SI 2001/3967, reg 39(2)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(2)(d).

5 Children's Homes Regulations 2001, SI 2001/3967, reg 39(1)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(1)(a). As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

6 Children's Homes Regulations 2001, SI 2001/3967, reg 39(1)(b); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(1)(b).

7 Children's Homes Regulations 2001, SI 2001/3967, reg 39(1)(c); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 38(1)(c).

8 Ibid reg 38(2)(c).

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### **1030. Death of registered person.**

If more than one person is registered in respect of a children's home, and a registered person dies, the other registered person must without delay notify the Commission for Social Care Inspection<sup>1</sup> or, as the case may be, the appropriate office of the National Assembly of the death in writing<sup>2</sup>.

If only one person is registered in respect of a children's home, and he dies, his personal representatives must notify the Commission or, as the case may be, the appropriate officer of the National Assembly in writing without delay of the death and within 28 days of their intentions regarding the future running of the home<sup>3</sup>.

The personal representatives of the deceased registered provider<sup>4</sup> may carry on the home without being registered in respect of it for a period not exceeding 28 days<sup>5</sup>. However, the Commission may extend this period by such further period, not exceeding one year, as the Commission may determine; and it must notify any such determination to the personal representatives in writing<sup>6</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante. As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

<sup>2</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 40(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 39(1).

<sup>3</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 40(2); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 39(2).

<sup>4</sup> For the meaning of 'registered provider' see para 999 note 1 ante.

<sup>5</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 40(3)(a); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 39(3)(a). The personal representatives must appoint a person to take full time day to day charge of the home during any period in which they carry on the children's home under these provisions without being registered in respect of it: Children's Homes Regulations 2001, SI 2001/3967, reg 40(5); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 39(5).

<sup>6</sup> Children's Homes Regulations 2001, SI 2001/3967, reg 40(3)(b), (4); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 39(3)(b), (4).

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### **1031. Complaints procedure in England.**

In England, the registered person<sup>1</sup> must establish a written procedure for considering complaints made by or on behalf of children accommodated in the children's home<sup>2</sup>. The procedure must, in particular, provide:

- 2410 (1) for an opportunity for informal resolution of the complaint at an early stage<sup>3</sup>;
- 2411 (2) that no person who is the subject of a complaint is to take any part in its consideration other than, if the registered person considers it appropriate, at the informal resolution stage<sup>4</sup>;
- 2412 (3) for dealing with complaints about the registered person<sup>5</sup>;
- 2413 (4) for complaints to be made by a person acting on behalf of a child<sup>6</sup>;
- 2414 (5) for arrangements for the procedure to be made known to children accommodated in the home, their parents, placing authorities and persons working in the home<sup>7</sup>.

The registered person must ensure that children accommodated in the home are enabled to make a complaint or representation and no child is subject to any reprisal for making a complaint or representation<sup>8</sup>.

The registered person must ensure that a written record is made of any complaint, the action taken in response, and the outcome of the investigation<sup>9</sup>. The registered person must supply to the Commission for Social Care Inspection at its request a statement containing a summary of any complaints made during the preceding 12 months and the action that was taken<sup>10</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes Regulations 2001, SI 2001/3967, reg 24(1). Regulation 24 (apart from reg 24(6): see the text and note 8 infra) does not apply to any matter to which the provisions of the Children Act 1989 Representations Procedure (England) Regulations 2006, SI 2006/1738 (see paras 944, 949 et seq ante) apply: Children's Homes Regulations 2001, SI 2001/3967, reg 24(8) (amended by SI 2006/1738). For the meaning of 'children's home' see para 983 ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 24(2)(a).

4 Ibid reg 24(2)(b).

5 Ibid reg 24(2)(c).

6 Ibid reg 24(2)(d).

7 Ibid reg 24(2)(e). A copy of the procedure, including the name, address and telephone number of the Commission for Social Care Inspection and details of the procedure (if any) which has been notified to the registered person by the Commission for the making of complaints to it relating to children's homes, must be supplied on request to any of the persons mentioned in reg 24(2)(e): reg 24(3), (4). As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

8 Ibid reg 24(6).

9 Ibid reg 24(5).

10 Ibid reg 24(7).

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### **1032. Complaints procedure in Wales.**

The registered person<sup>1</sup> must prepare and follow a written procedure ('the complaints procedure') for considering complaints made to the registered person by or on behalf of children accommodated in the children's home<sup>2</sup>. The complaints procedure must be appropriate to the needs of children accommodated in the home<sup>3</sup>. The complaints procedure must include provision for the consideration of complaints made about the registered person<sup>4</sup>. The registered person must ensure that the following persons are aware of the existence of the complaints procedure and take all reasonable steps to give a copy of the complaints procedure in an appropriate format or such format as may be requested to children accommodated in the home, their parents and the placing authority<sup>5</sup> of any child accommodated in the children's home<sup>6</sup>. The registered person must ensure that the staff employed at the children's home are informed about, given a copy of, and appropriately trained in the operation of the complaints procedure<sup>7</sup>.

The complaints procedure must include the name, address and telephone number of the appropriate office of the National Assembly and the procedure, if any, that has been notified to the registered person by the National Assembly for the making of complaints to the National Assembly<sup>8</sup>. The complaints procedure must include provision for the local resolution of complaints at an early stage where appropriate<sup>9</sup>. Where the complaints procedure includes provision for a formal consideration, this provision must be approved by the National Assembly<sup>10</sup>.

The complaints procedure must be operated in accordance with the principle that the welfare of the child is safeguarded and promoted and account must be taken of the ascertainable wishes and feelings of the child<sup>11</sup>.

When a complaint is made, the registered person must advise the complainant of his right to at any time complain to the National Assembly or, where relevant, to the placing authority<sup>12</sup>. The registered person must inform the complainant of the availability of any advocacy services which the registered person believes may be of assistance to the complainant; and, where relevant and the complainant is a child, the registered person must advise the complainant that a local authority receiving a complaint must provide information and assistance for complainants, and must in particular offer help in obtaining an advocate<sup>13</sup>.

The registered person can in any case where it is appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the complaint<sup>14</sup>.

The registered person must keep a written record of any complaint, the outcome of the investigation and any action taken in response; and it must supply to the appropriate office of the National Assembly at its request a statement containing a summary of the complaints made during the preceding 12 months and the action taken in response to each complaint<sup>15</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24(1) (reg 24 substituted by SI 2006/3251). As to the local resolution of complaints see para 1033 post. As to the formal consideration of complaints see para 1034 post. For the meaning of 'children's home' see para 983 ante.

- 3 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24(2) (as substituted: see note 2 supra).
- 4 Ibid reg 24(3) (as substituted: see note 2 supra).
- 5 For the meaning of 'placing authority' see para 1005 note 2 ante.
- 6 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24(4) (as substituted: see note 2 supra).
- 7 Ibid reg 24(5) (as substituted: see note 2 supra).
- 8 Ibid reg 24(6) (as substituted: see note 2 supra).
- 9 Ibid reg 24(7) (as substituted: see note 2 supra).
- 10 Ibid reg 24(8) (as substituted: see note 2 supra). The approval of the National Assembly under reg 24(8) (as substituted) will only be given where the complaints procedure includes provision for the formal consideration to be undertaken by a person who is independent of the management of the home: reg 24(9) (as so substituted).
- 11 Ibid reg 24A(1) (reg 24A added by SI 2006/3251).
- 12 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24A(2) (as added: see note 11 supra).
- 13 Ibid reg 24A(3) (as added: see note 11 supra).
- 14 Ibid reg 24A(4) (as added: see note 11 supra).
- 15 Ibid reg 24A(5), (6) (as added: see note 11 supra).



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### **1033. Local resolution procedure in Wales.**

Complaints that are dealt with locally must be resolved by the registered person<sup>1</sup> as soon as reasonably practicable and in any event within 14 days<sup>2</sup>. Where the complaint is resolved under these provisions the registered person must confirm in writing to the complainant the agreed resolution<sup>3</sup>.

The registered person must, at the request of the National Assembly or any authority who has arranged for the accommodation of a child at the children's home<sup>4</sup>, confirm the local resolution of a complaint<sup>5</sup>.

1 For the meaning of 'registered person' see para 999 note 1 ante.

2 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24B(1) (reg 24B added by SI 2006/3251). The time limit in the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24B(1) (as added) may be extended for up to a further 14 days with the agreement of the complainant: reg 24B(4) (as so added).

3 Ibid reg 24B(2) (as added: see note 2 supra).

4 For the meaning of 'children's home' see para 983 ante.

5 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24B(3) (as added: see note 2 supra).

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### **1034. Procedure for formal consideration of complaints in Wales.**

Complaints that are dealt with by way of formal consideration must be resolved as soon as reasonably practicable and in any event within 35 days of the request for formal consideration<sup>1</sup>. The registered person<sup>2</sup> must appoint an independent person who must take part in any consideration of the complaint by the registered person<sup>3</sup>. The outcome of a formal consideration must be confirmed in writing by the registered person to the complainant and must summarise the nature and substance of the complaint, the conclusions, and the action to be taken as a result<sup>4</sup>. The registered person must send a copy of the written response to a complaint to the appropriate office of the National Assembly and any placing authority of any child accommodated in the children's home<sup>5</sup>.

If the complaint has not been resolved within 35 days of the request for formal consideration, the registered person must notify the appropriate office of the National Assembly of the complaint and the reasons for the delay in resolution<sup>6</sup>.

<sup>1</sup> Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24C(1) (reg 24C added by SI 2006/3251). The time limit in the Children's Homes (Wales) Regulations 2002, SI 2002/3251, reg 24C (1) (as added) may be extended with the agreement of the complainant: reg 24C(5) (as so added).

<sup>2</sup> For the meaning of 'registered person' see para 999 note 1 ante.

<sup>3</sup> Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24C(2) (as added: see note 1 supra).

<sup>4</sup> Ibid reg 24C(3) (as added: see note 1 supra).

<sup>5</sup> Ibid reg 24C(4) (as added: see note 1 supra). For the meaning of 'children's home' see para 983 ante.

<sup>6</sup> Ibid reg 24C(6) (as added: see note 1 supra).

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### **1035. Procedure for concurrent consideration of complaints in Wales.**

Where a complaint relates to any matter:

- 2415 (1) about which the complainant has stated in writing that he intends to take proceedings in any court or tribunal<sup>1</sup>; or
- 2416 (2) about which the registered person<sup>2</sup> is taking or is proposing to take disciplinary proceedings<sup>3</sup>; or
- 2417 (3) about which the registered person has been notified that an investigation is being conducted by any person or body in contemplation of criminal proceedings<sup>4</sup>; or
- 2418 (4) about which a meeting involving other bodies including the police has been convened to discuss issues relating to the protection of children or vulnerable adults<sup>5</sup>; or
- 2419 (5) about which the registered person has been notified that there are current investigations in contemplation of proceedings under the Care Standards Act 2000<sup>6</sup>,

the registered person must consider, in consultation with the complainant and any other person or body which it considers it appropriate to consult, how the complaint should be handled; and such complaints are referred to for these purposes as 'complaints subject to concurrent consideration'<sup>7</sup>.

The consideration of complaints subject to concurrent consideration may be discontinued if at any time it appears to the registered person that to continue would compromise or prejudice the other consideration<sup>8</sup>. Where the registered person decides to discontinue the consideration of a complaint, the registered person must give notice of that decision to the complainant<sup>9</sup>. Consideration can be resumed at any time, and the registered person must resume consideration of any complaint where the concurrent consideration is discontinued or completed and the complainant requests that the complaint be considered<sup>10</sup>.

Where the consideration of a complaint has been discontinued<sup>11</sup> the registered person must ascertain the progress of the concurrent consideration and notify the complainant when it has been concluded<sup>12</sup>.

1 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24D(1)(a) (reg 24D added by SI 2006/3251).

2 For the meaning of 'registered person' see para 999 note 1 ante.

3 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24(1)(b) (as added: see note 1 supra).

4 Ibid reg 24(1)(c) (as added: see note 1 supra).

5 Ibid reg 24(1)(d) (as added: see note 1 supra).

6 Ibid reg 24(1)(e) (as added: see note 1 supra). The text refers to proceedings under the Care Standards Act 2000 s 59: see SOCIAL SERVICES AND COMMUNITY CARE.

7 Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 24D(1) (as added: see note 1 supra).

8 Ibid reg 24D(2) (as added: see note 1 supra).

- 9 Ibid reg 24D(3) (as added: see note 1 supra).
- 10 Ibid reg 24D(4), (6) (as added: see note 1 supra).
- 11 Ie under ibid reg 24D(2) (as added): see the text and note 8 supra.
- 12 Ibid reg 24D(5) (as added: see note 1 supra).

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### **1036. Offences.**

A contravention or failure to comply with certain provisions of the Children's Homes Regulations 2001<sup>1</sup> or the Children's Homes (Wales) Regulations 2002<sup>2</sup> is an offence<sup>3</sup>.

1 In the Children's Homes Regulations 2001, SI 2001/3976, regs 4-38 (as amended): see para 999 et seq ante.

2 In the Children's Homes (Wales) Regulations 2002, SI 2002/327, regs 4-37 (as amended): see para 999 et seq ante.

3 Children's Homes Regulations 2001, SI 2001/3967, reg 41(1); Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 40(1). Proceedings may be brought against a person who once was, but is no longer, a registered person in respect of a children's home: see the Children's Homes Regulations 2001, SI 2001/3967, reg 41(4); and the Children's Homes (Wales) Regulations 2002, SI 2002/327, reg 40(2). For the meaning of 'registered person' see para 999 note 1 ante. For the meaning of 'children's home' see para 983 ante.

In relation to England, the Commission for Social Care Inspection must serve notice in respect of contravention or failure to comply with the Children's Homes Regulations 2001, SI 2001/3967 (as amended): reg 41(2), (3). As to the Commission for Social Care Inspection see SOCIAL SERVICES AND COMMUNITY CARE.

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## (10) SECURE ACCOMMODATION

### 1037. Use of secure accommodation.

A child<sup>1</sup> who is being looked after<sup>2</sup> by a local authority<sup>3</sup> may not be placed, and, if placed, may not be kept, in accommodation provided for the purpose of restricting liberty<sup>4</sup> (secure accommodation)<sup>5</sup> unless certain conditions are satisfied<sup>6</sup>. Those conditions are that:

- 2420 (1) the child has a history of absconding and is likely to abscond from any other description of accommodation, and that if he absconds, he is likely to suffer significant harm<sup>7</sup>; or
- 2421 (2) if he is kept in any other description of accommodation he is likely to injure himself or other persons<sup>8</sup>.

1 For the meaning of 'child' see para 3 ante. The Secretary of State or the Welsh Ministers are empowered to make regulations applying or disapplying the Children Act 1989 s 25 (as amended) in relation to specified descriptions of children, and applying the provisions subject to modifications in specified cases: see s 25(7); and para 1045 post. As to regulations made under s 25(7) see the Children (Secure Accommodation) Regulations 1991, SI 1991/1505, regs 5-7 (as amended); and paras 1045-1047 post. As to the Secretary of State and the Welsh Ministers see para 155 ante.

2 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 The interpretation of the term 'accommodation provided for the restriction of liberty' is ultimately a matter to be determined by the courts; but it is important to recognise that any practice or measure which prevents a child from leaving a room or building of his own free will may be deemed by the courts to constitute 'restriction of liberty'. For example, while it is clear that the locking of a child in a room, or part of a building, to prevent him leaving voluntarily is caught by the statutory definition, other practices which place restrictions on freedom of mobility (eg creating a human barrier) are not so clear cut: see the Department of Health of publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.10. As to the guidance and regulations generally see para 163 ante. See also *Re C (a minor) (detention: medical treatment)* [1997] 3 FCR 49, [1997] 2 FLR 180.

Although a secure accommodation order is a deprivation of liberty, it is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): *Re K (a child) (secure accommodation order: right to liberty)* [2001] Fam 377, [2001] 2 All ER 719, CA; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 131. See *Re M (a child) (secure accommodation)* [2001] EWCA Civ 458, [2001] 1 FCR 692, [2001] All ER (D) 11 (Apr), CA.

5 Children Act 1989 s 25(1). Premises do not have to be specifically designated as such: *Wolverhampton Metropolitan Borough Council v DB (a minor)* (1996) 37 BMLR 172, sub nom *A Metropolitan Borough Council v DB (a minor)* [1997] 1 FLR 767 (hospital maternity ward where pass or key system restricted entry and exit and nursing staff were instructed to prevent child in question leaving ward held to be secure accommodation).

6 Children Act 1989 s 25(1). The local authority need only prove that one of the conditions is satisfied: *Re D (a minor) (secure accommodation order)* [1996] 2 FCR 452, [1997] 1 FLR 197 (erroneous approach by magistrates on application by local authority under the Children Act 1989 s 25(1)(a)). If one of the conditions is satisfied, the court must make the order (it does not have a discretion): *Re M (a minor) (secure accommodation order)* [1995] Fam 108, [1995] 3 All ER 407, CA (although welfare of child is very important, as long as relevant criteria for placing a child in secure accommodation are met, the court is obliged to authorise placement). See also *LM v Essex County Council* [1999] 1 FCR 673, [1999] 1 FLR 988 (where criteria no longer exist, local authority must cease holding child in secure accommodation; correct procedure while order is still in force is to apply for a writ of habeas corpus, and court had power under RSC Ord 54 r 4 to order immediate release of child).

without formally issuing the writ). See also *Hereford and Worcester County Council v S* [1993] 1 FCR 653, [1993] 2 FLR 360. In proceedings under the Children Act 1989 s 25 (as amended) the court must if practicable arrange for copies of all written reports before it to be made available before the hearing to specified parties: see the Family Proceedings Rules 1991, SI 1991/1247, r 4.25 (amended by SI 2001/821).

7 Children Act 1989 s 25(1)(a). As to the meaning of 'significant harm' see para 274 text and note 4 ante. As to the meaning of 'likely' see s 31; and para 274 note 3 ante.

8 Ibid s 25(1)(b). Before making a decision, the court must make findings of fact which relate to the issues before the court, and apply the statutory criteria laid down by this provision: *R v Oxfordshire County Council (secure accommodation order)* [1992] Fam 150, [1992] 3 All ER 660. Sworn evidence should be given on an application for such an order and the court should make a clear record of the findings that it makes: *Re AS (secure accommodation order)* [1999] 2 FCR 749, [1999] 1 FLR 103. See note 4 supra.

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### **1038. Maximum periods of secure accommodation.**

The maximum period beyond which a child<sup>1</sup> may not be kept in secure accommodation<sup>2</sup> without the authority of a court is an aggregate of 72 hours (whether or not consecutive) in any period of 28 consecutive days<sup>3</sup>.

Applications to a court in respect of a child for authorisation to keep him in secure accommodation beyond this period may be made only by the local authority<sup>4</sup> which is looking after<sup>5</sup> that child<sup>6</sup>. It is the duty of a court hearing an application to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case<sup>7</sup>; and if a court determines that any such criteria are satisfied it must make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept<sup>8</sup>.

The maximum period for which a court may authorise a child to be kept in secure accommodation is three months<sup>9</sup>; but a court may from time to time authorise the child to be kept in secure accommodation for a further period not exceeding six months at any one time<sup>10</sup>.

If an application to the court is adjourned, the court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation<sup>11</sup>.

1 le a child to whom the Children Act 1989 s 25 (as amended) applies. For the meaning of 'child' see para 3 ante. As to the children to whom the Children Act 1989 s 25 (as amended) applies, with or without modifications, see *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 692 at 696-697 per Booth J.

2 'Secure accommodation' means accommodation which is provided for the purpose of restricting the liberty of children to whom the Children Act 1989 s 25 (as amended) (use of accommodation for restricting liberty) applies: Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 2(1).

3 Children Act 1989 s 25(2)(a)(i); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 10(1). However, where authority of a court to keep a child in secure accommodation has been given, any period during which the child has been kept in such accommodation before the giving of that authority is to be disregarded for the purposes of calculating the maximum period in relation to any subsequent occasion on which the child is placed in such accommodation after the period authorised by the court has expired: reg 10(2). Moreover, where a child is in secure accommodation at any time between 12 midday on the day before and 12 midday on the day after a public holiday or a Sunday, and during that period the maximum period of 72 hours expires, and the child had, in the 27 days before the day on which he was placed in secure accommodation, been placed and kept in such accommodation for an aggregate of more than 48 hours, the maximum period does not expire until 12 midday on the first day, which is not itself a public holiday or a Sunday, after the public holiday or Sunday: reg 10(3).

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante.

6 Children Act 1989 s 25(2)(c); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 8 (amended by SI 2001/2237; SI 2002/808). This is expressed to be subject to the Local Government Act 1972 s 101 (as amended), which makes provision enabling local authorities to delegate their functions to committees and sub-committees and other local authorities (see LOCAL GOVERNMENT vol 69 (2009) PARAS 370, 380) or to provisions in or under the Local Government Act 2000 ss 14-20 (see LOCAL GOVERNMENT vol 69 (2009) PARAS 357-362). Applications to a court under the Children Act 1989 s 25 (as amended) in respect of a child provided with accommodation by a health authority, a primary care trust, a national health service trust established under the National Health Service and Community Care Act 1990 s 5, an NHS foundation trust or a local education authority must, unless the child is looked after by a local authority, be made only by the health authority, primary care trust, national health service trust, NHS foundation trust or local education authority providing



accommodation for the child: Children (Secure Accommodation) (No 2) Regulations 1991, SI 1991/2034, reg 2(1) (amended by SI 2002/546; SI 2002/2935; SI 2004/696). Applications to a court under the Children Act 1989 s 25 (as amended) in respect of a child provided with accommodation in a care home or independent hospital must, unless the child is looked after by a local authority, be made only by the person carrying on the home in which accommodation is provided for the child: Children (Secure Accommodation) (No 2) Regulations 1991, SI 1991/2034, reg 2(2).

7 Children Act 1989 s 25(3). Hearsay evidence may be admitted on an application for secure accommodation: *R v Stratford Youth Court, ex p S* [1998] 1 WLR 1758, DC. As to hearsay evidence see CIVIL PROCEDURE VOL 11 (2009) PARA 806 et seq.

8 Children Act 1989 s 25(4). See *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 692. The giving of such an authorisation does not prejudice any power of any court in England and Wales or Scotland to give directions relating to the child to whom the authorisation relates: Children Act 1989 s 25(8). The presumption against making an order should be taken into account: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.8. As to the guidance and regulations generally see para 163 ante. See also *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 345. As to the presumption against making an order and the circumstances in which it applies see the Children Act 1989 s 1(5); and para 302 ante.

Justices may not make a secure accommodation order for a period which totals more than three months. Where proceedings are adjourned under s 25(5) (see the text to note 11 infra), the period of an interim secure accommodation order must be taken into account in determining the period of the full order: *C v Humberside County Council* [1995] 1 FCR 110, [1994] 2 FLR 759. The authorised period runs from the date of the making of the order, not from the date when the child is actually placed in secure accommodation: *Re B (a minor) (secure accommodation order)* [1995] 1 WLR 232, [1994] 2 FLR 707, CA.

9 Children Act 1989 s 25(2)(a)(ii); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 11. However, an order should be for no longer than is necessary and unavoidable; and this requires full consideration by the court, which must give its reasons: *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 692. The relevant period begins on the date that the order is made by the court and not from the date on which the child is first placed in secure accommodation: *Re B (a minor) (secure accommodation order)* [1995] 1 WLR 232, [1994] 2 FLR 707, CA.

10 Children Act 1989 s 25(2)(b); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 12. Where a child has been remanded to local authority accommodation under the provisions of the Children and Young Persons Act 1969 s 23 (as substituted and amended; prospectively further amended) (see para 1247 post), the maximum period for which a court may from time to time authorise his accommodation in secure accommodation is the period of the remand, but any period of authorisation in respect of such a child must not exceed 28 days on any one occasion without further court authorisation: Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 13.

11 Children Act 1989 s 25(5). The interim order should not be longer than the most that is permitted for a full order: see *C v Humberside County Council* [1995] 1 FCR 110, [1994] 2 FLR 759. Any appeal against the making of a secure accommodation order must be heard without delay; and, if need be, an application for directions should be made to a High Court judge: *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 345.

## UPDATE

### 1038 Maximum periods of secure accommodation

NOTES 3, 6, 9, 10--Children Act 1989 s 25(2) amended: Children and Young Persons Act 2008 Sch 3 para 15.

NOTE 11--As to the principles to be applied when deciding whether to adjourn a secure accommodation application under the 1989 Act s 25 see *Re M (a child) (secure accommodation order)* [2008] EWHC 1085 (Fam), [2008] 2 FLR 542.

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### **1039. Representation of child.**

No court may exercise its powers relating to secure accommodation<sup>1</sup> in respect of a child<sup>2</sup> who is not legally represented<sup>3</sup> in that court unless, having been informed of his right to apply for representation funded by the Legal Services Commission as part of the Community Legal Service or Criminal Defence Service and having had the opportunity to do so, he refused or failed to apply<sup>4</sup>.

1 le its powers under the Children Act 1989 s 25 (as amended).

2 For the meaning of 'child' see para 3 ante.

3 Proceedings under the Children Act 1989 s 25 (as amended) are 'specified proceedings', and it is accordingly necessary for the court to appoint a children's guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests: see para 319 ante. A children's guardian must appoint a solicitor to represent the child unless such a solicitor has already been appointed: see para 321 ante. If justices depart from the children's guardian's recommendation they must give a full explanation of their reasons for so doing: *S v Oxfordshire County Council* [1993] 2 FCR 676, [1993] 1 FLR 452; *Re W (a minor) (secure accommodation order)* [1993] 1 FLR 345. Proceedings under the Children Act 1989 s 25 (as amended) are family proceedings in relation to magistrates' courts (see para 209 ante) and, accordingly, hearsay evidence is admissible (see para 228 ante). See *R v Oxfordshire County Council (secure accommodation order)* [1992] Fam 150, [1992] 3 All ER 660. As to children's guardians (formerly known as guardians ad litem) see para 230 ante. See *Re M (a child) (secure accommodation)* [2001] EWCA Civ 458, [2001] 1 FCR 692, [2001] All ER (D) 11 (Apr), CA.

The court must hear sworn evidence before it makes a secure accommodation order: *Re AS (secure accommodation order)* [1999] 2 FCR 749, [1999] 1 FLR 103.

4 Children Act 1989 s 25(6) (amended by the Access to Justice Act 1999 s 24, Sch 4 para 45). It is implicit that the legal representation of a child involves the taking of instructions: *Re AS (secure accommodation order)* [1999] 2 FCR 749, [1999] 1 FLR 103. As to the Legal Services Commission, the Community Legal Service and the Criminal Defence Service see LEGAL AID vol 65 (2008) PARAS 17 et seq, 31 et seq. 120 et seq.

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#### **1040. Notification to parents.**

Where a child<sup>1</sup> is kept in secure accommodation<sup>2</sup> in a children's home<sup>3</sup> and it is intended that an application should be made to a court to keep the child in that accommodation, the local authority looking after<sup>4</sup> the child must if practicable inform the child's parent, any person who is not a parent but who has parental responsibility<sup>5</sup> for him, the child's independent visitor<sup>6</sup> if one has been appointed, and any other person that the authority considers should be informed, of that intention as soon as possible<sup>7</sup>.

1   le a child to whom the Children Act 1989 s 25 (as amended) applies. For the meaning of 'child' see para 3 ante. As to the children to whom s 25 (as amended) applies, with or without modifications, see paras 1037 ante, 1045 post.

2   For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3   For these purposes, 'children's home' means a private children's home, a community home or a voluntary home: Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 2(1) (amended by SI 2002/546; SI 2002/2935). Where a child is placed in secure accommodation in a children's home which is managed by a person, organisation or authority other than the local authority which is looking after him, the person who, or the organisation or the authority which manages that accommodation must inform the authority which is looking after him that he has been placed there, within 12 hours of his being placed there, with a view to obtaining its authority to continue to keep him there if necessary: Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 9 (amended by SI 1995/1398).

4   As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'local authority' see para 248 note 10 ante.

5   For the meaning of 'parental responsibility' see para 134 ante.

6   'Independent visitor' means a person appointed under the Children Act 1989 Sch 2 para 17 (see para 871 ante): Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 2(1). As to the appointment of independent visitors see para 871 ante.

7   Ibid reg 14 (amended by SI 1995/1398).

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**1041. Right of parent to remove child.**

The general principle laid down in the Children Act 1989<sup>1</sup> that any person who has parental responsibility<sup>2</sup> for a child<sup>3</sup> may at any time remove the child from accommodation which is provided by or on behalf of the local authority<sup>4</sup>, applies equally to a child whom the local authority wishes to accommodate in secure accommodation<sup>5</sup>.

1 See the Children Act 1989 s 20(8); and para 866 ante.

2 For the meaning of 'parental responsibility' see para 134 ante.

3 For the meaning of 'child' see para 3 ante.

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 Children Act 1989 s 25(9). For the meaning of 'secure accommodation' see para 1038 note 2 ante.

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#### **1042. Review of placement in secure accommodation in a community home.**

Each local authority looking after<sup>1</sup> a child in secure accommodation<sup>2</sup> in a children's home<sup>3</sup> must appoint at least three persons, at least one of whom is neither a member nor an officer of the local authority by or on behalf of which the child is being looked after, to review the keeping of the child in that accommodation for the purposes of securing his welfare, within one month of the inception of the placement, and then at intervals not exceeding three months where the child continues to be kept in such accommodation<sup>4</sup>. The persons so appointed must satisfy themselves as to whether or not:

- 2422 (1) the criteria for keeping the child in secure accommodation<sup>5</sup> continue to apply<sup>6</sup>;
- 2423 (2) the placement in such accommodation in a children's home continues to be necessary<sup>7</sup>; and
- 2424 (3) any other description of accommodation would be appropriate for him<sup>8</sup>, and in doing so they must have regard to the welfare of the child whose case is being reviewed<sup>9</sup>.

In undertaking the review, the persons appointed must, if practicable, ascertain and take into account the wishes and feelings of<sup>10</sup>:

- 2425 (a) the child<sup>11</sup>;
- 2426 (b) any parent of his<sup>12</sup>;
- 2427 (c) any person not being a parent of his but who has parental responsibility<sup>13</sup> for him<sup>14</sup>;
- 2428 (d) any other person who has had the care of the child, whose views the persons appointed considers should be taken into account<sup>15</sup>;
- 2429 (e) the child's independent visitor<sup>16</sup> if one has been appointed<sup>17</sup>; and
- 2430 (f) the person, organisation or local authority managing the secure accommodation in which the child is placed if that accommodation is not managed by the authority which is looking after that child<sup>18</sup>.

The local authority must, if practicable, inform all those whose views are required under this provision to be taken into account of the outcome of the review and what action, if any, the authority proposes to take in relation to the child in the light of the review, and its reasons for taking or not taking such action<sup>19</sup>.

1 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'child' see para 3 ante. For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3 For the meaning of 'children's home' see para 1040 note 3 ante.

4 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 15 (amended by SI 1992/2117; SI 1995/1398).

- 5 As to those criteria see para 1037 ante. If the local authority fails to remove a child from secure accommodation after the persons appointed under the Children (Secure Accommodation) Regulations 1991, SI 1991/1505, regs 15, 16 (both as amended) recommend that he should be removed, an application for a writ of habeas corpus may be an appropriate remedy: see *LM v Essex County Council* [1999] 1 FCR 673, [1999] 1 FLR 988. As to the writ of habeas corpus see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) para 222 et seq. Judicial review would be the appropriate remedy to challenge the discharge by a local authority of its duties under the statute, including its duty to review the legality of a placement under the order: see *S v Knowsley Borough Council* [2004] EWHC 491 (Fam), [2004] 2 FLR 716.
- 6 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 16(1)(a).
- 7 Ibid reg 16(1)(b) (amended by SI 1995/1398).
- 8 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 16(1)(c).
- 9 Ibid reg 16(1).
- 10 Ibid reg 16(2).
- 11 Ibid reg 16(2)(a).
- 12 Ibid reg 16(2)(b).
- 13 For the meaning of 'parental responsibility' see para 134 ante.
- 14 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 16(2)(c).
- 15 Ibid reg 16(2)(d).
- 16 For the meaning of 'independent visitor' see para 1040 note 6 ante. As to the appointment of independent visitors see para 871 ante.
- 17 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 16(2)(e).
- 18 Ibid reg 16(2)(f) (substituted by SI 1995/1398).
- 19 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 16(3) (amended by SI 1992/2117).

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**1043. Approval of secure accommodation in a children's home in England.**

In England, accommodation in a children's home<sup>1</sup> must not be used as secure accommodation<sup>2</sup> unless it has been approved by the Secretary of State<sup>3</sup> for such use, and such approval is subject to such terms and conditions as the Secretary of State sees fit<sup>4</sup>.

1 For the meaning of 'children's home' see para 1040 note 3 ante.

2 For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3 As to the Secretary of State see para 155 ante.

4 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 3 (amended by SI 1995/1398; revoked in relation to Wales by SI 2006/2986).

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#### **1044. Secure accommodation of child under 13.**

A child<sup>1</sup> under the age of 13 years must not be placed in secure accommodation<sup>2</sup> in a children's home<sup>3</sup> without the prior approval of the Secretary of State or the Welsh Ministers<sup>4</sup> to the placement of that child, and such approval is subject to such terms and conditions as the Secretary of State or the Welsh Ministers may see fit<sup>5</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3 For the meaning of 'children's home' see para 1040 note 3 ante.

4 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

5 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 4 (amended by SI 1992/2117; SI 1995/1398). A local authority wishing to restrict the liberty of a child under the age of 13 should first discuss the case with the Social Services Inspectorate; and subject to its advice, a formal written submission should then be submitted to the Secretary of State for his consideration, providing details of why restriction of liberty is considered the only appropriate way of dealing with the child: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.24. As to the guidance and regulations generally see para 163 ante.



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### **1045. Children to whom secure accommodation provisions do not apply.**

The provisions of the Children Act 1989 relating to secure accommodation<sup>1</sup> do not apply to:

- 2431 (1) children<sup>2</sup> who are detained under any provision of the Mental Health Act 1983<sup>3</sup> or in respect of whom an order has been made relating to the punishment of certain grave crimes<sup>4</sup>; or
- 2432 (2) a person aged 16 or over but under 21 who is provided with accommodation in any community home<sup>5</sup>; or
- 2433 (3) a child in respect of whom a child assessment order<sup>6</sup> has been made and who is kept away from home pursuant to that order<sup>7</sup>.

1    le the Children Act 1989 s 25 (as amended). For the meaning of 'secure accommodation' see para 1038 note 2 ante.

2    For the meaning of 'child' see para 3 ante.

3    See generally MENTAL HEALTH.

4    Children Act 1989 s 25(7)(a); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 5(1) (amended by SI 2002/546; SI 2002/2935). The text refers to an order made under the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended) or s 91 (as amended): see para 1404 post.

In both these cases the child's liberty may be restricted without the Children Act 1989 s 25 (as amended) applying: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.25. As to the guidance and regulations generally see para 163 ante.

5    Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 5(2)(a). The text refers to a child to whom the Children Act 1989 s 20(5) applies: see para 864 ante. In this case the child's liberty may not be restricted in any circumstances: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.25.

A secure accommodation order may specify a detention period which extends beyond the date on which the child attains 16 years of age: *Re G (a child) (secure accommodation order)* [2000] 2 FCR 385, [2000] 2 FLR 259, CA.

6    le under the Children Act 1989 s 43: see para 578 et seq ante.

7    Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 5(2)(b). In this case the child's liberty may not be restricted in any circumstances: see the Department of Health publication *The Children Act 1989: Guidance and Regulations Volume 4 Residential Care* (HMSO, 1991) para 8.25.

## **UPDATE**

### **1045 Children to whom secure accommodation provisions do not apply**

NOTE 4--Children Act 1989 s 25(7) amended: Children and Young Persons Act 2008 Sch 3 para 15.

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#### **1046. Modification in respect of detained and remanded children.**

A different condition for placing any children<sup>1</sup> in secure accommodation<sup>2</sup> is prescribed in respect of a child who is looked after by a local authority<sup>3</sup> and who is<sup>4</sup>:

2434 (1) detained under a certain provision of the Police and Criminal Evidence Act 1984<sup>5</sup>; or

2435 (2) remanded to local authority accommodation<sup>6</sup>, but only if he has been charged with or convicted of a violent or sexual offence, or of an offence punishable in the case of an adult with imprisonment for 14 years or more, or he has a recent history of absconding while remanded to local authority accommodation and has been charged with or convicted of an imprisonable offence alleged or found to have been committed while he was so remanded<sup>7</sup>.

In these cases the child may not be placed or kept in secure accommodation unless it appears that accommodation other than that provided for the purpose of restricting liberty is inappropriate because: (a) he is likely to abscond from such other accommodation; or (b) he is likely to injure himself or other people if he is kept in any such other accommodation<sup>8</sup>. Where a child or young person has been remanded or committed to local authority accommodation by a youth court<sup>9</sup> or magistrates' court, it is to that court that the application to accommodate him in secure accommodation should be made<sup>10</sup>.

1 For the meaning of 'child' see para 3 ante.

2 See the Children Act 1989 s 25(1); and para 1037 ante. For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'local authority' see para 248 note 10 ante.

4 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 6(1).

5 Ibid reg 6(1)(a). The text refers to detention under the Police and Criminal Evidence Act 1984 s 38(6) (as substituted): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 944.

6 Ie under the Children and Young Persons Act 1969 s 23 (as substituted and amended): see para 1247 post.

7 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 6(1)(b) (amended by SI 1992/2117).

8 Children Act 1989 s 25(1), (7)(b) (substituted by SI 1992/2117); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 6(2).

9 As to youth courts see para 1263 et seq post.

10 Criminal Justice Act 1991 s 60(3). See *Liverpool City Council v B* [1995] 1 WLR 505, [1995] 2 FCR 105 (jurisdiction of youth court to make secure accommodation order when different youth court remanded young person).

#### **UPDATE**

**1046 Modification in respect of detained and remanded children**

NOTE 8--Children Act 1989 s 25(7) amended: Children and Young Persons Act 2008 Sch 3 para 15.

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#### **1047. Accommodation by health authorities etc.**

The provisions of the Children Act 1989 relating to secure accommodation<sup>1</sup> apply to children<sup>2</sup>, other than those looked after<sup>3</sup> by a local authority, who are<sup>4</sup>:

- 2436 (1) accommodated by health authorities, primary care trusts, national health service trusts<sup>5</sup>, NHS foundation trusts, or local education authorities<sup>6</sup>; or
- 2437 (2) accommodated in residential care homes or independent hospitals<sup>7</sup>.

In a case falling within head (1) above the application to the court may be made only by the health authority, primary care trust, national health service trust, NHS foundation trust or local education authority which is providing accommodation for the child; and in a case under head (2) above an application may be made only by the person carrying on the home in which accommodation is provided for the child<sup>8</sup>.

<sup>1</sup> I.e. the Children Act 1989 s 25 (as amended). For the meaning of 'secure accommodation' see para 1038 note 2 ante.

<sup>2</sup> For the meaning of 'child' see para 3 ante.

<sup>3</sup> As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'local authority' see para 248 note 10 ante.

<sup>4</sup> Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 7(1).

<sup>5</sup> I.e. established under the National Health Service and Community Care Act 1990 s 5 (as amended): see HEALTH SERVICES vol 54 (2008) PARA 155 et seq. As to health authorities see HEALTH SERVICES vol 54 (2008) PARA 75 et seq; and as to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

<sup>6</sup> Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 7(1)(a) (amended by SI 2000/694; SI 2004/696). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

<sup>7</sup> Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 7(1)(b) (amended by SI 2002/546; SI 2002/2935). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1042 et seq.

<sup>8</sup> Children Act 1989 s 25(1), (2)(c); Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 7(2) (amended by SI 2000/694; SI 2004/696) Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 7(3) (amended by SI 2000/694).

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### **1048. Records.**

Whenever a child<sup>1</sup> is placed in secure accommodation<sup>2</sup> in a children's home<sup>3</sup> the person, organisation or local authority<sup>4</sup> which manages that accommodation must ensure that a record is kept of<sup>5</sup>:

- 2438 (1) the name, date of birth and sex of that child<sup>6</sup>;
- 2439 (2) the care order<sup>7</sup> or other statutory provision by virtue of which the child is in the children's home and in either case particulars of the local authority involved with the placement of the child in that home<sup>8</sup>;
- 2440 (3) the date and time of his placement in secure accommodation, the reason for his placement, the name of the officer authorising the placement and where the child was living before the placement<sup>9</sup>;
- 2441 (4) all those required to be given information in relation to the keeping of the child in secure accommodation<sup>10</sup>;
- 2442 (5) court orders made authorising the keeping of the child in secure accommodation<sup>11</sup>;
- 2443 (6) reviews undertaken in respect of the child<sup>12</sup>;
- 2444 (7) the date and time of any occasion on which the child is locked on his own in any room in the secure accommodation other than his bedroom during usual bedtime hours, the name of the person authorising this action, the reason for it and the date on which and time at which the child ceases to be locked in that room<sup>13</sup>; and
- 2445 (8) the date and time of his discharge and his address following discharge from secure accommodation<sup>14</sup>.

The Secretary of State and the Welsh Ministers<sup>15</sup> may require copies of these records to be sent to him or them at any time<sup>16</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'secure accommodation' see para 1038 note 2 ante.

3 For the meaning of 'children's home' see para 1040 note 3 ante.

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 17.

6 Ibid reg 17(a).

7 As to care orders see paras 276-280 ante.

8 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 17(b) (amended by SI 1995/1398; SI 1996/692).

9 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 17(c).

10 Ibid reg 17(d), which refers to the persons informed under regs 9, 14, and 16(3) (all as amended) (see paras 1040, 1042 ante).

- 11 Ibid reg 17(e). As to such court orders see the Children Act 1989 s 25(4), (5); and para 1038 ante.
- 12 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 17(f). As to reviews see para 1042 ante.
- 13 Ibid reg 17(g).
- 14 Ibid reg 17(h).
- 15 As to the Secretary of State and the Welsh Ministers see para 155 ante.
- 16 Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 17.

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## **(11) PRIVATE ARRANGEMENTS FOR FOSTERING CHILDREN**

### **1049. Meaning of 'privately fostered child'.**

A privately fostered child<sup>1</sup> is a child who is under the age of 16 and who is cared for, and provided with accommodation in his own home by, someone other than<sup>2</sup>:

- 2446 (1) a parent of his<sup>3</sup>;
- 2447 (2) a person who is not a parent of his but who has parental responsibility<sup>4</sup> for him<sup>5</sup>; or
- 2448 (3) a relative<sup>6</sup> of his<sup>7</sup>.

In the case of a child who is disabled<sup>8</sup> this definition extends to a child who is under the age of 18<sup>9</sup>. However, a child is not a privately fostered child:

- 2449 (a) if the person caring for and accommodating him has done so for a period of less than 28 days, and does not intend to do so for any longer period<sup>10</sup>;
- 2450 (b) while he is being looked after<sup>11</sup> by a local authority<sup>12</sup>;
- 2451 (c) while he is in the care of any person in premises in which any parent of his, any other person having parental responsibility for him, or any relative of his who has assumed responsibility for his care, is for the time being living<sup>13</sup>;
- 2452 (d) while he is in the care of any person, in accommodation provided by or on behalf of any voluntary organisation<sup>14</sup>, in any school in which he is receiving full time education<sup>15</sup>, in any health service hospital<sup>16</sup>, in any care home or independent hospital<sup>17</sup>, or in any home or institution not specified above but provided, equipped and maintained by the Secretary of State or the Welsh Ministers<sup>18</sup>;
- 2453 (e) while he is in the care of any person in compliance with certain court orders<sup>19</sup>;
- 2454 (f) while he is liable to be detained or subject to guardianship under the Mental Health Act 1983<sup>20</sup>;
- 2455 (g) while he is placed in the care of a person who proposes to adopt him under arrangements made by an adoption agency within the meaning of the Adoption and Children Act 2002<sup>21</sup>; or
- 2456 (h) while he is a child in respect of whom a local authority has functions by virtue of regulations under the Adoption and Children Act 2002<sup>22</sup> or corresponding functions by virtue of regulations under the Adoption (Intercountry Aspects) Act 1999<sup>23</sup>.

1 To 'foster a child privately' means to look after the child in circumstances in which he is a privately fostered child as defined in the text to notes 2-7 infra: Children Act 1989 s 66(1)(b).

2 Ibid s 66(1)(a) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (15)(a)).

3 Children Act 1989 s 66(1)(a)(i).

4 For the meaning of 'parental responsibility' see para 134 ante.

5 Children Act 1989 s 66(1)(a)(ii).

6 For the meaning of 'relative' see para 249 note 15 ante.

7 Children Act 1989 s 66(1)(a)(iii). Section 66(1) (as amended) is subject to the provisions of s 63 (as amended) (see para 983 ante), and the exceptions made by Sch 8 paras 1-5 (as amended) (see the text and notes 12 -23 infra): s 66(3). As to the requirement to register any person who privately fosters a child see paras 1053-1054 post.

8 For the meaning of 'disabled' see para 851 note 9 ante.

9 Children Act 1989 s 66(4). The Secretary of State or the Welsh Ministers may by regulations make provision as to the circumstances in which a person who provides accommodation to a child is, or is not, to be treated as providing him with accommodation in the person's own home: s 66(4A) (added by the Care Standards Act 2000 Sch 4 para 14(1) (15)(b)). At the date at which this volume states the law no such regulations had been made. As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

10 Children Act 1989 s 66(2).

11 As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. For the meaning of 'local authority' see para 248 note 10 ante.

12 Children Act 1989 s 66(5), Sch 8 para 1.

13 Ibid Sch 8 para 2(1)(a).

14 Ibid Sch 8 para 2(1)(c). For the meaning of 'voluntary organisation' see para 248 note 10 ante.

Schedule 8 para 2(1)(1)(c)-(g) does not apply where the person caring for the child is doing so in his personal capacity and not in the course of carrying out his duties in relation to the establishment mentioned in the provision in question: Sch 8 para 2(2) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (27) (a)).

15 Children Act 1989 Sch 8 para 2(1)(d). See note 14 supra.

16 Ibid Sch 8 para 2(1)(e). See note 14 supra. For the meaning of 'health service hospital' see para 283 note 3 ante.

17 Ibid Sch 8 para 2(1)(f) (substituted by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (28)). See note 14 supra.

For the meaning of 'care home' see para 985 note 1 ante; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(ii)). For the meaning of 'independent hospital' see para 983 note 6 ante.

18 Children Act 1989 Sch 8 para 2(1)(g). See note 14 supra. As to the power of the Secretary of State to provide homes see s 82(5); and para 158 ante.

19 Ibid Sch 8 para 3. The orders in question are orders under the Powers of Criminal Courts (Sentencing) Act 2000 s 63(1) (as amended) (see para 1340 post), or a supervision requirement within the meaning of the Children (Scotland) Act 1995 Pt II (ss 16-93) (as amended): Children Act 1989 Sch 8 para 3 (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 132; and the Children (Scotland) Act 1995 s 105(4), Sch 4 para 48(5)).

20 Children Act 1989 Sch 8 para 4. See further MENTAL HEALTH vol 30(2) (Reissue) para 486 et seq.

21 Ibid Sch 8 para 5(a). For the meaning of 'adoption agency' see the Adoption and Children Act 2002 s 2; and para 342 note 1 ante. As to the modification of this provision in relation to parental orders under the Human Fertilisation and Embryology Act 1990 s 30 (see para 106 ante) see the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, reg 4, Sch 3 para 2.

22 Ie the Adoption and Children Act 2002 s 83(6)(b): see para 499 ante.

23 Children Act 1989 Sch 8 para 5 (amended by the Children and Adoption Act 2006 s 14(3)). The text refers to the Adoption (Intercountry Aspects) Act 1999 s 1: see para 483 ante.

## UPDATE



**1049 Meaning of 'privately fostered child'**

TEXT AND NOTE 19--Children Act 1989 Sch 8 para 3 further amended and Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 132 repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 38, Sch 28 Pt 1.

NOTE 21--SI 1994/2767 revoked: SI 2010/986.

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**1050. Advertisements relating to fostering.**

No advertisement indicating that a person will undertake, or will arrange for, a child<sup>1</sup> to be privately fostered<sup>2</sup> may be published, unless the advertisement states that person's name and address<sup>3</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'privately fostered child' see para 1049 ante.

3 Children Act 1989 s 66(5), Sch 8 para 10.

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**1051. Avoidance of insurances.**

A person who fosters a child privately<sup>1</sup> and for reward is deemed for the purposes of the Life Assurance Act 1774 to have no interest in the life of the child<sup>2</sup>. Accordingly an insurance taken out on the life of a child by such a person is void<sup>3</sup>.

1 For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 66(5), Sch 8 para 11.

3 See the Life Assurance Act 1774 s 1; and INSURANCE vol 25 (2003 Reissue) para 536.

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# **1052. Regulations requiring notification in respect of the fostering of children.**

The Secretary of State or Welsh Ministers<sup>1</sup> may by regulations make provision as to:

- 2457 (1) the circumstances in which notification is required to be given in connection with children<sup>2</sup> who are, have been or are proposed to be fostered privately<sup>3</sup>; and
- 2458 (2) the manner and form in which such notification is to be given<sup>4</sup>.

The regulations may, in particular require:

- 2459 (a) any person who is, or proposes to be, involved (whether or not directly) in arranging for a child to be fostered privately, to notify the appropriate authority<sup>5</sup>;
- 2460 (b) any person who is: (i) a parent of a child<sup>6</sup>; or (ii) a person who is not a parent of his but who has parental responsibility for a child<sup>7</sup>, and who knows that it is proposed that the child should be fostered privately, to notify the appropriate authority<sup>8</sup>;
- 2461 (c) any parent of a privately fostered child<sup>9</sup>, or person who is not a parent of such a child but who has parental responsibility for him, to notify the appropriate authority of any change in his address<sup>10</sup>;
- 2462 (d) any person who proposes to foster a child privately<sup>11</sup>, to notify the appropriate authority of his proposal<sup>12</sup>;
- 2463 (e) any person who is fostering a child privately, or proposes to do so, to notify the appropriate authority of: (i) any offence of which he has been convicted<sup>13</sup>; (ii) any disqualification imposed on him<sup>14</sup>; or (iii) any prohibition imposed on him<sup>15</sup>;
- 2464 (f) any person who is fostering a child privately, to notify the appropriate authority of any change in his address<sup>16</sup>;
- 2465 (g) any person who is fostering a child privately to notify the appropriate authority in writing of any person who begins, or ceases, to be part of his household<sup>17</sup>;
- 2466 (h) any person who has been fostering a child privately, but has ceased to do so, to notify the appropriate authority (indicating, where the child has died, that that is the reason)<sup>18</sup>.

Every local authority must promote public awareness in its area of requirements as to notification of which provision is made under the above provisions<sup>19</sup>.

1 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.  
2 For the meaning of 'child' see para 3 ante.  
3 Children Act 1989 s 66(5), Sch 8 para 7(1)(a).  
4 Ibid Sch 8 para 7(1)(b).  
5 Ibid Sch 8 para 7(2)(a).

- 6 Ibid Sch 8 para 7(2)(b)(i).
- 7 Ibid Sch 8 para 7(2)(b)(ii). For the meaning of 'parental responsibility' see para 134 ante.
- 8 Ibid Sch 8 para 7(2)(b).
- 9 For the meaning of 'privately fostered child' see para 1049 ante.
- 10 Children Act 1989 Sch 8 para 7(2)(c).
- 11 For the meaning of 'foster a child privately' see para 1049 note 1 ante.
- 12 Children Act 1989 Sch 8 para 7(2)(d).
- 13 Ibid Sch 8 para 7(2)(e)(i).
- 14 Ibid Sch 8 para 7(2)(e)(ii). The reference in the text to any disqualification imposed on any person who is fostering a child privately is to a disqualification imposed under s 68 (as amended): see paras 1063-1064 post.
- 15 Ibid Sch 8 para 7(2)(e)(iii). The reference in the text to any prohibition imposed on any person who is fostering a child privately is to a prohibition under s 69: see para 1066 post.
- 16 Ibid Sch 8 para 7(2)(f).
- 17 Ibid Sch 8 para 7(2)(g).
- 18 Ibid Sch 8 para 7(2)(h).
- 19 Ibid Sch 8 para 7A (added by the Children Act 2004 s 44(7)).

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### **1053. Regulations requiring registration for private fostering in England.**

The Secretary of State<sup>1</sup> may by regulations require any person who fosters a child<sup>2</sup> privately in the area of a children's services authority in England<sup>3</sup> to be registered for private fostering by that authority in accordance with the regulations<sup>4</sup>.

Regulations may make supplementary provision relating to the registration of persons for private fostering, including provision as to:

- 2467 (1) how a person applies for registration and the procedure to be followed in considering an application<sup>5</sup>;
- 2468 (2) the requirements to be satisfied before a person may be registered<sup>6</sup>;
- 2469 (3) the circumstances in which a person is disqualified from being registered<sup>7</sup>;
- 2470 (4) the circumstances in which an application for registration may or must be granted or refused;
- 2471 (5) the payment of a fee on the making or granting of an application for registration;
- 2472 (6) the imposition of conditions on registration and the variation or cancellation of such conditions<sup>8</sup>;
- 2473 (7) the circumstances in which a person's registration may be, or be regarded as, cancelled;
- 2474 (8) the making of appeals against any determination of a children's services authority in England in relation to a person's registration;
- 2475 (9) temporary registration, or circumstances in which a person may be regarded as registered;
- 2476 (10) requirements to be complied with by a children's services authority in England or a person registered under the regulations<sup>9</sup>.

Regulations may authorise a children's services authority in England to issue a notice to any person whom it believes to be fostering a child privately in its area without being registered in accordance with the regulations, and provide that a person who, without reasonable excuse, fosters a child privately without being registered in accordance with the regulations while such a notice is issued in respect of him is guilty of an offence<sup>10</sup>.

Regulations may also provide that a person registered under the regulations who without reasonable excuse contravenes or otherwise fails to comply with any requirement imposed on him in the regulations is guilty of an offence<sup>11</sup>.

Regulations may provide that a person who fosters a child privately while he is disqualified from being registered is guilty of an offence unless he is disqualified by virtue of the fact that he lives in the same household as a person who is himself disqualified from being registered or in a household in which such a person is employed, and he did not know, and had no reasonable grounds for believing, that that person was so disqualified<sup>12</sup>.

If no regulations have been made by 15 November 2008 then these provisions cease to have effect at that time<sup>13</sup>.

1 As to the Secretary of State see para 155 ante.

2 For the meaning of 'child' see para 3 ante.

3 See para 187 ante.

4 Children Act 2004 s 45(1). Similar provision is made in relation to Wales: see para 1054 post.

5 This includes provision that any person who, in an application for registration under the regulations, knowingly makes a statement which is false or misleading in a material particular is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: *ibid* s 45(3). As to the standard scale see para 132 note 2 ante.

6 These include requirements relating to the suitability of the applicant to foster children privately and the suitability of the premises in which it is proposed to foster children privately, including their suitability by reference to any other person living there: *ibid* s 45(4).

7 This includes provision that a person may be disqualified where: (1) an order of a kind specified in the regulations has been made at any time with respect to him; (2) an order of a kind so specified has been made at any time with respect to any child who has been in his care; (3) a requirement of a kind so specified has been imposed at any time with respect to any such child, under or by virtue of any enactment; (4) he has been convicted of a criminal offence of a kind so specified, or a probation order has been made in respect of him for any such offence or he has been discharged absolutely or conditionally for any such offence; (5) a prohibition has been imposed on him under any specified enactment; (6) his rights and powers with respect to a child have at any time been vested in a specified authority under a specified enactment; (7) he lives in the same household as a person who is himself disqualified from being registered or in a household in which such a person is employed: *ibid* s 45(5).

The provision which may be made under head (3) in the text also includes provision for a children's services authority in England to determine whether a person is or is not to be disqualified: s 45(6).

8 These include conditions relating to the maintenance of premises in which children are, or are proposed to be, privately fostered and any other persons living at such premises: *ibid* s 45(7).

9 *Ibid* s 45(2). The provision which may be made under head (10) in the text includes a requirement that a person registered under the regulations obtain the consent of the children's services authority in England by whom he is registered before privately fostering a child, and provision relating to the giving of such consent, including provision as to the circumstances in which, or conditions subject to which, it may or must be given: s 45(8). Such provision also includes a requirement for a children's services authority in England to undertake annual inspections in relation to persons registered under the regulations, whether in fact privately fostering children or not, and provision for the payment of a fee by registered persons in respect of such inspections: s 45(9).

10 *Ibid* s 45(10). A person guilty of such an offence is to be liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 45(10).

11 *Ibid* s 45(11). A person guilty of such an offence is to be liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 45(11).

12 *Ibid* s 45(12). Where regulations make such provision they must provide that a person who is guilty of the offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or a term of imprisonment not exceeding 51 weeks, or, in the case of an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), not exceeding six months, or both: Children Act 2004 s 45(13). At the date at which this volume states the law, the Criminal Justice Act 2003 s 281(5) had not been brought into force.

13 Children Act 2004 s 47(1), (3). At the date at which this volume states the law no such regulations had been made.

## **UPDATE**

### **1053 Regulations requiring registration for private fostering in England**

TEXT AND NOTE 9--Children Act 1989 s 45(9) repealed: Children and Young Persons Act 2008 s 30, Sch 4.

TEXT AND NOTE 13--For '2008' read '2011': Children Act 1989 s 47(3) (amended by the Children and Young Persons Act 2008 s 35).



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#### **1054. Regulations requiring registration for private fostering in Wales.**

Regulations may require any person who fosters a child<sup>1</sup> privately in the area of a children's services authority in Wales to be registered for private fostering by that authority in accordance with the regulations<sup>2</sup>.

If no regulations have been made by 15 November 2008 then these provisions cease to have effect at that time<sup>3</sup>.

1 For the meaning of 'child' see para 3 ante.

2 Children Act 1989 s 46(1). Section 45(2)-(15) (see para 1053 ante) apply in relation to Welsh regulations as they apply in relation to English regulations with the substitution for references to a children's services authority in England of references to a children's services authority in Wales (see para 192 ante): s 46(2).

3 Ibid s 47(2), (3).

#### **UPDATE**

#### **1054 Regulations requiring registration for private fostering in Wales**

TEXT AND NOTE 3--For '2008' read '2011': Children Act 1989 s 47(3) (amended by the Children and Young Persons Act 2008 s 35).

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### **1055. Notifications by prospective and actual foster parents.**

Any person who proposes to foster a child privately<sup>1</sup> must notify<sup>2</sup> the appropriate local authority<sup>3</sup> at least six weeks before the private fostering arrangement is to begin or, where the private fostering arrangement is to begin within six weeks, immediately<sup>4</sup>. A person who is fostering a child privately and has not given such notification to the appropriate authority must notify it immediately<sup>5</sup>. A person who has given the required notification must, within 48 hours of the start of the arrangement, notify the appropriate local authority of the fact<sup>6</sup>. A notice under the provisions described above must specify<sup>7</sup>:

- 2477 (1) the name, sex, date and place of birth, religious persuasion, racial origin and cultural and linguistic background of the child<sup>8</sup>;
- 2478 (2) the name and address of the person giving notice and any previous addresses within the last five years<sup>9</sup>;
- 2479 (3) the name and current address of the proposed or current private foster carer and his addresses within the last five years<sup>10</sup>;
- 2480 (4) the name and address of any parent of the child and of any other person who has parental responsibility<sup>11</sup> for the child and, if different, of any person from whom the child was or is to be received<sup>12</sup>;
- 2481 (5) the name and address of any minor siblings of the child and details of the arrangements for their care<sup>13</sup>;
- 2482 (6) the name and address of any person, other than a person specified in head (4) above, who is involved directly or indirectly in making the fostering arrangement<sup>14</sup>;
- 2483 (7) the intended date of the beginning of the fostering arrangement or, as the case may be, the date on which the arrangement actually began<sup>15</sup>; and
- 2484 (8) the intended duration of the private fostering arrangement<sup>16</sup>.

The person giving notice must include in it particulars of:

- 2485 (a) any offence of which he has been convicted<sup>17</sup>;
- 2486 (b) any disqualification or prohibition imposed on him<sup>18</sup>;
- 2487 (c) any such conviction, disqualification or prohibition imposed on any other person living in, or employed at, the same household<sup>19</sup>;
- 2488 (d) any order of a kind specified in regulations<sup>20</sup> made at any time with respect to him<sup>21</sup>;
- 2489 (e) any order of a kind specified in regulations<sup>22</sup> made at any time with respect to a child in his care<sup>23</sup>;
- 2490 (f) any rights or power with respect to a child that have been at any time vested in an authority specified in regulations<sup>24</sup>.

Any person who is fostering a child privately must also notify the appropriate local authority of:

- 2491 (i) any change of his address<sup>25</sup>;
- 2492 (ii) any person who begins or ceases to be part of the household<sup>26</sup>;

- 2493 (iii) any further offence of which the private foster carer of a person who is part of, or employed at, his household has been convicted<sup>25</sup>;
- 2494 (iv) any further disqualification<sup>26</sup> imposed on him or a person who is part of, or employed at, his household<sup>27</sup>;
- 2495 (v) any person who begins to be part of, or employed at, his household, and any offence of which that person has been convicted, and any disqualifications or prohibition imposed on him<sup>28</sup>,

and any such notice must be given in advance if practicable and in any other case not more than 48 hours after the change of circumstances<sup>29</sup>.

1 For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

2 Such notice must be given in writing and may be sent by post: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 11; Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 11.

3 'Appropriate local authority' means the local authority for the area within which the child is being fostered, or, in the case of a proposal to foster a child, within which it is proposed that he will be fostered: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 2(1); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 2(1). For the meaning of 'local authority' see para 248 note 10 ante.

4 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(1); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(1).

5 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 5(1); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 5(1).

6 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 6(1); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 6(1).

7 See the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, regs 3(4), 5(2); and the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, regs 3(4), 5(2).

8 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(a).

9 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(b).

10 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(c).

11 For the meaning of 'parental responsibility' see para 134 ante.

12 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(e).

13 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(f).

14 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(f); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(g).

15 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(g); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(h).

16 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 1(h); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 1(d).

17 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(a).

18 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(b). The text refers to any disqualification or prohibition imposed on him under the Children Act 1989 s 68 or s 69 (see paras 1063-1064, 1066 post) or under any previous enactment of either of those provisions.

19 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(c).

20 It is specified in regulations under the Children Act 1989 s 68: see paras 1063-1064 post.

21 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(d).

22 It is specified in regulations under the Children Act 1989 s 68: see paras 1063-1064 post.

23 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(e).

24 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1 para 2(f); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1 para 2(f). The text refers to regulations under the Children Act 1989 s 68: see paras 1063-1064 post.

25 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(1)(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(1)(a). If the private foster carer's new address is in the area of another local authority, or of a local authority in Scotland, Wales (or, in relation to Wales, England) or Northern Ireland, the authority to whom the notification is given under this regulation must pass on to the authority for the area the name and new address of the private foster carer, the name of the child, and the name and address of the child's parents or any other person with parental responsibility for the child: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(3); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(3).

24 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(1)(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(1)(b).

25 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(1)(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(1)(c).

26 It is a disqualification imposed by the Children Act 1989 s 68: see paras 1063-1064 post.

27 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(1)(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(1)(d).

28 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(1)(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(1)(e). The text refers to any disqualification or prohibition imposed under the Children Act 1989 s 68 or s 69: see paras 1063-1064 post.

29 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 9(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 9(2).

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### **1056. Notification by former foster parents.**

Any person who has been privately fostering a child<sup>1</sup> but has ceased to do so must notify<sup>2</sup> the appropriate local authority<sup>3</sup> within 48 hours and must include in the notice the name and address of the person into whose care the child has been received and that person's relationship with the child<sup>4</sup>. This requirement does not apply where the foster parent intends to resume the fostering arrangement after an interval of not more than 27 days, but if the foster parent subsequently abandons his intention or the interval expires without his having given effect to his intention he must thereon give notice to the local authority within 48 hours of abandoning his intention or, as the case may be, the expiry of the interval<sup>5</sup>. Where the reason for the ending of the fostering arrangement is the death of the child, the foster parent must notify the local authority and must in his notification indicate that that is the reason<sup>6</sup>.

<sup>1</sup> For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

<sup>2</sup> Such notice must be given in writing and may be sent by post: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 11; Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 11.

<sup>3</sup> For the meaning of 'appropriate local authority' see para 1055 note 3 ante.

<sup>4</sup> Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 10(1); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 10(1).

<sup>5</sup> Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 10(3); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 10(3).

<sup>6</sup> Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 10(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 10(2).

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### **1057. Other notifications.**

Any person who is involved (whether or not directly) in arranging for a child to be fostered privately<sup>1</sup> must notify<sup>2</sup> the appropriate local authority<sup>3</sup> not less than six weeks before the fostering arrangement begins<sup>4</sup>. The parent of a child and any other person who has parental responsibility<sup>5</sup> for the child who knows that it is proposed that the child should be fostered privately must also notify the appropriate local authority not less than six weeks before the fostering arrangement begins<sup>6</sup>. However, the parent of a child, and any other person who has parental responsibility for the child, who has given notification under these provisions<sup>7</sup> must within 48 hours of the child's going to live with a private foster carer, notify the appropriate local authority of the fact<sup>8</sup>. The notice under the provisions described above must include specified particulars<sup>9</sup>.

Any parent of a privately fostered child and any other person having parental responsibility for a child who has given notification to the local authority under the above provisions<sup>10</sup> must notify the appropriate local authority of the ending of the private fostering arrangement and must include in the notification the name and address of the person into whose care the child was received and that person's relationship with the child<sup>11</sup>.

1 For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

2 Such notice must be given in writing and may be sent by post: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 11; Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 11.

3 For the meaning of 'appropriate local authority' see para 1055 note 3 ante.

4 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(2).

5 For the meaning of 'parental responsibility' see para 134 ante.

6 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(3); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(3).

7 Ie under the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(2) or reg 3(3) or, as the case may be, the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(2) or reg 3(3).

8 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 6(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 6(2).

9 See the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(4) or, as the case may be, the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(4). As to the information to be provided see the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 1; the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 1; and para 1055 ante.

10 Ie under the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 3(2) or reg 3(3) or, as the case may be, under the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 3(2) or reg 3(3).

11 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 10(4); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 10(4).

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**1058. Welfare of privately fostered children and action to be taken by local authority on receipt of notification.**

It is the duty of every local authority<sup>1</sup> to satisfy itself that the welfare of children who are or are proposed to be privately fostered<sup>2</sup> within its area is being, or will be, satisfactorily safeguarded and promoted, and to secure that such advice is given to those concerned with the children as appears to the authority to be needed<sup>3</sup>. In carrying out functions under this provision the local authority must, on being notified of a proposal to foster a child privately, arrange for an officer of the local authority within seven days to:

- 2496 (1) visit the premises where it is proposed the child will be cared for and accommodated<sup>4</sup>;
  - 2497 (2) visit and speak to the proposed private foster carer and to all members of his household<sup>5</sup>;
  - 2498 (3) visit and speak to the child, alone unless the officer considers it inappropriate<sup>6</sup>;
  - 2499 (4) speak to and, if practicable, visit, every parent or other person with parental responsibility for the child<sup>7</sup>;
  - 2500 (5) establish the following matters that appear to the officer to be relevant<sup>8</sup>:
- .49
- 72. (a) that the intended duration of the arrangement is understood and agreed between the parents of the child and any other person with parental responsibility for the child and the proposed private foster carer<sup>9</sup>;
  - 73. (b) the wishes and feelings of the child about the proposed arrangement (considered in the light of his age and understanding)<sup>10</sup>;
  - 74. (c) the suitability of the proposed accommodation<sup>11</sup>;
  - 75. (d) the capacity of the proposed private foster carer to look after the child<sup>12</sup>;
  - 76. (e) the suitability of other members of the proposed private foster carer's household<sup>13</sup>;
  - 77. (f) that arrangements for contact between the child and the child's parents, any other persons with parental responsibility for the child, and other persons who are significant to the child, have been agreed and understood and that those arrangements will be satisfactory for the child<sup>14</sup>;
  - 78. (g) that the parents of the child or any other person with parental responsibility for him and the proposed private foster carer have agreed financial arrangement for the care and maintenance of the child<sup>15</sup>;
  - 79. (h) that consideration has been given to and necessary steps taken to make arrangements for care of the child's health<sup>16</sup>;
  - 80. (i) that consideration has been given to and necessary steps taken to arrange for the child's education<sup>17</sup>;
  - 81. (j) how decisions about the care of the child will be taken<sup>18</sup>;
  - 82. (k) whether the proposed private foster career, the parents of the child and any other person with parental responsibility for the child, or any other person concerned with the child are being given such advice as seems to the local authority to be needed<sup>19</sup>.



Having completed the above functions, the officer must make a written report to the local authority<sup>20</sup>.

Where a local authority has been notified that a child is being fostered privately<sup>21</sup>, it must arrange for an officer within seven working days to:

- 2501 (i) perform all the functions listed in heads (1) to (4) above<sup>22</sup>; and
  - 2502 (ii) establish the following matters that appear to the officer to be relevant<sup>23</sup>:
- .51**
- 83. (A) that the intended duration of the fostering arrangement is understood and agreed between the parents of the child or any other person with parental responsibility for him and the private foster carer<sup>24</sup>;
  - 84. (B) the wishes and feelings of the child about the arrangement (considered in the light of the child's age and understanding)<sup>25</sup>;
  - 85. (C) that the child's physical, intellectual, emotional, social and behavioural development is appropriate and satisfactory<sup>26</sup>;
  - 86. (D) that the child's needs arising from his religious persuasion, racial origin, cultural and linguistic background are being met<sup>27</sup>;
  - 87. (E) that the financial arrangements for the care and maintenance of the child are working<sup>28</sup>;
  - 88. (F) the capacity of the private foster carer to look after the child<sup>29</sup>;
  - 89. (G) the suitability of the accommodation<sup>30</sup>;
  - 90. (H) that the arrangements for the care of the child's health are in place and, in particular, that the child is registered<sup>31</sup> for NHS care<sup>32</sup>;
  - 91. (I) the arrangements for the child's education<sup>33</sup>;
  - 92. (J) the standard of care which the child is being given<sup>34</sup>;
  - 93. (K) the suitability of members of the private foster carer's family<sup>35</sup>;
  - 94. (L) whether the contact between the child and his parents, or any other person with whom contact has been arranged, is satisfactory for the child<sup>36</sup>;
  - 95. (M) how decisions about the child's care are being taken<sup>37</sup>;
  - 96. (N) whether the private foster carer, the parents of the child, any other person with parental responsibility for the child, or any other person concerned with the child, are being given such advice as appears to the authority to be needed<sup>38</sup>.

**.52**

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'privately fostered child' see para 1049 ante. For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 67(1) (amended by the Children Act 2004 s 44(1), (2)).

4 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(1)(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(1)(a); and see the Children Act 1989 s 67(2), (2A) (added by the Children Act 2004 s 44(1), (3)). As to visits to privately fostered children see para 1059 post.

5 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(1)(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(1)(b); and see the Children Act 1989 s 67(2). See the Department for Education and Skills publication *Replacement Children Act 1989: Guidance on Private Fostering* (2005), which replaces *The Children Act 1989: Guidance and Regulations Volume 8 Private Fostering and Miscellaneous* (HMSO, 1991) Ch 1. As to the guidance and regulations generally see para 163 ante.

6 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(1)(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(1)(c); and see the Children Act 1989 s 67(2).

- 7 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(1)(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(1)(d); and see the Children Act 1989 s 67(2).
- 8 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(1)(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(1)(e); and see the Children Act 1989 s 67(2).
- 9 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(a).
- 10 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(b).
- 11 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(c).
- 12 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(d).
- 13 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(e).
- 14 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(f); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(f).
- 15 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(g); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(g).
- 16 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(h); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(h).
- 17 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(i); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(i).
- 18 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(j); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(j).
- 19 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 2 para 1(k); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 2 para 1(k).
- 20 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 4(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 4(2).
- 21 Ie where notification has been given under the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 5 or reg 6 or, as the case may be the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 5 or reg 6: see para 1055 ante.
- 22 See the Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 7(1)(a)-(d); and the Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 7(1)(a)-(d).
- 23 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 7(1)(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 7(1)(e).
- 24 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(a).
- 25 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(b).
- 26 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(c).
- 27 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(d).
- 28 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(e).

29 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(f); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(f).

30 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(g); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(g).

31 He is included on a list of a person who provides primary medical services pursuant to the National Health Service Act 1977 Pt 1 (see HEALTH SERVICES vol 54 (2008) PARA 248 et seq).

32 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(h); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(h).

33 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(i); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(i).

34 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(j); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(j).

35 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(k); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(k).

36 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(l); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(n).

37 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(m); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(m).

38 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(m); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(l).

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### **1059. Regular visits to children.**

Each local authority<sup>1</sup> must arrange for an officer to visit every child who is being privately fostered<sup>2</sup> within its area:

2503 (1) in the first year of the private fostering arrangement, at intervals of not more than six weeks<sup>3</sup>; and

2504 (2) in any second or subsequent year, at intervals of not more than 12 weeks<sup>4</sup>.

The local authority must also arrange a visit when reasonably requested to do so by the child, foster parent, a parent of the child or any other person with parental responsibility for the child<sup>5</sup>.

The officer must, if he considers it appropriate, arrange to speak to the child alone<sup>6</sup>, and he must make a written report to the local authority after each visit<sup>7</sup>.

When carrying out the visit, the officer must establish such of the following matters as appear to the officer to be relevant<sup>8</sup>:

2505 (a) that the intended duration of the fostering arrangement is understood and agreed between the parents of the child or any other person with parental responsibility for him and the private foster carer<sup>9</sup>;

2506 (b) the wishes and feelings of the child about the arrangement (considered in the light of the child's age and understanding)<sup>10</sup>;

2507 (c) that the child's physical, intellectual, emotional, social and behavioural development is appropriate and satisfactory<sup>11</sup>;

2508 (d) that the child's needs arising from his religious persuasion, racial origin, cultural and linguistic background are being met<sup>12</sup>;

2509 (e) that the financial arrangements for the care and maintenance of the child are working<sup>13</sup>;

2510 (f) the capacity of the private foster carer to look after the child<sup>14</sup>;

2511 (g) the suitability of the accommodation<sup>15</sup>;

2512 (h) that the arrangements for the care of the child's health are in place and, in particular, that the child is registered<sup>16</sup> for NHS care<sup>17</sup>;

2513 (i) the arrangements for the child's education<sup>18</sup>;

2514 (j) the standard of care which the child is being given<sup>19</sup>;

2515 (k) the suitability of members of the private foster carer's family<sup>20</sup>;

2516 (l) whether the contact between the child and his parents, or any other person with whom contact has been arranged, is satisfactory for the child<sup>21</sup>;

2517 (m) how decisions about the child's care are being taken<sup>22</sup>;

2518 (n) whether the private foster carer, the parents of the child, any other person with parental responsibility for the child, or any other person concerned with the child are being given such advice as appears to the authority to be needed<sup>23</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'privately fostered child' see para 1049 ante. For the meaning of 'child' see para 3 ante.

3 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(1)(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(1)(a). The private fostering arrangement is deemed to begin when the local authority became aware of it: Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(6); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(6).

4 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(1)(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(1)(b).

5 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(2); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(2).

6 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(3); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(3).

7 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(5); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(5).

8 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 8(4); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 8(4).

9 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(a); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(a).

10 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(b); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(b).

11 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(c); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(c).

12 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(d); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(d).

13 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(e); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(e).

14 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(f); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(f).

15 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(g); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(g).

16 He is included on a list of a person who provides primary medical services pursuant to the National Health Service Act 1977 Pt 1 (see HEALTH SERVICES vol 54 (2008) PARA 248 et seq).

17 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(h); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(h).

18 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(i); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(i).

19 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(j); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(j).

20 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(k); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(k).

21 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(l); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(n).

22 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(m); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(m).

23 Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, Sch 3 para 1(m); Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, Sch 3 para 1(l).

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### **1060. Monitoring.**

Each local authority<sup>1</sup> must monitor the way in which it discharges its functions under the Children Act 1989 Pt 9<sup>2</sup> and must appoint an officer of the authority for that purpose<sup>3</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 Ie the Children Act 1989 ss 66-70.

3 Children Act 1989 s 67(6) (added by the Children Act 2004 s 44(1), (6)); Children (Private Arrangements for Fostering) Regulations 2005, SI 2005/1533, reg 12; Children (Private Arrangements for Fostering) (Wales) Regulations 2006, SI 2006/940, reg 12.

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### **1061. Inspection of premises and children.**

Where any person who is authorised by a local authority for the purpose to visit privately fostered children<sup>1</sup> has reasonable cause to believe that any privately fostered child is being accommodated in premises within the authority's area, or that it is proposed to accommodate any such child in any such premises, he may at any reasonable time inspect those premises<sup>2</sup> and any children there<sup>3</sup>. Any person exercising this power, if so required, must produce some duly authenticated document showing his authority to do so<sup>4</sup>.

1 For the meaning of 'privately fostered child' see para 1049 ante. For the meaning of 'child' see para 3 ante.

2 If such a person is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: Children Act 1989 s 102(1), (6)(a). As to the application for, and grant of, such a warrant see s 102(2)-(5). As to the circumstances in which a local authority may seek an emergency protection order under s 48, and the related power to seek a warrant to permit entry to premises or access to the child, see s 48(9); and para 588 ante.

3 Ibid s 67(3) (amended by the Children Act 2004 s 44(1), (4)).

4 Children Act 1989 s 67(4).

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**1062. Steps to be taken when welfare of privately fostered child not satisfactorily secured.**

Where a local authority<sup>1</sup> is not satisfied that the welfare of any child who is or is proposed to be privately fostered<sup>2</sup> within its area is being or will be satisfactorily safeguarded or promoted, it must<sup>3</sup>:

2519 (1) unless it considers that it would not be in the best interests of the child, take such steps as are reasonably practicable to secure that the care and accommodation of the child are undertaken by a parent of his, any other person having parental responsibility<sup>4</sup> for him, or a relative<sup>5</sup> of his<sup>6</sup>; and

2520 (2) consider the extent to which, if at all, it should exercise any of its functions under the Children Act 1989 with respect to the child<sup>7</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'privately fostered child' see para 1049 ante. For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 67(5) (amended by the Children Act 2004 s 44(1), (5)).

4 For the meaning of 'parental responsibility' see para 134 ante.

5 For the meaning of 'relative' see para 249 note 15 ante.

6 Children Act 1989 s 67(5)(a).

7 Ibid s 67(5)(b).



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### **1063. General disqualifications for being private foster parents.**

Where a person is disqualified by regulations, he must not foster a child privately<sup>1</sup> unless he has disclosed the fact to the appropriate local authority<sup>2</sup>, and obtained its written consent<sup>3</sup>. A person is disqualified in relation to England if<sup>4</sup>:

- 2521 (1) he is the parent of a child who at any time has been made the subject of a care order<sup>5</sup>;
- 2522 (2) any of certain orders has been made at any time with respect to a child so as to remove the child from his care or prevent the child living with him<sup>6</sup>;
- 2523 (3) a supervision order has been imposed so as to remove a child from his care, or his rights and powers with regard to a child have been vested in a local authority, under certain Scottish legislation<sup>7</sup>;
- 2524 (4) he has been convicted of a particular offence<sup>8</sup>;
- 2525 (5) he is a person who has been refused registration in respect of a children's home<sup>9</sup>;
- 2526 (6) he is a person whose registration in respect of a children's home has been cancelled<sup>10</sup>;
- 2527 (7) he is a person who has been concerned in the management of, or had any financial interest, in a children's home, in respect of which the registration of any person has been cancelled<sup>11</sup>;
- 2528 (8) he is a person who has at any time been refused registration in relation to a voluntary home or a children's home, or who carried on, was otherwise concerned with the management of, or had any financial interest in, a voluntary home or a children's home the registration of which was cancelled under certain provisions<sup>12</sup>;
- 2529 (9) he is a person in respect of whom a prohibition has been imposed at any time under certain provisions<sup>13</sup>;
- 2530 (10) he is a person in respect of whom a notice in writing has been given by a Health and Social Services Board<sup>14</sup>;
- 2531 (11) he has at any time been refused registration in respect of the provision of nurseries or day care or for child minding or had any such registration cancelled, as the case may be, under certain provisions<sup>15</sup>;
- 2532 (12) he has at time been refused registration or had such registration cancelled under provisions relating to Scotland<sup>16</sup>.

A person is disqualified in relation to Wales if:

- 2533 (a) he has been convicted of a particular offence (unless he successfully appealed against the conviction and is therefore not disqualified in respect of that conviction)<sup>17</sup>;
- 2534 (b) he is a parent of a child in respect of whom a particular order has been made<sup>18</sup>;
- 2535 (c) a particular order has been made at any time with respect to a child so as to remove the child from the care of, or prevent the child living with the person<sup>19</sup>;

- 2536 (d) a supervision order has been imposed at any time with respect to a child so as to remove that child from the person's care under provisions relating to Scotland<sup>20</sup>;
- 2537 (e) the person's rights and powers with respect to a child have at any time been vested in a local authority in Scotland under certain provisions<sup>21</sup>;
- 2538 (f) the person has been refused registration in respect of a children's home<sup>22</sup>, has had their registration in respect of a children's home cancelled<sup>23</sup> or has been concerned in the management of, or had any financial interest in, a children's home, in respect of which the registration of any person has been cancelled<sup>24</sup>;
- 2539 (g) the person has at any time been refused registration in relation to a voluntary home or a children's home, or who carried on, was otherwise concerned with the management of, or had any financial interest in, a voluntary home or a children's home the registration of which was cancelled<sup>25</sup>, as the case may be<sup>26</sup>;
- 2540 (h) the person has had a prohibition imposed at any time under certain provisions<sup>27</sup> or has been given a notice in writing by a Health and Social Services Board<sup>28</sup> withholding consent to the care and maintenance of the child being undertaken by a person<sup>29</sup>;
- 2541 (i) the person has at any time been refused registration in respect of the provision of nurseries or day care, or for child minding, or been disqualified from registration or had any such registration cancelled<sup>30</sup>, as the case may be<sup>31</sup>;
- 2542 (j) the person has at any time been refused registration or had such registration cancelled under certain provisions relating to Scotland<sup>32</sup>;
- 2543 (k) the person has at any time been included on a list of persons unsuitable to work with children<sup>33</sup> or has been disqualified from working with children<sup>34</sup>.

As from a day to be appointed a person must not foster a child privately if he is barred<sup>35</sup> from a regulated activity relating to children<sup>36</sup>.

1 For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

2 'The appropriate authority' means the local authority for the area within which it is proposed to foster the child in question: Children Act 1989 s 68(5). For the meaning of 'local authority' see para 248 note 10 ante.

3 See *ibid* s 68(1). An authority refusing consent must give the applicant a written notice informing him of the reason for the refusal, the right of appeal under s 66(5), Sch 8 para 8 (see para 1068 post) against the refusal, and the time within which he may do so: s 68(4).

4 See the Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(1); and see also the Children Act 1989 s 68(2) (amended by Criminal Justice Act 2003 ss 304, 332, Sch 32 paras 59, 60, Sch 37 Pt 7).

5 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(2). The text refers to a care order made under the Children Act 1989 s 31(1)(a) (see para 271 ante) or the Children (Northern Ireland) Order 1995, SI 1995/755.

6 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(3). The orders referred to in the text are:

736 (1) an order under the Children Act 1989 s 31(1)(a);

737 (2) any other order that would have been deemed to be a care order by virtue of the Children Act 1989 s 108(6), Sch 14 para 15 (as amended) (transitional provisions for children in compulsory care) had it been in force immediately before 14 October 1991 (ie the day on which Pt IV (ss 31-42) came into force);

738 (3) a supervision order which imposes a residence requirement under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 or the Children and Young Persons Act 1969 s 12AA (as added) (requirement that young offender live in local authority accommodation: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 257);

739 (4) an order under the Children (Northern Ireland) Order 1995, SI 1995/755, art 50(1)(a); or

740 (5) a fit person order, parental rights order or a training school order under the Children and Young Persons Act (Northern Ireland) 1968.

7 See the Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(4), (5). The text refers to a supervision requirement imposed at any time with respect to a child so as to remove that child from the person's care under the Social Work (Scotland) Act 1968 s 44 or the Children (Scotland) Act 1995 s 70, and the vesting of the person's rights and powers with respect to a child in a local authority in Scotland under the Social Work (Scotland) Act 1968 s 16 or pursuant to a parental responsibilities order under the Children (Scotland) Act 1995 s 86.

8 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(6). The offences mentioned in the text are:

741 (1) an offence against a child within the meaning of the Criminal Justice and Court Services Act 2000 s 26(1) (see para 667 ante);

742 (2) an offence listed in the Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, Schedule;

743 (3) any other offence involving bodily injury to a child.

9 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(7)(a). The text refers to a refusal under the Care Standards Act 2000 s 13 (see para 986 ante; and SOCIAL SERVICES AND COMMUNITY CARE).

10 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(7)(b). The text refers to cancellation under the Care Standards Act 2000 s 20(1) (see SOCIAL SERVICES AND COMMUNITY CARE).

11 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(7)(c). The text refers to cancellation under the Care Standards Act 2000 s 14 or s 20(1) (see SOCIAL SERVICES AND COMMUNITY CARE).

12 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(8). The provisions mentioned in the text are the Care Standards Act 2000 Sch 5 para 1, Sch 6 para 1, the Children and Young Persons Act (Northern Ireland) Act 1968 s 127 or the Children (Northern Ireland) Order 1995, SI 1995/755.

13 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(9). The provisions mentioned in the text are:

744 (1) the Care Standards Act 2000 s 69 (see SOCIAL SERVICES AND COMMUNITY CARE), the Foster Children Act 1980 s 10 (repealed) or the Children Act 1958 s 4 (repealed);

745 (2) the Children (Northern Ireland) Order 1995, SI 1995/755, art 110; or

746 (3) the Foster Children (Scotland) Act 1984 s 10.

14 Is a notice under the Children and Young Persons Act (Northern Ireland) 1968 s 1(3).

15 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(10). The provisions mentioned in the text are:

747 (1) the Children Act 1989 Pt X (repealed) or Pt XA (ss 79A-79X) (as added and amended; prospectively amended) (see para 1070 post);

748 (2) the Nurseries and Child-Minders Regulation Act 1948 s 1 or s 5;

749 (3) the Children (Northern Ireland) Order 1955, SI 1955/755, Pt XI;

750 (4) the Children and Young Persons Act (Northern Ireland) 1968 s 11(5) or s 15.

16 Disqualification from Caring for Children (England) Regulations 2002, SI 2002/635, reg 2(11). The provisions mentioned in the text are the Social Work (Scotland) Act 1968 s 62 (registration of residential and other establishments) or the Regulation of Care (Scotland) Act 2001 Pt 1 (care home service, child minding or day care of children).

17 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, reg 4(1), (2), Schedule; and see the Children Act 1989 s 68 (amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 paras 59, 60, Sch 37 Pt 7). The offences mentioned in the text are:

- 751 (1) any offence against a child within the meaning of the Criminal Justice and Court Services Act 2000 s 26(1) (see para 667 ante), or any other offence involving bodily injury to, or death of a child, save that a person is not disqualified for these purposes in respect of any offence if that person has successfully appealed against the disqualification order (pursuant to s 31: see para 669 ante) or if the Tribunal has determined (pursuant to s 32: see para 670 ante) that the person in question is no longer to be subject to the disqualification order (unless the High Court has restored the disqualification order pursuant to s 34: see para 671) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 1);
- 752 (2) any offence committed against a person aged 18 or over and mentioned in the Criminal Justice and Court Services Act 2000 Sch 4 para 2 (see para 667 ante) in respect of which a qualifying sentence has been imposed by a senior court or with which a person has been charged, against a person aged 18 or over and mentioned in Sch 4 para 2, in respect of which a relevant order has been imposed by a senior court; save that a person is not disqualified under these provisions in respect of any offence if that person has successfully appealed against the disqualification order (pursuant to s 31) or if the Tribunal has determined (pursuant to s 32) that the person is no longer to be subject to the disqualification order (unless the High Court has restored the disqualification order pursuant to s 34 following such a determination), and further a person ceases to be disqualified under these provisions where the rehabilitation period applicable to the conviction under the Rehabilitation of Offenders Act 1974 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 670 et seq) has expired (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 2);
- 753 (3) an offence under the Sexual Offences Act 2003, the Children Act 1989 ss 49, 50(9), 63(10), 70, 78C (as added), 79D-79F (as added), Sch 5 para 1(5), Sch 6 para 2(3), the Foster Children Act 1980 s 16, or the Children Act 1958 s 14 (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 3);
- 754 (4) an offence in relation to a children's home under or by virtue of any of the following provisions of the Care Standards Act 2000 ss 11(1), 24-27 (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 4);
- 755 (5) the following offences in relation to Scotland:
28. (a) offence of rape (ibid Schedule para 5);
- 29
29. (b) an offence specified in the Criminal Procedure (Scotland) Act 1995, Sch 1 (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 6).
- 30
30. (c) the common law offence of plagium (theft of a child below the age of puberty) (Schedule para 7);
- 31
31. (d) an offence under the Civic Government (Scotland) Act 1982 ss 52, 52A (as added) (offences relating to indecent photographs of children) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 8);
- 32
32. (e) an offence under the Sexual Offences (Amendment) Act 2000 s 3 (abuse of trust) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 9);
- 33
33. (f) an offence under the Children (Scotland) Act 1995 s 81, s 83, s 89 or the Social Work (Scotland) Act 1968 ss 17(8), 71 (harbouring offences), the Child Abduction Act 1984 s 6 (taking or sending child out of United Kingdom), the Children Act 1989 ss 78, 79D-79F (as added) (offences relating to child minding and day care) or the Foster Children (Scotland) Act 1984 s 15 (offences relating to private fostering) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 10);
- 34

34. (g) an offence under or by virtue of the Social Work (Scotland) Act 1968 ss 60(3), 61(3), 62(6) (offences relating to residential and other establishments) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 11);
- 35
35. (h) an offence in relation to a care home service, child minding or day care of children, under or by virtue of the Regulation of Care (Scotland) Act 2001 s 21, s 22 or s 29(10) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 12);
- 36
- 756 (6) the following offences in relation to Northern Ireland:
36. (a) an offence specified in the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, SI 2003/417, Schedule (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 13);
- 37
37. (b) an offence under the Children (Northern Ireland) Order 1995, SI 1995/755, arts 68, 69(9), 79(3), 81(4), 95(3), 97(4), 132, 117, the Children and Young Persons Act (Northern Ireland) 1968 ss 9(1), 14, 127(5), 129(3) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 14);
- 38
- 757 (7) certain offences in relation to the Channel Islands and the Isle of Man (see the Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule paras 15-17);
- 758 (8) an offence contrary to the Customs and Excise Management Act 1979 s 170 in relation to goods prohibited to be imported under the Customs Consolidation Act 1876 s 42 (prohibitions and restrictions) where the prohibited goods included indecent photographs of children under the age of 16 (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 18);
- 759 (9) an offence by virtue of the Sex Offenders Act 1997 s 7 (extension of jurisdiction: England and Wales and Northern Ireland) or the Criminal Law (Consolidation) (Scotland) Act 1995 s 16B (as added) (commission of certain sexual offences outside the United Kingdom) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 19);
- 760 (10) an offence contrary to the Children and Young Persons Act 1969 s 32(3) (detention of absentees) (Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 20).

18 Ibid Schedule para 21. The orders mentioned in the text are orders made under the Children Act 1989 s 31(1)(a), (b), s 44(1), the Children (Northern Ireland) Order 1995, SI 1995/755, art 50(1)(a) or the Children and Young Persons Act 2001 s 31.

19 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 22. The particular orders mentioned in the text are:

- 761 (1) an order under the Children Act 1989 s 31(1)(a);
- 762 (2) any order that would have been deemed to be a care order by virtue of Sch 14 para 15 (transitional provisions for children in compulsory care) had it been in force immediately before the day on which Pt IV (ss 31-42) came into force;
- 763 (3) a supervision order which imposes a residence requirement under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5 or the Children and Young Persons Act 1969 s 12AA (as added) (requirement to live in local authority accommodation);
- 764 (4) an order under the Children (Northern Ireland) Order 1995, SI 1995/755, art 50(1)(a);
- 765 (5) a fit person order, a parental rights order or a training school order under the Children and Young Persons Act (Northern Ireland) 1968;
- 766 (6) a child protection order under the Children (Scotland) Act 1995 s 57;
- 767 (7) an exclusion order under the Children (Scotland) Act 1995 s 76; or

- 768 (8) a supervision order which imposes a residence requirement under the Children and Young Persons Act 2001 Sch 9 para 5 (an Act of Tynwald) (requirement to live in accommodation provided by the Department of Health and Social Security).
- 20 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 23. The provisions mentioned in the text are the Social Work (Scotland) Act 1968 s 44 or the Children (Scotland) Act 1995 s 70.
- 21 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 24. The provisions mentioned in the text are the Social Work (Scotland) Act 1968 s 16 or the Children (Scotland) Act 1995 s 86.
- 22 Ie under the Care Standards Act 2000 s 13 (see para 986 ante; and SOCIAL SERVICES AND COMMUNITY CARE).
- 23 Ie under ibid ss 14, 20(1) (see SOCIAL SERVICES AND COMMUNITY CARE).
- 24 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 25.
- 25 Ie under the Children Act 1989 Sch 5 para 1, Sch 6 para 1 or Sch 6 para 4, the Children and Young Persons Act (Northern Ireland) 1968 s 127 or the Children (Northern Ireland) Order 1985, SI 1995/755, arts 80, 82, 96, 98.
- 26 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 26.
- 27 Ie under the Children Act 1989 s 69, the Foster Children Act 1980 s 10, the Children Act 1958 s 4, the Children (Northern Ireland) Order 1995, SI 1995/755, art 110, the Foster Children (Scotland) Act 1984 s 10 or the Children and Young Persons Act 2001 s 59.
- 28 Ie under the Children and Young Persons Act (Northern Ireland) 1968 s 1(3).
- 29 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 27.
- 30 Ie under the Nurseries and Child-Minders Regulation Act 1948 ss 1, 5, the Children Act 1989 Pt X (repealed), Pt XA (as added and amended; prospectively amended) (see para 1070 post), the Children (Northern Ireland) Order 1995, SI 1995/755, Pt XI, the Children and Young Persons Act (Northern Ireland) 1968 ss 11(5), 15, the Regulations of Care (Scotland) Act 2001 or the Children and Young Persons Act 2001 ss 65, 66, 69, Sch 7.
- 31 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 28.
- 32 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule paras 29, 30. The provisions mentioned in the text are the Social Work (Scotland) Act 1968 s 62 or the Regulations of Care (Scotland) Act 2001 ss 7, 12.
- 33 Ie under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, SI 2003/417, art 3.
- 34 Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, Schedule para 31. The text refers to disqualification under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, SI 2003/417, Pt 2.
- 35 Ie barred under the Safeguarding Vulnerable Groups Act 2006 s 3(2) (not yet in force) (see para 685 ante).
- 36 Children Act 1989 s 68(3A)(a) (prospectively added by the Safeguarding Vulnerable Groups Act 2006 s 63(1), Sch 9 para 12). At the date at which this volume states the law, no day had been appointed for the commencement of this provision.

## UPDATE

### 1063 General disqualifications for being private foster parents

NOTES 6, 19--Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

NOTE 17--Heads (1), (2). SI 2004/2695 Schedule paras 1, 2 amended: SI 2008/2691.  
Head (3). SI 2004/2695 Schedule para 3 amended: SI 2009/2541. Head (8). Customs  
Consolidation Act 1876 s 42 amended: Statute Law (Repeals) Act 2008.

NOTE 36--Appointed day is 12 October 2009: SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(11) PRIVATE ARRANGEMENTS FOR FOSTERING CHILDREN/1064. Disqualification of persons living in same household.

#### **1064. Disqualification of persons living in same household.**

A person who lives in the same household as a person who is himself prevented from fostering a child<sup>1</sup>, or lives in a household at which any such person is employed, may not foster a child privately<sup>2</sup>, unless he has disclosed the fact of that person's disqualification to the appropriate local authority<sup>3</sup> and obtained its written consent<sup>4</sup>. As from a day to be appointed a person must not foster a child privately if he lives in the same household as a person who is barred from such activity<sup>5</sup>.

1 He is so prevented under the Children Act 1989 s 68(1): see para 1063 ante. For the meaning of 'child' see para 3 ante.

2 For the meaning of 'foster a child privately' see para 1049 note 1 ante.

3 For the meaning of 'the appropriate authority' see para 1063 note 2 ante. For the meaning of 'local authority' see para 248 note 10 ante.

4 Children Act 1989 s 68(3). An authority refusing consent must give the applicant a written notice informing him of the reason for the refusal, the right of appeal under s 66(5), Sch 8 para 8 (see para 1068 post) against the refusal, and the time within which he may do so: s 68(4).

5 Ibid s 68(3A)(b) (prospectively added by the Safeguarding Vulnerable Groups Act 2006 s 63(1), Sch 9 para 12). At the date at which this volume states the law, no day had been appointed for the commencement of this provision.

#### **UPDATE**

#### **1064 Disqualification of persons living in same household**

NOTE 5--Appointed day is 12 October 2009: SI 2009/2611.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(11) PRIVATE ARRANGEMENTS FOR FOSTERING CHILDREN/1065. Power of local authority to impose requirements.

### **1065. Power of local authority to impose requirements.**

Where a person is fostering any child privately<sup>1</sup>, or proposes to do so, the appropriate local authority<sup>2</sup> may impose on him requirements as to<sup>3</sup>:

- 2544 (1) the number, age and sex of the children who may be privately fostered by him<sup>4</sup>;
- 2545 (2) the standard of accommodation and equipment to be provided for them<sup>5</sup>;
- 2546 (3) the arrangements to be made with respect to their health and safety<sup>6</sup>; and
- 2547 (4) particular arrangements which must be made with respect to the provision of care for them<sup>7</sup>.

It is the duty of the foster parent (or intending foster parent) to comply<sup>8</sup> with any such requirement before the end of such period as the authority may specify<sup>9</sup>. A requirement may be limited to a particular child or class of child<sup>10</sup>. A requirement may be limited by the authority so as to apply only when the number of children fostered by the person exceeds a specified number<sup>11</sup>. Such a requirement must be imposed by notice in writing and addressed to the person on whom it is imposed; and the notice must inform him of the reason for imposing the requirement, his right to appeal against it and the time within which he may do so<sup>12</sup>. A local authority may at any time vary any requirement, impose any additional requirement or remove any requirement<sup>13</sup>.

1 For the meaning of 'foster a child privately' see para 1049 note 1 ante. For the meaning of 'child' see para 3 ante.

2 For the meaning of 'appropriate local authority' see para 1055 note 3 ante.

3 Children Act 1989 s 66(5), Sch 8 para 6(1).

4 Ibid Sch 8 para 6(1)(a).

5 Ibid Sch 8 para 6(1)(b).

6 Ibid Sch 8 para 6(1)(c).

7 Ibid Sch 8 para 6(1)(d).

8 Ie unless, in the case of a proposal, the proposal is not carried out: ibid Sch 8 para 6(1).

9 Ibid Sch 8 para 6(1).

10 Ibid Sch 8 para 6(2).

11 Ibid Sch 8 para 6(3). This does not apply to a requirement under Sch 8 para 6(1)(a) (see head (1) in the text): Sch 8 para 6(3).

12 Ibid Sch 8 para 6(4). As to the right of appeal see Sch 8 para 8; and para 1068 post.

13 Ibid Sch 8 para 6(5).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(11) PRIVATE ARRANGEMENTS FOR FOSTERING CHILDREN/1066. Power of local authority to prohibit private fostering.

### **1066. Power of local authority to prohibit private fostering.**

Where the local authority<sup>1</sup> for the area within which a child<sup>2</sup> is proposed to be, or is being, fostered is of the opinion that the person who proposes to foster the child privately<sup>3</sup> or is doing so is not a suitable person to foster a child, or that the premises in which the child will be, or is being, accommodated are not suitable, or that it would be prejudicial to the welfare of the child for him to be, or continue to be, accommodated by that person in those premises, the authority may impose a prohibition on him<sup>4</sup>. Such a prohibition may prohibit the person concerned from fostering privately:

- 2548 (1) any child in any premises within the authority's area<sup>5</sup>;
- 2549 (2) any child in premises specified in the prohibition<sup>6</sup>; or
- 2550 (3) a child identified in the prohibition, in premises specified in the prohibition<sup>7</sup>.

A prohibition may also be imposed on a person in respect of whom a local authority has imposed a requirement under the statutory provisions<sup>8</sup> in that behalf<sup>9</sup>.

A prohibition must be imposed by notice in writing addressed to the person on whom it is imposed and informing him of the reasons for imposing the prohibition, his right to appeal against the prohibition<sup>10</sup> and the time within which he may do so<sup>11</sup>.

A local authority which has imposed a prohibition may if it thinks fit cancel the prohibition of its own motion or on an application made by the person prohibited, if it is satisfied that the prohibition is no longer justified<sup>12</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'child' see para 3 ante.

3 For the meaning of 'foster a child privately' see para 1049 note 1 ante.

4 Children Act 1989 s 69(1), (2).

5 Ibid s 69(3)(a).

6 Ibid s 69(3)(b).

7 Ibid s 69(3)(c).

8 Ie the provisions of ibid s 66(5), Sch 8 para 6: see para 1065 ante.

9 Ibid s 69(5). However, such a prohibition does not have effect unless the time specified for compliance with the requirement has expired and the requirement has not been complied with: s 69(6).

10 Ie under ibid Sch 8 para 8: see para 1068 post.

11 Ibid s 69(7).

12 Ibid s 69(4).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(11) PRIVATE ARRANGEMENTS FOR FOSTERING CHILDREN/1067. Offences.

## **1067. Offences.**

A person is guilty of an offence if:

- 2551 (1) being required, under any provision made by or under Part IX of the Children Act 1989<sup>1</sup> to give any notice or information, he fails without reasonable excuse to give the notice within the time specified in that provision<sup>2</sup>, or fails without reasonable excuse to give the information within a reasonable time, or makes, or causes or procures another person to make, any statement in the notice or information which he knows to be false or misleading in a material particular<sup>3</sup>;
- 2552 (2) he refuses to allow a privately fostered child<sup>4</sup> to be visited by a duly authorised officer of the local authority<sup>5</sup>;
- 2553 (3) he intentionally obstructs another in the exercise of the power to inspect premises<sup>6</sup>;
- 2554 (4) he contravenes the provisions dealing with disqualification for being a private foster parent<sup>7</sup>;
- 2555 (5) he fails without reasonable excuse to comply with any requirement imposed by a local authority<sup>8</sup>;
- 2556 (6) he accommodates a privately fostered child in any premises in contravention of a prohibition imposed by the local authority<sup>9</sup>; or
- 2557 (7) he knowingly causes to be published, or publishes, an advertisement which he knows contravenes the statutory prohibition<sup>10</sup>.

1 *Ie the Children Act 1989 Pt IX (ss 66-70) (as amended).*

2 Notwithstanding the time limit for proceedings laid down in the Magistrates' Courts Act 1980 s 127(1) (see MAGISTRATES vol 29(2) (Reissue) para 589), proceedings for failure to give notice may be brought at any time within six months after the date when evidence of the offence came to the knowledge of the local authority: Children Act 1989 s 70(7), (8).

For the meaning of 'local authority' see para 248 note 10 ante.

3 *Ibid* s 70(1)(a). This offence is punishable on summary conviction with a fine not exceeding level 5 on the standard scale: s 70(3). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

4 For the meaning of 'privately fostered child' see para 1049 ante. For the meaning of 'child' see para 3 ante.

5 Children Act 1989 s 70(1)(b). This offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: s 70(4).

6 *Ibid* s 70(1)(c). This offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: s 70(4). As to the power to inspect premises see s 67(3); and para 1061 ante.

7 *Ibid* s 70(1)(d). This offence is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both: s 70(5).

As to disqualifications see s 68 (as amended); and paras 1063-1064 ante. However, where a person contravenes s 68(3), he is not guilty of an offence under s 70 if he proves that he did not know, and had no reasonable ground for believing, that any person to whom s 68(1) applies was living or employed in the premises in question: s 70(2).

8 Ibid s 70(1)(e). This offence is punishable on summary conviction by a fine not exceeding level 4 on the standard scale: s 70(6). As to the power of the local authority to impose requirements see para 1065 ante.

9 Ibid s 70(1)(f). This offence is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both: s 70(5). As to the power of the local authority to impose prohibitions see para 1066 ante.

10 Ibid s 70(1)(g). This offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: s 70(4). As to the prohibition on the publication of certain advertisements see Sch 8 para 10; and para 1050 ante.

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### **1068. Appeals.**

A person aggrieved<sup>1</sup> by:

- 2558 (1) a requirement imposed by a local authority<sup>2</sup>;
- 2559 (2) a prohibition imposed by a local authority<sup>3</sup>;
- 2560 (3) a refusal to cancel a prohibition<sup>4</sup>;
- 2561 (4) a refusal of consent to the private fostering of children by a person who would otherwise be disqualified<sup>5</sup>;
- 2562 (5) a refusal to exempt a person from the usual fostering limit<sup>6</sup>;
- 2563 (6) a condition imposed in such an exemption<sup>7</sup>; or
- 2564 (7) a variation or cancellation of such an exemption<sup>8</sup>, may appeal to the court<sup>9</sup>.

The appeal must be made within 14 days from the date on which the person is notified of the matter by which he is aggrieved<sup>10</sup>. Where the appeal falls within head (1), head (6) or head (7) above, the requirement, condition, cancellation or variation in question does not have effect while the appeal is pending<sup>11</sup>.

Where the court allows an appeal against a requirement or prohibition, it may, instead of cancelling the requirement or prohibition, vary it, or allow more time for compliance with it; if an absolute prohibition was imposed, the court may substitute for it a prohibition on using the premises after such time as the court may specify unless such requirements as the local authority had power to impose are complied with<sup>12</sup>. Any requirement or prohibition specified or substituted by a court is deemed for the purposes of Part IX of the Children Act 1989<sup>13</sup> to have been imposed by the local authority<sup>14</sup>. Where it allows an appeal against a refusal to make an exemption, a condition imposed in such an exemption, or a variation or cancellation of such an exemption, the court may make an exemption, impose a condition or vary the exemption<sup>15</sup>.

1 As to persons aggrieved see JUDICIAL REVIEW vol 61 (2010) PARA 664.

2 Children Act 1989 s 66(5), Sch 8 para 8(1)(a). The text refers to a requirement imposed under Sch 8 para 6: see para 1065 ante. For the meaning of 'local authority' see para 248 note 10 ante.

3 Ibid Sch 8 para 8(1)(c). The text refers to a prohibition imposed under s 69: see para 1066 ante.

4 Ibid Sch 8 para 8(1)(d).

5 Ibid Sch 8 para 8(1)(b). The text refers to a refusal of consent under s 68 (as amended): see paras 1063-1064 ante.

6 Ibid Sch 8 para 8(1)(e). The text refers to a refusal under s 63(12), Sch 7 para 4: see para 966 ante. No right of appeal is conferred under Sch 8 para 8(1)(e), (f) or (g) (see head (5), head (6) or head (7) in the text) on a local authority foster parent or a person with whom a child is placed by a voluntary organisation: Sch 8 para 8(8).

7 Ibid Sch 8 para 8(1)(f). See note 6 supra.

8 Ibid Sch 8 para 8(1)(g). See note 6 supra.

9 Ibid Sch 8 para 8(1). For the meaning of 'court' see para 208 ante.

10 Ibid Sch 8 para 8(2).

11 Ibid Sch 8 para 8(3).

12 Ibid Sch 8 para 8(4).

13 Ie other than ibid Sch 8 para 8. The text refers to Pt IX (ss 66-70) (as amended).

14 Ibid Sch 8 para 8(5). The text refers to imposition by the local authority under Sch 8 para 6 or, as the case may be, s 69: see paras 1065-1066 ante.

15 Ibid Sch 8 para 8(6). Any exemption so made or varied, or condition so imposed, is deemed for the purposes of Sch 7 (prospectively amended) (see para 966 ante) (but not for the purposes of Sch 8 para 8) to have been so done under Sch 7 (prospectively amended): Sch 8 para 8(7).

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### **1069. Application of provisions to school children during holidays.**

Where a child<sup>1</sup> under 16 who is a pupil at a school lives at the school<sup>2</sup> during school holidays for a period of more than two weeks, the provisions of Part IX of the Children Act 1989 relating to private fostering<sup>3</sup> apply in relation to the child as if<sup>4</sup>:

- 2565 (1) while living at the school he were a privately fostered child<sup>5</sup>; and
- 2566 (2) certain provisions were omitted<sup>6</sup>.

Where a person proposes to care for and accommodate children at a school in which some or all of them will be treated as private foster children by virtue of this provision<sup>7</sup>, he must, not less than two weeks before the first of those children is so treated during the holiday in question, give written notice of his proposal to the local authority<sup>8</sup> for the area within which the child is ordinarily resident<sup>9</sup>, stating the estimated number of children<sup>10</sup>. However, the local authority may exempt any person from the duty of giving such a notice<sup>11</sup>.

Where a child who is treated as a private foster child by virtue of the above provisions dies, the person caring for him at the school must give written notice of the death within 48 hours to the appropriate local authority<sup>12</sup> and (where reasonably practicable) to each parent of the child and to every person who is not a parent of his but who has parental responsibility<sup>13</sup> for him<sup>14</sup>. Where a child who is treated as a foster child by virtue of these provisions ceases for any other reason to be such a child, the person caring for him at the school must give written notice of the fact to the appropriate local authority<sup>15</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'school' see para 271 note 8 ante.

3 Ie the Children Act 1989 Pt IX (ss 66-70) (as amended): see paras 1049-1069 ante.

4 Ibid s 66(5), Sch 8 para 9(1) (amended by the Care Standards Act 2000 ss 110, 117(2), Sch 6).

5 Children Act 1989 Sch 8 para 9(1)(a). For the meaning of 'privately fostered child' see para 1049 ante.

6 Ibid Sch 8 para 9(1)(b). The text refers to Sch 8 paras 2(1)(c), (d), 6 (see paras 1049, 1065 ante): Sch 8 para 9(1)(b) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (27)(b)). However, this does not apply to a school which is an appropriate children's home: Children Act 1989 Sch 8 para 9(1) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (27)(b)). For the meaning of 'appropriate children's home' see para 877 note 9 ante.

7 Children Act 1989 Sch 8 para 9(2).

8 For the meaning of 'local authority' see para 248 note 10 ante.

9 As to the ordinary residence of a child see the Children Act 1989 s 105(6) (as amended); and para 271 notes 8-9 ante.

10 Ibid Sch 8 para 9(3).

11 Ibid Sch 8 para 9(4). Any such exemption may be granted for a special period or indefinitely and may be revoked at any time by notice in writing given to the person exempted: Sch 8 para 9(5).

- 12 For the meaning of 'appropriate local authority' see para 1055 note 3 ante.
- 13 For the meaning of 'parental responsibility' see para 134 ante.
- 14 Children Act 1989 Sch 8 para 9(6).
- 15 Ibid Sch 8 para 9(7).



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## **(12) CHILD MINDING, CHILD CARE AND DAY CARE**

### **(i) Introduction**

#### **1070. The legislation.**

The law regulating child minding and day care for young children in relation to England, Wales and Scotland was formerly governed by Part X of the Children Act 1989<sup>1</sup>. Part X was repealed in relation to England and Wales by the Care Standards Act 2000<sup>2</sup> and in relation to Scotland by the Regulation of Care (Scotland) Act 2001<sup>3</sup>.

In relation to England and Wales, Part X of the Children Act 1989 was replaced by Part XA of that Act<sup>4</sup>. However, as from a day to be appointed, Part XA is amended by the Childcare Act 2006 so as to apply to Wales only<sup>5</sup>. As from that appointed day, the law regulating child care in England will be mainly governed by the Childcare Act 2006<sup>6</sup>.

1 The Children Act 1989 Pt X (ss 71-79) was repealed by the Care Standards Act 2000 s 79(5) as from 2 July 2001 in relation to England (see the Care Standards Act 2000 (Commencement No 7 (England) and Transitional, Transitory and Savings Provisions) Order 2001, SI 2001/2041, art 2(1)(c)), and as from 1 April 2002 in relation to Wales (see the Care Standards Act 2000 (Commencement No 8 (Wales) and Transitional, Savings and Consequential Provisions) Order 2002, SI 2002/920, art 3(3)(b)).

2 See the Care Standards Act 2000 s 79(5).

3 See the Regulation of Care (Scotland) Act 2001 s 80(1), Sch 4.

4 The Children Act 1989 Pt XA (ss 79A-79X) was added by the Care Standards Act 2000 s 79(1), (2), Sch 3. As to these provisions as they apply in relation to England see paras 1072-1104 post. As to these provisions as they apply in relation to Wales see paras 1163-1187 post.

5 The Children Act 1989 Pt XA (as added) is amended, as from a day to be appointed, by the Childcare Act 2006 s 103(1), Sch 2 paras 4-18. At the date at which this volume states the law no such day had been appointed. As to the Children Act 1989 Pt XA (as added and amended) as it applies in relation to Wales see paras 1163-1187 post.

The Childcare Act 2006 also introduces certain new substantive provisions which will apply to Wales: see Pt 2 (ss 22-30); and paras 1188-1194 post.

6 See *ibid* Pt 1 (ss 1-21), Pt 3 (ss 31-98) (as amended); and paras 1105-1162 post.

### **UPDATE**

#### **1070 The legislation**

TEXT AND NOTES--See Provision of Services Regulations 2009, SI 2009/2999; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 385A.

TEXT AND NOTE 5--Day appointed is 1 September 2008: SI 2008/2261.

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### **1071. Additional powers of inspection.**

The Secretary of State<sup>1</sup> may by order<sup>2</sup> confer on Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> such additional functions specified in the order as the Secretary of State considers necessary or expedient to enable Her Majesty's Chief Inspector to approve persons in accordance with criteria determined by or under a scheme made under the Tax Credits Act 2002<sup>4</sup> for the approval of persons who are to be regarded as providing child care for the purposes of working tax credit<sup>5</sup>.

The Welsh Ministers<sup>6</sup> have any additional function specified in an order made by them which they consider necessary or expedient to enable them to approve persons as mentioned above but the order may only specify a function corresponding to a function which, by virtue of the above provisions, is exercisable by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>7</sup>.

1 As to the Secretary of State see para 155 ante.

2 See the Education (Additional Functions of Her Majesty's Chief Inspector of Schools in England) Order 2003, SI 2003/469.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 See INCOME TAXATION.

5 Education Act 2002 s 151(1) (amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 70, 72).

6 As to the Welsh Ministers see para 155 ante.

7 Education Act 2002 s 151(2) (amended by the Education and Inspections Act 2006 Sch 14 paras 70, 72).

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## **(ii) Child Minding, Child Care and Day Care in England**

### ***A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989***

#### **(A) CHILD MINDERS AND DAY CARE PROVIDERS**

##### **1072. Definition of child minder.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A child minder is someone who looks after one or more children under the age of eight on domestic premises<sup>2</sup> for reward<sup>3</sup>. However, the following people do not act as a child minder when looking after a child:

- 2567 (1) the parent, or a relative, of the child<sup>4</sup>;
- 2568 (2) someone who has parental responsibility for the child<sup>5</sup>;
- 2569 (3) is a local authority foster parent in relation to the child<sup>6</sup>;
- 2570 (4) is a foster parent with whom the child has been placed by a voluntary organisation<sup>7</sup>; or
- 2571 (5) fosters the child privately<sup>8</sup>.

Where a person: (a) looks after a child for the parents ('P1')<sup>9</sup>; or (b) in addition to that work, looks after another child for different parents ('P2')<sup>10</sup>, and the work consists (in a case within head (a) above) of looking after the child wholly or mainly in P1's home or (in a case within head (b) above) of looking after the children wholly or mainly in P1's home or P2's home or both, the work is not to be treated as child minding<sup>11</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 'Domestic premises' means any premises which are wholly or mainly used as a private dwelling and 'premises' includes any area and any vehicle: Children Act 1989 s 79B(6) (ss 79A-79X added by the Care Standards Act 2000 s 79(1)).

3 See the Children Act 1989 s 79A(2) (as added: see note 2 supra). However, the provisions of the Children Act 1989 Pt XA (as added) do not apply in relation to a person who acts as a child minder or provides day care on any premises, unless the period, or the total of the periods, in any day which he spends looking after children or (as the case may be) during which the children are looked after on the premises exceeds two hours: s 79A(7) (as so added). 'Day care' means care provided at any time for children under the age of eight on premises other than domestic premises: s 79A(6) (as so added). In determining whether a person is required to register under Pt XA (as added) for child minding, any day on which he does not act as a child minder at any time between 2 am and 6 pm is to be disregarded: s 79A(8) (as so added).

4 Ibid s 79A(3)(a) (as added: see note 2 supra). For the meaning of 'child' see para 3 ante.

5 Ibid s 79A(3)(b) (as added: see note 2 supra). For the meaning of 'parental responsibility' see para 134 ante.

6 Ibid s 79A(3)(c) (as added: see note 2 supra). For the meaning of 'local authority foster parent' see para 249 note 13 ante. For the meaning of 'local authority' see para 248 note 10 ante.

7 Ibid s 79A(3)(d) (as added: see note 2 supra). For the meaning of 'voluntary organisation' see para 248 note 10 ante.

8 Ibid s 79A(3)(e) (as added: see note 2 supra).

9 Ibid s 79A(4)(a) (as added: see note 2 supra). For the purposes of s 79A(4) (as added), 'parent', in relation to a child includes: (1) a person who is not a parent of the child but has parental responsibility for the child; (2) a person who is a relative of the child: s 79A(5) (as so added).

10 Ibid s 79A(4)(b) (as added: see note 2 supra).

11 Ibid s 79A(4) (as added: see note 2 supra).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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### **1073. Qualification for registration for child minding and day care.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A person is qualified for registration for child minding<sup>2</sup> if:

- 2572 (1) he, and every other person looking after children on any premises<sup>3</sup> on which he is or is likely to be child minding, is suitable to look after children under the age of eight<sup>4</sup>;
- 2573 (2) every person living or employed on the premises in question is suitable to be in regular contact with children under the age of eight<sup>5</sup>;
- 2574 (3) the premises in question are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises<sup>6</sup>; and
- 2575 (4) he is complying with regulations<sup>7</sup> governing child minders and day care providers<sup>8</sup> and with any conditions imposed<sup>9</sup>.

A person is qualified for registration for providing day care<sup>10</sup> on particular premises if:

- 2576 (a) he has made adequate arrangements to ensure that every person (other than himself and the responsible individual<sup>11</sup>) looking after children on the premises is suitable to look after children under the age of eight; and every person (other than himself and the responsible individual) living or working on the premises is suitable to be in regular contact with children under the age of eight<sup>12</sup>;
- 2577 (b) the responsible individual is suitable to look after children under the age of eight, or if he is not looking after such children, is suitable to be in regular contact with them<sup>13</sup>;
- 2578 (c) the premises are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises<sup>14</sup>; and
- 2579 (d) he is complying with regulations governing child minders and day care providers<sup>15</sup> and with any conditions imposed<sup>16</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meaning of 'child minding' see para 1072 ante. For the meaning of 'child' see para 3 ante. Where, for the purposes of determining a person's qualification for registration the registration authority requests any person ('A') to consent to the disclosure to the authority by another person ('B') of any information relating to A which is held by B and is of a prescribed description, and A does not give his consent (or withdraws it after having given it), the registration authority may, if regulations so provide and it thinks it appropriate to do so, regard A as not suitable to look after children under the age of eight, or not suitable to be in regular contact with such children: Children Act 1989 s 79B(5A) (added by the Education Act 2002 s 152, Sch 13 para 1). As to

information of a prescribed description see the Day Care and Child Minding (Suitability) (England) Regulations 2005, SI 2005/2297. The registration authority in relation to England is Her Majesty's Chief Inspector of Education, Children's Services and Skills; and references to the Chief Inspector's area are references to England: Children Act 1989 s 79B(1) (as so added; and amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 9, 13).

3 For the meaning of 'premises' see para 1072 note 2 ante.

4 Children Act 1989 s 79B(3)(a) (s 79B added by the Care Standards Act 2000 s 79(1)).

5 Children Act 1989 s 79B(3)(b) (as added: see note 4 supra).

6 Ibid s 79B(3)(c) (as added: see note 4 supra).

7 'Regulations' means regulations made by the Secretary of State: *ibid* s 79B(7)(a) (as added: see note 4 supra). As to the Secretary of State see para 155 ante.

8 *Ie* regulations under the Children Act 1989 s 79C (as added) : see para 1074 post.

9 *Ibid* s 79B(3)(d) (as added (see note 4 supra); and amended by the Children Act 2004 s 48, Sch 4 paras 1, 2(1)).

10 For the meaning of 'day care' see para 1072 note 3 ante.

11 For these purposes 'the responsible individual' means:

769 (1) in a case of one individual working on the premises in the provision of day care, that person (Children Act 1989 s 79B(5ZA)(a) (s 79B(5ZA) added by the Children Act 2004 s 48, Sch 4 paras 1, 6(c));

770 (2) in a case of two or more individuals so working, the individual so working who is in charge (Children Act 1989 s 79B(5ZA)(b) (as so added)).

12 *Ibid* s 79B(4)(a) (s 79B as added (see note 4 supra); and s 79B(4)(a), (b) substituted by the Children Act 2004 Sch 4 paras 1, 6(a)). For the purposes of head (a) in the text, a person is not treated as working on the premises in question if none of his work is done in the part of the premises in which children are looked after, or he does not work on the premises at times when children are looked after there: s 79B(5) (as added (see note 4 supra); and amended by the Children Act 2004 Sch 4 paras 1, 6(b)).

13 Children Act 1989 s 79B(4)(b) (as added and substituted: see notes 4, 12 supra).

14 *Ibid* s 79B(4)(c) (as added: see note 4 supra).

15 *Ie* regulations under *ibid* s 79C (as added): see para 1074 post.

16 *Ibid* s 79B(4)(d) (as added: see note 4 supra).

## UPDATE

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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#### **1074. Regulations etc governing child minders and day care providers.**

Until a day to be appointed the following provisions apply<sup>1</sup>. The Secretary of State<sup>2</sup> may, after consulting with Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> and any other person he considers appropriate, make regulations<sup>3</sup> governing the activities of registered persons who act as child minders<sup>5</sup>, or provide day care<sup>6</sup>, on premises in England<sup>7</sup>.

The regulations made by the Secretary of State may deal with the following matters (among others):

- 2580 (1) the welfare and development of the children concerned<sup>8</sup>;
- 2581 (2) suitability to look after, or be in regular contact with, children under the age of eight<sup>9</sup>;
- 2582 (3) qualifications and training<sup>10</sup>;
- 2583 (4) the maximum number of children who may be looked after and the number of persons required to assist in looking after them<sup>11</sup>;
- 2584 (5) the maintenance, safety and suitability of premises and equipment<sup>12</sup>;
- 2585 (6) the keeping of records<sup>13</sup>;
- 2586 (7) the provision of information<sup>14</sup>.

If the regulations require any person (other than the registration authority<sup>15</sup>) to have regard to or meet factors, standards and other matters prescribed by or referred to in the regulations, they may also provide for any allegation that the person has failed to do so to be taken into account by the registration authority in the exercise of its functions<sup>16</sup>, or in any proceedings<sup>17</sup>.

Regulations may provide that a registered person who without reasonable excuse contravenes, or otherwise fails to comply with, any requirement of the regulations is guilty of an offence<sup>18</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to the Secretary of State see para 155 ante.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 For the meaning of 'regulations' see para 1073 note 7 ante.

5 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

6 For the meaning of 'day care' see para 1072 note 3 ante.

7 Children Act 1989 s 79C(1) (s 79C added by the Care Standards Act 2000 s 79(1)). In relation to activities on premises in England, the power to make regulations under the Children Act 1989 s 79C(1) (as added) may be exercised so as to confer powers or impose duties on the Chief Inspector in the exercise of his functions under Pt XA (as added): s 79C(4) (as so added). In particular that power may be exercised so as to require or authorise the Chief Inspector, in exercising those functions, to have regard to or meet factors, standards and

other matters prescribed by or referred to in the regulations: s 79C(5) (as so added). As to the regulations that have been made see the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (amended by SI 2005/2303) (see paras 1075-1080 post); and the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296 (amended by SI 2007/197; SI 2007/603) (see para 1084 post).

8 Children Act 1989 s 79C(3)(a) (as added: see note 7 supra).

9 Ibid s 79C(3)(b) (as added: see note 7 supra).

10 Ibid s 79C(3)(c) (as added: see note 7 supra).

11 Ibid s 79C(3)(d) (as added: see note 7 supra).

12 Ibid s 79C(3)(e) (as added: see note 7 supra).

13 Ibid s 79C(3)(f) (as added: see note 7 supra).

14 Ibid s 79C(3)(g) (as added: see note 7 supra).

15 As to the registration authorities see para 1073 note 2 ante.

16 Ie its functions under the Children Act 1989 Pt XA (as added).

17 Ibid s 79C(6) (as added: see note 7 supra). The proceedings mentioned in the text are proceedings under Pt XA (as added): s 79C(6) (as so added).

18 Ibid s 79C(7)(a) (as added: see note 7 supra). Regulations may also provide that a person who is guilty of an offence under s 79C(7)(a) (as added) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79C(7)(b) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante. See the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296 (amended by SI 2007/197; SI 2007/603).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1075. Duty of registered person to comply with national standards for England.

### **1075. Duty of registered person to comply with national standards for England.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A registered person<sup>2</sup> who acts as a child minder<sup>3</sup>, or provides day care<sup>4</sup>, on premises must:

- 2587 (1) meet the requirements of the national standards<sup>5</sup>; and
- 2588 (2) have regard to the supporting criteria<sup>6</sup> applicable to the child care category<sup>7</sup> into which he falls<sup>8</sup>.

In exercising his functions under Part XA of the Children Act 1989<sup>9</sup>, Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>10</sup> must have regard to the national standards and supporting criteria<sup>11</sup> and may take account of this duty imposed on a registered person, and he may take account of any failure or alleged failure of such a person to comply with that duty in any respect or on any occasion<sup>12</sup>. Any allegation that a registered person has failed to comply with the duty in heads (1) and (2) above may be taken into account in any proceedings under Part XA of the Act<sup>13</sup>.

Where the Chief Inspector considers that a registered person has failed to comply with the duty in heads (1) and (2) above he may give notice<sup>14</sup> to the registered person specifying<sup>15</sup>:

- 2589 (a) in what respect that person has failed or is failing to comply with the requirements of heads (1) and (2) above<sup>16</sup>;
- 2590 (b) what action the person should take to comply<sup>17</sup>; and
- 2591 (c) the period within which that person should take action, such period to begin with the date of the notice<sup>18</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 'Registered person' means a person registered under *ibid* Pt XA (as added) as a child minder or a provider of day care: Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 3.

3 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 4(2)(b). as to the national standards see reg 3, Sch 1.

6 'Supporting criteria' means the criteria set out in respect of each national standard in each national standards document: *ibid* reg 3.

7 'Child care category' means each one of the five categories of child minding and day care provision set out in the national standards documents: *ibid* reg 3.

8 *Ibid* reg 4(2)(c).

9 le the Children Act 1989 Pt XA (as added).

10 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

11 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 4(1).

12 Ibid reg 4(1).

13 Ibid reg 4(3).

14 The notice must be given in accordance with ibid reg 8(3) and reg 9 (see paras 1077-1078 post).

15 Ibid reg 8(1).

16 Ibid reg 8(1)(a).

17 Ibid reg 8(1)(b). A registered person must comply with the terms of the notice within the period specified in that notice: reg 8(2). A registered person who, without reasonable excuse, has failed to comply with the requirements of reg 8(2) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 10(1). As to the standard scale see para 132 note 2 ante. Proceedings for this offence may only be taken by the Chief Inspector: reg 10(2).

18 Ibid reg 8(1)(c).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1076. Events to be notified to Her Majesty's Chief Inspector of Education, Children's Services and Skills.

**1076. Events to be notified to Her Majesty's Chief Inspector of Education, Children's Services and Skills.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A registered person<sup>2</sup> must notify Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> of the occurrence of any of the events set out in heads (1) to (11) below and must at the same time provide him with any specified information in respect of that event<sup>4</sup>. Notification must be made where it is reasonably practicable to do so, in advance of the event occurring<sup>5</sup>, and in all other cases as soon as reasonably practicable, but not later than 14 days after the event has occurred<sup>6</sup>.

The following events must be notified to the Chief Inspector:

- 2592 (1) in the case of child minding, a change of:
  - .53 97. (a) any person looking after children on the premises; or
  - 98. (b) any person living or working on the premises<sup>7</sup>;
- .54 2593 (2) in the case of day care, a change of:
  - .55 99. (a) any person in charge<sup>8</sup>;
  - 100. (b) where the day care is provided by a partnership, committee or corporate or unincorporate body whose prime purpose is to provide day care, any person who is a member of that body; and
  - 101. (c) where the day care is provided by a partnership, committee or corporate or unincorporated body whose prime purpose is not the provision of day care, any person who has delegated clearly identifiable and direct responsibility for the provision of day care<sup>9</sup>;
- .56 2594 (3) any change in the name or home address of the registered person and, where day care is provided by a body corporate, any change in the name or registered number of the body corporate or, where day care is provided by a registered charity, any change in the name or registration number of the charity<sup>10</sup>;
- 2595 (4) any change in the child care category applicable to a registered person<sup>11</sup>;
- 2596 (5) any change in the address of the premises<sup>12</sup>;
- 2597 (6) in the case of day care, any change in the facilities to be used for day care that may affect the space available to children and the level of care available to them<sup>13</sup>;
- 2598 (7) any change in the hours during which day care or child minding is provided which will entail the provision of overnight care<sup>14</sup>;
- 2599 (8) any food poisoning affecting two or more children looked after at the premises<sup>15</sup>;
- 2600 (9) any serious accident or injury to or serious illness of or death of any child whilst in the care of a registered person or of any other person on the premises and any serious accident or injury to, or illness of, or death of, any other person on the premises<sup>16</sup>;

- 2601 (10) any allegations of serious harm or abuse against a child committed by any person looking after children at the premises (whether or not committed on the premises, or by any person living, working or employed on the premises, or any abuse alleged to have taken place at the premises<sup>17</sup>;
- 2602 (11) any other event which may affect the suitability of the registered person or any person caring for the children on the premises to look after children<sup>18</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'registered person' see para 1075 note 2 ante.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 6(1), Sch 2. A registered person who, without reasonable excuse, has failed to comply with the requirements of reg 6 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 10(1). Proceedings for this offence may only be taken by the Chief Inspector: reg 10(2). As to the standard scale see para 132 note 2 ante.

5 Ibid reg 6(2)(a). As to where a registered person who, without reasonable excuse, has failed to comply with the requirements of reg 6 see note 4 supra.

6 Ibid reg 6(2)(b). As to where a registered person who, without reasonable excuse, has failed to comply with the requirements of reg 6 see note 4 supra.

7 Ibid reg 6, Sch 2 para 1(1). The information to be provided is the new person's date of birth, full name, any former names or aliases and home address: Sch 2 para 1(2).

8 'Person in charge' means in relation to day care the individual appointed by the registered person as the person in charge of providing actual day care on the premises: ibid reg 3.

9 Ibid Sch 2 para 2(1). The information to be provided is the new person's date of birth, full name, any former names or aliases used by him and his home address: Sch 2 para 2(2).

10 Ibid Sch 2 para 2(3). The information to be provided is the new person's date of birth, full name, any former names or aliases used by him and his home address: Sch 2 para 3.

11 Ibid Sch 2 para 4.

12 Ibid Sch 2 para 5.

13 Ibid Sch 2 para 6.

14 Ibid Sch 2 para 7.

15 Ibid Sch 2 para 8 (amended by SI 2005/2303).

16 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, Sch 2 para 9.

17 Ibid Sch 2 para 11.

18 Ibid Sch 2 para 12.

## UPDATE

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1077. Keeping of records.

### **1077. Keeping of records.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A registered person<sup>2</sup> must:

- 2603 (1) keep at the premises, or another location notified to and agreed by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> all the records specified in heads (i) to (vi) and heads (A) to (E) below<sup>4</sup>;
- 2604 (2) preserve every entry in the records specified in heads (iv), (v) and (vi) below for a period of two years from the date on which the entry was made<sup>5</sup>; and
- 2605 (3) provide the Chief Inspector with copies of such of those records as he may from time to time request<sup>6</sup>.

A registered person who provides day care<sup>7</sup> must keep at the premises, or at another location notified and agreed by the Chief Inspector, all the records specified in heads (A) to (E) below and provide the Chief Inspector with copies of such of those records as he may from time to time request<sup>8</sup>. However, a registered person who provides day care by means of an open access scheme<sup>9</sup> is not required to keep the records specified in heads (i), (ii) and (iv) or head (c) below<sup>10</sup>.

Where the Chief Inspector considers that a registered person has failed to comply with the duty in heads (1), (2) and (3) above he may give notice<sup>11</sup> to the registered person specifying<sup>12</sup>:

- 2606 (a) in what respect that person has failed or is failing to comply with the requirements of heads (1), (2) and (3) above<sup>13</sup>;
- 2607 (b) what action the person should take to comply<sup>14</sup>; and
- 2608 (c) the period within which that person should take action, such period to begin with the date of the notice<sup>15</sup>.

The following records must be kept at the premises and are the particulars required in all cases:

- 2609 (i) the name, home address and date of birth of each child who is looked after on the premises<sup>16</sup>;
- 2610 (ii) the name, home address and telephone number of a parent<sup>17</sup>;
- 2611 (iii) the name, home address and telephone number of any person who will be looking after children on the premises<sup>18</sup>;
- 2612 (iv) a daily record of the names of the children looked after on the premises, their hours of attendance and the names of the persons who looked after them<sup>19</sup>;
- 2613 (v) a record of accidents occurring on the premises<sup>20</sup>;
- 2614 (vi) a record of any medicinal product administered to any child on the premises, including the date and circumstances of its administration, by whom it was administered, including medicinal products which the child is permitted to administer to himself, together with a record of a parent's consent<sup>21</sup>.

The following records must be kept at the premises and are the particulars required where the registered person is providing day care:

- 2615 (A) the name, address and telephone number of the registered person and every other person living or employed on the premises<sup>22</sup>;
- 2616 (B) a statement of the procedure to be followed in the event of a fire or accident<sup>23</sup>;
- 2617 (C) a statement of the procedure to be followed in the event of a child being lost or not collected<sup>24</sup>;
- 2618 (D) a statement of the procedure to be followed where a parent has a complaint about the service provided by the registered person<sup>25</sup>;
- 2619 (E) a statement of the arrangements in place for the protection of children, including arrangements to safeguard the children from abuse or neglect and procedures to be followed in the event of allegations of abuse or neglect<sup>26</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'registered person' see para 1075 note 2 ante.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 7(1)(a).

5 Ibid reg 7(1)(b).

6 Ibid reg 7(1)(c).

7 For the meaning of 'day care' see para 1072 note 3 ante.

8 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 7(2).

9 An 'open access scheme' is a scheme for the provision of day care which does not require: (1) children to be accompanied by a parent or other responsible person while on the premises at which the day care is provided; or (2) children to be escorted by a parent or other responsible person to and from those premises: ibid reg 7(4).

10 Ibid reg 7(3).

11 The notice must be given in accordance with ibid reg 9 (see para 1078 post): reg 8(3). A registered person must comply with the terms of the notice within the period specified in that notice: reg 8(2). A registered person who, without reasonable excuse, has failed to comply with the requirements of reg 8(2) is guilty of an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 10(1). Proceedings for this offence may only be taken by the Chief Inspector: reg 10(2). As to the standard scale see para 132 note 2 ante.

12 Ibid reg 8(1).

13 Ibid reg 8(1)(a).

14 Ibid reg 8(1)(b).

15 Ibid reg 8(1)(c).

16 Ibid Sch 3 para 1.

17 Ibid Sch 3 para 2. 'Parent', in relation to a child, includes any person who is not his parent but who has parental responsibility for him, or who has care of him: reg 3.

18 Ibid Sch 3 para 3.

- 19 Ibid Sch 3 para 4.
- 20 Ibid Sch 3 para 5.
- 21 Ibid Sch 3 para 6.
- 22 Ibid Sch 3 para 7.
- 23 Ibid Sch 3 para 8.
- 24 Ibid Sch 3 para 9.
- 25 Ibid Sch 3 para 10.
- 26 Ibid Sch 3 para 11.

#### **UPDATE**

#### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1078. Service of notices.

### **1078. Service of notices.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A notice may be given by being delivered personally to the registered person<sup>2</sup>, sent by post in a registered letter or by the recorded delivery service or by being transmitted electronically<sup>3</sup>. A notice is transmitted electronically for these purposes where the particulars contained in the notice are transmitted by electronic means from a computer system operated by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> to a computer system operated by the registered person at any number or address used for the purposes of electronic communications notified by that person to the Chief Inspector<sup>5</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'registered person' see para 1075 note 2 ante.

3 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 9(1). For the purposes of the Interpretation Act 1978 s 7, which defines 'service by post', a letter to a registered person enclosing a notice given under the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 9 is deemed to be properly addressed if it is addressed to him at the home address notified to the Chief Inspector on the registered person's application for registration or subsequently: reg 9(2).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, reg 9(3).

### **UPDATE**

#### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1079. Complaints.

## **1079. Complaints.**

Until a day to be appointed the following provisions apply<sup>1</sup>. The registered person<sup>2</sup> must ensure that any complaint<sup>3</sup> made to him is fully investigated<sup>4</sup>. The registered person must as soon as is reasonably practicable, and in any event within 28 days of the date on which the complaint is made, provide to the parent who made the complaint an account of the findings of the investigation into the complaint and of the action, if any, that has been or is to be taken as a result and must, if the parent so requests, confirm the account in written or electronic form<sup>5</sup>. A person registered as a provider of day care must prepare and follow a written procedure for considering complaints made by a parent of any child for whom he provides such care<sup>6</sup>.

The registered person must ensure that a written record is made of any complaint, the action taken in response and the outcome of the investigation and provide on request a summary of any record made to any parent of a child for whom the registered person acts as a child minder or a provider of day care and Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>7</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'registered person' see para 1075 note 2 ante.

3 'Complaint' means a complaint: (1) made in writing or in electronic form; (2) made by a parent of a child in respect of whom the registered person acts as a child minder or as a provider of day care; (3) which relates to one or more of the national standards; (4) made on or after the date of the coming into force of the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996: reg 6A(1) (reg 6A added by SI 2005/2303). The Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996, came into force on 1 September 2003: see reg 1(1).

4 Ibid reg 6A(2) (as added: see note 3 supra). The notice must be given in accordance with reg 8(3) and reg 9 (see para 1078 ante).

5 Ibid reg 6A(3) (as added: see note 3 supra). Nothing in reg 6A(3) (as added) requires the disclosure of any information the disclosure of which is prohibited by any other enactment: reg 6(10) (as so added).

6 Ibid reg 6A(4) (as added: see note 3 supra). The procedure must in particular provide arrangements for the procedure to be made known to any such parent and a copy of the procedure must be supplied by the registered person to such parent on request: reg 6A(5) (as so added).

7 See ibid reg 6A(6), (7) (as added: see note 3 supra). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. The registered person must keep at the premises, or at another location notified to and agreed by the Chief Inspector, the records referred to in reg 6A(6) (as added) and ensure that those records are preserved for a period of ten years from the date on which the record was made: reg 6A(8) (as so added). The registered person must, at the request of the Chief Inspector and within such reasonable time as he may specify, provide the Chief Inspector with a list of all complaints made within such period of time as may be specified by the Chief Inspector and recorded pursuant to reg 6A(6) (as added): reg 6A(9) (as so added). Nothing in reg 6A(7) (as added) requires the disclosure of any information the disclosure of which is prohibited by any other enactment: reg 6A(10) (as so added). The notice must be given in accordance with reg 8(3) and reg 9 (see para 1078 ante).

**UPDATE**

**1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1080. Prohibition on use of corporal punishment.

### **1080. Prohibition on use of corporal punishment.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A registered person<sup>2</sup> must not give corporal punishment<sup>3</sup> to a child for whom he acts as a child minder or provides day care<sup>4</sup> and, so far as is reasonably practicable, must ensure that corporal punishment is not given to any such child by any person looking after children on the premises, any person in charge or any person living or working on the premises<sup>5</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996 (which were made under the Children Act 1989 s 79C (as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'registered person' see para 1075 note 2 ante.

3 For this purpose 'corporal punishment' means anything done for the purpose of punishing the child (whether or not there are reasons for doing it) which, without any justification, would constitute battery: Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/2007, reg 3.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/2007, reg 5(1). A person must not be taken to have given corporal punishment in breach of reg 5(1) if the action was taken for reasons that include averting an immediate danger of personal injury to, or an immediate danger of death of, any person (including the child himself): reg 5(2). A registered person who, without reasonable excuse, has failed to comply with the requirements of reg 5 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 10(1). As to the standard scale see para 132 note 2 ante. Proceedings for this offence may only be taken by Her Majesty's Chief Inspector of Education, Children's Services and Skills: reg 10(2). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

### **UPDATE**

#### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1081. Requirement to register.

## (B) REGISTRATION

### **1081. Requirement to register.**

Until a day to be appointed the following provisions apply<sup>1</sup>. No person can act as a child minder<sup>2</sup> in England unless he is registered<sup>3</sup> for child minding by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup>. Where it appears to the registration authority<sup>5</sup> that a person has contravened this requirement, the authority may serve a notice ('an enforcement notice') on him<sup>6</sup>. An enforcement notice has effect for a period of one year beginning with the date on which it is served<sup>7</sup>. If a person in respect of whom an enforcement notice has effect contravenes the provision requiring him to register<sup>8</sup> without reasonable excuse he is guilty of an offence<sup>9</sup>.

No person may provide day care<sup>10</sup> on any premises unless he is registered<sup>11</sup> for providing day care on those premises by the registration authority<sup>12</sup>. If any person without reasonable excuse contravenes the provision requiring him so to register<sup>13</sup>, he is guilty of an offence<sup>14</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

3 He is registered under the Children Act 1989 Pt XA (as added): see paras 1072-1078 ante, 1082-1093 post.

4 Ibid s 79D(1)(a) (s 79D added by the Care Standards Act 2000 s 79(1)). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 As to the registration authority see para 1073 note 2 ante.

6 Children Act 1989 s 79D(2) (as added: see note 4 supra).

7 Ibid s 79D(3) (as added: see note 4 supra).

8 He is under ibid s 79D(1) (as added): see the text and note 4 supra.

9 Ibid s 79D(4) (as added: see note 4 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79D(7) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

10 References in ibid Pt XA (as added) to a person, so far as relating to the provision of day care, include an unincorporated association: Sch 9A para 5A(1) (Sch 9A added by the Care Standards Act 2000 s 79, Sch 3; and the Children Act 1989 Sch 9A para 5A added by the Children Act 2004 s 48, Sch 4 paras 1, 9). Proceedings for an offence under the Children Act 1989 Pt XA (as added) which is alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in that of any of its members): Sch 9A para 5A(2) (as so added). For the purpose of any such proceedings, rules of court relating to the service of documents are to have effect as if the association were a body corporate: Sch 9A para 5A(3) (as so added). In proceedings for an offence under Pt XA (as added) brought against an unincorporated association, the Criminal Justice Act 1925 s 33 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1281) and the Magistrates' Courts Act 1980 Sch 3 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1161) (procedure) apply as they do in relation to a body corporate: Children Act 1989 Sch 9A para 5A(4)

(as so added). A fine imposed on an unincorporated association on its conviction of an offence under Pt XA (as added) is to be paid out of the funds of the association: Sch 9A para 5A(5) (as so added). If an offence under Pt XA (as added) committed by an unincorporated association is shown to have been committed with the consent or connivance of an officer of the association or a member of its governing body or to be attributable to any neglect on the part of such an officer or member, the officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly: Sch 9A para 5A(6) (as so added).

11 See note 3 supra.

12 Children Act 1989 s 79D(5) (as added: see note 4 supra).

13 *Ibid* s 79D(5) (as added).

14 *Ibid* s 79D(6) (as added: see note 4 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79D(7) (as so added).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1082. Applications for registration.

## **1082. Applications for registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A person who wishes to be registered<sup>2</sup> in relation to child minding<sup>3</sup> and day care<sup>4</sup> for children must make an application to the registration authority<sup>5</sup>. The application must:

- 2620 (1) give prescribed information about prescribed matters<sup>6</sup>; and
- 2621 (2) give any other information which the registration authority reasonably requires the applicant to give<sup>7</sup>.

Where a person provides, or proposes to provide, day care on different premises, he must make a separate application in respect of each of them<sup>8</sup>.

Where the registration authority has sent the applicant notice<sup>9</sup> of its intention to refuse such an application, the application may not be withdrawn without the consent of the authority<sup>10</sup>.

A person who, in such an application, knowingly makes a statement which is false or misleading in a material particular is guilty of an offence<sup>11</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 Ie registered under the Children Act 1989 Pt XA (as added).

3 As to when a person is a child minder see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79E(1) (s 79E added by the Care Standards Act 2000 s 79). As to the registration authority see para 1073 note 2 ante.

6 Children Act 1989 s 79E(2)(a) (as added: see note 5 supra). As to the regulations that have been made see the Child Minding and Day Care (Applications for Registration) (England) Regulations 2001, SI 2001/1829 (amended by SI 2003/1995; SI 2005/1995; SI 2005/2448). The Child Minding and Day Care (Applications for Registration) (England) Regulations 2001, SI 2001/1829, reg 3, Sch 1 (amended by SI 2003/1995; SI 2005/2448) provides that the information to be included in applications includes information relating to:

- 771 (1) where the applicant is an individual, his date of birth, full name and any former name or alias;
- 772 (2) where the applicant is a body corporate whose primary purpose is the provision of day care, its name and any number by which it is registered, together with the date of birth and full name and any former name or alias of any director or trustee and of the person in charge;
- 773 (3) where the applicant is an unincorporated body, a partnership or a committee whose primary purpose is the provision of day care, its name together with the dates of birth, full names and any former names or aliases of all persons responsible for the management of the unincorporated body, partners in the partnership or members of the committee;
- 774 (4) where the applicant is an incorporated or unincorporated body, a partnership or a committee for whom the provision of day care is not its primary purpose, its name and any

registered number, together with the dates of birth, full names and any former names or aliases of all persons who have delegated direct responsibility for the provision of day care by the applicant;

- 775 (5) the dates of birth, full names and any former names or aliases of any associates of the any responsible individual;
- 776 (6) the address at which children are to be looked after and, if different, the addresses of the applicant and the person in charge;
- 777 (7) whether the premises where the children are to be looked after are domestic premises;
- 778 (8) whether the applicant wishes to register as a child minder, or as a provider of day care;
- 779 (9) the proposed hours for which the applicant wishes to provide child minding or day care;
- 780 (10) the relevant experience of the applicant and any responsible individual including any previous work with children or with elderly or disabled people, whether paid or not;
- 781 (11) the number and ages of any children of the applicant and any responsible individual, and of any children for whom either is to be responsible, other than as a child minder or provider of day care, during the hours in which the child minding or day care is to be provided;
- 782 (12) any relevant qualifications of the applicant and any responsible individual;
- 783 (13) details of the employment history of the applicant and any responsible individual;
- 784 (14) the names and addresses of two referees for both the applicant and any responsible individual;
- 785 (15) details of any criminal convictions of the applicant, responsible individual and any person mentioned in heads (1)-(5) supra.

'Date of birth' in the case of a corporate body means the date of incorporation: Child Minding and Day Care (Applications for Registration) (England) Regulations 2001, SI 2001/1829, reg 2. For the meaning of 'responsible individual' see para 1073 note 11 ante.

7 Children Act 1989 s 79E(2)(b) (as added: see note 5 supra). The application should also be accompanied by the prescribed fee: see s 79E(2)(c) (as so added). For the prescribed fee see the Day Care and Child Minding (Registration Fees) (England) Regulations 2005, SI 2005/2301, reg 3 (amended by SI 2007/1769).

8 Children Act 1989 s 79E(3) (as added: see note 5 supra).

9 *le* under *ibid* s 79L(1) (as added): see para 1091 post.

10 *Ibid* s 79E(4) (as added: see note 5 supra).

11 *Ibid* s 79E(5) (as added: see note 5 supra). Such a person is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79E(5) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

## UPDATE

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1083. Disqualification for registration; scope of regulations.

### **1083. Disqualification for registration; scope of regulations.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Regulations<sup>2</sup> may provide for a person to be disqualified for registration<sup>3</sup> for child minding<sup>4</sup> or providing day care<sup>5</sup>. The regulations may, in particular, provide for a person to be disqualified where<sup>6</sup>:

- 2622 (1) he is included in the list kept under the Protection of Children Act 1999<sup>7</sup>;
- 2623 (2) he is subject to a direction<sup>8</sup>, given on the grounds that he is unsuitable to work with children or on grounds relating to his health<sup>9</sup>;
- 2624 (3) an order of a prescribed kind has been made at any time with respect to him<sup>10</sup>;
- 2625 (4) an order of a prescribed kind has been made at any time with respect to any child<sup>11</sup> who has been in his care<sup>12</sup>;
- 2626 (5) a requirement of a prescribed kind has been imposed at any time with respect to such a child, under or by virtue of any enactment<sup>13</sup>;
- 2627 (6) he has at any time been refused registration under Part X or Part XA<sup>14</sup> of the Children Act 1989, or any prescribed enactment, or has had any such registration cancelled<sup>15</sup>;
- 2628 (7) he has been convicted of any offence of a prescribed kind, or has been discharged absolutely or conditionally for any such offence<sup>16</sup>;
- 2629 (8) he has been given a caution in respect of any offence of a prescribed kind<sup>17</sup>;
- 2630 (9) he has at any time been disqualified from fostering a child privately<sup>18</sup>;
- 2631 (10) a prohibition has been imposed on him at any time under the provisions providing a power to prohibit private fostering<sup>19</sup>, or any prescribed enactment<sup>20</sup>; or
- 2632 (11) his rights and powers with respect to a child have at any time been vested in a prescribed authority under a prescribed enactment<sup>21</sup>.

As from a day to be appointed, the regulations may also provide for a person to be disqualified where he is barred from regulated activity relating to children<sup>22</sup>.

Regulations may provide for a person who lives in the same household as a person who is himself disqualified for registration for child minding or providing day care, or in a household at which any such person is employed, to be disqualified for registration for child minding or providing day care<sup>23</sup>. Regulations may provide for a person not to be disqualified for registration<sup>24</sup> by reason of any fact which would otherwise cause him to be disqualified if he has disclosed the fact to the registration authority and the registration authority has consented in writing and has not withdrawn that consent<sup>25</sup>.

A person who is disqualified for registration for providing day care must not provide day care, or be concerned in the management of any provision of day care<sup>26</sup>. No person may employ, in connection with the provision of day care, a person who is disqualified for registration for providing day care<sup>27</sup>.

If any person acts as a child minder at any time when he is disqualified for registration for child minding, or contravenes any of the relevant provisions<sup>28</sup>, he is guilty of an offence<sup>29</sup>.

- 1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.
- 2 For the meaning of 'regulations' see para 1073 note 7 ante.
- 3 As to registration see para 1073 et seq ante.
- 4 As to when a person is a child minder see para 1072 ante.
- 5 Children Act 1989 s 79B(9), Sch 9A para 4(1) (s 79B(9), Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). For the meaning of 'day care' see para 1072 note 3 ante.
- 6 Children Act 1989 Sch 9A para 4(2) (as added: see note 5 supra).
- 7 Ibid Sch 9A para 4(2)(a) (as added (see note 5 supra); prospectively repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10). As to the list kept under the Protection of Children Act 1999 s 1 (as amended; prospectively repealed) see para 648 ante.
- 8 Ie a direction under the Education Act 2002 s 142 (prospectively repealed): see EDUCATION vol 15(2) (2006 Reissue) para 782.
- 9 Children Act 1989 Sch 9A para 4(2)(b) (as added (see note 5 supra); substituted by the Education Act 2002 s 215(1), Sch 21 para 9; and amended by the Childcare Act 2006 ss 102(1), (2)(a)). As from a day to be appointed, this provision is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10. At the date at which this volume states the law no such day had been appointed.
- 10 Children Act 1989 Sch 9A para 4(2)(c) (as added: see note 5 supra).
- 11 For the meaning of 'child' see para 3 ante.
- 12 Children Act 1989 Sch 9A para 4(2)(d) (as added: see note 5 supra).
- 13 Ibid Sch 9A para 4(2)(e) (as added: see note 5 supra). For the purposes of Sch 9A para 4 (as added), 'enactment' means any enactment having effect, at any time, in any part of the United Kingdom: Sch 9A para 4(6) (as so added; and substituted by the Childcare Act 2006 s 102(1), (3)). For the meaning of 'United Kingdom' see para 102 note 7 ante.
- 14 Ie the Children Act 1989 Pt X (ss 71-79) (repealed in relation to England and Wales) and Pt XA (ss 79A-79X) (as added). As from a day to be appointed head (6) in the text also includes where registration has been refused under the Childcare Act 2006 Pt 3 (ss 31-98) (as amended) (see para 1117 et seq post): see the Children Act 1989 Sch 9A para 4(2)(f) (prospectively amended by the Childcare Act 2006 s 103(1), Sch 2 para 18(1), (4)(b)). At the date at which this volume states the law no such day had been appointed.
- 15 Children Act 1989 Sch 9A para 4(2)(f) (as added: see note 5 supra).
- 16 Ibid Sch 9A para 4(2)(g) (as added (see note 5 supra); and amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 Pt 1 paras 59, 61(1), (2), Sch 37 Pt 7). As to absolute and conditional discharges see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40. A conviction in respect of which a probation order was made before 1 October 1992 (which would not otherwise be treated as a conviction) is to be treated as a conviction for the purposes of the Children Act 1989 Sch 9A para 4 (as added): Sch 9A para 4(7) (Sch 9A as so added; and Sch 9A para 4(7) added by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 59, 61(1), (3)).
- 17 Children Act 1989 Sch 9A para 4(2)(ga) (Sch 9A as added (see note 5 supra); and Sch 9A para 4(2)(ga) added by the Childcare Act 2006 s 102(1), (2)(b)). 'Caution' includes a reprimand or warning within the meaning of the Crime and Disorder Act 1998 s 65 (see para 1235 post): Children Act 1989 Sch 9A para 4(6) (as so added; and substituted by the Childcare Act 2006 s 102(1), (3)).
- 18 Children Act 1989 Sch 9A para 4(2)(h) (as added: see note 5 supra). As to fostering children privately see para 1049 et seq ante.
- 19 Ie under ibid s 69 (see para 1066 ante) or under the Foster Children (Scotland) Act 1984 s 10.
- 20 Children Act 1989 Sch 9A para 4(2)(j) (as added: see note 5 supra).

21 Ibid Sch 9A para 4(2)(k) (as added: see note 5 supra).

22 Ibid Sch 9A para 4(2)(ba) (Sch 9A as added (see note 5 supra); and Sch 9A para 4(2)(ba) prospectively added by the Safeguarding Vulnerable Groups Act 2006 s 63(1), Sch 9 Pt 1 para 1). At the date at which this volume states the law no day had been appointed for the commencement of this provision.

23 Children Act 1989 Sch 9A para 4(3) (as added: see note 5 supra). If any person contravenes Sch 9A para 4(3) (as added) he is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: Sch 9A para 5(1)(b) (as so added). As to the standard scale see para 132 note 2 ante. However, until a day to be appointed, such a person is not guilty of an offence if he proves that he did not know, and had no reasonable grounds for believing, that the person in question was living or employed in the household: Sch 9A para 5(2) (as so added; prospectively substituted by the Childcare Act 2006 s 103(1), Sch 2 para 18(1), (5)(c)). At the date at which this volume states the law no such day had been appointed.

24 Regulations may in particular provide for a person not to be disqualified for registration for the purposes of the Children Act 1989 Sch 9A para 4(4), (5) (as added).

25 Ibid Sch 9A para 4(3A) (Sch 9A as added (see note 5 supra); and Sch 9A para 4(3A) added by the Education Act 2002 s 152, Sch 13 para 6; and amended by the Children Act 2004 s 48, Sch 4 paras 1, 5(a)).

26 Children Act 1989 Sch 9A para 4(4) (as added: see note 5 supra). If any person contravenes Sch 9A para 4(4) (as added) he is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: Sch 9A para 5(1)(b) (as so added). However, as from a day to be appointed a person who contravenes Sch 9A para 4(4) (as added) is not guilty of an offence under Sch 9A para 5 (as added) if he is disqualified for registration by virtue only of regulations made under Sch 9A para 4(3) (as added) and he proves that he did not know, and had no reasonable grounds for believing, that he was living in the same household as a person who was disqualified for registration or in a household in which such a person was employed: Sch 9A para 4(2) (Sch 9A as so added; and Sch 9A para 5(2) as substituted (see note 23 supra)).

27 Ibid Sch 9A para 4(5) (as added: see note 5 supra). If any person contravenes Sch 9A para 4(5) (as added) he is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: Sch 9A para 5(1)(b) (as so added). However, such a person is not guilty of an offence if he proves that he did not know, and had no reasonable grounds for believing, that the person whom he was employing was disqualified: Sch 9A para 5(3) (as so added).

28 Ie ibid Sch 9A para 4(5) (as added: see note 5 supra).

29 Ibid Sch 9A para 5(1)(a) (as added: see note 5 supra). A person guilty of an offence under Sch 9A para 5 (as added) is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: Sch 9A para 5(4) (as so added). As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

### **1083 Disqualification for registration; scope of regulations**

NOTE 22--Appointed day is 12 October 2009: SI 2009/2611.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1084. Persons disqualified for registration in England.

#### **1084. Persons disqualified for registration in England.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A person is disqualified<sup>2</sup> from registration in England as a child minder<sup>3</sup> or a provider of day care<sup>4</sup> if:

- 2633 (1) a specified order or determination<sup>5</sup> relating to the care of children has been:
  - .57
  - 102. (a) made against him<sup>6</sup>;
  - 103. (b) preventing him from being registered in relation to any facility in which children are looked after or from being involved in the management of or otherwise concerned with the provision of any such facility<sup>7</sup>;
  - 104. (c) with respect to a child so as to remove the child from him care<sup>8</sup>; or
  - 105. (d) with respect to a child so as to prevent the child from living with him<sup>9</sup>;
  - .58
  - 2634 (2) he has been found to have committed<sup>10</sup>:
    - .59
    - 106. (a) an offence against a child within the meaning of the Criminal Justice and Court Services Act 2000<sup>11</sup>;
    - 107. (b) a specified repealed offence<sup>12</sup> or an offence that is related to such an offence or that falls within other specified repealed offences<sup>13</sup> despite the fact that such offences have been repealed<sup>14</sup>;
    - 108. (c) an offence other than an offence under head (2)(a) or head (2)(b) above involving bodily injury to a child<sup>15</sup>;
    - 109. (d) a specified offence<sup>16</sup> or an offence related to such an offence<sup>17</sup>;
    - .60
    - 2635 (3) he has been:
      - .61
      - 110. (a) found to have committed any offence committed against a person aged 18 or over, mentioned in certain provisions of the Criminal Justice and Court Services Act 2000<sup>18</sup> or an offence that is related to such an offence<sup>19</sup>; or
      - 111. (b) charged with any offence, committed against a person aged 18 or over, as so mentioned in the Criminal Justice and Court Services Act 2000<sup>20</sup> in respect of which a relevant order has been imposed by a senior court<sup>21</sup>;
      - .62
      - 2636 (4) on or after 28 February 2007 he has been found to have done an act which constituted an offence<sup>22</sup> under the law in force in a country outside the United Kingdom and would constitute an offence requiring disqualification under the Day Care and Child Minding (Disqualification) (England) Regulations 2005 if it had been done in any part of the United Kingdom<sup>23</sup>;
      - 2637 (5) he is a person who is included in the list of persons kept under the Protection of Children Act 1999<sup>24</sup> (that is, the list of those considered by the Secretary of State unsuitable to work with children)<sup>25</sup>;
      - 2638 (6) he is a person in respect of whom a direction has been made under the Education Act 2002<sup>26</sup> or an order has been made under the Education and Libraries

(Northern Ireland) Order 1986<sup>27</sup> or the Education and Libraries (Northern Ireland) Order 1987<sup>28</sup>;

2639 (7) he is a person who lives in the same household as a person who is himself disqualified or in a household at which any such person is employed<sup>29</sup>.

A person is not disqualified under head (1) and head (2) above<sup>30</sup> in respect of any order, determination or offence if he has successfully appealed against the order, determination or conviction, a caution in respect of that offence has been withdrawn or set aside or a direction based wholly or in part on that offence has been revoked<sup>31</sup>. A person is not disqualified under head (3)<sup>32</sup> above in respect of any order or offence if he has successfully appealed against the order or conviction, a caution in respect of that offence has been withdrawn or set aside or a direction based wholly or in part on that offence has been revoked<sup>33</sup>. A person is not disqualified under head (4) above in respect of any finding if, under the law in force in the country concerned, such a finding has been reversed<sup>34</sup>.

Where a person would be disqualified by virtue of heads (1) to (4), (6) and (7) above<sup>35</sup> but has disclosed to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>36</sup> the facts that would give rise to the disqualification and the Chief Inspector has given consent in writing to waive the disqualification, that person may not be regarded as disqualified for these purposes<sup>37</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante. Consequently on that day the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296 (which were made under the Children Act 1989 ss 79C, 79M (both as added) and apply to England only) will lapse. At the date at which this volume states the law no such day had been appointed.

2 'Disqualified' means disqualified for registration under the Children Act 1989 Pt XA (ss 79A-79X) for child minding or providing day care: Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 3.

3 As to the meaning of 'child minder' see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 As to the list of orders and determinations see the Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, Sch 1.

6 Ibid reg 4(1), (2)(a).

7 Ibid reg 4(1), (2)(b).

8 Ibid reg 4(1), (2)(c).

9 Ibid reg 4(1), (2)(d).

10 For these purposes, a person has been 'found to have committed' an offence if he has been convicted of an offence or on or after 28 February 2007 he has been: (1) given a caution in respect of an offence by a police officer after he has admitted that offence; (2) found not guilty of an offence by reason of insanity; or (3) found to be under a disability and to have done the act charged against him in respect of such an offence (ibid reg 3(2)(a) (reg 3(2) added by SI 2007/197)). A person has been found to have committed an offence that is 'related to' an offence if on or after 28 February 2007 he has been found to have committed an offence of attempting, conspiring or incitement to commit that offence or aiding, abetting, counselling or procuring the commission of that offence: Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 3(2) (b) (as so added).

11 Ibid reg 4(3) (amended by SI 2007/197). An offence against a child mentioned in the text refers to an offence against a child within the meaning of the Criminal Justice and Court Services Act 2000 s 26(1) (see para 667 ante).

12 Ie an offence listed in the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, Sch 2 para 1.

- 13    le an offence that falls with *ibid* Sch 2 para 2 (amended by SI 2007/197).
- 14    Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 4(4) (amended by SI 2007/197).
- 15    Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 4(5) (amended by SI 2007/197).
- 16    le an offence specified in Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, Sch 3.
- 17    *Ibid* reg 4(6) (amended by SI 2007/197).
- 18    le an offence mentioned in the Criminal Justice and Court Services Act 2000 Sch 4 para 2 (see para 667 ante). A person convicted before 28 February 2007 of any offence, committed against a person aged 18 or over, mentioned in Sch 4 para 2 is not disqualified under the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296 (as amended) unless a qualifying sentence has been imposed by a senior court in respect of that offence and ceases to be disqualified where the rehabilitation period applicable to the conviction under the Rehabilitation of Offenders Act 1974 has expired: Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5(3) (added by SI 2007/197). 'Qualifying sentence' and 'senior court' have the same meanings as in the Criminal Justice and Court Services Act 2000 s 30(1) (see para 663 notes 8-9 ante); and 'rehabilitation period' has the same meaning as in the Rehabilitation of Offenders Act 1974 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 670 et seq): Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 3(1).
- 19    *Ibid* reg 5(1)(a) (amended by SI 2007/197).
- 20    le an offence mentioned in the Criminal Justice and Court Services Act 2000 Sch 4 para 2 (see para 667 ante).
- 21    Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5(1)(b) (amended by SI 2007/197).
- 22    For these purposes, a person has been 'found to have done an act which constituted an offence' if, under the law in force in a country outside the United Kingdom he has been convicted of an offence (whether or not he has been punished for it), he has been cautioned in respect of an offence, a court exercising jurisdiction under that law has made in respect of an offence a finding equivalent to a finding that he is not guilty by reason of insanity or such a court has made in respect of an offence a finding equivalent to a finding that he is under a disability and did the act charged against him: Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5A(2) (reg 5A added by SI 2007/197). An act punishable under the law in force in a country outside the United Kingdom constitutes an offence under that law for these purposes however it is described in that law: Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5A(4) (as so added).
- 23    *Ibid* reg 5A(1) (as added: see note 22 supra). The text refers to the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296 (as amended).
- 24    le the Protection of Children Act 1999 s 1 (as amended; prospectively repealed): see para 648 ante.
- 25    Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 6. As to the Secretary of State see para 155 ante.
- 26    For these purposes, 'direction' means a direction made or which has effect as if made under the Education Act 2002 s 142 (prospectively repealed) (see EDUCATION vol 15(2) (2006 Reissue) para 782) on the grounds set out in s 142(4)(a), (b) or (d): Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 3(1) (amended by SI 2007/197).
- 27    le under the Education and Libraries (Northern Ireland) Order 1986, SI 1986/594, art 70(2)(e).
- 28    Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 7. The text refers to an order made under the Education and Libraries (Northern Ireland) Order 1987, SI 1987/167, art 8.
- 29    Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 8.
- 30    le under *ibid* reg 4(1)-(6) (as amended).
- 31    *Ibid* reg 4(7) (substituted by SI 2007/197).

32 le under the Child Minding and Day Care (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5(1) (as amended).

33 Ibid reg 5(2) (substituted by SI 2007/197).

34 Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 5A(3) (added by SI 2007/197).

35 le under the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 4, 5, 5A, 7 or 8. However, this does not apply in relation to a person who would be disqualified by virtue of reg 7(2), or in relation to a person who would be disqualified by virtue of reg 4(3) where a court has made an order under the Criminal Justice and Court Services Act 2000 s 28(4), 29(4) or s 29A(2) (as added) (see para 663 et seq ante): Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 9(5), (6) (amended by SI 2007/197).

36 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

37 See the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 9(1), (2) (amended by SI 2007/603). See also the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 9(3), (4).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1085. Grant or refusal of registration.

### **1085. Grant or refusal of registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. If, on an application by a person for registration<sup>2</sup> for child minding<sup>3</sup>, the registration authority<sup>4</sup> is of the opinion that the applicant is, and will continue to be qualified for registration for child minding, the authority must grant the application; otherwise, it must refuse it<sup>5</sup>.

If, on an application by any person for registration<sup>6</sup> for providing day care<sup>7</sup> on any premises, the registration authority is of the opinion that the applicant is, and will continue to be, qualified for registration for providing day care on those premises, the authority must grant the application; otherwise, it must refuse it<sup>8</sup>.

An application may, as well as being granted subject to any conditions the authority thinks necessary or expedient for the purpose of giving effect to regulations governing child minders and day care providers<sup>9</sup>, be granted subject to any other conditions the authority thinks fit to impose<sup>10</sup>. The registration authority may, as it thinks fit, vary or remove any condition to which the registration is subject or impose a new condition<sup>11</sup>. A registered person who without reasonable excuse contravenes, or otherwise fails to comply with, any condition imposed on his registration is guilty of an offence<sup>12</sup>.

Any register kept by a registration authority of persons who act as child minders or provide day care must be open to inspection by any person at all reasonable times<sup>13</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 Ie an application under the Children Act 1989 s 79E (as added): see para 1082 ante. A person registered for child minding or for providing day care pursuant s 79F (as added) has a continuing duty to disclose certain information: see the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 10.

3 As to when a person is a child minder see para 1072 ante.

4 As to the registration authority see para 1073 note 2 ante.

5 Children Act 1989 s 79F(1) (added by the Care Standards Act 2000 s 79(1); and amended by the Children Act 2004 ss 48, 69, Sch 4 paras 1, 3(2), Sch 5 Pt 2). The text refers to an applicant being, and continuing to be, qualified for registration for child minding so far as the conditions of the Children Act 1989 s 79B(3) (as added) (see para 1073 ante) are applicable.

6 See note 2 supra.

7 For the meaning of 'day care' see para 1072 note 3 ante.

8 Children Act 1989 s 79F(2) (as added (see note 5 supra); and amended by the Children Act 2004 Sch 4 paras 1, 3(2), Sch 5 Pt 2). The text refers to an applicant being, and continuing to be, qualified for registration for providing day care so far as the conditions of the Children Act 1989 s 79B(4) (as added) are applicable: see para 1073 ante.

9 Ie regulations under ibid s 79C (as added): see para 1074 ante.



10 Ibid s 79F(3) (as added: see note 5 supra).

11 Ibid s 79F(4) (as added: see note 5 supra).

12 Ibid s 79F(6) (as added: see note 5 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79F(7) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

13 Ibid s 79F(5) (as added: see note 5 supra).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1086. Certificates of registration.

### **1086. Certificates of registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. If an application for registration<sup>2</sup> is granted, the registration authority<sup>3</sup> must give the applicant a certificate of registration<sup>4</sup>. A certificate of registration<sup>5</sup> must give prescribed information about prescribed matters<sup>6</sup>. Where, due to a change of circumstances, any part of the certificate requires to be amended, the registration authority must issue an amended certificate<sup>7</sup>. Where the registration authority is satisfied that the certificate has been lost or destroyed, the authority must issue a copy, on payment by the registered person of any prescribed fee<sup>8</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to registration see para 1073 et seq ante.

3 As to the registration authority see para 1073 note 2 ante.

4 Children Act 1989 s 79B(9), Sch 9A para 6(1) (s 79B(9), Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). Regulations may require registered persons to pay to the registration authority at prescribed times an annual fee of a prescribed amount: Children Act 1989 Sch 9A para 7 (as so added). As to the fees prescribed see the Day Care and Child Minding (Registration Fees) (England) Regulations 2005, SI 2005/2301, reg 4 (amended by SI 2007/1769).

5 For the purposes of the Children Act 1989 Pt XA (as added), a person is registered for providing child minding, or for providing day care on any premises, if a certificate of registration to that effect is in force in respect of him: Sch 9A para 6(5) (as added: see note 4 supra). As to when a person is a child minder see para 1072 ante. For the meaning of 'day care' see para 1072 note 3 ante.

6 Ibid Sch 9A para 6(2) (as added: see note 4 supra). As to the information to be provided in certificates of registration see the Child Minding and Day Care (Certificate of Registration) (England) Regulations 2001, SI 2001/1830.

7 Children Act 1989 Sch 9A para 6(3) (as added: see note 4 supra).

8 Ibid Sch 9A para 6(4) (as added: see note 4 supra). As to the prescribed fee see the Day Care and Child Minding (Registration Fees) (England) Regulations 2005, SI 2005/2301, reg 5.

### **UPDATE**

#### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1087. Cancellation of registration.

### **1087. Cancellation of registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. The registration authority<sup>2</sup> may cancel the registration of any person if:

- 2640 (1) in the case of a person registered for child minding<sup>3</sup>, the authority is of the opinion that the person has ceased or will cease to be qualified for registration for child minding<sup>4</sup>; and
- 2641 (2) in the case of a person registered for providing day care<sup>5</sup> on any premises, the authority is of the opinion that the person has ceased or will cease to be qualified for registration for providing day care on those premises<sup>6</sup>,

or if an annual fee which is due from the person has not been paid<sup>7</sup>. Any such cancellation<sup>8</sup> must be in writing<sup>9</sup>.

Where a requirement to make any changes or additions to any services, equipment or premises has been imposed on a registered person<sup>9</sup>, his registration must not be cancelled on the ground of any defect or insufficiency in the services, equipment or premises if<sup>10</sup>: (a) the time set for complying with the requirements has not expired<sup>11</sup>; and (b) it is shown that the defect or insufficiency is due to the changes or additions not having been made<sup>12</sup>. Any cancellation must be in writing<sup>13</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to the registration authority see para 1073 note 2 ante.

3 As to when a person is a child minder see para 1072 ante.

4 Children Act 1989 s 79G(1)(a) (s 79G added by the Care Standards Act 2000 s 79(1)).

5 For the meaning of 'day care' see para 1072 note 3 ante.

6 Children Act 1989 s 79G(1)(b) (as added: see note 4 supra).

7 Ibid s 79G(1) (as added: see note 4 supra).

8 Ie any cancellation under ibid s 79G (as added).

9 Ibid s 79G(3) (as added: see note 4 supra).

10 Ie under ibid s 79F(3) (as added): see para 1085 ante.

11 Ibid s 79G(2) (as added: see note 4 supra).

12 Ibid s 79G(2)(a) (as added: see note 4 supra).

13 Ibid s 79G(2)(b) (as added: see note 4 supra).

**UPDATE**

**1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1088. Suspension of registration.

### **1088. Suspension of registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Regulations<sup>2</sup> may provide for the registration of any person for acting as a child minder<sup>3</sup> or providing day care<sup>4</sup> to be suspended for a prescribed period by the registration authority<sup>5</sup> in prescribed circumstances<sup>6</sup>. Any regulations so made must include provision conferring on the person concerned a right of appeal to the Tribunal<sup>7</sup> against suspension<sup>8</sup>.

A person registered for child minding by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>9</sup> must not act as a child minder in England at a time when that registration is suspended in accordance with the regulations<sup>10</sup>. A person registered for providing day care<sup>11</sup> on any premises must not provide day care on those premises at any time when that registration is so suspended<sup>12</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meaning of 'regulations' see para 1073 note 7 ante. As to regulations that have been made under the Children Act 1989 s 79H(1), (2) (as added) see the Child Minding and Day Care (Suspension of Registration) (England) Regulations 2003, SI 2003/332.

3 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 As to the registration authority see para 1073 note 2 ante.

6 Children Act 1989 s 79H(1) (s 79H added by the Care Standards Act 2000 s 79(1)).

7 As to the Tribunal see para 708 et seq ante.

8 Children Act 1989 s 79H(2) (as added: see note 6 supra).

9 Ie a person registered under *ibid* Pt XA (as added). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

10 *Ibid* s 79H(3) (s 79H as added (see note 6 supra); and s 79H(3)-(6) added by the Education Act 2002 s 152, Sch 13 para 2). If a person contravenes the Children Act 1989 s 79H(3) (as added) without reasonable excuse, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79H(6) (as so added). As to the standard scale see para 132 note 2 ante.

11 Ie a person registered under *ibid* Pt XA (as added).

12 *Ibid* s 79H(5) (as added: see note 10 supra). If a person contravenes s 79H(5) (as added) without reasonable excuse, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79H(6) (as so added). As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

### **1088 Suspension of registration**

TEXT AND NOTES 7, 8--Appeals now lie to the First-tier Tribunal: see the Children Act 1989 s 79H(2) (amended by SI 2008/2833).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1089. Resignation of registration.

### **1089. Resignation of registration.**

Until a day to be appointed the following provisions apply<sup>1</sup>. A person who is registered for acting as a child minder<sup>2</sup> or providing day care<sup>3</sup> may by notice in writing to the registration authority<sup>4</sup> resign his registration<sup>5</sup>. However, a person may not give such a notice:

- 2642 (1) if the registration authority has sent him a notice of its intention to cancel the registration<sup>6</sup>, unless the authority has decided not to take that step<sup>7</sup>; or
- 2643 (2) if the registration authority has sent him a notice of its decision to cancel the registration<sup>8</sup> and the time within which an appeal may be brought has not expired or, if an appeal has been brought, it has not been determined<sup>9</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

3 For the meaning of 'day care' see para 1072 note 3 ante.

4 As to the registration authority see para 1073 note 2 ante.

5 Children Act 1989 s 79J(1) (added by the Care Standards Act 2000 s 79(1)).

6 Ie a notice under the Children Act 1989 s 79L(1) (as added) (see para 1091 post).

7 Ibid s 79J(2)(a) (as added: see note 5 supra).

8 Ie under ibid s 79L(5) (as added) (see para 1091 post).

9 Ibid s 79J(2)(b) (as added: see note 5 supra).

### **UPDATE**

#### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1090. Protection of children in an emergency.

### **1090. Protection of children in an emergency.**

Until a day to be appointed the following provisions apply<sup>1</sup>. If, in the case of any person registered<sup>2</sup> for acting as a child minder<sup>3</sup> or providing day care<sup>4</sup>:

2644 (1) the registration authority<sup>5</sup> applies to a justice of the peace for an order cancelling the registration<sup>6</sup>, varying or removing any condition to which the registration is subject<sup>7</sup>, or imposing a new condition<sup>8</sup>; and

2645 (2) it appears to the justice that a child who is being, or may be, looked after by that person, or (as the case may be) in accordance with the provision for day care made by that person, is suffering, or is likely to suffer, significant harm<sup>9</sup>,

the justice may make the order<sup>10</sup>. Any cancellation, variation, removal or imposition has effect from the time when the order is made<sup>11</sup>. An order must be made in writing<sup>12</sup>. Where an order has been made, the registration authority must, as soon as is reasonably practicable after the making of the order, notify the local authority in whose area the person concerned acts or acted as a child minder, or provides or provided day care, of the making of the order<sup>13</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 le under the Children Act 1989 Pt XA (as added).

3 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 As to the registration authority see para 1073 note 2 ante.

6 See para 1087 ante.

7 See para 1087 ante.

8 Children Act 1989 s 79K(1)(a) (s 79K (added by the Care Standards Act 2000 s 79(1)). An application may be made without notice: Children Act 1989 s 79K(3) (as so added).

9 Ibid s 79K(1)(b) (as added: see note 8 supra).

10 Ibid s 79K(1) (as added: see note 8 supra).

11 Ibid s 79K(2) (as added: see note 8 supra).

12 Ibid s 79K(4) (as added: see note 8 supra).

13 Ibid s 79K(6) (as added: see note 8 supra). Where such an order is made the registration authority must also serve on the registered person, as soon as is reasonably practicable after the making of the order: (1) a copy of the order; (2) a copy of any written statement of the authority's reasons for making the application for the order which supported that application; and (3) notice of any right of appeal conferred by s 79M (as added and amended) (see para 1092 post): s 79K(5) (as so added).



**UPDATE**

**1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1091. Notice of intention to take steps.

### **1091. Notice of intention to take steps.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Not less than 14 days before:

- 2646 (1) refusing an application for registration<sup>2</sup>;
- 2647 (2) cancelling a registration<sup>3</sup>;
- 2648 (3) removing or varying any condition to which a registration is subject or imposing a new condition<sup>4</sup>; or
- 2649 (4) refusing to grant an application for the removal or variation of any condition to which a registration is subject<sup>5</sup>,

the registration authority<sup>6</sup> must send to the applicant or (as the case may be) registered person notice in writing of its intention to take the step in question<sup>7</sup>.

Every such notice must give the authority's reasons for proposing to take the step, and inform the person concerned of his rights under these provisions<sup>8</sup>.

Where the recipient of such a notice informs the authority in writing of his desire to object to the step being taken, the authority must afford him an opportunity to do so<sup>9</sup>. Any objection so made may be made orally or in writing, by the recipient of the notice or a representative<sup>10</sup>. If the authority, after giving the person concerned an opportunity to object to the step being taken, decides nevertheless to take it, it must send him written notice of its decision<sup>11</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 Children Act 1989 s 79L(1)(a) (s 79L added by the Care Standards Act 2000 s 79(1)). As to the refusal of an application for registration see para 1085 ante.

3 Children Act 1989 s 79L(1)(b) (as added: see note 2 supra). As to the cancellation of a registration see para 1087 ante. A step of a kind mentioned in head (2) or head (3) in the text must not take effect until the expiry of the time within which an appeal under s 79M (as added and amended) (see para 1092 post) may be brought or, where such an appeal is brought, before its determination: s 79L(6) (as so added). This does not prevent a step from taking effect before the expiry of the time within which an appeal may be brought if the person concerned notifies the registration authority in writing that he does not intend to appeal: s 79L(7) (as so added).

4 Ibid s 79L(1)(c) (as added: see note 2 supra). As to the removal or variation of any condition, or the imposition of a new condition see para 1089 ante. See note 3 supra.

5 Ibid s 79L(1)(d) (as added: see note 2 supra).

6 As to the registration authority see para 1073 note 2 ante.

7 Children Act 1989 s 79L(1) (as added: see note 2 supra).

8 Ibid s 79L(2) (as added: see note 2 supra).

9 Ibid s 79L(3) (as added: see note 2 supra). If the authority, after giving the person concerned an opportunity to object to the step being taken, decides nevertheless to take it, it must send him written notice of its decision: s 79L(5) (as so added).

10 Ibid s 79L(4) (as added: see note 2 supra).

11 Ibid s 79L(7) (as added: see note 2 supra).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(B) Registration/1092. Appeals.

## **1092. Appeals.**

Until a day to be appointed the following provisions apply<sup>1</sup>. An appeal against:

- 2650 (1) the refusal of an application for registration<sup>2</sup>, the cancellation of a registration<sup>3</sup>, the removal or variation of any condition to which a registration is subject or the imposition of a new condition<sup>4</sup>, or the refusal to grant an application for the removal or variation of any condition to which a registration is subject<sup>5</sup>;
- 2651 (2) an order under the provisions relating to the protection of children in an emergency<sup>6</sup>; or
- 2652 (3) a determination made under Part XA of the Children Act 1989 by the registration authority (other than under head (1) or head (2) above)<sup>7</sup>,

lies to the Tribunal<sup>8</sup>.

On an appeal, the Tribunal may:

- 2653 (a) confirm the taking of the step or the making of the order or direct that it is not to have, or is to cease to have, effect<sup>9</sup>; and
- 2654 (b) impose, vary or cancel any condition<sup>10</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to the refusal of an application for registration see para 1085 ante.

3 As to the cancellation of a registration see para 1087 ante.

4 As to the removal or variation of any condition, or the imposition of a new condition, see para 1090 ante.

5 Children Act 1989 s 79M(1)(a) (s 79M added by the Care Standards Act 2000 s 79(1)). Such an appeal as is mentioned in the Children Act 1989 s 79M(1)(a) (as added) is an appeal against the taking of any of the steps mentioned in s 79L (as added) (see para 1091 ante). As to the refusal to grant an application for the removal or variation of a condition see para 1090 ante.

6 Ibid s 79M(1)(b) (as added: see note 5 supra). As to emergency protection orders under s 79K (as added) see para 1090 ante.

7 Ibid s 79M(1)(c) (s 79M as added (see note 5 supra); and the Children Act 1989 s 79M(1)(c) added by the Education Act 2002 s 148, Sch 13 para 3(1), (2)). As to the Tribunal see para 708 et seq ante. A determination as to whether to give consent under the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 9 (as amended) (see para 1084 ante) is a prescribed condition for the purposes of the Children Act 1989 s 79M(1)(c) (as added): see the Day Care and Child Minding (Disqualification) (England) Regulations 2005, SI 2005/2296, reg 11 (amended by SI 2007/603).

8 Children Act 1989 s 79M(1) (as added: see note 5 supra).

9 Ibid s 79M(2)(a) (as added (see note 5 supra); and amended by the Education Act 2002 Sch 13 para 3(1), (3)).

10 Children Act 1989 s 79M(2)(b) (as added: see note 5 supra).

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

## **1092 Appeals**

TEXT AND NOTES--Appeals now lie to the First-tier Tribunal: see the Children Act 1989 s 79M (amended by SI 2008/2833).

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### **1093. Requirement for certificate of suitability.**

Until a day to be appointed the following provisions apply<sup>1</sup>. These provisions<sup>2</sup> apply to any person not required to register under Part XA of the Children Act 1989<sup>3</sup> who looks after, or provides care for, children<sup>4</sup> when<sup>5</sup>:

- 2655 (1) the period, or the total of the periods, in any week which he spends looking after children or (as the case may be) during which the children are looked after exceeds five hours<sup>6</sup>; and
- 2656 (2) he would be required to register<sup>7</sup> if the children were under the age of eight<sup>8</sup>.

Regulations<sup>9</sup> may require a person to whom these provisions apply to hold a certificate issued by the registration authority<sup>10</sup> as to his suitability, and the suitability of each prescribed person, to look after children<sup>11</sup>. The regulations may make provision about:

- 2657 (a) applications for certificates<sup>12</sup>;
- 2658 (b) the matters to be taken into account by the registration authority in determining whether to issue certificates<sup>13</sup>;
- 2659 (c) the information to be contained in certificates<sup>14</sup>; and
- 2660 (d) the period of their validity<sup>15</sup>.

The regulations may provide that a person to whom these provisions apply is guilty of an offence if he does not hold a certificate as required by the regulations, or if, being a person who holds such a certificate, he fails to produce it when reasonably required to do so by a prescribed person<sup>16</sup>. The regulations may also provide that a person who, for the purpose of obtaining such a certificate, knowingly makes a statement which is false or misleading in a material particular is guilty of an offence<sup>17</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see paras 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 Ie the Children Act 1989 s 79W (as added): see the text and notes 3-17 infra.

3 Ie *ibid* Pt XA (as added).

4 References in *ibid* s 79W (as added) to children are to those under the age of 15 or, in the case of disabled children, 17: s 79W(1) (added by the Care Standards Act 2000 s 79(1)).

5 Children Act 1989 s 79W(1) (as added: see note 4 *supra*).

6 *Ibid* s 79W(2) (as added: see note 4 *supra*).

7 Ie under *ibid* Pt XA (as added).

8 *Ibid* s 79W(3) (as added: see note 4 *supra*).

9 For the meaning of 'regulations' see para 1073 note 7 ante.

10 As to the registration authority see para 1073 note 2 ante.

11 Children Act 1989 s 79W(4) (as added: see note 4 supra).

12 Ibid s 79W(5)(a) (as added: see note 4 supra).

13 Ibid s 79W(5)(b) (as added: see note 4 supra).

14 Ibid s 79W(5)(c) (as added: see note 4 supra).

15 Ibid s 79W(5)(d) (as added: see note 4 supra).

16 Ibid s 79W(6) (as added: see note 4 supra). The regulations may provide that a person guilty of an offence under the regulations is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79W(8) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

17 Ibid s 79W(7) (as added: see note 4 supra). As to the penalty for a person guilty of an offence under the regulations see note 16 supra.

## **UPDATE**

### **1072-1093 Definition of child minder ... Requirement for certificate of suitability**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(C) Inspection of Child Minding and Day Care Provision/1094. General functions of Her Majesty's Chief Inspector of Education, Children's Services and Skills.

## (C) INSPECTION OF CHILD MINDING AND DAY CARE PROVISION

### **1094. General functions of Her Majesty's Chief Inspector of Education, Children's Services and Skills.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> may secure the provision of training for persons who provide or assist in providing child minding or day care<sup>3</sup>, or intend to do so<sup>4</sup>. Regulations<sup>5</sup> may confer further functions on the Chief Inspector relating to child minding and day care provided in England<sup>6</sup>.

1 As from a day to be appointed the Children Act 1989 s 79N (as added) is repealed by the Childcare Act 2006 s 103(1), Sch 2 para 2. At the date at which this volume states the law no such day had been appointed.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 For the meaning of 'child minding' see para 1072 ante. For the meaning of 'day care' see para 1072 note 3 ante.

4 Ibid s 79N(4) (s 79N added by the Care Standards Act 2000 s 79(1)).

5 For the meaning of 'regulations' see para 1073 note 7 ante.

6 Children Act 1989 s 79N(5) (as added: see note 4 supra). The Chief Inspector has the additional function, in prescribed circumstances, of disclosing to parents, the police and various organisations concerned with the provision of care for children, or with protecting them, certain information gathered while regulating child care: see the Child Minding and Day Care (Disclosure Functions) (England) Regulations 2004, SI 2004/3136.

### **UPDATE**

#### **1094-1096 Inspection of Child Minding and Day Care Provision**

Repeal of these provisions in force 1 September 2008: SI 2008/2261.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(C) Inspection of Child Minding and Day Care Provision/1095. Inspection of provision of child minding and day care.

### **1095. Inspection of provision of child minding and day care.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> may at any time require any registered person<sup>3</sup> to provide him with any information connected with the person's activities as a child minder<sup>4</sup>, or provider of day care<sup>5</sup>, which the Chief Inspector considers it necessary to have for the purposes of his functions under Part XA of the Children Act 1989<sup>6</sup>.

The Chief Inspector must:

- 2661 (1) at prescribed intervals inspect any child minding provided in England by a registered person<sup>7</sup>; and
- 2662 (2) at prescribed intervals inspect any day care provided by a registered person on any premises in England<sup>8</sup>.

In prescribing the intervals mentioned in head (1) or head (2) above the Secretary of State may make provision as to the period within which the first inspection of child minding or day care provided by any person or at any premises is to take place<sup>9</sup>. Regulations may make provision requiring a registered person, except in prescribed cases, to notify prescribed persons of the fact that any child minding or day care provided by the registered person is to be inspected<sup>10</sup>.

The Chief Inspector must report in writing when conducting an inspection<sup>11</sup>.

1 As from a day to be appointed the Children Act 1989 s 79Q (as added and amended) is repealed by the Childcare Act 2006 s 103, Sch 2 para 12, Sch 3 Pt 2. At the date at which this volume states the law no such day had been appointed.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 As to registration see para 1073 et seq ante.

4 As to the meaning of 'child minder' see para 1072 ante.

5 For the meaning of 'day care' see para 1072 note 3 ante.

6 Children Act 1989 s 79Q(1) (s 79Q added by the Care Standards Act 2000 s 79(1); and the Children Act 1989 s 79Q(1) amended by the Education Act 2005 s 53, Sch 7 Pt 1 para 3(1), (2)).

7 Children Act 1989 s 79Q(2) (as added (see note 6 supra); and amended by the Education Act 2002 s 148, Sch 13 para 4(1), (2); and the Education Act 2005 ss 53, 123, Sch 7 Pt 1 para 3(1), (3), Sch 19 Pt 1). As to the Secretary of State see para 155 ante. As to the prescribed intervals for inspection see the Day Care and Child Minding (Inspection) (England) Regulations 2005, SI 2005/2300, reg 3.

8 Children Act 1989 s 79Q(3) (as added: (see note 6 supra); and amended by the Education Act 2002 Sch 13 para 4(1), (3); and the Education Act 2005 Sch 7 Pt 1 para 3, Sch 19 Pt 1). As to the prescribed intervals for inspection see the Day Care and Child Minding (Inspection) (England) Regulations 2005, SI 2005/2300, reg 3.

9 Children Act 1989 s 79Q(5) (as added: see note 6 supra).

10 Ibid s 79Q(5A) (s 79Q as added (see note 6 supra); and s 79Q(5A) added by the Education Act 2005 Sch 7 Pt 1 para 3(1), (6)). See also the Day Care and Child Minding (Inspection) (England) Regulations 2005, SI 2005/2300, reg 4.

11 See the Children Act 1989 s 79Q(6) (as added); and para 1096 post.

## **UPDATE**

### **1094-1096 Inspection of Child Minding and Day Care Provision**

Repeal of these provisions in force 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(C) Inspection of Child Minding and Day Care Provision/1096. Reports of inspections.

### **1096. Reports of inspections.**

Until a day to be appointed the following provisions apply<sup>1</sup>. When conducting an inspection<sup>2</sup>, Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> must report in writing on:

- 2663 (1) the quality and standards of the child minding and day care provided<sup>4</sup>;
- 2664 (2) how far the child minding or day care meets the needs of the range of children for whom it is provided<sup>5</sup>;
- 2665 (3) the contribution made by the child minding or day care to the well-being of the children for whom it is provided<sup>6</sup>; and
- 2666 (4) in the case of day care, the quality of leadership and management in connection with its provision<sup>7</sup>.

Once the report of an inspection has been made by the Chief Inspector, he:

- 2667 (a) may send a copy of it to the Secretary of State, and must do so without delay if the Secretary of State requests a copy<sup>8</sup>;
- 2668 (b) must send a copy of it to the registered person providing the child minding or day care that was inspected<sup>9</sup>;
- 2669 (c) must send a copy of it, or of such parts of it as he considers appropriate, to any prescribed authorities or persons<sup>10</sup>; and
- 2670 (d) may arrange for the report (or parts of it) to be further published in any manner he considers appropriate<sup>11</sup>.

1 As from a day to be appointed the Children Act 1989 ss 79Q, 79R (both as added and amended) are repealed by the Childcare Act 2006 s 103, Sch 2 para 12, Sch 3 Pt 2. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Children Act 1989 s 79Q (as added and amended): see para 1095 ante.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Children Act 1989 s 79Q(6)(a) (s 79Q added by the Care Standards Act 2000 s 79(1); and the Children Act 1989 s 79Q(6) substituted by the Education Act 2005 s 53, Sch 7 Pt 1 para 3(1), (7)).

5 Children Act 1989 s 79Q(6)(b) (as added: see note 4 supra).

6 Ibid s 79Q(6)(c) (as added: see note 4 supra). The reference to well-being is a reference to well-being having regard to the matters in the Children Act 2004 s 10(2) (see para 187 ante): Children Act 1989 s 79Q(6A) (s 79Q as so added; and s 79Q(6A) added by the Education Act 2005 Sch 7 Pt 1 para 3(1), (7)).

7 Children Act 1989 s 79Q(6)(d) (as added: see note 4 supra).

8 Ibid s 79R(3)(a) (s 79R added by the Care Standards Act 2000 s 79(1); and the Children Act 1989 s 79R(3) substituted by the Education Act 2005 Sch 7 Pt 1 para 4(1), (3)). Regulations may make provision: (1) requiring a registered person to make a copy of any report sent to him under the Children Act 1989 s 79R(3)(b) (as added and substituted) available for inspection by prescribed persons; (2) requiring a registered person, except in

prescribed cases, to provide a copy of the report to prescribed persons; and (3) authorising a registered person in prescribed cases to charge a fee for providing a copy of the report: s 79R(3A) (added by the Education Act 2005 Sch 7 Pt 1 para 4(1), (4)). As to persons prescribed for the purposes of head (2) *supra* see the Day Care and Child Minding (Inspection) (England) Regulations 2005, SI 2005/2300, reg 5.

9 Children Act 1989 s 79R(3)(b) (as added and substituted: see note 8 *supra*).

10 *Ibid* s 79R(3)(c) (as added and substituted: see note 8 *supra*). As to persons prescribed for the purposes of head (3) in the text see the Day Care and Child Minding (Inspection) (England) Regulations 2005, SI 2005/2300, reg 5. See also reg 6.

11 Children Act 1989 s 79R(3)(d) (as added and substituted: see note 8 *supra*).

## **UPDATE**

### **1094-1096 Inspection of Child Minding and Day Care Provision**

Repeal of these provisions in force 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(D) Rights of Entry/1097. Rights of entry etc.

## (D) RIGHTS OF ENTRY

### 1097. Rights of entry etc.

Until a day to be appointed the following provisions apply<sup>1</sup>. A person authorised for these purposes by the registration authority<sup>2</sup> may at any reasonable time enter any premises<sup>3</sup> on which child minding or day care<sup>4</sup> is at any time provided<sup>5</sup>. Where a such a person has reasonable cause to believe that a child<sup>6</sup> is being looked after on any premises in contravention of Part XA of the Children Act 1989<sup>7</sup>, he may enter those premises at any reasonable time<sup>8</sup>.

A person entering premises<sup>9</sup> may<sup>10</sup>:

- 2671 (1) inspect the premises<sup>11</sup>;
- 2672 (2) inspect, and take copies of any records<sup>12</sup> kept by the person providing the child minding or day care, and any other documents<sup>13</sup> containing information relating to its provision<sup>14</sup>;
- 2673 (3) seize and remove any document or other material or thing found there which he has reasonable grounds to believe may be evidence of a failure to comply with any condition or requirement imposed<sup>15</sup>;
- 2674 (4) require any person to afford him such facilities and assistance with respect to matters within the person's control as are necessary to enable him to exercise his powers<sup>16</sup>;
- 2675 (5) take measurements and photographs or make recordings<sup>17</sup>;
- 2676 (6) inspect any children being looked after there, and the arrangements made for their welfare<sup>18</sup>;
- 2677 (7) interview in private the person providing the child minding or day care<sup>19</sup>; and
- 2678 (8) interview in private any person looking after children, or living or working, there who consents to be interviewed<sup>20</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 le for the purposes of the Children Act 1989 s 79U(1) (as added). As to the registration authority see para 1073 note 2 ante. A person exercising any power conferred by s 79U (as added and amended) must, if so required, produce some duly authenticated document showing his authority to do so: s 79U(6) (s 79U added by the Care Standards Act 2000 s 79(1)) It is an offence wilfully to obstruct a person exercising any such power and any person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Children Act 1989 s 79U(7), (8) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

3 For the meaning of 'premises' see para 1072 note 2 ante.

4 For the meaning of 'child minding' see para 1072 ante. For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79U(1) (as added (see note 2 supra); and the Children Act 1989 s 79U(1) amended by the Education Act 2002 s 152, Sch 13 para 5(1), (2)). If a person attempting to exercise powers under the

Children Act 1989 s 79U (as added and amended) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: see s 102(1), (6)(a) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (22)). As to the application for, and grant of, such a warrant see the Children Act 1989 s 102(2)-(5) (as amended); and para 1061 ante. Authorisation under s 79U(1), (2) (as added) may be given: (1) for a particular occasion or period; (2) subject to conditions: s 79U(2A) (s 79U as so added; and s 79U(2A) added by the Education Act 2002 s 152, Sch 15 para 5(1), (4)).

6 For the meaning of 'child' see para 3 ante.

7 Ie the Children Act 1989 Pt XA (as added).

8 Ibid s 79U(2) (as added (see note 2 supra); and amended by the Education Act 2002 Sch 13 para 5(1), (3)).

9 Ie under the Children Act 1989 s 79U (as added and amended) subject to any conditions imposed under s 79U(2A)(b) (as added) (see note 5 head (2) supra).

10 Ibid s 79U(3) (as added (see note 2 supra); and amended by the Education Act 2002 Sch 13 para 5(1), (5)). The Education Act 2005 s 58 (inspection of computer records) (see EDUCATION vol 15(2) (2006 Reissue) para 1293) applies for the purposes of the Children Act 1989 s 79U (as added and amended) as it applies for the purposes of the Education Act 2005 Pt 1 (ss 1-63) (as amended): Children Act 1989 s 79U(4) (as so added; and amended by the Education Act 2005 s 53, Sch 7 Pt 1 para 6).

11 Children Act 1989 s 79U(3)(a) (as added: see note 2 supra).

12 'Records' includes information recorded in any form: ibid s 79U(9) (as added: see note 2 supra).

13 'Documents' includes information recorded in any form: ibid s 79U(9) (as added: see note 2 supra).

14 Ibid s 79U(3)(b) (as added: see note 2 supra).

15 Ibid s 79U(3)(c) (as added: see note 2 supra). The text refers to any condition or requirement imposed by or under Pt XA (as added): s 79U(3)(c) (as so added).

16 Ibid s 79U(3)(d) (as added: see note 2 supra). The text refers to powers exercised under s 79U (as added and amended): s 79U(3)(d) (as so added).

17 Ibid s 79U(3)(e) (as added: see note 2 supra).

18 Ibid s 79U(3)(f) (as added: see note 2 supra).

19 Ibid s 79U(3)(g) (as added: see note 2 supra).

20 Ibid s 79U(3)(h) (as added: see note 2 supra).

## **UPDATE**

### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(E) Exemptions/1098. Exemption of certain schools.

## (E) EXEMPTIONS

### 1098. Exemption of certain schools.

Until a day to be appointed the following provisions apply<sup>1</sup>. Except in prescribed circumstances<sup>2</sup>, Part XA of the Children Act 1989<sup>3</sup> does not apply to the provision of day care<sup>4</sup> made by:

- 2679 (1) the person carrying on the establishment in question as part of the establishment's activities<sup>5</sup>; or
  - 2680 (2) a person employed to work at that establishment and authorised to make that provision as part of the establishment's activities<sup>6</sup>, for any child looked after in:
- .63**
- 112. (a) a maintained school<sup>7</sup>;
  - 113. (b) a school assisted<sup>8</sup> by a local education authority<sup>9</sup>;
  - 114. (c) a school in respect of which payments are made by the Secretary of State<sup>10</sup> under the Education Act 1996<sup>11</sup>; or
  - 115. (d) an independent school<sup>12</sup>.

**.64**

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to the prescribed circumstances see the Day Care (Application to Schools) (England) Regulations 2003, SI 2003/1992.

3 Ie the Children Act 1989 Pt XA (as added).

4 Ibid s 79B(9), Sch 9A para 1(1) (Sch 9A added by the Care Standards Act 2000 s 79, Sch 3). For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 Sch 9A para 1(2)(a) (as added: see note 4 supra).

6 Ibid Sch 9A para 1(2)(b) (as added: see note 4 supra).

7 Ibid Sch 9A para 1(1)(a) (as added: see note 4 supra). For the purposes of Sch 9A para 1(1) (as added), 'maintained school' has the meaning given by the School Standards and Framework Act 1998 s 20(7) (see EDUCATION vol 15(1) (2006 Reissue) para 94); Children Act 1989 Sch 9A para 1(3) (as so added).

8 For the purposes of ibid Sch 9A para 1(1) (as added), 'assisted' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 45); Children Act 1989 Sch 9A para 1(3) (as added: see note 4 supra).

9 Ibid Sch 9A para 1(1)(b) (as added: see note 4 supra).

10 As to the Secretary of State see para 155 ante.

11 Children Act 1989 Sch 9A para 1(1)(c) (as added: see note 4 supra). As to payments under the Education Act 1996 s 485 see EDUCATION vol 15(1) (2006 Reissue) para 69.

12 Children Act 1989 Sch 9A para 1(1)(d) (as added: see note 4 supra).

**UPDATE**

**1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.



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### **1099. Exemption for other establishments.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Part XA of the Children Act 1989<sup>2</sup> does not apply to provision of day care made by<sup>3</sup>:

- 2681 (1) the department, authority or other person carrying on the establishment in question as part of the establishment's activities<sup>4</sup>; or
  - 2682 (2) a person employed to work at that establishment and authorised to make that provision as part of the establishment's activities<sup>5</sup>, for any child looked after:
- .65**
- 116. (a) in an appropriate children's home<sup>6</sup>;
  - 117. (b) in a care home<sup>7</sup>;
  - 118. (c) as a patient in a hospital (within the meaning of the Care Standards Act 2000)<sup>8</sup>; or
  - 119. (d) in a residential family centre<sup>9</sup>.
- .66**

Part XA of the Children Act 1989 does not apply to provision of day care in a hotel, guest house or other similar establishment for children staying in that establishment where the provision only takes place between 6 pm and 2 am and the person providing the care is doing so for no more than two different clients at the same time<sup>10</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 I.e. the Children Act 1989 Pt XA (as added).

3 Ibid s 79B(9), Sch 9A para 2(1) (Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). For the meaning of 'day care' see para 1072 note 3 ante.

4 Children Act 1989 Sch 9A para 2(2)(a) (as added: see note 3 supra).

5 Ibid Sch 9A para 2(2)(b) (as added: see note 3 supra).

6 Ibid Sch 9A para 2(1)(a) (as added: see note 3 supra). For the meaning of 'appropriate children's home' see para 877 note 9 ante.

7 Ibid Sch 9A para 2(1)(b) (as added: see note 3 supra).

8 Ibid Sch 9A para 2(1)(c) (as added: see note 3 supra). For the meaning of 'hospital' see para 283 note 3 ante.

9 Ibid Sch 9A para 2(1)(d) (as added: see note 3 supra).

10 Ibid Sch 9A para 2A(1) (Sch 9A as added (see note 3 supra); and Sch 9A para 2A added by the Children Act 2004 s 48, Sch 4 paras 1, 7). For these purposes, a 'client' is a person at whose request (or persons at whose joint request) day care is provided for a child: Children Act 1989 Sch 9A para 2A(2) (as so added).

**UPDATE**

**1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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### **1100. Exemption for occasional facilities.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Where day care<sup>2</sup> is provided on particular premises on less than six days in any year<sup>3</sup>, that provision must be disregarded for the purposes of Part XA of the Children Act 1989<sup>4</sup> if the person making it has notified the registration authority<sup>5</sup> in writing before the first occasion on which the premises<sup>6</sup> concerned are so used in that year<sup>7</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meaning of 'day care' see para 1072 note 3 ante.

3 For the purposes of the Children Act 1989 s 79B(9), Sch 9A para 3(1) (as added), 'year' means the year beginning with the day (after the commencement of Sch 9 para 5 (repealed)) on which the day care in question was or is first provided on the premises concerned and any subsequent year: Children Act 1989 Sch 9A para 3(2) (Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3).

4 Ie the Children Act 1989 Pt XA (as added).

5 As to the registration authority see para 1073 note 2 ante.

6 For the meaning of 'premises' see para 1072 note 2 ante.

7 Children Act 1989 Sch 9A para 3(1) (as added: see note 3 supra).

### **UPDATE**

#### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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## (F) OFFENCES

### 1101. Offences.

Until a day to be appointed the following provisions apply<sup>1</sup>. It is an offence:

- 2683 (1) for a registered person, without reasonable excuse, to contravene, or otherwise fail to comply with, any requirement of any regulations governing child minders and day care providers<sup>2</sup>;
- 2684 (2) for a person, in respect of whom an enforcement notice has effect, to act as a child minder unless he is registered under Part XA of the Children Act 1989<sup>3</sup> for child minding<sup>4</sup>;
- 2685 (3) for a person to provide day care on premises unless he is registered under Part XA of the Children Act 1989 for providing day care on those premises by the registration authority<sup>5</sup>;
- 2686 (4) for a person who, in an application for registration<sup>6</sup>, knowingly makes a statement which is false or misleading in a material particular<sup>7</sup>;
- 2687 (5) for a person to act as a child minder at any time when he is disqualified for registration for child minding<sup>8</sup>;
- 2688 (6) for a person to contravene the provision<sup>9</sup> that provides that regulations may provide for a person who lives in the same household as a person who is himself disqualified for registration for child minding or providing day care, or in a household at which any such person is employed, to be disqualified for registration for child minding or providing day care<sup>10</sup>;
- 2689 (7) for a person who is disqualified for registration for providing day care to provide day care, or to be concerned in the management of, or have any financial interest in, any provision of day care<sup>11</sup>;
- 2690 (8) for a person to employ, in connection with the provision of day care, a person who is disqualified for registration for providing day care<sup>12</sup>;
- 2691 (9) for a registered person, without reasonable excuse, to contravene or otherwise fail to comply with any condition imposed on his registration<sup>13</sup>;
- 2692 (10) for a person who is required to hold a certificate of suitability<sup>14</sup> not to hold such a certificate or to fail to produce it when reasonably required to do so by a prescribed person<sup>15</sup>; or
- 2693 (11) for a person who, for the purpose of obtaining a certificate of suitability knowingly to make a statement which is false or misleading in a material particular<sup>16</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 See the Children Act 1989 s 79C(7)(a) (as added); and para 1074 ante. For the meaning of 'day care' see para 1072 note 3 ante.

3 *Ibid* Pt XA (as added).

4 See ibid s 79D(4) (as added); and para 1081 ante. As to when a person is a child minder see para 1072 ante.

5 See ibid s 79D(5) (as added); and para 1081 ante. As to the registration authority see para 1073 note 2 ante.

6 Ie an application for registration under ibid Pt XA (as added): see para 1082 ante.

7 See ibid s 79E(5) (as added); and para 1082 ante.

8 See ibid Sch 9A para 5(1) (as added); and para 1083 ante.

9 Ie ibid Sch 9A para 4(3) (as added): see para 1083 ante.

10 See ibid Sch 9A paras 4(3), 5(1) (as added); and para 1083 ante.

11 See ibid Sch 9A paras 4(4), 5(1) (as added); and para 1083 ante.

12 See ibid Sch 9A paras 4(4), 5(1) (as added); and para 1083 ante.

13 See ibid s 79F(6) (as added); and para 1085 ante.

14 Ie required by regulations made under ibid s 79W (as added): see para 1093 ante.

15 See ibid s 79W(6) (as added); and para 1093 ante.

16 See ibid s 79W(7) (as added); and para 1093 ante.

## **UPDATE**

### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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### **1102. Time limit for proceedings.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Proceedings for an offence under Part XA of the Children Act 1989<sup>2</sup> or regulations<sup>3</sup> made under that Part may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge<sup>4</sup>. However, no such proceedings may be brought<sup>5</sup> more than three years after the commission of the offence<sup>6</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 Ie the Children Act 1989 Pt XA (as added).

3 For the meaning of 'regulations' see para 1073 note 7 ante.

4 Children Act 1989 s 79X (added by the Care Standards Act 2000 s 79(1)).

5 Ie by virtue of the Children Act 1989 s 79X (as added).

6 Ibid s 79X (as added: see note 4 supra).

### **UPDATE**

#### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(G) Role of Local Authorities/1103. Function of local authorities.

## (G) ROLE OF LOCAL AUTHORITIES

### **1103. Function of local authorities.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Each local authority<sup>2</sup> must, in accordance with regulations<sup>3</sup>, secure the provision<sup>4</sup>:

- 2694 (1) of information and advice about child minding<sup>5</sup> and day care<sup>6</sup>; and
- 2695 (2) of training for persons who provide or assist in providing child minding or day care<sup>7</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 For the meaning of 'local authority' see para 248 note 10 ante.

3 For the meaning of 'regulations' see para 1073 note 7 ante. As to such regulations see the Day Care and Child Minding (Functions of Local Authorities: Information, Advice and Training) (England) Regulations 2001, SI 2001/2746 (amended by SI 2005/2302).

4 Children Act 1989 s 79V (added by the Care Standards Act 2000 s 79(1)).

5 As to when a person is a child minder see para 1072 ante.

6 Children Act 1989 s 79V(a) (as added: see note 4 supra). For the meaning of 'day care' see para 1072 note 3 ante.

7 Ibid s 79V(b) (as added: see note 4 supra).

## **UPDATE**

### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.

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#### **1104. Co-operation between authorities.**

Until a day to be appointed the following provisions apply<sup>1</sup>. Where it appears to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> that any local authority<sup>3</sup> in England could, by taking any specified action, help in the exercise of any of his functions under Part XA of the Children Act 1989<sup>4</sup>, he may request the help of that authority specifying the action in question<sup>5</sup>. An authority whose help is so requested must comply with the request if it is compatible with its own statutory or other duties and obligations and does not unduly prejudice the discharge of any of its functions<sup>6</sup>.

1 As from a day to be appointed the Children Act 1989 Pt XA (ss 79A-79X) (as added) is amended by the Childcare Act 2006 s 103(1), Sch 2 paras 5-16 so as to apply to Wales only: see para 1070 ante, 1163 et seq post. At the date at which this volume states the law no such day had been appointed. As to the provisions that will then apply in relation to England see para 1105 et seq post.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 For the meaning of 'local authority' see para 248 note 10 ante.

4 Ie the Children Act 1989 Pt XA (as added).

5 Ibid s 79B(9), Sch 9A para 8(1) (s 79B(9), Sch 9A para 8 added by the Care Standards Act 2000 s 79(1), (2), Sch 3).

6 Children Act 1989 Sch 9A para 8(3) (as added: see note 5 supra).

#### **UPDATE**

#### **1097-1104 Rights of entry etc ... Co-operation between authorities**

As from 1 September 2008, these provisions do not apply to England: see SI 2008/2261.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(A) General Functions and Provision of Child Care/1105. Duties imposed by the Childcare Act 2006.

## ***B. CHILD CARE UNDER THE CHILDCARE ACT 2006***

### **(A) GENERAL FUNCTIONS AND PROVISION OF CHILD CARE**

#### **1105. Duties imposed by the Childcare Act 2006.**

The Childcare Act 2006, much of which is not yet in force, imposes duties on local authorities in relation to children<sup>1</sup>. The Childcare Act 2006 applies to England and Wales<sup>2</sup>: Part 1 of the Act<sup>3</sup> imposes duties on English local authorities<sup>4</sup> and Part 2 of the Act<sup>5</sup> imposes them on Welsh local authorities<sup>6</sup>.

<sup>1</sup> As to the general regulation of child care provision in England under the Childcare Act 2006 see Pt 3 (ss 31-98) (as amended); and para 1117 et seq post.

<sup>2</sup> The Childcare Act 2006 applies to England and Wales only, except in relation to any amendments or repeals made by the Act which apply to the same extent as the provision amended or repealed: see s 111(2), (3). Part 1 (ss 1-21), Pt 3 (ss 31-98) (as amended), and Pt 4 (ss 99-111) in their application to the Isles of Scilly, have effect subject to such exceptions, adaptations and modifications as the Secretary of State may by order prescribe: s 108. At the date at which this volume states the law no such order had been made. As to the Secretary of State see para 155 ante.

There must be paid out of money provided by Parliament any expenses incurred by a Minister of the Crown or government department under or by virtue of the Childcare Act 2006 and any increase attributable to the Childcare Act 2006 in the sums which under any other Act are payable out of money so provided: s 107.

<sup>3</sup> *le ibid* Pt 1 (ss 1-21): see para 1106 et seq post. Sections 99, 100 (see para 1116 post) also impose duties in relation to England only.

<sup>4</sup> 'English local authority' means: (1) a county council in England; (2) a metropolitan district council; (3) a non-metropolitan district council for an area for which there is no county council; (4) a London borough council; (5) the Common Council of the City of London (in its capacity as a local authority); (6) the Council of the Isles of Scilly: *ibid* s 106. As to local government areas and authorities see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

The Education Act 1996 s 496 (powers of Secretary of State to prevent unreasonable exercise of functions: see EDUCATION vol 15(1) (2006 Reissue) para 57) applies in relation to an English local authority and the powers conferred or duties imposed on it by or under the Childcare Act 2006 Pt 1 as it applies in relation to a local education authority in England and the powers conferred or duties imposed on it by or under the Education Act 1996: Childcare Act 2006 s 15(1). The Education Act 1996 s 497 (general default powers: see EDUCATION vol 15(1) (2006 Reissue) para 58) applies in relation to the duties imposed on an English local authority by or for the purposes of the Childcare Act 2006 Pt 1 as it applies in relation to the duties imposed on a local education authority in England by or for the purposes of the Education Act 1996: Childcare Act 2006 s 15(2). The Education Act 1996 s 497A (as added) (power to secure proper performance of local education authority's functions: see EDUCATION vol 15(1) (2006 Reissue) para 56) applies in relation to an English local authority's functions under the Childcare Act 2006 Pt 1 as it applies in relation to the functions of a local education authority in England mentioned in the Education Act 1996 s 497A(1) (as added): Childcare Act 2006 s 15(3). The Education Act 1996 ss 497AA, 497B (both as added) (see EDUCATION vol 15(1) (2006 Reissue) para 56) apply accordingly where powers under s 497A (as added) are exercised in relation to any of the functions of an English local authority under the Childcare Act 2006 Pt 1: s 15(4). In the application of the Education Act 1996 ss 497A(2)-(7), 497AA, 497B (all as added) in relation to an English local authority's functions under the Childcare Act 2006 Pt 1, references to the local education authority are to be read as references to the local authority: s 15(5). In the Education Act 1996 s 497A(5) (as added), the reference to functions to which s 497A

(as added) applies includes (for all purposes) functions of an English local authority under the Childcare Act 2006 Pt 1: s 15(6).

5     Ie *ibid* Pt 2 (ss 22-30): see para 1189 et seq post. Section 101 (see para 1194 post) also imposes duties in relation to Wales only.

6     'Welsh local authority' means a county council or county borough council in Wales: *ibid* s 106. As to local government areas and authorities see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

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### **1106. General duties of English local authorities.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An English local authority must improve the well-being of young children<sup>2</sup> in its area and reduce inequalities between young children in its area in relation to matters relating to their well-being<sup>3</sup>.

'Well-being', in relation to children, means their well-being so far as relating to:

- 2696 (1) physical and mental health and emotional well-being<sup>4</sup>;
- 2697 (2) protection from harm and neglect<sup>5</sup>;
- 2698 (3) education, training and recreation<sup>6</sup>;
- 2699 (4) the contribution made by them to society<sup>7</sup>;
- 2700 (5) social and economic well-being<sup>8</sup>.

The Secretary of State may, in accordance with regulations<sup>9</sup>, set targets<sup>10</sup> for: (a) the improvement of the well-being of young children in the area of an English local authority<sup>11</sup>; (b) the reduction of inequalities between young children in the area of an English local authority in relation to the matters relating to their well-being<sup>12</sup>.

In exercising their functions, an English local authority must act in the manner that is best calculated to secure that any targets set by the regulations (so far as relating to the area of the local authority) are met<sup>13</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 1 had only been brought into force for the purpose of making regulations: see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(a).

2 For these purposes and the purposes of the Childcare Act 2006 Pt 3 (ss 31-98) (as amended), a child is a 'young child' during the period beginning with his birth and ending immediately before 1 September next following the date on which he attains the age of five: ss 19, 21. 'Child' means a person under the age of 18: s 106.

3 Ibid s 1(1). The text refers to the matters mentioned in s 1(2): see heads (1)-(5) in the text. In performing their duties under s 1, an English local authority must have regard to any guidance given from time to time by the Secretary of State: s 1(5). For the meaning of 'English local authority' see para 1105 note 4 ante. As to the Secretary of State see para 155 ante.

4 Ibid s 1(2)(a).

5 Ibid s 1(2)(b).

6 Ibid s 1(2)(c).

7 Ibid s 1(2)(d).

8 Ibid s 1(2)(e).

9 Any power to make an order or regulations under the Childcare Act 2006 is exercisable by statutory instrument (s 104(1)) and includes power to make different provision for different cases or areas, to make provision generally or in relation to specific cases, and to make incidental, supplementary, saving or transitional

provision (s 104(2)). A statutory instrument containing an order or regulations made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament but not in relation to an order under s 109(2) or to which s 109(3) applies: s 105(1), (2). A statutory instrument which contains (whether alone or with other provisions) an order under s 5 (see para 1107 post), s 41(4) (see para 1122 post) or s 94 (see para 1130 post) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 105(3).

10 The Secretary of State may not set targets under *ibid* s 1(3) in respect of a particular English local authority more frequently than once in each calendar year: Local Authority Targets (Well-being of Young Children) Regulations 2007, SI 2007/1415, reg 2. A target must be set by reference to one or more of the foundation stage assessment scales: reg 3. 'Foundation stage assessment scales' means the assessment scales described in the Foundation Stage Profile Handbook (January 2003) published by the Qualifications and Curriculum Authority: reg 1. Prior to setting a target in relation to an English local authority, the Secretary of State must:

786 (1) notify the authority that he is proposing to set the target by a date specified in the notification, such date not to be less than two months from the date of notification and of a date, such date not to be less than one month from the date of notification, by which the authority's proposed target and any representations in respect of the target may be submitted (reg 4(a)); and

787 (2) have regard to any target proposed by the authority and any representations submitted (reg 4(b)).

Where the Secretary of State proposes to set a target which is different from a target which has been proposed by an English local authority, he must give the authority an account of his reasons and specify a date by which further representations may be submitted: reg 5.

11 Childcare Act 2006 s 1(3)(a).

12 *Ibid* s 1(3)(b).

13 *Ibid* s 1(4).

## UPDATE

### **1106-1109 General duties of English local authorities ... Duty to secure sufficient child care for working parents**

These provisions are in force by 1 April 2008 for all purposes: SI 2008/785.

### **1106 General duties of English local authorities**

NOTE 10--SI 2007/1415 regs 1, 3 amended: SI 2008/1437.

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### **1107. Duty to provide early childhood services.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. For the purpose of its general duty<sup>2</sup>, an English local authority<sup>3</sup> has the following further duties<sup>4</sup>. The authority must make arrangements to secure that early childhood services<sup>5</sup> in its area are provided in an integrated manner which is calculated to facilitate access to those services and maximise the benefit of those services to parents<sup>6</sup>, prospective parents<sup>7</sup> and young children<sup>8</sup>.

The authority must take steps:

- 2701 (1) to identify parents or prospective parents in the authority's area who would otherwise be unlikely to take advantage of early childhood services that may be of benefit to them and their young children<sup>9</sup>; and
- 2702 (2) to encourage those parents or prospective parents to take advantage of those services<sup>10</sup>.

An English local authority must take all reasonable steps to encourage and facilitate the involvement in the making and implementation of arrangements of parents and prospective parents in its area, early years providers in its area, including those in the private and voluntary sectors and other persons engaged in activities which may improve the well-being of young children in its area<sup>11</sup>.

In discharging these duties<sup>12</sup> an English local authority must have regard to:

- 2703 (a) such information about the views of young children as is available to the local authority and appears to it to be relevant to the discharge of those duties<sup>13</sup>;
- 2704 (b) any guidance given from time to time by the Secretary of State<sup>14</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 2, 3, 5 had not been brought into force.

2 Ie the duty under *ibid* s 1 (see para 1106 ante).

3 For the meaning of 'English local authority' see para 1105 note 4 ante.

4 Childcare Act 2006 s 3(1).

5 'Early childhood services', in relation to an English local authority, means: (1) early years provision; (2) the social services functions of the local authority, so far as relating to young children, parents or prospective parents; (3) health services relating to young children, parents or prospective parents; (4) the provision, under arrangements made under the Employment and Training Act 1973 s 2 (see EMPLOYMENT vol 40 (2009) PARA 563), of assistance to parents or prospective parents; (5) the service provided by the local authority under the Childcare Act 2006 s 12 (duty to provide information and assistance: see para 1114 post) so far as relating to parents or prospective parents: s 2(1).

The Secretary of State may by order amend the above definition of 'early childhood services' and in connection with any such amendment make such other amendments of s 2 or s 4 as appear to him to be necessary: s 5. At the date at which this volume states the law no such order had been made.

For the purposes of Pt 1, 'early years provision' means the provision of child care for a young child: s 20. For the meaning of 'young child' see para 1106 note 2 ante. For the meaning of 'child care' see para 1109 note 3 post. As to the Secretary of State see para 155 ante.

6 'Parent' means a parent of a young child, and includes any individual who has parental responsibility for a young child or has care of a young child: *ibid* s 2(2). For the meaning of 'parental responsibility' see para 134 ante (definition applied by s 106).

7 'Prospective parent' means a pregnant woman or any other person who is likely to become or is planning to become a parent: *ibid* s 2(2).

8 *Ibid* s 3(2).

9 *Ibid* s 3(3)(a).

10 *Ibid* s 3(3)(b).

11 *Ibid* s 3(4). For the meaning of 'well-being' see para 1106 ante.

12 *Ie* their duties under *ibid* s 3.

13 *Ibid* s 3(5).

14 *Ibid* s 3(6).

## **UPDATE**

### **1106-1109 General duties of English local authorities ... Duty to secure sufficient child care for working parents**

These provisions are in force by 1 April 2008 for all purposes: SI 2008/785.

### **1107 Duty to provide early childhood services**

TEXT AND NOTES--English local authorities and others also have duties in relation to children's centres: see PARA 1107A.

NOTE 11--In deciding what arrangements to make under s 3(4), an English local authority must in particular have regard to (1) the quantity and quality of early childhood services that are provided, or that the authority expects to be provided, in its area; and (2) where in that area those services are provided or expected to be provided: Childcare Act 2006 s 3(4A) (added by Apprenticeships, Skills, Children and Learning Act 2009 s 201).

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### **1107A. Duty to provide children's centres.**

Arrangements made by an English local authority under Childcare Act 2006 s 3(2) (see PARA 1107) must, so far as is reasonably practicable, include arrangements for sufficient provision of children's centres to meet local need: Childcare Act 2006 s 5A(1) (ss 5A-5G added by Apprenticeships, Skills, Children and Learning Act 2009 s 198). A 'children's centre' is a place, or a group of places, (1) which is managed by or on behalf of, or under arrangements made with, an English local authority, with a view to securing that early childhood services in its area are made available in an integrated manner; (2) through which each of the early childhood services is made available; and (3) at which activities for young children are provided, whether by way of early years provision or otherwise: Childcare Act 2006 s 5A(4), 5G. A service is made available by providing the service or by providing advice and assistance to parents and prospective parents on gaining access to the service: Childcare Act 2006 s 5A(5). 'Local need' is the need of parents, prospective parents, and young children in the authority's area: Childcare Act 2006 s 5A(2). In determining what provision of children's centres is sufficient to meet local need, an authority may have regard to any children's centres that are provided outside its area or that it expects to be provided outside its area: Childcare Act 2006 s 5A(3). A children's centre provided by virtue of the above provisions is to be known as a Sure Start Children's Centre: Childcare Act 2006 s 5A(7). As to the use of guidance issued under Childcare Act 2006 s 3(6) (see PARA 1107) in relation to the provision of early childhood services see Childcare Act 2006 s 5A(6).

Regulations may make provision about the staffing, organisation and operation of children's centres: see Childcare Act 2006 s 5B. A local authority must ensure that each children's centre for which it is responsible has an advisory board: see Childcare Act 2006 s 5C. A local authority must secure that appropriate consultation is carried out before establishing or closing a children's centre, or making a significant change in the services provided through a centre: see Childcare Act 2006 s 5D. A local authority and its relevant partners must also consider whether early childhood services to be provided by them should be provided through a children's centre: see Childcare Act 2006 s 5E.

Her Majesty's Chief Inspector of Education, Children's Services and Skills ('the Chief Inspector') must inspect a children's centre at prescribed intervals or at any time when the Secretary of State requires him to do so: see Childcare Act 2006 ss 98A, 98G (ss 98A-98G added by Apprenticeships, Skills, Children and Learning Act 2009 s 199). The Chief Inspector has the power of entry and related powers for the purpose of conducting an inspection (see Childcare Act 2006 s 98D), and it is an offence punishable on summary conviction by a fine not exceeding level 4 on the standard scale to intentionally obstruct the exercise of those powers (see Childcare Act 2006 s 98E). The court may, on an application by the Chief Inspector, authorise a police constable to assist him in the exercise of his powers: see Childcare Act 2006 s 98F. After conducting an inspection the Chief Inspector must make a written report, and regulations may make provision about the matters required and not required to be dealt with in it: see Childcare Act 2006 s 98B. A local authority must take specified action on receiving the report: see Childcare Act 2006 s 98C.

### **UPDATE**

**1106-1109 General duties of English local authorities ... Duty to secure sufficient child care for working parents**

These provisions are in force by 1 April 2008 for all purposes: SI 2008/785.



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### **1108. Duty to work with relevant partners.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An English local authority<sup>2</sup> must make arrangements to work with each of the authority's relevant partners<sup>3</sup> in the performance by the authority of its duties<sup>4</sup>. Each of the relevant partners of an English local authority must work with the authority and with the other relevant partners in the making of the arrangements<sup>5</sup>.

An English local authority and each of its relevant partners may for the purposes of arrangements:

- 2705 (1) provide staff, goods, services, accommodation or other resources;
- 2706 (2) establish and maintain a pooled fund<sup>6</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 4 had not been brought into force.

2 For the meaning of 'English local authority' see para 1105 note 4 ante.

3 For this purpose, each of the following is a relevant partner of an English local authority: (1) a strategic health authority or primary care trust for an area any part of which falls within the area of the local authority; (2) the Secretary of State, in relation to his functions under the Employment and Training Act 1973 s 2 (see EMPLOYMENT vol 40 (2009) PARA 563); Childcare Act 2006 s 4(1). As to primary care trusts and strategic health authorities see HEALTH SERVICES vol 54 (2008) PARAS 111 et seq, 136 et seq. As to the Secretary of State see para 155 ante.

4 Ibid s 4(2). The text refers to the duties under ss 1, 3 (see paras 1106-1107 ante). An English local authority and each of its relevant partners must, in exercising functions under s 4, have regard to any guidance given from time to time by the Secretary of State: s 4(6).

5 Ibid s 4(3).

6 Ibid s 4(4). For these purposes, a 'pooled fund' is a fund which is made up of contributions by the authority and the relevant partner or partners concerned and out of which payments may be made towards expenditure incurred in the discharge of functions of the authority and functions of the relevant partner or partners: s 4(5).

### **UPDATE**

#### **1106-1109 General duties of English local authorities ... Duty to secure sufficient child care for working parents**

These provisions are in force by 1 April 2008 for all purposes: SI 2008/785.

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### **1109. Duty to secure sufficient child care for working parents.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An English local authority<sup>2</sup> must secure, so far as is reasonably practicable, that the provision of child care<sup>3</sup> (whether or not by it) is sufficient to meet the requirements of parents<sup>4</sup> in its area who require child care in order to enable them to take up, or remain in work, or to undertake education or training which could reasonably be expected to assist them to obtain work<sup>5</sup>.

In determining whether the provision of child care is sufficient to meet those requirements, a local authority:

- 2707 (1) must have regard to the needs of parents in its area for the provision of child care in respect of which the child care element<sup>6</sup> of working tax credit is payable and the provision of child care which is suitable for disabled children<sup>7</sup>; and
- 2708 (2) may have regard to any child care which it expects to be available outside its area<sup>8</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 6 had not been brought into force.

2 For the meaning of 'English local authority' see para 1105 note 4 ante.

3 For the purposes of the Childcare Act 2006 Pt 1 and Pt 3 (ss 31-98) (as amended), 'child care' means any form of care for a child and includes education for a child and any other supervised activity for a child (s 18(1), (2)), however, it does not include:

788 (1) education (or any other supervised activity) provided by a school during school hours for a registered pupil who is not a young child or any form of health care for a child (s 18(3));

789 (2) care provided for a child by:

38. (a) a parent or step-parent of the child (s 18(4)(a));

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39. (b) a person with parental responsibility for the child (s 18(4)(b));

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40. (c) a relative of the child (s 18(4)(c));

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41. (d) a person who is a local authority foster parent in relation to the child (s 18(4)(d));

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42. (e) a person who is a foster parent with whom the child has been placed by a voluntary organisation (s 18(4)(e));

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43. (f) a person who fosters the child privately (s 18(4)(f));

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790 (3) care provided for a child if the care:

44. (a) is provided in any of the following establishments as part of the establishment's activities: (i) an appropriate children's home; (ii) a care home; (iii) a hospital in which the child is a patient; (iv) a residential family centre (s 18(5)(a)); and

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45. (b) is so provided by the person carrying on the establishment or a person employed (including a person employed under a contract for services) to work at the establishment (s 18(5)(b), (6));

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- 791 (4) care provided for a child who is detained in a young offender institution or a secure training centre (s 18(7)).

For the meaning of 'appropriate children's home' see the Children Act 1989 s 23; and para 877 note 9 ante (applied by the Childcare Act 2006 s 18(8)(a)). For the meaning of 'children's home' see the Care Standards Act 2000 s 1; and para 983 ante. For the meaning of 'local authority foster parent' see the Children Act 1989 s 23(3); and para 249 note 13 ante (applied by the Childcare Act 2006 s 18(8)(a)). For the meaning of 'to foster a child privately' see the Children Act 1989 s 66; and para 1049 ante (applied by the Childcare Act 2006 s 18(8)(a)). For the meaning of 'voluntary organisation' see the Children Act 1989 s 105; and para 248 note 10 ante (applied by the Childcare Act 2006 s 18(8)(a)). For the meaning of 'care home' see para 985 note 1 ante (definition applied by the Childcare Act 2006 s 18(8)(b)). For the meaning of 'hospital' see the Care Standards Act 2000 s 2(3); and para 983 note 6 ante (applied by the Childcare Act 2006 s 18(8)(b)). For the meaning of 'residential family centre' see the Care Standards Act 2000 s 4(2), (6); and para 983 note 8 (applied by the Childcare Act 2006 s 18(8)(b)). 'Relative', in relation to a child, means a grandparent, aunt, uncle, brother or sister, whether of the full blood or half blood or by marriage or civil partnership: s 18(8)(c).

- 4 'Parent' includes any individual who has parental responsibility for a child or has care of a child: *ibid* s 6(8).

- 5 *Ibid* s 6(1). In discharging its duty under s 6(1), a local authority must have regard to any guidance given from time to time by the Secretary of State: s 6(3). As to the Secretary of State see para 155 ante. Except in relation to a disabled child, s 6 does not apply in relation to child care for a child on or after 1 September next following the date on which he attains the age of 14: s 6(5).

- 6 'Child care element', in relation to working tax credit, is to be read in accordance with the Tax Credits Act 2002 s 12 (see SOCIAL SECURITY AND PENSIONS): Childcare Act 2006 s 6(6).

- 7 *Ibid* s 6(2)(a). 'Disabled child' means a child who has a disability for the purposes of the Disability Discrimination Act 1995 (see DISCRIMINATION vol 13 (2007 Reissue) para 511): s 6(6). The Secretary of State may by order amend s 6(2) (and s 6(6) so far as relating to s 6(2)) so as to modify the matters to which a local authority must or may have regard in determining whether the provision of child care is sufficient: s 6(4).

- 8 *Ibid* s 6(2)(b).

## UPDATE

### **1106-1109 General duties of English local authorities ... Duty to secure sufficient child care for working parents**

These provisions are in force by 1 April 2008 for all purposes: SI 2008/785.

### **1109 Duty to secure sufficient child care for working parents**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **1110. Duty to secure prescribed early years provision free of charge.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An English local authority<sup>2</sup> must secure that early years provision of a prescribed description<sup>3</sup> is available free of charge for such periods as may be prescribed for each young child<sup>4</sup> in its area who has attained such age as may be prescribed but is under compulsory school age<sup>5</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 7 had not been brought into force; but ss 104, 105 came into force on Royal Assent (s 109(1)).

2 For the meaning of 'English local authority' see para 1105 note 4 ante.

3 For the meaning of 'early years provision' see para 1107 note 5 ante. 'Prescribed' means prescribed by regulations: s 21. At the date at which this volume states the law no such regulations had been made. As to the power to make orders and regulations see para 1106 note 9 ante.

4 For the meaning of 'young child' see para 1106 note 2 ante.

5 Childcare Act 2006 s 7(1). In discharging its duty under s 7(1) a local authority must have regard to any guidance given from time to time by the Secretary of State: s 7(2). As to the Secretary of State see para 155 ante.

### **UPDATE**

### **1110 Duty to secure prescribed early years provision free of charge**

TEXT AND NOTES--These provisions in force for all purposes by 1 September 2008: SI 2008/785, SI 2008/2261. The Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2008, SI 2008/1724, prescribe various matters for the purposes of the Childcare Act 2006 s 7.

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### **1111. Powers to assist or make arrangements for those providing child care.**

An English local authority may<sup>1</sup> assist any person who provides or proposes to provide child care<sup>2</sup>. It may also make arrangements with any other person for the provision of child care<sup>3</sup>. The assistance which may be provided by the authority includes financial assistance and the arrangements that may be provided include arrangements involving the provision of financial assistance by the authority<sup>4</sup>.

Where an English local authority makes arrangements with a person (other than the governing body of a maintained school<sup>5</sup>) for the provision by that person of child care in consideration of financial assistance provided by the local authority under the arrangements, the local authority must exercise its functions with a view to securing that the provider of the child care meets any requirements imposed on him by the arrangements<sup>6</sup>. The requirements imposed by the arrangements may, in particular, if any specified conditions are not satisfied, require the repayment of the whole or any part of any financial assistance provided by the local authority under the arrangements<sup>7</sup>.

1 For the meaning of 'English local authority' see para 1105 note 4 ante. In exercising its functions under the Childcare Act 2006 s 8, an English local authority must have regard to any guidance given from time to time by the Secretary of State: s 8(6). As to the Secretary of State see para 155 ante.

2 Ibid s 8(1)(a). For the meaning of 'child care' see para 1109 note 3 ante.

3 Ibid s 8(1)(b).

4 Ibid s 8(2).

5 'Maintained school' means a community, foundation or voluntary school, a community or foundation special school or a maintained nursery school: *ibid* s 106. See EDUCATION vol 15(1) (2006 Reissue) para 94 et seq.

6 Ibid s 9(1), (2).

7 Ibid s 9(3).

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### **1112. Power to provide child care.**

An English local authority may<sup>1</sup> provide child care<sup>2</sup>. However, the authority may not provide child care for a particular child or group of children unless satisfied that no other person is willing to provide the child care (whether in pursuance of arrangements made with the authority or otherwise) or, if another person is willing to do so, that in the circumstances it is appropriate for the local authority to provide the child care<sup>3</sup>. This does not affect the provision of child care by the governing body of a maintained school<sup>4</sup>.

The authority may enter into an agreement under which payments are made to the authority for the provision by the authority of child care for a child<sup>5</sup>.

1 For the meaning of 'English local authority' see para 1105 note 4 ante. In exercising its functions under the Childcare Act 2006 s 8, an English local authority must have regard to any guidance given from time to time by the Secretary of State: s 8(6). As to the Secretary of State see para 155 ante.

2 Ibid s 8(1)(c). For the meaning of 'child care' see para 1109 note 3 ante.

3 Ibid s 8(3). Section 8(3) does not apply in relation to the provision of child care under the Children Act 1989 s 18(1) or s 18(5) (day care for children in need: see para 860 ante): Childcare Act 2006 s 8(5).

4 Ibid s 8(4). For the meaning of 'maintained school' see para 1111 note 5 ante.

5 Ibid s 10(1). Section 10(1) does not apply to child care provided in pursuance of the duty imposed by s 7 (see para 1110 ante), or to child care provided under the Children Act 1989 s 18(1) or s 18(5) (day care for children in need: see para 860 ante), provision as to charges for such care being made by s 29 (as amended; prospectively amended) (see para 934 ante): Childcare Act 2006 s 10(2).

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### **1113. Duty to assess child care.**

An English local authority<sup>1</sup> must prepare assessments of the sufficiency of the provision of child care<sup>2</sup> (whether or not by it) in its area ('child care assessments')<sup>3</sup>. The authority must keep a child care assessment prepared by it under review until the child care assessment is superseded by a further child care assessment<sup>4</sup>.

1 For the meaning of 'English local authority' see para 1105 note 4 ante.

2 For the meaning of 'child care' see para 1109 note 3 ante. The Childcare Act 2006 s 6(5) (see para 1109 note 5 ante) applies for the purposes of s 11 as it applies for the purposes of s 6: s 11(7).

3 Ibid s 11(1). The first child care assessment must be prepared before the end of the period of one year beginning with the commencement of s 11 and subsequent child care assessments must be prepared at intervals not exceeding three years: s 11(2), (3). Regulations may make provision requiring a child care assessment to deal with prescribed matters or to be prepared according to prescribed criteria, to be in the prescribed form, and to be published in the prescribed manner: s 11(5). As to the prescribed criteria, the matters which a child care assessment must deal with, and its publication see the Childcare Act 2006 (Child care Assessments) Regulations 2007, SI 2007/463, regs 3-5. In preparing a child care assessment and keeping it under review, an English local authority must consult such persons, or persons of such a description, as may be prescribed, and have regard to any guidance given from time to time by the Secretary of State: Childcare Act 2006 s 11(6). As to the persons that are prescribed for the purposes of consultation under s 11(6) see the Childcare Act 2006 (Child care Assessments) Regulations 2007, SI 2007/463, reg 2. For the meaning of 'prescribed' see para 1110 note 3 ante. As to the making of regulations generally under the Childcare Act 2006 see para 1106 note 9 ante.

4 Ibid s 11(4).

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**1114. Duty to provide information, advice and assistance to parents or prospective parents.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An English local authority<sup>2</sup> must establish and maintain a service providing information, advice and assistance in accordance with the following provisions<sup>3</sup>.

The service must provide to parents or prospective parents<sup>4</sup> information which is of a prescribed description<sup>5</sup> and relates to any of the following:

- 2709 (1) the provision of child care in the area of the local authority<sup>6</sup>;
- 2710 (2) any other services or facilities, or any publications, which may be of benefit to parents or prospective parents in its area<sup>7</sup>;
- 2711 (3) any other services or facilities, or any publications, which may be of benefit to children or young persons in its area<sup>8</sup>.

The service must provide advice and assistance to parents or prospective parents who use, or propose to use, child care provided in the area of the local authority<sup>9</sup>. The service must be established and maintained in the manner which is best calculated to facilitate access to the service by persons in the local authority's area who may benefit from it including in particular persons who might otherwise have difficulty in taking advantage of the service<sup>10</sup>.

1 The Childcare Act 2006 Pt 1 (ss 1-21) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 12 had only been brought into force for the purposes of making regulations (see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(a)) and in so far as it requires an English local authority to establish and maintain a service providing information relating to the provision of child care in the area of the local authority by persons voluntarily registered (ie persons registered under the Childcare Act 2006 Pt 3 Ch 4 (ss 62-67): see para 1134 et seq post) (see the Childcare Act 2006 (Commencement No 2 and Savings and Transitional Provisions) Order 2007, SI 2007/1019, art 5).

2 For the meaning of 'English local authority' see para 1105 note 4 ante. In exercising its functions under the Childcare Act 2006 s 12, a local authority must have regard to any guidance given from time to time by the Secretary of State: s 12(7). As to the Secretary of State see para 155 ante.

3 Ibid s 12(1).

4 For the purpose of ibid s 12, 'parent' means a parent of a child or young person and includes any individual who has parental responsibility for a child or who has care of a child; 'prospective parent' means a pregnant woman or any other person who is likely to become, or is planning to become, a parent; and 'young person' means a person who has attained the age of 18 but has not attained the age of 20: s 12(9). The service may, in addition to providing information which it is required to provide under s 12(2), provide information relating to any of the matters mentioned in heads (1)-(3) in the text to such persons as the local authority considers appropriate: s 12(4).

5 In prescribing information for the purpose of ibid s 12(2), the Secretary of State must have regard to the needs of the parents of disabled children or young persons for information relating to the provision of child care which is suitable for disabled children and other services or facilities, or publications, which may be of particular benefit to the parents of disabled children or young persons or to disabled children or young persons: s 12(3). For the purposes of s 12, a child or young person is disabled if he has a disability for the purposes of the



Disability Discrimination Act 1995 (see DISCRIMINATION); Childcare Act 2006 s 12(8). As to information to be treated as prescribed information for the purposes of s 12(2) see the Child care (Provision of Information) (England) Regulations 2007, SI 2007/1063.

6 Childcare Act 2006 s 12(2)(a).

7 Ibid s 12(2)(b).

8 Ibid s 12(2)(c).

9 Ibid s 12(5).

10 Ibid s 12(6).

## **UPDATE**

### **1114 Duty to provide information, advice and assistance to parents or prospective parents**

TEXT AND NOTES--These provisions in force by 1 April 2008 for all purposes: SI 2008/785.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 4-8--See the Childcare Act 2006 (Provision of Information to Parents) (England) Regulations 2007, SI 2007/3490.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(A) General Functions and Provision of Child Care/1115. Duty to provide information, advice and training to children providers.

### **1115. Duty to provide information, advice and training to children providers.**

An English local authority<sup>1</sup> must, in accordance with regulations<sup>2</sup>, secure the provision of information<sup>3</sup>, advice and training to:

- 2712 (1) persons providing child care<sup>4</sup> in its area who are registered under Part 3 of the Childcare Act 2006<sup>5</sup>;
- 2713 (2) persons who intend to provide child care in its area in respect of which they will be required to be registered under Part 3 of the Act<sup>6</sup>;
- 2714 (3) persons who provide child care at any of the following schools in its area (whether or not they are required to be registered under Part 3 of the Act):
  - .67
  - 120. (a) a maintained school;
  - 121. (b) a non-maintained special school approved by the Secretary of State<sup>7</sup>;
  - 122. (c) an independent school<sup>8</sup>;
  - .68
  - 2715 (4) persons who intend to provide child care at any such school (whether or not they would be required to be registered under Part 3 of the Act)<sup>9</sup>;
  - 2716 (5) persons who are employed to assist any such persons as are mentioned in head (1) or head (3) above in the provision of child care or persons who intend to obtain such employment<sup>10</sup>.

An English local authority may provide information, advice and training to persons who do not fall within any of heads (1) to (5) above but who provide or intend to provide child care in its area or are employed to assist in the provision of child care in its area or who intend to obtain such employment<sup>11</sup>.

1 For the meaning of 'English local authority' see para 1105 note 4 ante. An English local authority may impose such charges as it considers reasonable for the provision of information, advice or training provided by it in pursuance of the Childcare Act 2006 s 13(1), (2) or (3): s 13(4). In exercising its functions under s 13, an English local authority must have regard to any guidance given from time to time by the Secretary of State: s 13(5).

2 As to such regulations see the Child care Providers (Information, Advice and Training) Regulations 2007, SI 2007/1797.

3 An English local authority may, in addition to securing the provision of information, advice and training which it is required to secure under the Childcare Act 2006 s 13(1), provide other information, advice and training to any persons mentioned in s 13(1)(a)-(e): s 13(2).

4 For the meaning of 'child care' see para 1109 note 3 ante.

5 Childcare Act 2006 s 13(1)(a). As to registration under Pt 3 (ss 31-98) (as amended) see para 1117 et seq ante.

6 Ibid s 13(1)(b).

7     le a school approved under the Education Act 1996 s 342 (see EDUCATION vol 15(2) (2006 Reissue) paras 1028-1029).

8     Childcare Act 2006 s 13(1)(c).

9     Ibid s 13(1)(d).

10    Ibid s 13(1)(e).

11    Ibid s 13(3).

## **UPDATE**

### **1115 Duty to provide information, advice and training to children providers**

TEXT AND NOTES 8, 9--Childcare Act 2006 s 13(1)(c), (d) amended: Education and Skills Act 2008 Sch 1 para 31 (not yet in force).

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### **1116. Provision of information about young children.**

Until a day to be appointed<sup>1</sup>, regulations<sup>2</sup> may make provision requiring a person who provides funded nursery education<sup>3</sup> to provide to the relevant person<sup>4</sup> such individual child information<sup>5</sup> as may be prescribed<sup>6</sup>; and as from a day to be appointed<sup>7</sup>, regulations may instead make provision requiring:

- 2717 (1) a person registered<sup>8</sup> as an early years provider<sup>9</sup>; and
- 2718 (2) a person who provides early years provision in respect of which, but for the exemption for provision for children aged three or over at certain schools<sup>10</sup>, he would be required to be registered<sup>11</sup>,

to provide to the relevant person such individual child information<sup>12</sup> as may be prescribed<sup>13</sup>.

The Secretary of State may provide any individual child information to any information collator<sup>14</sup>, to any prescribed person or to any person falling within a prescribed category<sup>15</sup>.

Any information collator:

- 2719 (a) may provide any individual child information to the Secretary of State or to any other information collator<sup>16</sup>; and
- 2720 (b) may at such times as the Secretary of State may determine or in prescribed circumstances provide such individual child information as may be prescribed to any prescribed person or to any person falling within a prescribed category<sup>17</sup>.

Any person holding any individual child information (other than the Secretary of State or an information collator) may provide that information to the Secretary of State, any information collator or any prescribed person<sup>18</sup>.

1 The Childcare Act 2006 s 99 has effect with modifications until s 7 (see para 1110 ante) comes into force: s 100(1). At the date at which this volume states the law s 7 had not been brought into force.

2 'Regulations' means regulations made by the Secretary of State: *ibid* s 99(9). Regulations under s 99 may provide that, in such circumstances as may be prescribed, the provision of information to a person other than the Secretary of State is to be treated, for the purposes of any provision of such regulations or s 99, as compliance with any requirement imposed by or by virtue of any such provision and relating to the provision of information to the Secretary of State: s 99(8). As to the Secretary of State see para 155 ante.

3 'Funded nursery education' means nursery education, within the meaning of the School Standards and Framework Act 1998 Pt 5 (ss 117-124) which is provided by any person:

- 792 (1) under arrangements made with that person by a local education authority in England in pursuance of the duty imposed on the authority by s 118 (duty of local education authority to secure sufficient nursery education: see EDUCATION vol 15(1) (2006 Reissue) para 86); and
- 793 (2) in consideration of financial assistance provided by the authority under those arrangements,

other than such education provided by a school for its pupils: Childcare Act 2006 s 99(9) (modified by s 100(3)(a)).

4 'The relevant person' means one or more of the following: (1) the Secretary of State; and (2) any prescribed person: *ibid* s 99(2).

Where any person within head (2) *supra* receives information by virtue of s 99(1), the Secretary of State may require that person to provide any such information to the Secretary of State or to any prescribed person: s 99(3). As to regulations made under s 99 (as modified) see the Education (Provision of Information about Young Children) (England) Regulations 2007, SI 2007/712.

5 For the purposes of the Childcare Act 2006 s 99 (as modified), 'individual child information' means information relating to and identifying individual children for whom funded nursery education is being or has been provided, whether obtained under s 99(1) or otherwise: s 99(9) (modified by s 100(3)(b)). No information received under or by virtue of s 99 is to be published in any form which includes the name of the child or children to whom it relates: s 99(7).

6 *Ibid* s 99(1) (modified by s 100(2)). 'Prescribed' means prescribed by regulations: s 99(9). As to regulations made under s 99 (as modified) see the Education (Provision of Information about Young Children) (England) Regulations 2007, SI 2007/712.

7 *Ie* as from the date at which the Childcare Act 2006 s 7 (see para 1110 *ante*) comes into force: see note 1 *supra*.

8 *Ie* registered under *ibid* Pt 3 Ch 2 (ss 33-51) (see para 1118 *et seq post*).

9 *Ibid* s 99(1)(a). For the meaning of 'early years provider' see s 20; and para 1107 note 5 *ante* (definition applied by s 99(9)).

10 *Ie* the exemption under *ibid* s 34(2) (see para 1119 *post*).

11 *Ibid* s 99(1)(b). The requirement to be registered mentioned in the text refers to a requirement to be registered under Pt 3 Ch 2 (see para 1118 *et seq post*).

12 'Individual child information' means information relating to and identifying individual children for whom early years provision is being or has been provided by a person mentioned in *ibid* s 99(1)(a) or (b), whether obtained under s 99(1) or otherwise: s 99(9).

13 *Ibid* s 99(1).

14 Until a day to be appointed, 'information collator' means any body which, for the purposes of or in connection with the functions of the Secretary of State relating to funded nursery education, is responsible for collating or checking information relating to children for whom such provision is made: *ibid* s 99(9) (modified by s 100(3)(c)). As from a day to be appointed, 'information collator' means any body which, for the purposes of or in connection with the functions of the Secretary of State relating to early years provision, is responsible for collating or checking information relating to children for whom such provision is made: s 99(9).

15 *Ibid* s 99(4). As to regulations made under s 99 (as modified) see the Education (Provision of Information about Young Children) (England) Regulations 2007, SI 2007/712.

16 Childcare Act 2006 s 99(5)(a).

17 *Ibid* s 99(5)(b).

18 *Ibid* s 99(6). As to regulations made under s 99 (as modified) see the Education (Provision of Information about Young Children) (England) Regulations 2007, SI 2007/712.

## UPDATE

### 1116 Provision of information about young children

NOTE 1--2006 Act s 7 in force for all purposes: SI 2008/2261.

NOTES 4, 6, 15, 18--SI 2007/712 replaced: see now Childcare (Provision of Information About Young Children) (England) Regulations 2009, SI 2009/1554.

NOTE 4--A local authority in whose area funded early years provision is provided is a prescribed person for the purposes of the Childcare Act 2006 s 99(2): SI 2009/1554 reg 5. As to prescribed persons under the Childcare Act 2006 s 99(3) see SI 2009/1554 reg 6.

NOTE 6--Prescribed information for the purposes of the Childcare Act 2006 s 99(1) is (1) for each child in the final year of the Early Years Foundation Stage, the total number of points achieved in each of the assessment scales of the Early Years Foundation State; 'assessment scales' has the same meaning as in the 'Statutory Framework for the Early Years Foundation Stage' document published by the Department for Children, Schools and Families in May 2008 with ISBN reference number 978-1-84775-128-7; (2) surname; (3) first name, or if more than one, each first name; (4) date of birth; (5) address and postcode of the home where the child normally resides; (6) ethnic group; (7) gender; (8) whether the child has special educational needs; (9) number of hours of funded early years provision that the child receives per week; (10) total number of hours of early years provision that the child receives per week; (11) where the person provides funded early years provision to the child in more than 38 weeks in the funding period, the number of hours of funded early years provision which the child receives from that person during the period starting with 1 January and ending with 31 March in the calendar year in which the information is requested; 'the funding period' means the period being no longer than 12 months, of arrangements under the Childcare Act 2006 s 8 between the person providing funded early years provision and a local authority under which the person provides such early years provision; and (12) whether English is not the child's first language: SI 2009/1554 reg 4(1), Schedule. 'Funded early years provision' means early years provision which is available free of charge in pursuance of the duty imposed by the Childcare Act 2006 s 7; 'local authority' has the same meaning as 'English local authority' in the Childcare Act 2006 s 106; 'special educational needs' has the same meaning as in the Education Act 1996 s 312 (see PARA 296): SI 2009/1554 reg 2. When providing any of the above items of information, a person referred to in the Childcare Act 2006 s 99(1) must also provide (a) the early years reference number allocated to the provider by the Department for Children, Schools and Families; (b) the early years unique reference number or other identifier allocated to the provider by Her Majesty's Chief Inspector of Education, Children's Services and Skills on registration; and (c) if known the local authority code allocated by the Department for Children, Schools and Families to the local authority in whose area the funded early years provision is provided: SI 2009/1554 reg 4(3).

NOTES 9, 11--A person falling within the Childcare Act 2006 s 99(1) who provides funded early years provision, if requested to do so by the relevant person, must provide to that person the item of information set out in specified parts of SI 2009/1554 Schedule (ie those parts set out in NOTE 6 heads (1), (4)-(8), (12)): SI 2009/1554 reg 4(2).

NOTE 15--As to prescribed persons under the Childcare Act 2006 s 99(4) see SI 2009/1554 regs 7, 8.

NOTE 18--As to prescribed persons under the Childcare Act 2006 s 99(6) see SI 2009/1554 reg 9.

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## (B) REGULATION OF CHILD CARE PROVISION

### *(a) In general*

#### **1117. Regulation under the Childcare Act 2006.**

As from a day to be appointed<sup>1</sup>, provisions are made by Part 3 of the Childcare Act 2006<sup>2</sup> for the regulation of the provision of child care in England<sup>3</sup>.

Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> must maintain two registers<sup>5</sup>. The first register ('the early years register') is to be a register of all persons who are registered as early years child minders or other early years providers<sup>6</sup>. The second register ('the general child care register') is to be divided into two parts<sup>7</sup>: the first part ('Part A') is to be a register of all persons who are required to be registered as later years child minders or other later years providers<sup>8</sup>; and the second part ('Part B') is to be a register of all persons who are voluntarily registered as child minders or other child care providers providing early years provision or later years provision in respect of which they are not required to be registered<sup>9</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force by order made by the Secretary of State as from a day to be appointed under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 96, 98, 104, 105, 111 had been brought into force; but s 32 had only been brought into force so far as it requires Her Majesty's Chief Inspector of Education, Children's Services and Skills to maintain Part B of the second register (see the text and note 9 infra): see s 109(1); the Childcare Act 2006 (Commencement No 2 and Savings and Transitional Provisions) Order 2007, SI 2007/1019, art 4; and the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(d). At the date at which this volume states the law no further order had been made bringing the Childcare Act 2006 s 32 into force in so far as it requires the Chief Inspector to maintain the first register or Part A of the second register. As to the Secretary of State see para 155 ante. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 *Ibid* Pt 3: see para 1118 et seq post.

3 The Childcare Act 2006 applies to England and Wales, except in relation to any amendments or repeals made by the Act which apply to the same extent as the provision amended or repealed: see s 111(2), (3). However, Pt 3 applies to the regulation of child care in England only. The amended provisions of the Children Act 1989 continue to apply in relation to the regulation of child care in Wales: see paras 1070 ante, 1163 et seq post.

4 Regulations may require persons under *ibid* Pt 3 Chs 2-4 (ss 33-67) to pay to the Chief Inspector, at or by prescribed times, fees of the prescribed amounts in respect of the discharge by the Chief Inspector of his functions: s 89(1). Regulations under s 89(1) may prescribe circumstances in which: (1) the amount of a fee payable under the regulations may be varied in accordance with the regulations; (2) a fee payable under the regulations may be waived: s 89(2). At the date at which this volume states the law no such regulations had been made.

5 *Ibid* s 32(1).

6 *Ibid* s 32(2). The text refers to early year child minders or other early year providers registered under Pt 3 Ch 2 (ss 33-51) (which provides for the compulsory registration of persons providing early years provision: see paras 1116 ante, 1118-1126 post). For the purposes of Pt 3, 'early years provision' means the provision of child care for a young child; and 'early years provider' means a person who provides early years provision: s 96(1)-

(3). 'Early years child minding' means early years provision on domestic premises for reward; and 'early years child minder' is to be read accordingly: s 96(1), (4). Early years provision on domestic premises for reward is not early years child minding if at any time the number of persons providing the early years provision on the premises or assisting with the provision exceeds three: s 96(1), (5). 'Premises' includes any area and any vehicle; and 'domestic premises' means premises which are used wholly or mainly as a private dwelling: s 98(1). For the meaning of 'young child' see para 1106 note 2 ante. For the purposes of Pt 3, where an individual ('the employee') is employed to care for a child by a person who provides early years provision or later years provision for the child, the employee is not to be regarded as providing early years provision or (as the case may be) later years provision by virtue of anything done by him in the course of that employment: s 97.

7 Ibid s 32(3).

8 Ibid s 32(4). The text refers to persons registered as later years child minders or other later years providers under Pt 3 Ch 3 (ss 52-61) (which provides for the compulsory registration of persons providing later years provision for children under the age of eight: see paras 1127-1133 post). For the purposes of Pt 3, 'later years child minding' means later years provision on domestic premises for reward; and 'later years child minder' is to be read accordingly: s 96(1), (8). Later years provision on domestic premises for reward is not later years child minding if at any time the number of persons providing the later years provision on the premises or assisting with the provision exceeds three: s 96(1), (9). 'Later years provider' means a person who provides later years provision: s 96(1), (7). 'Later years provision', in relation to a child, means the provision of child care at any time during the period beginning with 1 September next following the date on which he attains the age of five and ending with such day as may be prescribed: s 96(1), (6). 'Prescribed' means prescribed by regulations (s 98(1)); and the date so prescribed for the purpose of s 96(6) is the date on which the child attains the age of 18 (Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 3). As to the power to make orders and regulations under the Childcare Act 2006 see para 1106 note 9 ante.

9 Ibid s 32(5). The text refers to persons voluntarily registered as child minders under Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq post).



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*(b) Early Years Child Minders*

**UPDATE**

**1117-1121 Regulation under the Childcare Act 2006 ... Registration process for other early years providers**

These provisions are all in force by 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

**1117 Regulation under the Childcare Act 2006**

NOTE 8--SI 2007/730 reg 3 now Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 3.

**1118. Early years child minders: requirement to register.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person may not provide early years child minding in England unless he is registered in the early years register as an early years child minder<sup>2</sup>. However, the Secretary of State may by order provide that, in circumstances specified in the order, such registration does not apply in relation to early years child minding<sup>3</sup>. The circumstances specified in such an order may relate to one or more of the following matters (among others):

- 2721 (1) the person providing the early years child minding<sup>4</sup>;
- 2722 (2) the child or children for whom it is provided<sup>5</sup>;
- 2723 (3) the nature of the early years child minding<sup>6</sup>;
- 2724 (4) the premises on which it is provided<sup>7</sup>;
- 2725 (5) the times during which it is provided<sup>8</sup>;
- 2726 (6) the arrangements under which it is provided<sup>9</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 33 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 Childcare Act 2006 s 33(1). As to the 'early years register' see para 1117 ante. If it appears to Her Majesty's Chief Inspector of Education, Children's Services and Skills that a person has provided early years child minding in contravention of s 33(1), he may serve a notice ('an enforcement notice') on the person: s 33(4). An enforcement notice may be served on a person by delivering it to him, or by sending it by post: s 33(5). An enforcement notice has effect until it is revoked by the Chief Inspector: s 33(6). A person commits an offence if, at any time when an enforcement notice has effect in relation to him and without reasonable excuse, he provides early years child minding in contravention of s 33(1): s 33(7). A person guilty of an offence under s 33(7) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 33(8). As to the standard scale see para 132 note 2 ante. For the meanings of 'early years child minder' and 'early years child

mindings' see para 1117 note 6 ante. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 Ibid s 33(2). At the date at which this volume states the law no such order had been made. As to the Secretary of State see para 155 ante.

4 Ibid s 33(3)(a).

5 Ibid s 33(3)(b). 'Child' means a person under the age of 18: s 106.

6 Ibid s 33(3)(c).

7 Ibid s 33(3)(d).

8 Ibid s 33(3)(e).

9 Ibid s 33(3)(f).

## **UPDATE**

### **1117-1121 Regulation under the Childcare Act 2006 ... Registration process for other early years providers**

These provisions are all in force by 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1118 Early years child minders: requirement to register**

NOTE 3--The Childcare Act 2006 s 33(1) does not apply in relation to early years childminding in the circumstances specified in the Childcare (Exemptions from Registration) Order 2008, SI 2008/979, arts 3, 6, or 8: art 2(1).

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### **1119. Other early years providers: requirement to register.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person may not provide early years provision on premises<sup>2</sup> in England which are not domestic premises<sup>3</sup>, or early years provision on domestic premises in England which would be early years child minding<sup>4</sup> but for certain provisions<sup>5</sup>, unless he is registered in the early years register in respect of the premises<sup>6</sup>. This does not apply in relation to early years provision for a child or children who has (or have) attained the age of three if:

- 2727 (1) the provision is made at any of the following schools as part of the school's activities:
  - .69
  - 123. (a) a maintained school<sup>7</sup>;
  - 124. (b) a school approved<sup>8</sup> by the Secretary of State<sup>9</sup>; or
  - 125. (c) an independent school<sup>10</sup>;
  - .70
- 2728 (2) the provision is made by the proprietor of the school or a person employed to work at the school<sup>11</sup>; and
- 2729 (3) the child is a registered pupil at the school or, if the provision is made for more than one child, at least one of the children is a registered pupil at the school<sup>12</sup>.

The Secretary of State may by order provide that, in circumstances specified in the order, the above provisions do not apply in relation to early years provision<sup>13</sup>. The circumstances specified in such an order may relate to one or more of the following matters (among others):

- 2730 (i) the person providing the early years provision<sup>14</sup>;
- 2731 (ii) the child or children for whom it is provided<sup>15</sup>;
- 2732 (iii) the nature of the early years provision<sup>16</sup>;
- 2733 (iv) the premises on which it is provided<sup>17</sup>;
- 2734 (v) the times during which it is provided<sup>18</sup>;
- 2735 (vi) the arrangements under which it is provided<sup>19</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 34 had only been brought into force for the purpose of making orders and regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the meaning of 'premises' see para 1117 note 6 ante.

3 For the meaning of 'domestic premises' see para 1117 note 6 ante.

4 For the meaning of 'early years child minding' see para 1117 note 6 ante.

5 Ie but for the Childcare Act 2006 s 96(5) (see para 1117 ante).

6 Ibid s 34(1). As to registration on the early years register see para 1117 ante. A person commits an offence if, without reasonable excuse, he provides early years provision in contravention of s 34(1) (s 34(5)); and a

person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (s 34(6)). As to the standard scale see para 132 note 2 ante.

7 Ibid s 34(2)(a)(i).

8 le under the Education Act 1996 s 342 (approval of non-maintained special schools: see EDUCATION vol 15(2) (2006 Reissue) paras 1028-1029).

9 Childcare Act 2006 s 34(2)(a)(ii). As to the Secretary of State see para 155 ante.

10 Ibid s 34(2)(a)(iii).

11 Ibid s 34(2)(b).

12 Ibid s 34(2)(c).

13 Ibid s 34(3).

14 Ibid s 34(4)(a).

15 Ibid s 34(4)(b).

16 Ibid s 34(4)(c).

17 Ibid s 34(4)(d).

18 Ibid s 34(4)(e).

19 Ibid s 34(4)(f).

## UPDATE

### **1117-1121 Regulation under the Childcare Act 2006 ... Registration process for other early years providers**

These provisions are all in force by 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1119 Other early years providers: requirement to register**

TEXT AND NOTES 7-12--Childcare Act 2006 s 34(2)(a), (b) amended, s 34(2)(c) substituted: Education and Skills Act 2008 Sch 1 para 32 (not yet in force).

NOTE 13--The Childcare Act 2006 s 34(1) does not apply in relation to early years provision in the circumstances specified in the Childcare (Exemptions from Registration) Order 2008, SI 2008/979, arts 4-9: art 2(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (b) Early Years Child Minders/1120. Registration process for early years child minders.

### **1120. Registration process for early years child minders.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person who proposes to provide early years child minding<sup>2</sup> in respect of which he is required to be registered<sup>3</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> for registration as an early years child minder<sup>5</sup>. An application must give any prescribed information about prescribed matters, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>6</sup>. The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>7</sup> and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration<sup>8</sup> are satisfied and are likely to continue to be satisfied<sup>9</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>10</sup>.

The prescribed requirements for registration may include requirements relating to:

- 2736 (1) the applicant<sup>11</sup>;
- 2737 (2) the premises on which the early years child minding is to be provided<sup>12</sup>;
- 2738 (3) the arrangements for early years child minding on those premises<sup>13</sup>;
- 2739 (4) any person who may be caring for children on those premises<sup>14</sup>;
- 2740 (5) any other person who may be on those premises<sup>15</sup>.

If an application is granted, the Chief Inspector must register the applicant in the early years register as an early years child minder, and give the applicant a certificate of registration stating that he is so registered<sup>16</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 35, 37 had only been brought into force for the purpose of making orders and regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the meaning of 'early years child minding' see para 1117 note 6 ante.

3 Ie under the Childcare Act 2006 s 33(1) (see para 1118 ante).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 35(1). For the meaning of 'early years child minder' see para 1117 note 6 ante.

6 Ibid s 35(2). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

7 Ie under ibid s 75 (see para 1156 post).

8 Ie the requirements prescribed for the purposes of ibid s 35.

9 Ibid s 35(3).

10 Ibid s 35(4).

11 Ibid s 35(5)(a).

12 Ibid s 35(5)(b).

13 Ibid s 35(5)(c).

14 Ibid s 35(5)(d).

15 Ibid s 35(5)(e).

16 Ibid s 37(1). A certificate of registration given to the applicant must contain prescribed information about prescribed matters (s 37(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered early years provider an amended certificate (s 37(4)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered early years provider a copy, on payment by the provider of any prescribed fee: s 37(5). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

## **UPDATE**

### **1117-1121 Regulation under the Childcare Act 2006 ... Registration process for other early years providers**

These provisions are all in force by 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1120 Registration process for early years child minders**

NOTE 5--An application under the Childcare Act 2006 s 35(1) must include the information specified in the Childcare (Early Years Register) Regulations 2008, SI 2008/974, Sch 1, paras 12-22: reg 4(1).

NOTE 6--In the case of an application for registration made under the Childcare Act 2006 s 35(1), the prescribed fee which must accompany the application is £30: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 3 (amended by SI 2009/1507).

NOTE 9--SI 2008/974 contains requirements prescribed for the purposes of the Childcare Act 2006 s 35(3) as follows: (1) the applicant is an individual who is suitable to provide early years childminding; (2) the applicant is to have the charge of the early years childminding; (3) the applicant has provided an application for an enhanced criminal record certificate in respect of themselves to the Chief Inspector; (4) the applicant will secure that the proposed early years childminding meets the EYFS learning and development requirements; (5) the applicant will comply with the EYFS welfare requirements; (6) the applicant has an appropriate first aid qualification; (7) the applicant has carried out an assessment to identify any risks to the health or safety of children for whom early years childminding is to be provided, arising from (a) the relevant premises, including the means of access to and exit from those premises, (b) any equipment there, and (c) the activities to be provided there; (8) every person, other than the applicant, who is to care for children for whom the early years childminding is provided is suitable to care for young children; (9) an application for an enhanced criminal record certificate is provided to the Chief Inspector in respect of every person mentioned in head (8) above; (10) every person, other than a person mentioned in head (8) above, who has attained the age of 16 and who lives on the relevant premises, or works on the relevant premises, is suitable to be in regular contact with young children; a person who works on the relevant premises includes a person who works on a voluntary basis and a person is not to be treated as working on

the relevant premises if that person only works on the relevant premises at times when early years childminding is not being provided; and (11) an application for an enhanced criminal record certificate is provided to the Chief Inspector in respect of every person mentioned in head (10) above: SI 2008/974 reg 3(1), Sch 1, paras 1-11. 'Appropriate first aid qualification' means a qualification in first aid appropriate for the treatment of children for whom early years provision is provided; 'enhanced criminal record certificate' means an enhanced criminal record certificate issued under the Police Act 1997 s 113B (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq); 'the EYFS learning and development requirements' means the requirements specified under the Childcare Act 2006 s 39(1)(a) (see PARA 1122); 'the EYFS welfare requirements' means the requirements specified under the Childcare Act 2006 s 39(1)(b) (see PARA 1124); 'relevant premises' means, in relation to early years provision by a person, the premises or part of the premises on which that early years provision is provided or will be provided: SI 2008/974 reg 2.

NOTE 16--As to the content of a certificate of registration given in accordance with the Childcare Act 2006 s 37, see the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 6. A person who is registered as an early years childminder under the Childcare Act 2006 s 37(1) must pay to the Chief Inspector a fee of £30 at or by the prescribed time: see the Childcare (Fees) Regulations 2008, SI 2008/1804, reg 9 (amended by SI 2009/1507). For the purposes of the Childcare Act 2006 s 37(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (b) Early Years Child Minders/1121. Registration process for other early years providers.

### **1121. Registration process for other early years providers.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person who proposes to provide on any premises early years provision<sup>2</sup> in respect of which he is required to be registered<sup>3</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> for registration as an early years provider in respect of the premises<sup>5</sup>. An application must give any prescribed information about prescribed matters, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>6</sup>. The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>7</sup>, and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration ('the prescribed requirements for registration')<sup>8</sup> are satisfied and are likely to continue to be satisfied<sup>9</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>10</sup>. The prescribed requirements for registration may include requirements relating to:

- 2741 (1) the applicant<sup>11</sup>;
- 2742 (2) the premises on which the early years provision is to be provided<sup>12</sup>;
- 2743 (3) the arrangements for early years provision on those premises<sup>13</sup>;
- 2744 (4) any person who may be caring for children on those premises<sup>14</sup>;
- 2745 (5) any other person who may be on those premises<sup>15</sup>.

If an application is granted, the Chief Inspector must register the applicant in the early years register as an early years provider other than a child minder, in respect of the premises in question, and give the applicant a certificate of registration stating that he is so registered<sup>16</sup>. The Chief Inspector may impose such conditions as he thinks fit on the registration of an early years provider<sup>17</sup> and the early years provider commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>18</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 38 had not been brought into force; and ss 36, 37 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'premises' see para 1117 note 6 ante. As from a day to be appointed the Secretary of State may by order amend the Childcare Act 2006 Pt 3 so as to enable an application for registration under s 36(1) to be made in respect of more than one set of premises; and he may make such further amendments to Pt 3 as appear to him to be necessary or expedient in consequence of the amendments: s 94. At the date at which this volume states the law no such order had been made. As to the powers to make orders under the Childcare Act 2006 generally see para 1106 note 9 ante.

3 Ie under *ibid* s 34(1) (see para 1119 ante).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 36(1). For the meaning of 'early years provider' see para 1117 note 6 ante.



6 Ibid s 36(2). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

7 le under ibid s 75 (see para 1156 post).

8 le the requirements prescribed for the purposes of ibid s 36.

9 Ibid s 36(3).

10 Ibid s 36(4).

11 Ibid s 36(5)(a).

12 Ibid s 36(5)(b).

13 Ibid s 36(5)(c).

14 Ibid s 36(5)(d).

15 Ibid s 35(5)(e).

16 Ibid s 37(2). A certificate of registration given to the applicant must contain prescribed information about prescribed matters (s 37(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered early years provider an amended certificate (s 37(4)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered early years provider a copy, on payment by the provider of any prescribed fee: s 37(5). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

17 Ibid s 38(1). This power may be exercised at the time when the Chief Inspector registers the person in pursuance of s 37 or at any subsequent time: s 38(2). The Chief Inspector may at any time vary or remove any condition imposed under s 38(1): s 38(3). The power imposed by s 38(1) includes power to impose conditions for the purpose of giving effect to an order under s 39(1)(a) (see para 1122 post) or regulations under s 39(1)(b) (see para 1124 post): s 38(4).

18 Ibid s 38(5). A person guilty of an offence under s 38(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 38(6). As to the standard scale see para 132 note 2 ante.

## UPDATE

### **1117-1121 Regulation under the Childcare Act 2006 ... Registration process for other early years providers**

These provisions are all in force by 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1121 Registration process for other early years providers**

NOTE 5--An application under the Childcare Act 2006 s 36(1) must include the information in the Childcare (Early Years Register) Regulations 2008, SI 2008/974, Sch 2 paras 15-25: reg 4(2).

NOTE 6--In the case of an application for registration made under the Childcare Act 2006 s 36(1) (1) where the applicant intends to provide the early years provision for less than three hours per day, less than five days per week, or less than 45 weeks per year, the prescribed fee which must accompany the application is £30; (2) where the applicant intends to provide the early years provision for three or more hours per day, five or more days per week, and 45 or more weeks per year, the prescribed fee which must accompany the application is £200: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 4 (amended by SI 2009/1507).

NOTE 9--SI 2008/974 contains requirements prescribed for the purposes of the Childcare Act 2006 s 36(3) as follows: (1) the applicant is suitable to provide early years provision; (2) Where the applicant is an individual, the applicant has provided an application for an enhanced criminal record certificate in respect of themselves to the Chief Inspector; (3) the applicant will secure that the proposed early years provision meets the EYFS learning and development requirements; (4) the applicant will comply with the EYFS welfare requirements; (5) the applicant has carried out an assessment to identify any risks to the health or safety of children for whom early years provision is to be provided, arising from (a) the relevant premises, including the means of access to and exit from those premises, (b) any equipment there, and (c) the activities to be provided there; (6) the applicant has appointed an individual to manage the early years provision ('the manager'); (7) the manager is suitable to care for young children; (8) an application for an enhanced criminal record certificate in respect of the manager, if not the applicant, is provided to the Chief Inspector: SI 2008/974 reg 3(2), Sch 2 paras 1-8. As to requirements relating to an individual nominated by the applicant who is a partner in, or a director, secretary, other officer or member of the governing body of the applicant ('the nominated individual'), the requirement for first aid qualification and additional requirements for certain early years provision on domestic premises see Sch 2 paras 9-14. As to the meaning of 'enhanced criminal record certificate', the EYFS learning and development requirements', the EYFS welfare requirements' and 'relevant premises' see PARA 1120 NOTE 9.

NOTE 16--A person who is registered as an early years provider, other than a childminder, under the Childcare Act 2006 s 37(2) must pay to the Chief Inspector a fee of £30 in a case where the early years provision is provided for less than three hours per day, less than five days per week, or less than 45 weeks per year, or £200 in a case where the early years provision is provided for three or more hours per day, five or more days per week, and 45 or more weeks per year, at or by the prescribed time: see the Childcare (Fees) Regulations 2008, SI 2008/1804, reg 10 (amended by SI 2009/1507). For the purposes of the Childcare Act 2006 s 37(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (b) Early Years Child Minders/1122. Learning and development requirements.

### **1122. Learning and development requirements.**

For the purpose of promoting the well-being of young children<sup>1</sup> for whom early years provision is provided by early years providers<sup>2</sup>, the Secretary of State<sup>3</sup> must by order specify<sup>4</sup> such requirements as he considers appropriate relating to learning by, and the development of, such children ('learning and development requirements')<sup>5</sup>.

The learning and development requirements must cover the following areas of learning and development:

- 2746 (1) personal, social and emotional development<sup>6</sup>;
- 2747 (2) communication, language and literacy<sup>7</sup>;
- 2748 (3) problem solving, reasoning and numeracy<sup>8</sup>;
- 2749 (4) knowledge and understanding of the world<sup>9</sup>;
- 2750 (5) physical development<sup>10</sup>; and
- 2751 (6) creative development<sup>11</sup>.

The learning and development requirements may specify in relation to each of the areas of learning and development:

- 2752 (a) the knowledge, skills and understanding which young children of different abilities and maturities are expected to have before 1 September next following the day on which they attain the age of five ('early learning goals')<sup>12</sup>;
- 2753 (b) the matters, skills and processes which are required to be taught to young children of different abilities and maturities ('educational programmes')<sup>13</sup>; and
- 2754 (c) the arrangements which are required for assessing children for the purpose of ascertaining what they have achieved in relation to the early learning goals ('assessment arrangements')<sup>14</sup>.

A learning and development order may specify such assessment arrangements as may for the time being be made by a person specified in the order<sup>15</sup> and may confer or impose on any of the following:

- 2755 (i) an early years provider<sup>16</sup>;
- 2756 (ii) the governing body or head teacher of a maintained school in England<sup>17</sup>;
- and
- 2757 (ii) an English local authority<sup>18</sup>,

such functions as appear to the Secretary of State to be required<sup>19</sup>.

<sup>1</sup> For the meaning of 'well-being' see para 1106 ante. For the meaning of 'young child' see para 1106 note 2 ante.

2 le early years providers to whom the Childcare Act 2006 s 40 applies (see para 1125 post). For the meanings of 'early years provision' and 'early years provider' see para 1117 note 6 ante.

3 As to the Secretary of State see para 155 ante.

4 le in accordance with the Childcare Act 2006 s 41.

5 Ibid s 39(1)(a). An order under s 39(1)(a) ('a learning and development order') may not require:

794 (1) the allocation of any particular period or periods of time to the teaching of any educational programme or any matter, skill or process forming part of it (s 41(5)(a)); or

795 (2) the making in the timetables of any early years provider of provision of any particular kind for the periods to be allocated to such teaching (s 41(5)(b)).

Where the Secretary of State proposes to make an order under s 39(1)(a) specifying early learning goals or educational programmes, he must give notice of the proposal to such bodies representing the interests of early years providers as the Secretary of State considers appropriate, and to any other persons with whom consultation appears to the Secretary of State to be desirable; and he must give them a reasonable opportunity of submitting evidence and representations as to the issues arising: s 45(1), (2). When the Secretary of State has considered any evidence and representations submitted to him he must publish in such manner as, in his opinion, is likely to bring them to the notice of persons having a special interest in early years provision a draft of the proposed order and any associated document, and a summary of the views expressed during the consultation: s 45(3). The Secretary of State must allow a period of not less than one month beginning with the publication of the draft of the proposed order for the submission of any further evidence and representations as to the issues arising; and when the period so allowed has expired, the Secretary of State may make the order, with or without modifications: s 45(4), (5).

An order under s 39(1)(a) may, instead of containing the provisions to be made, refer to provisions in a document published as specified in the instrument and direct that those provisions are to have effect or, as the case may be, are to have effect as specified in the instrument: s 44(1), (5). The power to make an order under s 39(1)(a) may be exercised so as to confer powers or impose duties on Her Majesty's Chief Inspector of Education, Children's Services and Skills in the exercise of his functions under Pt 3 (ss 31-98) (as amended) (s 44(2), (5)); and, in particular, that power may be exercised so as to require or authorise the Chief Inspector, in exercising those functions, to have regard to factors, standards and other matters prescribed by or referred to in the order (s 44(3), (5)). If the order requires any person (other than the Chief Inspector) to have regard to or to meet factors, standards and other matters prescribed by or referred to in the order, the order may also provide for any allegation that the person has failed to do so to be taken into account by the Chief Inspector in the exercise of his functions under Pt 3, or in any proceedings under Pt 3: s 44(4), (5). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

As from 1 September 2008, for the purpose of specifying the learning and development requirements under s 39(1)(a), the Department for Education and Skills publication the *Statutory Framework for the Early Years Foundation Stage* (2007) s 2 has effect and the Chief Inspector must have regard to the requirements and guidance given in s 2 of that document when exercising functions under the Childcare Act 2006 Pt 3: see the Early Years Foundation Stage (Learning and Development Requirements) Order 2007, SI 2007/1772, arts 3(1), 5. Any allegation that an early years provider has failed to have regard to the guidance or learning and development requirements prescribed in the *Statutory Framework for the Early Years Foundation Stage* (2007) s 2 may be taken into account by the Chief Inspector in the exercise of functions under the Childcare Act 2006 Pt 3 and may be taken into account in any proceedings under Pt 3: see the Early Years Foundation Stage (Learning and Development Requirements) Order 2007, SI 2007/1772, arts 6, 7.

6 Childcare Act 2006 s 41(1), (3)(a).

7 Ibid s 41(1), (3)(b).

8 Ibid s 41(1), (3)(c).

9 Ibid s 41(1), (3)(d).

10 Ibid s 41(1), (3)(d).

11 Ibid s 41(1), (3)(f). The Secretary of State may order amend s 41(3): s 41(4). At the date at which this volume states the law no such orders had been made.

12 Ibid s 41(2)(a).

13 Ibid s 41(2)(b).

14 Ibid s 41(2)(c).

15 Ibid s 42(3). Provision must be made for determining the extent to which any assessment arrangements, and the implementation of the arrangements, achieve the purpose for which the arrangements were made; and any such provision may be made by or under the learning and development order specifying the arrangements or (where the order specifies the person making the arrangements) in the arrangements themselves: s 42(4). The duties that may be imposed by virtue of s 41(1) include, in relation to persons exercising any power in pursuance of provision made by virtue of s 42(4), the duty to permit them to enter premises on which the early years provision is provided, to observe implementation of the arrangements, and to inspect, and take copies of, documents and other articles: s 42(5). A learning and development order under s 39(1)(a) (see the text and note 5 supra) specifying assessment arrangements may authorise the making of such provisions giving full effect to or otherwise supplementing the provisions made by the order (other than provision conferring or imposing functions as mentioned in s 42(1): see the text and note 19 infra) as appear to the Secretary of State to be expedient; and any provisions made under such an order, on being published as specified in the order, are to have effect as if made by the order: s 42(6), (7).

16 Ibid s 42(2)(a).

17 Ibid s 42(2)(b).

18 Ibid s 42(2)(c). For the meaning of 'English local authority' see para 1105 note 4 ante.

19 Ibid s 42(1). Where a person ('the authorised person') proposes to enter domestic premises in pursuance of provision made by virtue of s 42(1), (4) in a learning development order specifying assessment arrangements in relation to early years provision and that person has reasonable cause to believe that the premises are not the home of the person providing the early years or later years provision or that the premises are the home of a child for whom the early years or later years provision is provided, the authorised person may not enter the premises without the consent of an adult who is an occupier of the premises: s 78(1), (2). However, this does not prevent the imposition under s 38 (see para 1121 ante), s 58 (see para 1130 post) or s 66 (see para 1134 post) of a condition requiring a person registered under Pt 3 Ch 2 (ss 33-51), Pt 3 Ch 3 (ss 52-61) or Pt 3 Ch 4 (ss 62-67) to secure that the occupier of any premises on which the registered person provides early years provision or later years provision gives any consent required by s 78(2): s 78(3). 'Occupier' does not include the person providing the early years or later years provision: s 78(4). For these purposes, a 'learning and development order' means an order under s 39(1)(a) (see the text and note 5 supra): s 78(4).

As from 1 September 2008, an English local authority must:

796 (1) make provision to ensure the accuracy and consistency of the assessments made by early years providers in their area (Early Years Foundation Stage (Learning and Development Requirements) Order 2007, SI 2007/1772, art 4(1));

797 (2) have regard to any guidance given by the Qualifications and Curriculum Authority in exercising its function under head (1) supra (art 4(2)).

An early years provider must permit any person authorised by an English local authority for the purposes of exercising its function under head (1) supra to enter the premises on which the early years provision is provided, to observe the implementation of the assessment arrangements, and to inspect, and take copies of, documents and other articles relating to early years foundation stage profiles and assessment arrangements: art 4(3), (4). For the meaning of 'English local authority' see para 1105 note 4 ante.

## UPDATE

### 1122 Learning and development requirements

TEXT AND NOTES--Childcare Act 2006 ss 41(2)(c), 42(2), (5) amended, s 42(4) repealed, s 42(6) substituted, ss 41(4A), 42(A1), (3A), (6A)-(6C) added: Apprenticeships, Skills, Children and Learning Act 2009 s 160, Sch 12 paras 39, 40, Sch 16 Pt 4 (s 160 is in force in part for certain purposes only: see SI 2010/1151).

NOTE 5--Childcare Act 2006 s 44(1) amended: Apprenticeships, Skills, Children and Learning Act 2009 Sch 12 para 41. The document referred to is now *Statutory Framework for the Early Years Foundation Stage* (2008): see SI 2007/1772 art 2 (as amended by SI 2008/1952).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (b) Early Years Child Minders/1123. Exemptions to learning and development requirements.

### **1123. Exemptions to learning and development requirements.**

Regulations may enable the Secretary of State<sup>1</sup>, in prescribed circumstances, to direct in respect of a particular early years provider or a particular description of early years providers<sup>2</sup>, that to such extent as may be prescribed the learning and development requirements<sup>3</sup> do not apply or apply with such modifications as may be specified in the direction<sup>4</sup>.

Regulations may enable an early years provider, in prescribed circumstances, to determine in respect of a particular young child<sup>5</sup> that to such extent as may be prescribed the learning and development requirements do not apply or apply with such modifications as may be specified in the determination<sup>6</sup>.

1 As to the Secretary of State see para 155 ante.

2 For the meaning of 'early years provider' see para 1117 note 6 ante.

3 For the meaning of 'learning and development requirements' see para 1122 ante.

4 Childcare Act 2006 s 46(1). At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see para 1117 note 4 ante.

5 For the meaning of 'young child' see para 1106 note 2 ante.

6 Childcare Act 2006 s 46(2). At the date at which this volume states the law no such regulations had been made.

### **UPDATE**

### **1123 Exemptions to learning and development requirements**

TEXT AND NOTES--See the Early Years Foundation Stage (Exemptions from Learning and Development Requirements) Regulations 2008, SI 2008/1743.

NOTE 4--Childcare Act 2006 s 46(1A)-(1D) added: Apprenticeships, Skills, Children and Learning Act 2009 Sch 12 para 42.

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### **1124. Welfare requirements.**

For the purpose of promoting the well-being of young children<sup>1</sup> for whom early years provision is provided by early years providers<sup>2</sup>, the Secretary of State<sup>3</sup> must by regulations specify<sup>4</sup> such requirements as he considers appropriate governing the activities of early years providers<sup>5</sup> ('welfare requirements')<sup>6</sup>.

The matters that may be dealt with by welfare regulations include:

- 2758 (1) the welfare of the children concerned<sup>7</sup>;
- 2759 (2) the arrangements for safeguarding the children concerned<sup>8</sup>;
- 2760 (3) suitability of persons to care for, or be in regular contact with, the children concerned<sup>9</sup>;
- 2761 (4) qualifications and training<sup>10</sup>;
- 2762 (5) the suitability of premises and equipment<sup>11</sup>;
- 2763 (6) the manner in which the early years provision is organised<sup>12</sup>;
- 2764 (7) procedures for dealing with complaints<sup>13</sup>;
- 2765 (8) the keeping of records<sup>14</sup>;
- 2766 (9) the provision of information<sup>15</sup>.

The learning and development requirements and the welfare requirements are together to be known as 'the early years foundation stage'<sup>16</sup>.

1 For the meaning of 'well-being' see para 1106 ante. For the meaning of 'young children' see para 1106 note 2 ante.

2 Ie early years providers to whom the Childcare Act 2006 s 40 applies (see para 1125 post). For the meanings of 'early years provision' and 'early years providers' see para 1117 note 6 ante.

3 As to the Secretary of State see para 155 ante.

4 Ie in accordance with the Childcare Act 2006 s 43.

5 Ie early years providers to whom ibid s 40 applies (see para 1125 post).

6 Ibid s 39(1)(b). Before making welfare regulations, the Secretary of State must consult Her Majesty's Chief Inspector of Education, Children's Services and Skills and any other persons he considers appropriate: s 43(2). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. Welfare regulations may provide that a person who without reasonable excuse fails to comply with any requirement of the regulations is guilty of an offence; and that a person guilty of the offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 43(3). As to the standard scale see para 132 note 2 ante.

Regulations under s 39(1)(b) may, instead of containing the provisions to be made, refer to provisions in a document published as specified in the instrument and direct that those provisions are to have effect or, as the case may be, are to have effect as specified in the instrument: s 44(1), (5). The power to make regulations under s 39(1)(b) may be exercised so as to confer powers or impose duties on the Chief Inspector in the exercise of his functions under Pt 3 (ss 31-98) (as amended) (s 44(2), (5)); and, in particular, that power may be exercised so as to require or authorise the Chief Inspector, in exercising those functions, to have regard to factors, standards and other matters prescribed by or referred to in the regulations (s 44(3), (5)). If the regulations require any person (other than the Chief Inspector) to have regard to or to meet factors, standards

and other matters prescribed by or referred to in the regulations, the regulations may also provide for any allegation that the person has failed to do so to be taken into account by the Chief Inspector in the exercise of his functions under Pt 3, or in any proceedings under Pt 3: s 44(4), (5).

As from 1 September 2008 for the purpose of specifying the welfare requirements under s 39(1)(b), the Department for Education and Skills publication the *Statutory Framework for the Early Years Foundation Stage* (2007) s 3 has effect; and the Chief Inspector must have regard to the requirements and guidance given in s 3 of that document when exercising functions under the Childcare Act 2006 Pt 3: see the Early Years Foundation Stage (Welfare Requirements) Regulations 2007, SI 2007/1771, regs 3(1), 4. Any allegation that an early years provider has failed to meet the welfare requirements and to have regard to the guidance prescribed in the *Statutory Framework for the Early Years Foundation Stage* (2007) s 3 may be taken into account by the Chief Inspector in the exercise of functions under the Childcare Act 2006 Pt 3, and may be taken into account in any proceedings under Pt 3: see the Early Years Foundation Stage (Welfare Requirements) Regulations 2007, SI 2007/1771, regs 5, 6.

7 Childcare Act 2006 s 43(1)(a). As from 1 September 2008 an early years provider must not use corporal punishment on a child for whom he provides early years provision; and, so far as is reasonably practicable, he must ensure that corporal punishment is not used on any such child by any person who cares for, or is in regular contact with, children or by any person living or working on the premises on which the early years provision is provided: Early Years Foundation Stage (Welfare Requirements) Regulations 2007, SI 2007/1771, regs 3(1), 7(1). However, a person will not be taken to have used corporal punishment for the purposes of art 7(1) if the action was taken for reasons that include averting an immediate danger of personal injury to, or an immediate danger of death of, any person (including the child himself): regs 3(1), 7(2). For these purposes, 'corporal punishment' means anything done for the purpose of punishing the child (whether or not there are other reasons for doing it) which, without any justification, would constitute battery: regs 3(1), 7(3). An early years provider who fails to comply with the requirements of reg 7(1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 11(1).

8 Childcare Act 2006 s 43(1)(b).

9 Ibid s 43(1)(c).

10 Ibid s 43(1)(d).

11 Ibid s 43(1)(e).

12 Ibid s 43(1)(f).

13 Ibid s 43(1)(g).

14 Ibid s 43(1)(h).

15 Ibid s 43(1)(i). As from 1 September 2008, an early years provider must notify the Chief Inspector of the occurrence of any of the events set out in the Early Years Foundation Stage (Welfare Requirements) Regulations 2007, SI 2007/1771, Schedule; and he must at the same time provide the Chief Inspector with the information specified in that Schedule in respect of that event: regs 3(1), 8(1). Notification must be made, where it is reasonably practicable to do so, in advance of the event occurring; and in all other cases, as soon as reasonably practicable, but in any event within 14 days of the event occurring: regs 3(1), 8(2). An early years provider who fails to comply with the requirements of reg 8 is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 11(1). The events to be notified are as follows:

798 (1) any change to the address of the premises on which child care is provided (Schedule para 1);

799 (2) particulars of any change to the premises on which child care is provided that may affect the space available to children and the quality of child care available to them (Schedule para 2);

800 (3) particulars of any proposal to change the hours during which child care is to be provided which will entail the provision of overnight child care (Schedule para 3);

801 (4) particulars of any allegation of serious harm to or abuse of a child committed by any person living, working or caring for children at the premises on which child care is provided (whether that allegation relates to harm or abuse committed on those premises or elsewhere), and any other abuse which is alleged to have taken place on those premises, and of the action taken in respect of the allegation (Schedule para 4);

802 (5) particulars of any serious accident, serious illness, injury to, or death of, any child whilst in the care of the early years provider, and of the action taken in respect of the serious accident, serious illness, injury, or death (Schedule para 5);



- 803 (6) particulars of any incident of food poisoning affecting two or more children cared for on the premises on which child care is provided (Schedule para 6);
- 804 (7) particulars of any other significant event which is likely to affect the suitability of the early years provider or any person who cares for, or is in regular contact with, children on the premises on which child care is provided to look after children (Schedule para 7);
- 805 (8) where child care is provided by a body corporate, any change in the name or registered number or registered address of the company (Schedule para 8);
- 806 (9) where child care is provided by a registered charity, any change in the name or registration number or registered address of the charity (Schedule para 9);
- 807 (10) in the case of an early years provider who is not an early years child minder, any change in the name or address of the provider, and any change of the person who is managing the early years provision (Schedule para 10);
- 808 (11) in the case of an early years child minder:
46. (a) any change of the persons of 16 years or older living or working on the premises on which child care is provided (providing that persons are not to be treated as working on the premises for these purposes if none of their work is done in the part of the premises in which children are cared for or if they do not work on the premises at times when children are there) (Schedule para 11(a));
47. (b) any change in the name or address of the child minder (Schedule para 11(b)).

16 Childcare Act 2006 s 39(2).

## UPDATE

### 1124 Welfare requirements

TEXT AND NOTES--See the Early Foundation Stage (Welfare Requirements) Regulations) 2007, SI 2007/1771, regs 3A-3C (added by SI 2008/1953), which relate to transitional arrangements for specified early years providers (reg 3A), transitional arrangements for independent schools (reg 3B) and further modifications for independent schools (reg 3C).

NOTE 6--The document referred to is now *Statutory Framework for the Early Years Foundation Stage* (2008): see SI 2007/1771 reg 2 (as amended by SI 2008/1953).

NOTE 7--SI 2007/1771 regs 7(1), 11(1) amended: SI 2008/1953.

NOTE 15--SI 2007/1771 regs 8(1), 11(1), Schedule amended, reg 8(3) added: SI 2008/1953. A registered early years provider, and persons living or employed in the same household as the registered early years provider, must also provide information, as soon as practicable and within 14 days, about orders, determinations, convictions or other grounds for disqualification from registration which results in that person being disqualified from registration under regulations made under the Childcare Act 2006 s 75: SI 2007/1771 regs 3(1), 8A (reg 3(1) amended, reg 8A added by SI 2009/1549).

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### **1125. Duty to implement the early years foundation stage.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. An early years provider<sup>2</sup>:

- 2767 (1) must secure that the early years provision meets the learning and development requirements<sup>3</sup>; and
- 2768 (2) must comply with the welfare requirements<sup>4</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 40 had not been brought into force.

2 Ibid s 40 applies to early years providers providing early years provision in respect of which they are registered under Pt 3 Ch 2 (ss 33-51), and early years providers providing early years provision in respect of which, but for s 34(2) (exemption for provision for children aged three or over at certain schools: see para 1119 ante), they would be required to be registered under Pt 3 Ch 2: s 40(1). For the meanings of 'early years provision' and 'early years providers' see para 1117 note 6 ante.

3 Ibid s 40(2)(a). For the meaning of 'learning and development requirements' see para 1122 ante. As from 1 September 2008 the following provisions apply. An early years providers to whom s 40 applies must have regard to the Department for Education and Skills publication the *Statutory Framework for the Early Years Foundation Stage* (2007) s 2 in securing that the early years provision they provide meets the learning and development requirements and s 3 in securing that the early years provision they provide complies with the welfare requirements: see the Early Years Foundation Stage (Welfare) Requirements) Regulations 2007, SI 2007/1771, reg 3(3); and the Early Years Foundation Stage (Learning and Development Requirements) Order 2007, SI 2007/1772, art 3(2). Where Her Majesty's Chief Inspector of Education, Children's Services and Skills considers that an early years provider to whom the Childcare Act 2006 s 40 applies has failed to comply with the welfare requirements, he may give a notice to the early years provider which the early years provider must comply with or be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Early Years Foundation Stage (Welfare) Requirements) Regulations 2007, SI 2007/1771, regs 9, 11. As to the standard scale see para 132 note 2 ante. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Childcare Act 2006 s 40(2)(b). For the meaning of 'welfare requirement' see para 1124 ante.

### **UPDATE**

#### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1125 Duty to implement the early years foundation stage**

NOTE 3--The document referred to is now *Statutory Framework for the Early Years Foundation Stage* (2008): see SI 2007/1772 art 2 (as amended by SI 2008/1952); and

SI 2007/1771 reg 2 (as amended by SI 2008/1953). SI 2007/1771 regs 9, 11 amended:  
SI 2008/1953.

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### **1126. Inspection of registered early years providers.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The following applies to early years provision in respect of a registered<sup>2</sup> early years provider<sup>3</sup>. Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup>:

- 2769 (1) must at such intervals as may be prescribed inspect early years provision<sup>5</sup>;
- 2770 (2) must inspect early years provision at any time when the Secretary of State requires the Chief Inspector to secure its inspection<sup>6</sup>; and
- 2771 (3) may inspect early years provision at any other time when the Chief Inspector considers that it would be appropriate for it to be inspected<sup>7</sup>.

Regulations may make provision requiring the registered person to notify prescribed persons of the fact that early years provision is to be inspected<sup>8</sup>.

After conducting an inspection, the Chief Inspector must make a report in writing<sup>9</sup> on:

- 2772 (a) the contribution of the early years provision to the well-being of the children for whom it is provided<sup>10</sup>;
- 2773 (b) the quality and standards of the early years provision<sup>11</sup>;
- 2774 (c) how far the early years provision meets the needs of the range of children for whom it is provided<sup>12</sup>; and
- 2775 (d) the quality of leadership and management in connection with the early years provision<sup>13</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 49, 50 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 le registered under the Childcare Act 2006 Pt 3 Ch 2 (ss 33-51).

3 Ibid s 49(1). For the meanings of 'early years provision' and 'early years provider' see para 1117 note 6 ante.

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 49(2)(a). Regulations may provide that: (1) in prescribed circumstances the Chief Inspector is not required to inspect early years provision at an interval prescribed for the purposes of s 49(2)(a) (s 49(3)); (2) the Chief Inspector is not required by s 49(2)(a) to inspect early years provision at an independent school if the early years provision is inspected in prescribed circumstances by a body approved by the Secretary of State for the purposes of s 49(4) (s 49(4)). As to the Secretary of State see para 155 ante.

6 Ibid s 49(2)(b). A requirement made by the Secretary of State as mentioned in s 49(2)(b) may be imposed in relation to early years provision at particular premises or a class of premises: s 49(5). If the Chief Inspector so elects in the case of an inspection falling within s 49(2)(b) or s 49(2)(c) (see head (3) in the text), that inspection is to be treated as if it were an inspection falling within s 49(2)(a) (see head (1) in the text): s 49(7).

7 Ibid s 49(2)(c). See note 6 supra.

8 Ibid s 49(6). At the date at which this volume states the law no regulations had been made under s 49.

9 The Chief Inspector:

809 (1) may send a copy of the report to the Secretary of State and must do so without delay if the Secretary of State requests a copy (ibid s 50(2)(a));

810 (2) must ensure that a copy of the report is sent without delay to the registered person (s 50(2)(b));

811 (3) must ensure that copies of the report, or such parts of it as he considers appropriate, are sent to such other persons as may be prescribed (s 50(2)(c)); and

812 (4) may arrange for the report (or parts of it) to be further published in any manner he considers appropriate (s 50(2)(d)).

Regulations may make provision: (a) requiring the registered person to make a copy of any report sent to him under head (2) above available for inspection by prescribed persons (s 50(3)(a)); (b) requiring the registered person, except in prescribed cases, to provide a copy of the report to prescribed persons (s 50(3)(b)); (c) authorising the registered person in prescribed cases to charge a fee for providing a copy of the report (s 50(3)(c)). At the date at which this volume states the law no regulations had been made under s 50.

10 Ibid s 50(1)(a). For the meaning of 'well-being' see para 1106 ante.

11 Ibid s 50(1)(b).

12 Ibid s 50(1)(c).

13 Ibid s 50(1)(d).

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*(c) Regulation of Later Years Child Minders*

**UPDATE**

**1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

**1126 Inspection of registered early years providers**

TEXT AND NOTES--See the Childcare (Inspections) Regulations 2008, SI 2008/1729, which make provision as to the frequency of inspection of early years provision (regs 3, 4 (reg 3 amended by SI 2009/1508)); arrangements for the inspection of independent schools (SI 2008/1729 reg 5); notification of inspection in relation to early years childminders and other early years providers (regs 6, 7); the copy of the report which must be sent by the Chief Inspector (reg 8); the copies of the report which must be provided by an early years childminder (reg 9); the copy of a report which is to be provided by other early years providers (reg 10); and the fee for providing a copy of the report (reg 11).

NOTE 5--Childcare Act 2006 s 49(4) amended: Education and Skills Act 2008 Sch 1 para 33 (not yet in force).

**1127. Later years child minders: requirement to register.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person may not provide later years child minding in England for a child who has not attained the age of eight unless he is registered in Part A of the general child care register as a child minder<sup>2</sup>. However, the Secretary of State<sup>3</sup> may by order provide that, in circumstances specified in the order, such registration does not apply in relation to later years child minding<sup>4</sup>. The circumstances specified in such an order may relate to one or more of the following matters (among others):

- 2776 (1) the person providing the later years child minding<sup>5</sup>;
- 2777 (2) the child or children for whom it is provided<sup>6</sup>;
- 2778 (3) the nature of the later years child minding<sup>7</sup>;
- 2779 (4) the premises on which it is provided<sup>8</sup>;
- 2780 (5) the times during which it is provided<sup>9</sup>;
- 2781 (6) the arrangements under which it is provided<sup>10</sup>.

<sup>1</sup> The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 52 had only been

brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 Childcare Act 2006 s 52(1). As to Part A of the general child care register see para 1117 ante. If it appears to Her Majesty's Chief Inspector of Education, Children's Services and Skills that a person has provided later years child minding in contravention of s 52(1), the Chief Inspector may serve a notice ('an enforcement notice') on the person (s 52(4)), which has effect until it is revoked by the Chief Inspector (s 52(6)). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. An enforcement notice may be served on a person by delivering it to him or by sending it by post: s 52(5). A person commits an offence if, at any time when an enforcement notice has effect in relation to him and without reasonable excuse, he provides later years child minding in contravention of s 52(1): s 52(7). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 52(8). As to the standard scale see para 132 note 2 ante. For the meaning of 'later years child minding' see para 1117 note 8 ante. For the meaning of 'child' see para 1118 note 5 ante.

3 As to the Secretary of State see para 155 ante.

4 Childcare Act 2006 s 52(2). At the date at which this volume states the law no such order had been made.

5 Ibid s 52(3)(a).

6 Ibid s 52(3)(b).

7 Ibid s 52(3)(c).

8 Ibid s 52(3)(d).

9 Ibid s 52(3)(e).

10 Ibid s 52(3)(f).

## UPDATE

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1127 Later years child minders: requirement to register**

NOTE 4--The Childcare Act 2006 s 52(1) does not apply in relation to later years childminding in the circumstances specified in the Childcare (Exemptions from Registration) Order 2008, SI 2008/979, arts 3, 6, or 8: art 2(3).

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### **1128. Other later years providers: requirement to register.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person may not provide for a child who has not attained the age of eight later years provision<sup>3</sup> on premises<sup>4</sup> in England which are not domestic premises<sup>5</sup> or later years provision on domestic premises in England which would be later years child minding but for certain provisions<sup>6</sup>, unless he is registered in Part A of the general child care register<sup>7</sup> in respect of the premises<sup>8</sup>. This does not apply in relation to later years provision for a child if:

- 2782 (1) the provision is made at any of the following schools as part of the school's activities:
  - .71
  - 126. (a) a maintained school<sup>9</sup>;
  - 127. (b) a school approved<sup>10</sup> by the Secretary of State<sup>11</sup>; or
  - 128. (c) an independent school<sup>12</sup>;
  - .72
  - 2783 (2) the provision is made by the proprietor of the school or a person employed to work at the school<sup>13</sup>; and
  - 2784 (3) the child is a registered pupil at the school or, if the provision is made for more than one child who has not attained the age of eight, at least one of the children is a registered pupil at the school<sup>14</sup>.

However, the Secretary of State may by order provide that, in circumstances specified in the order, the above provisions do not apply in relation to later years provision<sup>15</sup>. The circumstances specified in such an order may relate to one or more of the following matters (among others):

- 2785 (i) the person providing the later years provision<sup>16</sup>;
- 2786 (ii) the child or children for whom it is provided<sup>17</sup>;
- 2787 (iii) the nature of the later years provision<sup>18</sup>;
- 2788 (iv) the premises on which it is provided<sup>19</sup>;
- 2789 (v) the times during which it is provided<sup>20</sup>;
- 2790 (vi) the arrangements under which it is provided<sup>21</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 53 is only in force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the meaning of 'child' see para 1118 note 5 ante.

3 For the meaning of 'later years provision' see para 1117 note 8 ante.

4 For the meaning of 'premises' see para 1117 note 6 ante.

5 For the meaning of 'domestic premises' see para 1117 note 6 ante.



- 6    le under the Childcare Act 2006 s 96(9): see para 1117 ante.
- 7    As to Part A of the general child care register see para 1117 ante.
- 8    Childcare Act 2006 s 53(1). A person commits an offence if, without reasonable excuse, he provides later years provision in contravention of s 53(1) (s 53(5)); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (s 53(6)). As to the standard scale see para 132 note 2 ante.
- 9    Ibid s 53(2)(a)(i).
- 10   le under the Education Act 1996 s 342 (approval of non-maintained special schools): see EDUCATION vol 15(2) (2006 Reissue) paras 1028-1029.
- 11   Childcare Act 2006 s 53(2)(a)(ii). As to the Secretary of State see para 155 ante.
- 12   Ibid s 53(2)(a)(iii).
- 13   Ibid s 53(2)(b).
- 14   Ibid s 53(2)(c).
- 15   Ibid s 53(3).
- 16   Ibid s 53(4)(a).
- 17   Ibid s 53(4)(b).
- 18   Ibid s 53(4)(c).
- 19   Ibid s 53(4)(d).
- 20   Ibid s 53(4)(e).
- 21   Ibid s 53(4)(f).

## UPDATE

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1128 Other later years providers: requirement to register**

TEXT AND NOTES 9-14--Childcare Act 2006 s 53(2)(a), (b) amended, s 53(2)(c) substituted: Education and Skills Act 2008 Sch 1 para 34 (not yet in force).

NOTES 15-21--The Childcare Act 2006 s 53(1) does not apply in relation to later years provision in the circumstances specified in the Childcare (Exemptions from Registration) Order 2008, SI 2008/979, arts 4-8: art 2(4).

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### **1129. Registration process for later years child minders.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person who proposes to provide later years child minding<sup>2</sup> in respect of which he is required to be registered<sup>3</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> for registration as a later years child minder<sup>5</sup>. An application must give any prescribed information about prescribed matters, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>6</sup>. The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>7</sup> and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration<sup>8</sup> are satisfied and are likely to continue to be satisfied<sup>9</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>10</sup>.

The prescribed requirements for registration may include requirements relating to:

- 2791 (1) the applicant<sup>11</sup>;
- 2792 (2) the premises on which the later years child minding is to be provided<sup>12</sup>;
- 2793 (3) the arrangements for later years child minding on those premises<sup>13</sup>;
- 2794 (4) any person who may be caring for children on those premises<sup>14</sup>;
- 2795 (5) any other person who may be on those premises<sup>15</sup>.

If an application is granted, the Chief Inspector must register the applicant in Part A of the general child care register as a later years child minder and give the applicant a certificate of registration stating that he is so registered<sup>16</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 54, 56 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the meaning of 'later years child minding' see para 1117 note 8 ante.

3 Ie under the Childcare Act 2006 s 52(1) (see para 1127 ante).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 54(1). For the meaning of 'later years child minder' see para 1117 note 8 ante.

6 Ibid s 54(2). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

7 Ie regulations under ibid s 75 (see para 1156 post).

8 Ie the requirements prescribed for the purposes of ibid s 54.

9 Ibid s 54(3).

10 Ibid s 54(4).

11 Ibid s 54(5)(a).

12 Ibid s 54(5)(b).

13 Ibid s 54(5)(c).

14 Ibid s 54(5)(d).

15 Ibid s 54(5)(e).

16 Ibid s 56(1). A certificate of registration given to the applicant in pursuance of s 56(1) must contain prescribed information about prescribed matters (s 56(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered later years provider an amended certificate (s 56(4)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered later years provider a copy, on payment by the provider of any prescribed fee: s 56(5). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

## **UPDATE**

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1129 Registration process for later years child minders**

NOTE 6--In the case of an application for registration under the Childcare Act 2006 s 54(1), the prescribed fee which must accompany the application is £103: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 5.

NOTE 16--As to the content of a certificate of registration given in accordance with the Childcare Act 2006 s 56, see the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 6. A person who is registered as a later years childminder under the Childcare Act 2006 s 56(1) must pay to the Chief Inspector a fee of £103 at or by the prescribed time; this does not apply in any case where, on the date on which the annual fee would otherwise be payable, the person by whom that annual fee would be payable is also registered as an early years childminder under s 37(1): see the Childcare (Fees) Regulations 2008, SI 2008/1804, regs 11, 13(1). For the purposes of the Childcare Act 2006 s 56(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.

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### **1130. Registration process for other later years providers.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person who proposes to provide on any premises<sup>2</sup> later years provision<sup>3</sup> in respect of which he is required to be registered<sup>4</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>5</sup> for registration as a later years provider<sup>6</sup> in respect of the premise<sup>7</sup>. An application must give any prescribed information about prescribed matters, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>8</sup>. The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>9</sup> and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration<sup>10</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>11</sup>.

The prescribed requirements for registration may include requirements relating to:

- 2796 (1) the applicant<sup>12</sup>;
- 2797 (2) the premises on which the later years provision is to be provided<sup>13</sup>;
- 2798 (3) the arrangements for later years provision on those premises<sup>14</sup>;
- 2799 (4) any person who may be caring for children on those premises<sup>15</sup>;
- 2800 (5) any other person who may be on those premises<sup>16</sup>.

If an application is granted, the Chief Inspector must register the applicant in Part A of the general child care register as a later years child minder and give the applicant a certificate of registration stating that he is so registered<sup>17</sup>.

The Chief Inspector may impose such conditions as he thinks fit on the registration of a later years provider<sup>18</sup> and the later years provider commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>19</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 58 had not been brought into force; and ss 55, 56 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c)

2 For the meaning of 'premises' see para 1117 note 6 ante. As from a day to be appointed the Secretary of State may by order amend the Childcare Act 2006 Pt 3 so as to enable an application for registration under s 36(1) to be made in respect of more than one set of premises; and he may make such further amendments to Pt 3 as appear to him to be necessary or expedient in consequence of those amendments: s 94. At the date at which this volume states the law no such order had been made.

3 For the meaning of 'later years provision' see para 1117 note 8 ante.

4 Ie under the Childcare Act 2006 s 53(1) (see para 1128 ante).

5 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

6 For the meaning of 'later years provider' see para 1117 note 8 ante.

7 Childcare Act 2006 s 55(1).

8 Ibid s 55(2). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

9 le under ibid s 75 (see para 1156 post).

10 Ibid s 55(3).

11 Ibid s 55(4).

12 Ibid s 55(5)(a).

13 Ibid s 55(5)(b).

14 Ibid s 55(5)(c).

15 Ibid s 55(5)(d).

16 Ibid s 55(5)(e).

17 Ibid s 56(2). A certificate of registration given to the applicant in pursuance of s 56(1) must contain prescribed information about prescribed matters (s 56(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered later years provider an amended certificate (s 56(4)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered later years provider a copy, on payment by the provider of any prescribed fee: s 56(5). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

18 Ibid s 58(1). This power may be exercised at a time when the Chief Inspector registers the person in pursuance of s 56 or at any subsequent time: s 58(2). The Chief Inspector may at any time vary or remove any condition imposed under s 58(1): s 58(3). The power imposed by s 58(1) includes power to impose conditions for the purpose of giving effect to regulations under s 59 (see para 1132 post): s 58(4).

19 Ibid s 58(5). A person guilty of an offence under s 58(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 58(6). As to the standard scale see para 132 note 2 ante.

## UPDATE

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1130 Registration process for other later years providers**

NOTE 8--In the case of an application for registration under the Childcare Act 2006 s 55(1), the prescribed fee which must accompany the application is £114: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 6.

NOTE 17--A person who is registered as a later years provider, other than a childminder, under the Childcare Act 2006 s 56(2) must pay to the Chief Inspector a fee of £114 at or by the prescribed time; this provision does not apply in any case where, on the date on which the annual fee would otherwise be payable, the person by whom that annual fee would be payable is also registered as an early years provider, other than a childminder, under s 37(2): see SI 2008/1804 regs 12, 13(2). For the purposes of the Childcare Act 2006 s 56(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.



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### **1131. Special procedure for registered early years providers.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. If a person who is registered in the early years register<sup>2</sup> as an early years child minder<sup>3</sup> gives notice<sup>4</sup> to Her Majesty's Chief Inspector of Education, Children's Services and Skills that he proposes to provide later years child minding<sup>5</sup> in respect of which he is required to be registered<sup>6</sup>, the Chief Inspector must register the person in Part A of the general child care register as a later years child minder<sup>7</sup> and give the person a certificate of registration stating that he is so registered<sup>8</sup>.

If a person who is registered in the early years register in respect of particular premises as an early years provider<sup>9</sup> other than a child minder gives notice to the Chief Inspector that he proposes to provide later years provision<sup>10</sup> in respect of which he is required to be registered on the same premises, the Chief Inspector must register the person in Part A of the general child care register as a later years provider other than a child minder in respect of the premises and give the person a certificate of registration stating that he is so registered<sup>11</sup>.

The Chief Inspector may impose such conditions as he thinks fit on the registration of a later years provider<sup>12</sup>; and the later years provider commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>13</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 57, 58 had not been brought into force; and s 56 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(d); and the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 For the early years register see para 1117 ante.

3 For the meaning of 'early years child minder' see para 1117 note 6 ante.

4 The notice given under the Childcare Act 2006 s 57(1), (2) may be given to the person in question by delivering it to him, by sending it by post or by transmitting it electronically: s 93(1), (2). However, if the notice is transmitted electronically, it is to be treated as given only if the following requirements are met: s 93(3). If the person required or authorised to give the notice is Her Majesty's Chief Inspector of Education, Children's Services and Skills, the person to whom the notice is required or authorised to be given must have indicated to the Chief Inspector his willingness to receive notices transmitted by electronic means and must have provided an address suitable for that purpose and the notice must be sent to the address provided by him: s 93(4). An indication given for the purposes of s 93(4) may be given generally for the purposes of notices required or authorised to be given by the Chief Inspector or may be limited to notices of a particular description: s 93(6). If the person required or authorised to give the notice is not the Chief Inspector, the notice must be transmitted in such manner as the Chief Inspector may require: s 93(5). A requirement imposed by the Chief Inspector under s 93(5) must be published in such manner as the Chief Inspector thinks appropriate for the purpose of bringing it to the attention of persons who are likely to be affected by it: s 93(7). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 For the meaning of 'later years child minding' see para 1117 note 8 ante.

6 Ie required to be registered under the Childcare Act 2006 Pt 3 Ch 3 (ss 52-61).

7 As to registration on Part A of the general child care register see para 1117 ante. For the meaning of 'later years child minder' see para 1117 note 8 ante.

8 Childcare Act 2006 s 57(1). A certificate of registration given to the applicant in pursuance of s 57(1) must contain prescribed information about prescribed matters (s 56(3); applied by virtue of s 57(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered later years provider an amended certificate (s 56(4); applied by virtue of s 57(3)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered later years provider a copy, on payment by the provider of any prescribed fee: s 56(5); applied by virtue of s 57(3). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

9 For the meaning of 'early years provider' see para 1117 note 6 ante.

10 For the meanings of 'later years provision' and 'later years provider' see para 1117 note 8 ante.

11 Childcare Act 2006 s 57(2). A certificate of registration given to the applicant in pursuance of s 57(2) must contain prescribed information about prescribed matters (s 56(3); applied by virtue of s 57(3)); and if there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered later years provider an amended certificate (s 56(4); applied by virtue of s 57(3)). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered later years provider a copy, on payment by the provider of any prescribed fee: s 56(5); applied by virtue of s 57(3). At the date at which this volume states the law, no regulations had been made prescribing any such information, matters or fee.

12 Ibid s 58(1). This power may be exercised at a time when the Chief Inspector registers the person in pursuance of s 57 or at any subsequent time: s 58(2). The Chief Inspector may at any time vary or remove any condition imposed under s 58(1): s 58(3). The power imposed by s 58(1) includes power to impose conditions for the purpose of giving effect to regulations under s 59 (see para 1132 post): s 58(4).

13 Ibid s 58(5). A person guilty of an offence under s 58(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 58(6). As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).



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### **1132. Regulations governing activities.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The Secretary of State<sup>2</sup> may, after consulting Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> and any other person he considers appropriate, make regulations governing the activities of later years providers providing later years provision in respect of which they are registered<sup>4</sup> and later years providers providing later years provision in respect of which, but for the exemption for provision for children at certain schools<sup>5</sup>, they would be required to be registered<sup>6</sup>.

The regulations may deal with the following matters (among others):

- 2801 (1) the welfare of the children concerned<sup>7</sup>;
- 2802 (2) the arrangements for safeguarding the children concerned<sup>8</sup>;
- 2803 (3) suitability of persons to care for, or be in regular contact with, the children concerned<sup>9</sup>;
- 2804 (4) qualifications and training<sup>10</sup>;
- 2805 (5) the suitability of premises and equipment<sup>11</sup>;
- 2806 (6) the manner in which the later years provision is organised<sup>12</sup>;
- 2807 (7) procedures for dealing with complaints<sup>13</sup>;
- 2808 (8) the keeping of records<sup>14</sup>;
- 2809 (9) the provision of information<sup>15</sup>.

The regulations may provide that a person who without reasonable excuse fails to comply with any requirement of the regulations is guilty of an offence and that a person guilty of the offence is liable on summary conviction to a fine<sup>16</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 59 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 As to the Secretary of State see para 155 ante.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Ie registered under the Childcare Act 2006 Pt 3 Ch 3 (ss 52-61). For the meanings of 'later years provider' and 'later years provision' see para 1117 note 8 ante.

5 Ie but for ibid s 53(2) (see para 1128 ante).

6 Ibid s 59(1), (2). At the date at which this volume states the law no such regulations had been made. The power to make regulations under s 59 may be exercised so as confer powers or impose duties on the Chief Inspector in the exercise of his functions under Pt 3: s 59(4). In particular, it may be exercised so as to require the Chief Inspector, in exercising his functions under Pt 3, to have regard to factors, standards and other matters prescribed by or referred to in the regulations: s 59(5). If the regulations require any person (other than the Chief Inspector) to have regard to or to meet factors, standards and other matters prescribed by or referred to in the regulations, they may also provide for any allegation that the person has failed to do so to be taken

into account by the Chief Inspector in the exercise of his functions under Pt 3 or in any proceedings under Pt 3: s 59(6).

7 Ibid s 59(3)(a).

8 Ibid s 59(3)(b).

9 Ibid s 59(3)(c).

10 Ibid s 59(3)(d).

11 Ibid s 59(3)(e).

12 Ibid s 59(3)(f).

13 Ibid s 59(3)(g).

14 Ibid s 59(3)(h).

15 Ibid s 59(3)(i).

16 Ibid s 59(7). The fine must not exceed level 5 on the standard scale: see s 59(7). As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

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### **1133. Inspection of later years providers.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The following applies to later years provision in respect of which the provider is registered<sup>2</sup>. Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup>:

- 2810 (1) must inspect later years provision at any time when the Secretary of State<sup>4</sup> requires the Chief Inspector to secure its inspection<sup>5</sup>; and
- 2811 (2) may inspect later years provision at any other time when the Chief Inspector considers that it would be appropriate for it to be inspected<sup>6</sup>.

Regulations may make provision requiring the registered person to notify prescribed persons of the fact that later years provision is to be inspected<sup>7</sup>.

After conducting an inspection the Chief Inspector may make a report in writing<sup>8</sup> on such of the following matters as he considers appropriate:

- 2812 (a) the contribution of the later years provision to the well-being of the children for whom it is provided<sup>9</sup>;
- 2813 (b) the quality and standards of the later years provision<sup>10</sup>;
- 2814 (c) how far the later years provision meets the needs of the range of children for whom it is provided<sup>11</sup>; and
- 2815 (d) the quality of leadership and management in connection with the later years provision<sup>12</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law ss 60, 61 had only been brought into force for the purpose of making orders or regulations: see the Childcare Act 2006 (Commencement No 3 and Transitional Provisions) Order 2007, SI 2007/2717, art 2(c).

2 Childcare Act 2006 s 60(1). For the meaning of 'later years provision' see para 1117 note 8 ante. The text refers to a provider registered under Pt 3 Ch 3 (ss 52-61).

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 As to the Secretary of State see para 155 ante.

5 Childcare Act 2006 s 60(2)(a). A requirement made by the Secretary of State as mentioned in s 60(2)(a) may be imposed in relation to later years provision at particular premises or a class of premises: s 60(3).

6 Ibid s 60(2)(b).

7 Ibid s 60(4). At the date at which this volume states the law no such regulations had been made.

8 The Chief Inspector:

813 (1) may send a copy of the report to the Secretary of State and must do so without delay if the Secretary of State requests a copy (ibid s 61(2)(a));

- 814 (2) must ensure that a copy of the report is sent without delay to the registered person (s 61(2)(b));
- 815 (3) must ensure that copies of the report, or such parts of it as he considers appropriate, are sent to such other persons as may be prescribed (s 61(2)(c)); and
- 816 (4) may arrange for the report (or parts of it) to be further published in any manner he considers appropriate (s 61(2)(d)).

Regulations may make provision: (a) requiring the registered person to make a copy of any report sent to him under head (2) supra available for inspection by prescribed persons (s 61(3)(a)); (b) requiring the registered person, except in prescribed cases, to provide a copy of the report to prescribed persons (s 61(3)(b)); (c) authorising the registered person in prescribed cases to charge a fee for providing a copy of the report (s 61(3)(c)). At the date at which this volume states the law no such regulations had been made.

9 Ibid s 61(1)(a). For the meaning of 'well-being' see para 1106 ante.

10 Ibid s 61(1)(b).

11 Ibid s 61(1)(c).

12 Ibid s 61(1)(d).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1134. Voluntary registration process for child minding.

#### *(d) Voluntary Registration*

##### **UPDATE**

##### **1125-1133 Duty to implement the early years foundation stage ... Inspection of later years providers**

These provisions have effect for all purposes from 1 September 2008: SI 2008/2261. See also the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

##### **1133 Inspection of later years providers**

TEXT AND NOTES--See the Childcare (Inspections) Regulations 2008, SI 2008/1729, which make provision as to notification of inspection in relation to later years childminders and other later years providers (regs 12, 13); the copy of the report to be sent by the Chief Inspector (reg 14); the copy of the report to be provided by a later years childminder and other later years providers (regs 15, 16); and the fee for providing the copy of the report (reg 17).

##### **1134. Voluntary registration process for child minding.**

A person who provides or proposes to provide in England later years child minding<sup>1</sup> for a child<sup>2</sup> who has attained the age of eight<sup>3</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> for registration in Part B of the general child care register as a child minder<sup>5</sup>.

The application must give any prescribed information about prescribed matters<sup>6</sup>, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>7</sup>. The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>8</sup> and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration<sup>9</sup> are satisfied and are likely to continue to be satisfied<sup>10</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>11</sup>.

The prescribed requirements for registration may include requirements relating to:

- 2816 (1) the applicant<sup>12</sup>;
- 2817 (2) the premises on which the child minding is being (or is to be) provided<sup>13</sup>;
- 2818 (3) the arrangements for child minding on those premises<sup>14</sup>;
- 2819 (4) any person who may be caring for children on those premises<sup>15</sup>;
- 2820 (5) any other person who may be on those premises<sup>16</sup>.

As from a day to be appointed<sup>17</sup> a person who provides or proposes to provide in England early years child minding<sup>18</sup> or later years child minding for a child who has not attained that age but in respect of which the person is not required to be registered<sup>19</sup> may also make an application to the Chief Inspector for registration in Part B of the general child care register as a child minder<sup>20</sup>.

If an application is granted, the Chief Inspector must register the applicant in Part B of the general child care register as a child minder and give the applicant a certificate of registration stating that he is so registered<sup>21</sup>. The Chief Inspector may impose such conditions as he thinks fit on the above registration of a person<sup>22</sup>; and that person commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>23</sup>.

1 For the meaning of 'later years child minding' see para 1117 note 8 ante.

2 For the meaning of 'child' see para 1118 note 5 ante.

3 See the Childcare Act 2006 s 62(1)(a).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 62(1). As to Part B of the general child care register see para 1117 ante.

6 An application under *ibid* s 62(1) for registration in Part B of the general child care register as a child minder must include the information set out in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 1 paras 1-7 as follows, although where child minding is not being provided at the time the application is made the information prescribed in heads (4)-(7) below is not required (reg 4(1), (2)):

817 (1) the full name (including any alias or former name), date of birth, address and telephone number of the applicant (Sch 1 para 1);

818 (2) the following information about any criminal convictions of the applicant:

48. (a) the date of the offence (Sch 1 para 2(a));

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49. (b) the nature of the offence (Sch 1 para 2(b));

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50. (c) the place where the offence occurred (Sch 1 para 2(c));

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51. (d) the name of the court where the person was convicted (Sch 1 para 2(d)); and

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52. (e) the penalty imposed (Sch 1 para 2(e));

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819 (3) details of any criminal offences in respect of which the applicant has been cautioned by a police officer after he has admitted the offence (Sch 1 para 3);

820 (4) the address of the domestic premises on which the child minding is being provided (Sch 1 para 4);

821 (5) the hours during which the child minding is being provided (Sch 1 para 5);

822 (6) the number and ages of children in respect of whom the applicant is providing child minding (Sch 1 para 6);

823 (7) whether or not the individual is a home child-carer (Sch 1 para 7).

For these purposes, 'home child-carer' means an individual who:

824 (i) cares for a child for a parent (P1); or

825 (ii) in addition to that work cares for another child for a different parent (P2),

and whose work consists (in a case falling within head (i) supra) of caring for the child wholly or mainly in P1's home or (in a case falling within head (ii) supra) of caring for the children wholly or mainly in P1's home or P2's home or both (reg 2(1)).

7 Childcare Act 2006 s 62(2). The fee prescribed for these purposes is £100: see the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 5(1).

8 The regulations under the Childcare Act 2006 s 75 (see para 1156 post).

9 The requirements prescribed for this purpose are those set out in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 1 paras 8-16 as follows (although where, at the time he makes an application, the applicant is not providing the child minding or is a home-carer, the requirements in heads (4), (5) and (8) below are not required: reg 6(1), (2)):

- 826 (1) the applicant is an individual (Sch 1 para 8);
- 827 (2) the applicant is suitable to provide child minding (Sch 1 para 9);
- 828 (3) an application for an enhanced criminal record certificate relating to the applicant is included with the application (Sch 1 para 10);
- 829 (4) the premises are suitable for the provision of child minding (Sch 1 para 11);
- 830 (5) the applicant has carried out a full risk assessment of the premises and the activities he will be providing and has taken all necessary measures to minimise any identified risks (Sch 1 para 12);
- 831 (6) the child minding provided is provided in respect of a particular child for a continuous period of at least two hours or as part of arrangements whereby child care is provided for a period ending at the start of normal school hours or beginning at the end of normal school hours or for a continuous period of at least two hours (Sch 1 para 13);
- 832 (7) the child minding provided is safe and suitable for the children to whom it is provided (Sch 1 para 14);
- 833 (8) any equipment used in the provision of child minding is safe and suitable for the children to whom it is provided (Sch 1 para 15);
- 834 (9) the applicant has a first aid qualification which is appropriate to the ages of the children for whom child minding is provided and to the nature of the provision (Sch 1 para 16).

'Enhanced criminal records certificate' means an enhanced criminal record certificate issued under the Police Act 1997 s 113B (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 713 et seq): Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 2(1).

10 Childcare Act 2006 s 62(3).

11 Ibid s 62(4).

12 Ibid s 62(5)(a).

13 Ibid s 62(5)(b).

14 Ibid s 62(5)(c).

15 Ibid s 62(5)(d).

16 Ibid s 62(5)(e).

17 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 62(1)(b) had not been brought into force except in relation to the power to make regulations: see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(d); and the Childcare Act 2006 (Commencement No 2 and Savings and Transitional Provisions) Order 2007, SI 2007/1019, art 4.

18 For the meaning of 'early years child minding' see para 1117 note 6 ante.

19 See the Childcare Act 2006 s 62(1)(b). The text refers to a person not being required to be registered under Pt 3 Ch 2 (ss 33-51) or Pt 3 Ch 3 (ss 52-61).

20 Ibid s 62(1).

21 Ibid s 64(1). A certificate of registration given to the applicant must contain the following prescribed information about prescribed matters:

- 835 (1) the name of the registered person (s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(1)(a));
- 836 (2) the date of registration (Childcare Act 2006 s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(1)(b));
- 837 (3) any conditions imposed on the person's registration under the Childcare Act 2006 s 66(1) (see paras 1135-1136 post) (s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(1)(c)).

If there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered early years provider an amended certificate: Childcare Act 2006 s 64(4). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered early years provider a copy, on payment by the provider of any prescribed fee: s 64(5). The fee prescribed for this purpose is £5: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(3).

22 Childcare Act 2006 s 66(1). This power may be exercised at the time when the Chief Inspector registers the person in pursuance of s 64 or at any subsequent time: s 66(2). The Chief Inspector may at any time vary or remove any condition imposed under s 66(1): s 66(3). The power imposed by s 66(1) includes power to impose conditions for the purpose of giving effect to regulations under s 67 (see para 1137 post): s 66(4).

23 Ibid s 66(5). A person guilty of an offence under s 66(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 66(6). As to the standard scale see para 132 note 2 ante.

## UPDATE

### 1134 Voluntary registration process for child minding

TEXT AND NOTES--SI 2007/730 replaced: Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

NOTE 7--In the case of an application for registration under the Childcare Act 2006 s 62(1), the prescribed fee which must accompany the application is £103: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 7.

TEXT AND NOTE 17--Day appointed is 1 September 2008: SI 2008/2261.

NOTE 21--As to the content of a certificate of registration given in accordance with the Childcare Act 2006 s 64, see the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 6. A person who is registered under the Childcare Act 2006 s 64(1) must pay to the Chief Inspector a fee of £103 at or by the prescribed time; this provision does not apply in any case where, on the date on which the annual fee would otherwise be payable, the person by whom that annual fee would be payable is also registered (1) as an early years childminder under s 37(1) (see PARA 120) or (2) as a later years childminder under s 56(1) (see PARA 1130); see SI 2008/1804 regs 14, 16(1). For the purposes of the Childcare Act 2006 s 64(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1135. Voluntary registration process for other child care providers.

### **1135. Voluntary registration process for other child care providers.**

A person who provides or proposes to provide on premises<sup>1</sup> in England later years provision<sup>2</sup> (other than later years child minding) for a child<sup>3</sup> who has attained the age of eight<sup>4</sup> may make an application to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>5</sup> for registration in Part B of the general child care register in respect of the premises<sup>6</sup>.

The application must give any prescribed information about prescribed matters<sup>7</sup>, give any other information which the Chief Inspector reasonably requires the applicant to give, and be accompanied by any prescribed fee<sup>8</sup>. An application may not be made in respect of provision for a child who has attained the age of three if:

- 2821 (1) the provision is made at any of the following schools as part of the school's activities:
  - .73
  - 129. (a) a maintained school<sup>9</sup>;
  - 130. (b) a school approved<sup>10</sup> by the Secretary of State<sup>11</sup>; or
  - 131. (c) an independent school<sup>12</sup>;
  - .74
  - 2822 (2) the provision is made by the proprietor of the school or a person employed to work at the school<sup>13</sup>; and
  - 2823 (3) the child is a registered pupil at the school or, if the provision is made for more than one child who has attained the age of three, at least one of the children is a registered pupil at the school<sup>14</sup>.

The Chief Inspector must grant an application if the applicant is not disqualified from registration by regulations<sup>15</sup> and it appears to the Chief Inspector that any requirements prescribed for the purposes of registration<sup>16</sup> are satisfied and are likely to continue to be satisfied<sup>17</sup>; however, the Chief Inspector must refuse any application which he is not so required to grant<sup>18</sup>.

The prescribed requirements for registration may include requirements relating to:

- 2824 (i) the applicant<sup>19</sup>;
- 2825 (ii) the premises on which the child care is being (or is to be) provided<sup>20</sup>;
- 2826 (iii) the arrangements for child care on those premises<sup>21</sup>;
- 2827 (iv) any person who may be caring for children on those premises<sup>22</sup>;
- 2828 (v) any other person who may be on those premises<sup>23</sup>.

As from a day to be appointed<sup>24</sup>, a person who provides or proposes to provide on premises in England early years provision<sup>25</sup> or later years provision (other than early years or later years child minding) for a child who has not attained that age but in respect of which the person is not required to be registered<sup>26</sup> may make an application to the Chief Inspector for registration in Part B of the general child care register in respect of the premises<sup>27</sup>.

If an application is granted, the Chief Inspector must register the applicant in the early years register as an early years child minder, and give the applicant a certificate of registration stating that he is so registered<sup>28</sup>. The Chief Inspector may impose such conditions as he thinks fit on the above registration of a person<sup>29</sup>; and that person commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>30</sup>.

1 For the meaning of 'premises' see para 1117 note 6 ante. As from a day to be appointed, the Secretary of State may by order amend the Childcare Act 2006 Pt 3 (ss 31-98) (as amended) so as to enable an application for registration under s 63(1) to be made in respect of more than one set of premises and make such further amendments to Pt 3 as appear to him to be necessary or expedient in consequence of the amendments: s 94. At the date at which this volume states the law no such orders had been made. As to the Secretary of State see para 155 ante.

2 For the meaning of 'later years provision' see para 1117 note 8 ante.

3 For the meaning of 'child' see para 1118 note 5 ante.

4 See the Childcare Act 2006 s 63(1)(a).

5 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

6 Childcare Act 2006 s 63(1). As to Part B of the general child care register see para 1117 ante.

7 An application under *ibid* s 63(1) for registration in Part B of the general child care register in respect of premises must include the information set out in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 2 paras 1-9 as follows:

838 (1) where the applicant for registration is an individual:

53. (a) his full name (including any alias or former name), date of birth, address and telephone number (Sch 2 para 1(a)); and

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54. (b) in relation to the manager (if any), the information prescribed in head (1)(a) *supra* (Sch 2 para 1(b));

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839 (2) where the applicant for registration is a partnership:

55. (a) the name and address of the partnership (Sch 2 para 2(a));

56

56. (b) in relation to the nominated individual (if different from the manager) and the manager, the information prescribed in head (1)(a) *supra* (Sch 2 para 2(b));

57

840 (3) where the applicant for registration is a body corporate or any unincorporated association other than a partnership:

57. (a) its name and the address of its registered office or principal office (Sch 2 para 3(a));

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58. (b) in relation to the nominated individual (if different from the manager) and the manager, the information prescribed in head (1)(a) *supra* (Sch 2 para 3(b));

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841 (4) the following information about any criminal convictions of the applicant:

59. (a) the date of the offence (Sch 2 para 5(a));

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60. (b) the nature of the offence (Sch 2 para 5(b));

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61. (c) the place where the offence occurred (Sch 2 para 5(c));

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62. (d) the name of the court where the person was convicted (Sch 2 para 5(d)); and

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63. (e) the penalty imposed (Sch 2 para 5(e));

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842 (5) details of any criminal offences in respect of which the applicant has been cautioned by a police officer after he has admitted the offence (Sch 2 para 6);

843 (6) the address of the premises on which the child care is being provided (Sch 3 para 7);

844 (7) the hours during which the child care is being provided (Sch 2 para 8);

845 (8) the number and ages of children in respect of whom child care is being provided (Sch 2 para 9).

In heads (4) and (5) supra, in a case in which the applicant is not an individual, references to the applicant are to be read as references to the nominated individual (if different from the manager) and the manager: Sch 2 para 4;

8 Childcare Act 2006 s 63(2). The fee prescribed for these purposes is £110: see the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 5(2).

9 Childcare Act 2006 s 63(3)(a)(i).

10 Ie under the Education Act 1996 s 342 (see EDUCATION vol 15(2) (2006 Reissue) paras 1028-1029).

11 Childcare Act 2006 s 63(3)(a)(ii).

12 Ibid s 63(3)(a)(iii).

13 Ibid s 63(3)(b).

14 Ibid s 63(3)(c).

15 Ie regulations under ibid s 75 (see para 1156 post).

16 The requirements prescribed for this purpose are those set out in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 2 paras 10-18 as follows:

846 (1) the applicant is suitable to provide child care (Sch 2 para 10);

847 (2) the manager (if any) is suitable to care for children (Sch 2 para 11);

848 (3) an application for an enhanced criminal record certificate, relating (where the applicant is an individual) to the applicant or (where the applicant is not an individual) to the nominated individual (if different from the manager) and the manager, is included with the application (Sch 2 para 12);

849 (4) the premises on which the child care is being provided are suitable for the provision of child care (other than child minding) (Sch 2 para 13);

850 (5) the applicant has carried out a full risk assessment of the premises on which the child care is being provided and the activities being provided and has taken all necessary measures to minimise any identified risks (Sch 2 para 14);

851 (6) the child care being provided is provided in respect of a particular child for a continuous period of at least two hours or as part of arrangements whereby child care is provided for a period ending at the start of normal school hours, or beginning at the end of normal school hours or for a continuous period of at least two hours (Sch 2 para 15);

852 (7) the child care being provided is safe and suitable for the children to whom it is provided (Sch 2 para 16);

853 (8) any equipment used in the provision of child care is safe and suitable for the children to whom it is provided (Sch 2 para 17);

- 854 (9) the registered person or another person caring for children on the premises has a first aid qualification which is appropriate to the ages of the children for whom child care is provided and to the nature of the provision (Sch 2 para 18).

For the meaning of 'enhanced criminal record certificate' see para 1134 note 9 ante.

17 Childcare Act 2006 s 63(4).

18 Ibid s 63(5).

19 Ibid s 63(6)(a).

20 Ibid s 63(6)(b).

21 Ibid s 63(6)(c).

22 Ibid s 63(6)(d).

23 Ibid s 63(6)(e).

24 The Childcare Act 2006 is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 63(1)(b) had not been brought into force except in relation to the power to make regulations: see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(d); and the Childcare Act 2006 (Commencement No 2 and Savings and Transitional Provisions) Order 2007, SI 2007/1019, art 4.

25 For the meaning of 'later years provision' see para 1117 note 8 ante.

26 See the Childcare Act 2006 s 63(1)(b). The text refers to a person not being required to be registered under Pt 3 Ch 2 (ss 33-51) or Pt 3 Ch 3 (ss 52-61).

27 Ibid s 63(1).

28 Ibid s 64(2). A certificate of registration given to the applicant must contain the following prescribed information about prescribed matters:

855 (1) the name of the registered person (s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(2)(a));

856 (2) the date of registration (Childcare Act 2006 s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(2)(b));

857 (3) the address of the premises on which the child care is being provided (Childcare Act 2006 s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(2)(c));

858 (4) any conditions imposed on the person's registration under the Childcare Act 2006 s 66(1) (see paras 1134 ante, 1136 post) (s 64(3); Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(2)(d)).

If there is a change of circumstances which requires the amendment of a certificate of registration, the Chief Inspector must give the registered early years provider an amended certificate: Childcare Act 2006 s 64(4). If the Chief Inspector is satisfied that a certificate of registration has been lost or destroyed, the Chief Inspector must give the registered early years provider a copy, on payment by the provider of any prescribed fee: s 64(5). The fee prescribed for this purpose is £5: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 7(3).

29 Childcare Act 2006 s 66(1). This power may be exercised at the time when the Chief Inspector registers the person in pursuance of s 64 or at any subsequent time: s 66(2). The Chief Inspector may at any time vary or remove any condition imposed under s 66(1): s 66(3). The power imposed by s 66(1) includes power to impose conditions for the purpose of giving effect to regulations under s 67 (see para 1137 post): s 66(4).

30 Ibid s 66(5). A person guilty of an offence under s 66(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 66(6). As to the standard scale see para 132 note 2 ante.

## UPDATE

### 1135 Voluntary registration process for other child care providers

TEXT AND NOTES--SI 2007/730 replaced: Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

NOTE 8--In the case of an application for registration under the Childcare Act 2006 s 63(1), the prescribed fee which must accompany the application is £114: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 8.

TEXT AND NOTES 9-14--Childcare Act 2006 s 63(3)(a), (b) amended, s 63(3)(c) substituted: Education and Skills Act 2008 Sch 1 para 35 (not yet in force).

TEXT AND NOTE 24--Day appointed is 1 September 2008: SI 2008/2261.

NOTE 28--A person who is registered under the Childcare Act 2006 s 64(2) must pay to the Chief Inspector a fee of £114 at or by the prescribed time; this provision does not apply in any case where, on the date on which the annual fee would otherwise be payable, the person by whom that annual fee would be payable is also registered (1) as an early years provider, other than a childminder, under s 37(2) (see PARA 1121), or (2) as a later years provider, other than a childminder, under s 56(2) (see PARA 1130): see SI 2008/1804 regs 15, 16(2). For the purposes of the Childcare Act 2006 s 64(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7.00: SI 2008/1804 reg 17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1136. Special procedure for persons already registered.

### **1136. Special procedure for persons already registered.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. If a person who is registered as a child minder<sup>2</sup> in the early years register or in Part A of the general child care register<sup>3</sup> gives notice to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> that he wishes to be registered in Part B of the general child care register, the Chief Inspector must register the person in Part B of the general child care register as a child minder and give the applicant a certificate of registration stating that he is so registered<sup>5</sup>.

If a person who is registered (otherwise than as a child minder) in the early years register or in Part A of the general child care register in respect of particular premises<sup>6</sup> gives notice to the Chief Inspector that he wishes to be registered in Part B of the general child care register in respect of the same premises, the Chief Inspector must register the person in Part B of the general child care register as a provider of child care other than a child minder, in respect of the premises, and give the person a certificate of registration stating that he is so registered<sup>7</sup>.

The Chief Inspector may impose such conditions as he thinks fit on the registration of a person<sup>8</sup>; and that person commits an offence if, without reasonable excuse, he fails to comply with any conditions so imposed<sup>9</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 65 had not been brought into force.

2 As to the registration as a child minder see para 1117.

3 As to the early years register and the general child care register see para 1117 ante.

4 The notice given under the Childcare Act 2006 s 65(1), (2) may be given to the person in question by delivering it to him, by sending it by post or by transmitting it electronically: s 93(1), (2). However, if the notice is transmitted electronically, it is to be treated as given only if the following requirements are met: s 93(3). If the person required or authorised to give the notice is the Chief Inspector, the person to whom the notice is required or authorised to be given must have indicated to the Chief Inspector his willingness to receive notices transmitted by electronic means and must have provided an address suitable for that purpose, and the notice must be sent to the address provided by him: s 93(4). An indication given for the purposes of s 92(4) may be given generally for the purposes of notices required or authorised to be given by the Chief Inspector or may be limited to notices of a particular description: s 93(6). If the person required or authorised to give the notice is not the Chief Inspector, the notice must be transmitted in such manner as the Chief Inspector may require: s 93(5). A requirement imposed by the Chief Inspector under s 92(5) must be published in such manner as the Chief Inspector thinks appropriate for the purpose of bringing it to the attention of persons who are likely to be affected by it: s 93(7). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Ibid s 65(1). The provisions of s 64(3)-(5) (see para 1135 ante) apply in relation to a certificate of registration given in pursuance of s 65(1) or s 65(2) (see the text and note 7 infra) as they apply in relation to a certificate of registration given in pursuance of s 64(1) or s 64(2): s 65(3).

6 For the meaning of 'premises' see para 1117 note 6 ante.

7 Childcare Act 2006 s 65(2). See note 5 supra.

8 Ibid s 66(1). This power may be exercised at the time when the Chief Inspector registers the person in pursuance of s 65 or at any subsequent time: s 66(2). The Chief Inspector may at any time vary or remove any condition imposed under s 66(1): s 66(3). The power imposed by s 66(1) includes power to impose conditions for the purpose of giving effect to regulations under s 67 (see para 1137 post): s 66(4).

9 Ibid s 66(5). A person guilty of an offence under s 66(5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 66(6). As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **1136 Special procedure for persons already registered**

TEXT AND NOTES--These provisions have effect from 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1137. Regulations governing activities.

### **1137. Regulations governing activities.**

The Secretary of State<sup>1</sup>, after consulting Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> and any other person he considers appropriate, has made regulations governing the activities of persons providing early years provision or later years provision (or both) in respect of which they are registered<sup>3</sup>.

The regulations deal with the following matters (among others):

- 2829 (1) the welfare of the children concerned<sup>4</sup>;
- 2830 (2) the arrangements for safeguarding the children concerned<sup>5</sup>;
- 2831 (3) suitability of persons to care for, or be in regular contact with, the children concerned<sup>6</sup>;
- 2832 (4) qualifications and training<sup>7</sup>;
- 2833 (5) the suitability of premises and equipment<sup>8</sup>;
- 2834 (6) the manner in which the child care provision is organised<sup>9</sup>;
- 2835 (7) procedures for dealing with complaints<sup>10</sup>;
- 2836 (8) the keeping of records<sup>11</sup>;
- 2837 (9) the provision of information<sup>12</sup>.

1 As to the Secretary of State see para 155 ante.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 Childcare Act 2006 s 67(1), (2). For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante. The power to make regulations under s 67 may be exercised so as to confer powers or impose duties on the Chief Inspector in the exercise of his functions under Pt 3 (ss 31-98) (as amended): s 67(4). In particular, it may be exercised so as to require the Chief Inspector, in exercising his functions under Pt 3, to have regard to factors, standards and other matters prescribed by or referred to in the regulations: s 67(5). If the regulations require any person (other than the Chief Inspector) to have regard to or to meet factors, standards and other matters prescribed by or referred to in the regulations, they may also provide for any allegation that the person has failed to do so to be taken into account by the Chief Inspector in the exercise of his functions under Pt 3 or in any proceedings under Pt 3: s 67(6). For the purposes of s 67, a registered person must, in relation to the early years provision or later years provision (or both) in respect of which he is registered: (1) meet the prescribed requirements set out in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 (see paras 1138-1140 post) that are applicable to that person; and (2) in the provision of child care have regard to the needs of each child relating to child care: reg 8. An allegation that a registered person has failed to meet the requirements prescribed in Sch 3 or to have regard to the matter specified in head (2) supra may be taken into account by the Chief Inspector in the exercise of functions under the Childcare Act 2006 Pt 3 and may be taken into account in any proceedings under Pt 3: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, regs 9, 10. 'A registered person' means a person providing early years or later years provision who is registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante): Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 2(1).

4 Childcare Act 2006 s 67(3)(a). As to the regulations see para 1138 post.

5 Ibid s 67(3)(b). As to the regulations see para 1139 post.

6 Ibid s 67(3)(c). As to the regulations see para 1140 post.



- 7 Ibid s 67(3)(d). As to the regulations see para 1141 post.
- 8 Ibid s 67(3)(e). As to the regulations see para 1142 post.
- 9 Ibid s 67(3)(f). As to the regulations see para 1143 post.
- 10 Ibid s 67(3)(g). As to the regulations see para 1144 post.
- 11 Ibid s 67(3)(h). As to the regulations see para 1145 post.
- 12 Ibid s 67(3)(i). As to the regulations see para 1146 post. See also para 1147 post.

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1138. The welfare of the children concerned.

### **1138. The welfare of the children concerned.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person in relation to the welfare of the children concerned:

- 2838 (1) children receiving child care are kept safe from harm<sup>4</sup>;
- 2839 (2) at least one person who is caring for children on the premises on which child care is being provided has a first aid qualification which is appropriate to the ages of the children for whom child care is provided and to the nature of the provision<sup>5</sup>;
- 2840 (3) in the case of a person voluntarily registered as a child minder<sup>6</sup>, the registered person is present at all times on the premises on which child care is provided while the child care is being provided<sup>7</sup>;
- 2841 (4) in the case of a person who is voluntarily registered other than as under head (3) above<sup>8</sup>, two persons are present at all times on the premises on which child care is provided while the child care is being provided<sup>9</sup>;
- 2842 (5) in the case of a registered person who is not a home child-carer<sup>10</sup>, the registered person ensures, so far as is reasonably practicable, that no person smokes, or consumes or is under the influence of, drugs (including medication that may have an adverse effect on the individual's ability to provide child care) or alcohol on premises on which child care is being provided at any time while child care is being provided on the premises or in the presence of a child receiving child care<sup>11</sup>;
- 2843 (6) in the case of a registered person who is a home child-carer, the registered person does not smoke or consume drugs (including medication that may have an adverse effect on the registered person's ability to provide child care) or alcohol and is not under the influence of drugs (including medication that may have an adverse effect on the registered person's ability to provide child care) or alcohol, while providing child care<sup>12</sup>.
- 2844 (7) the registered person or any person employed by him does not use corporal punishment on a child receiving child care<sup>13</sup>;
- 2845 (8) in the case of a registered person who is not a home child-carer, the registered person ensures, so far as is reasonably practicable, that no person living or working on the premises where the child care is provided uses corporal punishment on a child receiving child care<sup>14</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 1. For these purposes, 'harm' has the same meaning as in the Children Act 1989 s 31(9) (see para 274 ante): Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 2(1).

5 Ibid Sch 3 para 2.

6 Ie a person who is registered under the Childcare Act 2006 s 62 (see para 1134 ante).

7 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 3.

8 Ie a person who is registered under the Childcare Act 2006 s 63 (see para 1135 ante).

9 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 4(1). However, this does not require each person present to be the registered person or a person employed by the registered person provided that at least one such person is either the registered person or a person employed by the registered person, and any other such person is suitable to work with children; and for these purposes a person is not suitable to work with children unless the registered person is satisfied that an enhanced criminal record certificate has been obtained in respect of that person: Sch 3 para 4(2). For the meaning of 'enhanced criminal record certificate' see para 1134 note 9 ante.

10 For the meaning of 'home child-carer' see para 1134 note 6 ante.

11 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 5(1).

12 Ibid Sch 3 para 5(2).

13 Ibid Sch 3 para 6(1). 'Corporal punishment' means anything done for the purpose of punishing a child (whether or not there are other reasons for doing it) which, without any justification, would constitute battery: Sch 3 para 6(3).

14 Ibid Sch 3 para 6(2).

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1139. Arrangements for safeguarding the children being cared for.

### **1139. Arrangements for safeguarding the children being cared for.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2846 (1) in the case of a registered person who is not a home child-carer<sup>4</sup>, a written statement of procedures to be followed for the protection of children, which is intended to safeguard the children concerned from abuse or neglect, is available and implemented<sup>5</sup>;
- 2847 (2) in the case of a registered person who is a home child-carer, the registered person ensures he has appropriate knowledge of child protection considerations and procedures to safeguard children from abuse or neglect<sup>6</sup>;
- 2848 (3) in the case of a registered person who is not a home child-carer, no individual who is not suitable to work with children has unsupervised access to a child receiving child care<sup>7</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 For the meaning of 'home child-carer' see para 1134 note 6 ante.

5 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 7(1).

6 Ibid Sch 3 para 7(2).

7 Ibid Sch 3 para 8(1). A person is not suitable to work with children unless the registered person is satisfied that an enhanced criminal record certificate has been obtained in respect of that person: Sch 3 para 8(2). For the meaning of 'enhanced criminal record certificate' see para 1134 note 9 ante.

### **UPDATE**

#### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1140. Suitability or persons to care for the children being cared for.

#### **1140. Suitability or persons to care for the children being cared for.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2849 (1) the registered person and any person caring for, or in regular contact with, children is suitable to work with children, of integrity and good character, has skills and experience suitable for the work and is physically and mentally fit for the work<sup>4</sup>;
- 2850 (2) effective systems are in place to ensure that any person caring for, or in regular contact with, children satisfies the requirements in head (1) above<sup>5</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Is registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 9.

5 Ibid Sch 3 para 10(1). As part of meeting the requirement in head (2) in the text a registered person must obtain an enhanced criminal record certificate in relation any person who is employed by the registered person and who is caring for, or in regular contact with, children: Sch 3 para 10(2). For the meaning of 'enhanced criminal record certificate' see para 1134 note 9 ante.

#### **UPDATE**

#### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1141. Qualifications and training.

### **1141. Qualifications and training.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet the prescribed requirement that at least one person who is caring for children on the premises has successfully completed training in the core skills<sup>4</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 11. The core skills are those set out in the document 'Common Core of Skills and Knowledge for the Children's Workforce': Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 11.

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1142. Suitability of premises and equipment.

### **1142. Suitability of premises and equipment.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2851 (1) the premises and equipment used for the purposes of the child care concerned are suitable for the provision of that child care and in particular:
  - .75
  - 132. (a) in the case of a registered person who is not a home child-carer<sup>4</sup>, the premises are safe for the provision of that child care<sup>5</sup>;
  - 133. (b) a child is not able to leave the premises without a person who is caring for children on the premises becoming aware of the child leaving except where the child care is open access child care<sup>6</sup> or the registered person has agreed with the parent of the child, where he is not a young child, that this requirement does not apply<sup>7</sup>; and
  - 134. (c) no person is able to enter the premises without a person who is caring for children on the premises being aware of the entry of that person<sup>8</sup>;
- .76
- 2852 (2) in the case of a registered person who is not a home child-carer, a risk assessment of those premises and that equipment is undertaken:
  - .77
  - 135. (a) at least once in each calendar year; and
  - 136. (b) immediately, where the need for an assessment arises,
- .78
- 2853 and all necessary measures are taken to minimise any identified risks<sup>9</sup>;
- 2854 (3) in the case of a registered person who is a home child-carer, the registered person advises parents of any health and safety risks<sup>10</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Is registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 For the meaning of 'home child-carer' see para 1134 note 6 ante.

5 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 12(1)(a).

6 'Open access child care' means child care, other than child minding, under the arrangements for which a child, other than a young child, may leave the premises unaccompanied: *ibid* Sch 3 para 12(2).

7 *Ibid* Sch 3 para 12(1)(b).

8 *Ibid* Sch 3 para 12(1)(c).

9 *Ibid* Sch 3 para 13(1).

10 Ibid Sch 3 para 13(2).

**UPDATE**

**1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1143. Manner in which child care is organised.

### **1143. Manner in which child care is organised.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2855 (1) in the case of a registered person who is not a home child-carer<sup>4</sup>, arrangements are in place, with other providers of early years provision or later years provision, or with parents<sup>5</sup>, for occasions on which the registered person is not able to provide the child minding in respect of which he is registered<sup>6</sup>;
- 2856 (2) the behaviour of the children is managed in a suitable manner<sup>7</sup>;
- 2857 (3) the child care for children who have attained the age of eight does not have an adverse impact on the child care for children who have not attained that age<sup>8</sup>;
- 2858 (4) no child is refused the provision of child care or, in the provision of child care, treated less favourably than another child by reason of:
  - .79 137. (a) the race, home language, family background or gender of the child<sup>9</sup>;
  - 138. (b) the religion or belief of the child or his parents<sup>10</sup>; or
  - 139. (c) any disability or learning difficulty<sup>11</sup> which the child may have<sup>12</sup>.
- .80

In relation to a physical feature which makes it impossible or unreasonably difficult for disabled children to make use of the child care, the registered person is treated as complying with this provision if he has complied with the duty in the Disability Discrimination Act 1995<sup>13</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 For the meaning of 'home child-carer' see para 1134 note 6 ante.

5 'Parent' includes a person who is not a parent of the child but who has parental responsibility for the child and a person who is a relative of the child: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 2(1).

6 Ibid reg 8, Sch 3 para 14.

7 Ibid Sch 3 para 15.

8 Ibid Sch 3 para 16.

9 Ibid Sch 3 para 17(1)(a).

10 Ibid Sch 3 para 17(1)(b).

11 le within the meaning of the Education Act 1996 s 312(2) (see EDUCATION vol 15(2) (2006 Reissue) para 984).

12 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 17(1)(c).

13 Ibid Sch 3 para 17(2). The duty mentioned in the text is the duty under the Disability Discrimination Act 1995 s 21 (see DISCRIMINATION vol 13 (2007 Reissue) paras 586-587).

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1143 Manner in which child care is organised**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1144. Procedure for dealing with complaints.

#### **1144. Procedure for dealing with complaints.**

A registered person<sup>1</sup> who is not a home child-carer<sup>2</sup> must, in relation to the early years provision or later years provision<sup>3</sup> (or both) in respect of which he is registered<sup>4</sup>, meet such of the following prescribed requirements as are applicable to that person in relation to complaints<sup>5</sup>:

- 2859 (1) there is a written statement of procedures to be followed in relation to complaints<sup>6</sup>;
- 2860 (2) each complaint is fully investigated<sup>7</sup>;
- 2861 (3) a written record is made of any complaint, the outcome of the investigation and the action taken in response<sup>8</sup>;
- 2862 (4) the parent who made the complaint is provided (in written or electronic form if requested by the parent) as soon as is reasonably practicable<sup>9</sup> with an account of the findings of the investigation into the complaint and the action, if any, that has been taken, or is to be taken as a result<sup>10</sup>;
- 2863 (5) the registered person supplies to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>11</sup> at his request within such reasonable time as he may specify:

**.81**

- 140. (a) a statement containing a summary of any complaints made during the preceding 12 months and the action taken in consequence<sup>12</sup>;
- 141. (b) a list of all complaints recorded pursuant to head (3) above within such period of time<sup>13</sup> as may be specified by the Chief Inspector<sup>14</sup>;

**.82**

- 2864 (6) the record referred to in head (3) above is retained for a period of two years from the date on which the record was made<sup>15</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'home child-carer' see para 1134 note 6 ante.

3 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

4 Ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

5 'Complaint' means a complaint which is made in writing or electronic form to the registered person by a parent in respect of a child for whom the registered person provides child care, and which relates to any of the requirements prescribed in the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3: reg 8, Sch 3 para 18(2).

6 Ibid Sch 3 para 18(1)(a).

7 Ibid Sch 3 para 18(1)(b).

8 Ibid Sch 3 para 18(1)(c).

- 9 And in any event within 20 days of the date on which the complaint is made: see *ibid* Sch 3 para 18(1)(d).
- 10 *Ibid* Sch 3 para 18(1)(d).
- 11 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 *ante*; and EDUCATION.
- 12 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 18(1)(e)(i).
- 13 This time period must not exceed two years before the date on which the request was made: see *ibid* Sch 3 para 18(1)(e)(ii).
- 14 *Ibid* Sch 3 para 18(1)(e)(ii).
- 15 *Ibid* Sch 3 para 18(1)(f).

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1145. Record keeping.

### **1145. Record keeping.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2865 (1) in the case of a registered person who is not a home child-carer<sup>4</sup>, in relation to each child who is cared for on the premises, a record is maintained consisting of name, home address and date of birth; name, home address and telephone number of a parent<sup>5</sup>; and a daily record of the names of the children looked after on the premises and their hours of attendance<sup>6</sup>;
- 2866 (2) in the case of a registered person who is not a home child-carer, a record is maintained of accidents occurring on the premises on which the child care is provided<sup>7</sup>;
- 2867 (3) in the case of a registered person who is not a home child-carer, a record is maintained of any medicinal product administered to any child who is cared for on the premises including the date and circumstances of its administration, by whom it was administered, and a record of a parent's consent<sup>8</sup>;
- 2868 (4) in the case of a registered person who is not a home child-carer, a record is maintained of the name, home address and telephone number of every person living or employed on the premises on which the child care is provided<sup>9</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Is registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 For the meaning of 'home child-carer' see para 1134 note 6 ante.

5 For the meaning of 'parent' see para 1143 note 5 ante.

6 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 19. There is no requirement to comply with head (1) in the text in relation to a child if the child care is open access child care: Sch 3 para 20. For the meaning of 'open access child care' see para 1142 note 6 ante. The records specified in head (1) in the text must be retained for a period of two years from the date on which the entry was made: Sch 3 para 24.

7 Ibid Sch 3 para 21. The records specified in head (2) in the text must be retained for a period of two years from the date on which the entry was made: Sch 3 para 24.

8 Ibid Sch 3 para 22.

9 Ibid Sch 3 para 23. The records specified in head (4) in the text must be retained for a period of two years from the date on which the entry was made: Sch 3 para 24.

### **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1146. Provision of information.

#### **1146. Provision of information.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

2869 (1) in the case of a registered person who is not a home child-carer<sup>4</sup>, the following information is made available to parents of children cared for on the premises:

**.83**

- 142. (a) information on the activities the children will undertake<sup>5</sup>;
- 143. (b) if the child care is open access child care<sup>6</sup>, a statement to that effect<sup>7</sup>;
- 144. (c) copies of the written statements of procedures<sup>8</sup>;
- 145. (d) information about the system of registration<sup>9</sup>;
- 146. (e) the address of Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>10</sup>;

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2870 (2) in the case of a registered person who is a home child-carer, the registered person provides parents<sup>11</sup> with information about Part B of the general child care register<sup>12</sup> and informs them of the address of the Chief Inspector<sup>13</sup>;

2871 (3) the registered person notifies the Chief Inspector as soon as is reasonably practicable and provides him with information<sup>14</sup> relating to any of the following events:

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- 147. (a) the death of, or serious accident or serious injury to, a child while receiving early years provision or later years provision<sup>15</sup>;
- 148. (b) the death of, or serious accident or injury to, any other person on the premises on which the early years provision or later years provision is provided<sup>16</sup>;
- 149. (c) any allegation of serious harm to or abuse of a child committed by any person caring for children on the premises (whether the allegation relates to harm or abuse occasioned on those premises or elsewhere) or by any person (where the allegation relates to harm or abuse occasioned on those premises)<sup>17</sup>;
- 150. (d) any incident of food poisoning affecting two or more children cared for on those premises<sup>18</sup>;

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2872 (4) the Chief Inspector is informed of:

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- 151. (a) any significant event which is likely to affect the suitability to work with children of the registered person or any person caring for, or in regular contact with, children<sup>19</sup>;
- 152. (b) any change in circumstances which affects certain information<sup>20</sup> held by the Chief Inspector<sup>21</sup>;
- 153. (c) the matters relating to the information about the child minding provided by the applicant<sup>22</sup> where information about those matters was not included<sup>23</sup> in the application<sup>24</sup>, as soon as they are known, together with any change in circumstances

which affects the information held by the Chief Inspector relating to the matters about the child minding provided<sup>25</sup>.

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- 1 For the meaning of 'registered person' see para 1137 note 3 ante.
- 2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.
- 3 Ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).
- 4 For the meaning of 'home child-carer' see para 1134 note 6 ante.
- 5 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 25(1)(a).
- 6 For the meaning of 'open access child care' see para 1142 note 6 ante.
- 7 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 25(1)(b).
- 8 Ibid Sch 3 para 25(1)(c). The written statements of procedures mentioned in the text are those referred to in Sch 3 paras 7(1), 18(1)(a) (see paras 1139, 1144 ante).
- 9 Ibid Sch 3 para 25(1)(d). The text refers to the system of registration under ss 62-67 (see para 1134 et seq ante).
- 10 Ibid Sch 3 para 25(1)(e). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.
- 11 'Parent' includes a person who is not a parent of the child but who has parental responsibility for the child, and a person who is a relative of the child: ibid reg 2(1).
- 12 As to the general child care register see para 1117 ante.
- 13 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 25(2).
- 14 Information is to be provided as soon as is reasonably practicable and in any event within 14 days of the event occurring: see ibid reg 26.
- 15 Ibid Sch 3 paras 26, 27(a). In the case of a registered person who is not a home child-carer, Sch 3 para 26 applies in relation to events occurring while the registered person is providing child care and in relation to any other events of which the registered person is aware: Sch 3 para 28(1). In the case of a registered person who is a home child-carer, Sch 3 para 26 only applies in relation to events occurring while the registered person is providing child care: Sch 3 para 28(2).
- 16 Ibid Sch 3 paras 26, 27(b). See note 15 supra.
- 17 Ibid Sch 3 paras 26, 27(c). See note 15 supra.
- 18 Ibid Sch 3 paras 26, 27(d). See note 15 supra.
- 19 Ibid Sch 3 para 29(a).
- 20 Ie information held as a result of the requirements of ibid Sch 1 paras 1-4, 7, Sch 2 paras 1-7 (see paras 1134-1135 ante).
- 21 Ibid Sch 3 para 29(b).
- 22 Ie the matters referred to in ibid Sch 1 paras 4-7 (see para 1134 ante).
- 23 Ie by virtue of ibid reg 4(2) (see para 1134 ante).
- 24 Ie an application under the Childcare Act 2006 s 62(1) (see para 1134 ante).
- 25 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, Sch 3 para 29(c).

## UPDATE



**1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(ii) Child Minding, Child Care and Day Care in England/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/(B) Regulation of Child Care Provision/ (d) Voluntary Registration/1147. Duty of disclosure.

### **1147. Duty of disclosure.**

A person who has been voluntarily registered<sup>1</sup> has a continuing duty throughout the period of his registration to provide Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> with certain information in respect of certain persons in relation to any order, determination, conviction or other ground for disqualification from registration under the Childcare (Disqualification) Regulations 2007<sup>3</sup>.

A registered person must provide the following information to the Chief Inspector for this purpose:

- 2873 (1) details of the precise nature of the order, determination, conviction or other ground for disqualification from registration<sup>4</sup>;
- 2874 (2) the date when the order, determination or conviction was made or when any other ground for disqualification from registration arose<sup>5</sup>;
- 2875 (3) the body or court by which any order, determination or conviction was made and the sentence, if any, imposed<sup>6</sup>;
- 2876 (4) in relation to any order or conviction, a certified copy of the relevant order or court order<sup>7</sup>.

The persons in respect of whom the information listed in heads (1) to (4) above must be supplied are the registered person and any person who lives in the same household as the registered person or who is employed in that household<sup>8</sup>.

1    Ie under the Childcare Act 2006 Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

2    As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3    Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 10(1). As to the grounds for disqualification see para 1156 post. Any allegation that a registered person has failed to meet these requirements may be taken into account by the Chief Inspector in the exercise of his functions and in any proceedings under the Childcare Act 2006 Pt 3 (ss 31-98) (as amended): Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 10(5), (6).

4    Ibid art 10(2)(a). The information referred to in heads (1)-(4) in the text must be provided to the Chief Inspector within 14 days of the time when the registered person became aware of that information or ought reasonably to have become aware of it if he had made reasonable enquiries: art 10(4).

5    Ibid art 10(2)(b).

6    Ibid art 10(2)(c).

7    Ibid art 10(2)(d).

8    Ibid art 10(3).

### **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

**1147 Duty of disclosure**

TEXT AND NOTES--SI 2007/723 (as amended) replaced: Childcare (Disqualification) Regulations 2009, SI 2009/1547.

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#### **1148. Other matters.**

A registered person<sup>1</sup> must, in relation to the early years provision or later years provision<sup>2</sup> (or both) in respect of which he is registered<sup>3</sup>, meet such of the following prescribed requirements as are applicable to that person:

- 2877 (1) the registered person is covered by insurance in respect of liability which may be incurred in respect of death, injury, public liability, damage or other loss<sup>4</sup>;
- 2878 (2) in the case of a registered person who is not a home child-carer, the certificate of registration is displayed on the premises on which child care is provided<sup>5</sup>;
- 2879 (3) if a registered person other than a home child-carer is suspended<sup>6</sup>, the notice of suspension is displayed on the premises on which child care is provided<sup>7</sup>.

1 For the meaning of 'registered person' see para 1137 note 3 ante.

2 For the meaning of 'early years provision' see para 1117 note 6 ante. For the meaning of 'later years provision' see para 1117 note 8 ante.

3 Ie registered under the Childcare Act 2006 ss 62-67 (see para 1134 et seq ante).

4 Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 8, Sch 3 para 30.

5 Ibid Sch 3 para 31(1). A registered person who is a home child-carer must show the certificate of registration to a parent on request: Sch 3 para 31(2).

6 Ie by virtue of ibid reg 13 (see para 1150 post).

7 Ibid Sch 3 para 32(1). If a registered person who is a home child-carer is suspended by virtue of reg 13 (see para 1150 post), the home child-carer must show the notice of suspension to each parent to whom he provides child care: Sch 3 para 32(2).

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*(e) Common Provisions*

**UPDATE**

**1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

**1149. Cancellation of registration.**

Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> must cancel the registration of a person registered as an early years child minder or provider<sup>2</sup>, as a later years child minder or provider<sup>3</sup>, or under the provisions for voluntary registration<sup>4</sup>, if it appears to him that the person has become disqualified from registration<sup>5</sup>.

The Chief Inspector may cancel the registration of a person registered as an early years child minder or provider<sup>6</sup>, as a later years child minder or provider<sup>7</sup>, or under the provisions for voluntary registration<sup>8</sup>, if it appears to him:

- 2880 (1) that the prescribed requirements for registration which apply in relation to the person's registration have ceased, or will cease, to be satisfied<sup>9</sup>;
- 2881 (2) that the person has failed to comply with a condition imposed on his registration<sup>10</sup>;
- 2882 (3) that he has failed to comply with a requirement imposed on him by regulations<sup>11</sup>;
- 2883 (4) in the case of person registered as an early years child minder or provider<sup>12</sup>, that he has failed to secure that the early years provision meets the learning and developments requirements<sup>13</sup>; or
- 2884 (5) in any case, that he has failed to pay a prescribed fee<sup>14</sup>.

The Chief Inspector may cancel the registration of a person registered as an early years child minder<sup>15</sup> if it appears to him that the person has not provided early years child minding for a period of more than three years during which he was registered<sup>16</sup>.

The Chief Inspector may cancel the registration of a person registered as a later years child minder<sup>17</sup> if it appears to him that the person has not provided later years child minding for a period of more than three years during which he was registered<sup>18</sup>.

The Chief Inspector may cancel the voluntary registration of a person registered as a child minder<sup>19</sup> if it appears to him that the person has provided neither early years child minding nor later years child minding for a period of more than three years during which he was registered<sup>20</sup>.

Where a requirement to make any changes or additions to any services, equipment or premises has been imposed on a person registered as an early years child minder or provider<sup>21</sup>, as a later years child minder or provider<sup>22</sup>, or under the provisions for voluntary registration<sup>23</sup>,

his registration may not be cancelled on the ground of any defect or insufficiency in the services, equipment or premises if the time set for complying with the requirements has not expired and it is shown that the defect or insufficiency is due to the changes or additions not having been made<sup>24</sup>.

- 1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.
- 2 Ie under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).
- 3 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).
- 4 Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).
- 5 Ibid s 68(1). The text refers to disqualification from registration by regulations under s 75 (see para 1156 post).
- 6 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).
- 7 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).
- 8 Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).
- 9 Ibid s 68(2)(a).
- 10 Ibid s 68(2)(b).
- 11 Ibid s 68(2)(c).
- 12 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).
- 13 Ibid s 68(2)(d). As to the requirement to secure that the early years provision meets the learning and development requirements see s 40(2)(a); and para 1125 ante.
- 14 Ibid s 68(2)(e).
- 15 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).
- 16 Ibid s 68(3).
- 17 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).
- 18 Ibid s 68(4).
- 19 Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).
- 20 Ibid s 68(5).
- 21 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).
- 22 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).
- 23 Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).
- 24 Ibid s 68(6).

## **UPDATE**

### **1137-1150 Regulations governing activities ... Suspension of registration**

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).



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### **1150. Suspension of registration.**

Regulations may provide for the registration of a person registered as an early years child minder or provider<sup>1</sup>, as a later years child minder or provider<sup>2</sup>, or under the provisions for voluntary registration<sup>3</sup>, to be suspended for a prescribed period in prescribed circumstances<sup>4</sup>. Such regulations must include provision conferring on the registered person a right of appeal against suspension to the Tribunal<sup>5</sup>.

A person registered as an early years child minder<sup>6</sup> may not provide early years child minding in England at any time when his registration is suspended in accordance with the regulations<sup>7</sup>. A person registered as a later years child minder<sup>8</sup> may not provide later years child minding in England, for a child who has not attained the age of eight, at any time when his registration is suspended in accordance with the regulations<sup>9</sup>. However, these provisions<sup>10</sup> do not apply in relation to early years child minding or (as the case may be) later years child minding which the person may provide without being registered under the relevant provisions<sup>11</sup>.

A person registered as an early years provider (other than an early years child minder)<sup>12</sup> may not provide early years provision on premises<sup>13</sup> in England at any time when his registration in respect of the premises is suspended in accordance with the regulations<sup>14</sup>. A person registered as a later years provider (other than a later years child minder)<sup>15</sup> may not provide later years provision on premises in England, for a child who has not attained the age of eight, at any time when his registration in respect of the premises is suspended in accordance with the regulations<sup>16</sup>. However, these provisions<sup>17</sup> do not apply in relation to early years provision or (as the case may be) later years provision which the person may provide without being registered under the relevant provisions<sup>18</sup>.

1    Ie under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).

2    Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

3    Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

4    Ibid s 69(1). The registration of a registered person may be suspended by Her Majesty's Chief Inspector of Education, Children's Services and Skills by notice in certain circumstances: see the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 13. The circumstance prescribed for the purposes of the Childcare Act 2006 s 69(1) are that the Chief Inspector has reasonable cause to believe that the continued provision of child care by the registered person exposes or may expose any relevant child to the risk of harm: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 14(1). 'Relevant child' means a child for whom child care is or may be provided by the registered person: reg 14(2). A notice under reg 13 may be given to the person in question by delivering it to him, by sending it by post, or by transmitting it electronically: reg 15(4). If the notice is transmitted electronically, it is to be treated as given only if the person to whom the notice was given indicated to the Chief Inspector his willingness to receive notices transmitted by electronic means and provided an address suitable for that purpose, and the notice was sent to the address provided by him: reg 15(5), (6). The period for which the registration of a registered person may be suspended is six weeks beginning with the date specified in the notice of suspension given: reg 15(1). In a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the Chief Inspector's power to suspend registration may only be exercised so as to give rise to a continuous period of suspension of 12 weeks: reg 15(2). Where, however, it is not reasonably practicable (for reasons beyond the control of the Chief Inspector):



859 (1) to complete any investigation as to the circumstances giving rise to the Chief Inspector's belief referred to in reg 14; or

860 (2) for any necessary steps to be taken to reduce or eliminate the risk of harm referred to in reg 14,

within a period of 12 weeks, the period of suspension may continue until the end of the investigation referred to in head (1) supra or until the steps referred to in head (2) supra have been taken: reg 15(3). If, at any time during a period of suspension under reg 13, it appears to the Chief Inspector that the circumstances prescribed in reg 14(1) no longer exist, the Chief Inspector must lift the suspension: reg 16.

As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Childcare Act 2006 s 69(2). 'The Tribunal' means the Tribunal established by the Protection of Children Act 1999 s 9 (see para 708 ante): Childcare Act 2006 s 69(11). A person whose registration has been suspended under the Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 13 (see note 4 supra) may appeal to the Tribunal against suspension: reg 17(1). On an appeal, the Tribunal must either confirm the Chief Inspector's decision to suspend registration or direct that the suspension is to cease to have effect: reg 17(2). However, if the suspension of a person's registration against which an appeal has been made no longer has effect, the Tribunal must dismiss the appeal: reg 17(3).

6 Ie under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).

7 Ibid s 69(3). A person commits an offence if, without reasonable excuse, he contravenes s 69(3); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 69(9), (10). As to the standard scale see para 132 note 2 ante.

8 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

9 Ibid s 69(4). A person commits an offence if, without reasonable excuse, he contravenes s 69(4); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 69(9), (10).

10 Ie ibid s 69(3), (4) (see the text and notes 6-9 supra).

11 Ibid s 69(5). The relevant provisions are those of Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante) and Pt 3 Ch 3 (see para 1127 et seq ante).

12 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante). As to the registration of an early years provider other than an early years child minder see para 1121 ante.

13 For the meaning of 'premises' see para 1117 note 6 ante.

14 Childcare Act 2006 s 69(6). A person commits an offence if, without reasonable excuse, he contravenes s 69(6); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 69(9), (10).

15 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

16 Ibid s 69(7). A person commits an offence if, without reasonable excuse, he contravenes s 69(7); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 69(9), (10).

17 Ie ibid s 69(6), (7) (see the text and notes 12-16 supra).

18 Ibid s 69(8). The relevant provisions are those of Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante) and Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

## UPDATE

### 1137-1150 Regulations governing activities ... Suspension of registration

SI 2007/730 revoked: see now the Childcare (General Childcare Register) Regulations 2008, SI 2008/975 (amended by SI 2009/1545).

### **1150 Suspension of registration**

NOTE 4--As to the circumstances in which registration may be suspended including the maximum period of suspension and notice of suspension see now the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, regs 8-11, 13.

NOTE 5--As to appeals against suspension, see now SI 2008/976 reg 12 (amended by SI 2008/2683). 'The Tribunal' means the First-tier Tribunal: Childcare Act 2006 s 69(11) (amended by SI 2008/2833).

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### **1151. Voluntary removal from register.**

A person registered as an early years child minder or provider<sup>1</sup>, as a later years child minder or provider<sup>2</sup>, or under the provisions for voluntary registration<sup>3</sup>, may give notice to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> that he wishes to be removed from the early years register or (as the case may be) from Part A or Part B of the general child care register<sup>5</sup> and the Chief Inspector must remove him from the early years register or (as the case may be) from the relevant part of the general child care register<sup>6</sup>.

1    Ie under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).

2    Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

3    Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

4    The notice given under ibid s 70(1) may be given to the person in question by delivering it to him, by sending it by post, or by transmitting it electronically: s 93(1), (2). However, if the notice is transmitted electronically, it is to be treated as given only if the following requirements are met: s 93(3). If the person required or authorised to give the notice is the Chief Inspector, the person to whom the notice is required or authorised to be given must have indicated to the Chief Inspector his willingness to receive notices transmitted by electronic means and must have provided an address suitable for that purpose, and the notice must be sent to the address provided by him: s 93(4). An indication given for the purposes of s 93(4) may be given generally for the purposes of notices required or authorised to be given by the Chief Inspector or may be limited to notices of a particular description: s 93(6). If the person required or authorised to give the notice is not the Chief Inspector, the notice must be transmitted in such manner as the Chief Inspector may require: s 93(5). A requirement imposed by the Chief Inspector under s 92(5) must be published in such manner as the Chief Inspector thinks appropriate for the purpose of bringing it to the attention of persons who are likely to be affected by it: s 93(7). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5    Ibid s 70(1). As to the early years register and the general child care register see para 1117 ante.

6    Ibid s 70(2). The Chief Inspector must not act under s 70(2):

861   (1)   if the Chief Inspector has sent the person a notice (in pursuance of s 73(2): see para 1154 post) of his intention to cancel his registration and the Chief Inspector has not decided that he no longer intends to take that step (s 70(3));

862   (2)   the Chief Inspector has sent the person a notice (in pursuance of s 73(7): see para 1154 post) of his decision to cancel his registration, and the time within which an appeal under s 74 (see para 1155 post) may be brought has not expired or, if such an appeal has been brought, it has not been determined (s 70(4)).

However, heads (1) and (2) supra do not apply if the person is seeking removal from Part B of the general child care register: s 70(5).

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### **1152. Termination of voluntary registration on expiry of prescribed period.**

Regulations may make provision requiring Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> to remove a registered person from Part B of the general child care register<sup>2</sup> on the expiry of a prescribed period of time from the date of his registration<sup>3</sup>.

<sup>1</sup> As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

<sup>2</sup> As to Part B of the child care register see para 1117 ante.

<sup>3</sup> Childcare Act 2006 s 71. At the date at which this volume states the law no such regulations had been made.

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### **1153. Cancellation in an emergency.**

In relation to a person registered as an early years child minder or provider<sup>1</sup>, as a later years child minder or provider<sup>2</sup>, or under the provisions for voluntary registration<sup>3</sup>, Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> may apply to a justice of the peace for an order<sup>5</sup>:

- 2885 (1) cancelling the person's registration<sup>6</sup>;
- 2886 (2) varying or removing a condition to which his registration is subject<sup>7</sup>;
- 2887 (3) imposing a new condition on his registration<sup>8</sup>.

If it appears to the justice that a child for whom early years provision or later years provision is being or may be provided by that person is suffering or is likely to suffer significant harm<sup>9</sup>, the justice may make the order<sup>10</sup>.

1 le under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).

2 le under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

3 le under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 An application may be made without notice: Childcare Act 2006 s 72(3).

6 Ibid s 72(1)(a).

7 Ibid s 72(1)(b).

8 Ibid s 72(1)(c).

9 For these purposes, 'harm' has the same meaning as in the Children Act 1989 and the question of whether harm is significant is to be determined in accordance with s 31(10) (see para 274 ante): Childcare Act 2006 s 72(7).

10 Ibid s 72(2). An order under s 72(2) must be made in writing and has effect from the time when it is made: s 72(4). If an order is made, the Chief Inspector must serve on the registered person as soon as is reasonably practicable after the making of the order a copy of the order, a copy of any written statement in support of the application for the order and notice of any right of appeal conferred by s 74 (see para 1155 post): s 72(5). The documents may be served on the registered person by delivering them to him or sending them by post: s 72(6).

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#### **1154. Procedural steps.**

Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> must give to the applicant or (as the case may be) the registered person notice<sup>2</sup> of his intention to take any of the following steps, namely:

- 2888 (1) to refuse an application for registration<sup>3</sup>;
- 2889 (2) to impose a new condition on a person's registration<sup>4</sup>;
- 2890 (3) to vary or remove any condition imposed on a person's registration<sup>5</sup>;
- 2891 (4) to refuse to grant an application for the variation or removal of any such condition<sup>6</sup>;
- 2892 (5) to cancel a person's registration<sup>7</sup>.

The notice must give the Chief Inspector's reasons for proposing to take the step and inform the person concerned of his rights<sup>8</sup>.

The Chief Inspector may not take the step until the end of the period of 14 days beginning with the day on which he gives notice unless the applicant or (as the case may be) the registered person notifies the Chief Inspector that he does not wish to object to the step being taken<sup>9</sup>. If the recipient of a notice gives notice to the Chief Inspector that he wishes to object to the step being taken, the Chief Inspector must give him an opportunity to object before deciding whether to take the step<sup>10</sup>.

If the Chief Inspector decides to take the step, he must give the recipient notice of his decision (whether or not the recipient informed the Chief Inspector that he wished to object to the step being taken)<sup>11</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 The notice given under the Childcare Act 2006 s 73(2), (4), (5), (7), (9) may be given to the person in question by delivering it to him, by sending it by post, or by transmitting it electronically: s 93(1), (2). However, if the notice is transmitted electronically, it is to be treated as given only if the following requirements are met: s 93(3). If the person required or authorised to give the notice is the Chief Inspector, the person to whom the notice is required or authorised to be given must have indicated to the Chief Inspector his willingness to receive notices transmitted by electronic means and must have provided an address suitable for that purpose, and the notice must be sent to the address provided by him: s 93(4). An indication given for the purposes of s 93(4) may be given generally for the purposes of notices required or authorised to be given by the Chief Inspector or may be limited to notices of a particular description: s 93(6). If the person required or authorised to give the notice is not the Chief Inspector, the notice must be transmitted in such manner as the Chief Inspector may require: s 93(5). A requirement imposed by the Chief Inspector under s 93(5) must be published in such manner as the Chief Inspector thinks appropriate for the purpose of bringing it to the attention of persons who are likely to be affected by it: s 93(7). In relation to the taking of a step mentioned in s 73(1)(b) or (c) (see the text and notes 4, 5 infra), notification authorised to be given to the Chief Inspector under s 73(4) (see the text and note 9 infra) or s 73(9) (see note 4 infra) may be given orally to a person authorised by the Chief Inspector to receive such notification (as well as by any of the methods mentioned in s 93(2)): s 93(8).

3 Ibid s 73(1)(a), (2). If the Chief Inspector gives notice to an applicant for registration under Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante) or Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante) that he intends to refuse his application, the application may not be withdrawn without the consent of the Chief Inspector: s 73(10).

4 Ibid s 73(1)(b), (2). 'A new condition' means a condition imposed otherwise than at the time of the person's registration: s 73(11). The taking of a step mentioned in head (2), head (3) or head (5) in the text does not have effect until the expiry of the time within which an appeal may be brought under s 74 (see para 1155 post) or, if such an appeal is brought, the time when the appeal is determined (and the taking of the step is confirmed): s 73(8). However, this does not prevent such a step having effect before the expiry of the time within which an appeal may be brought if the person concerned notifies the Chief Inspector that he does not intend to appeal: s 73(9).

5 Ibid s 73(1)(c), (2).

6 Ibid s 73(1)(d), (2).

7 Ibid s 73(1)(e), (2).

8 Ibid s 73(3).

9 Ibid s 73(4).

10 Ibid s 73(5). An objection may be made orally or in writing and in either case may be made by the recipient or his representative: s 73(6).

11 Ibid s 73(7).

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### **1155. Appeals.**

An applicant for registration or (as the case may be) a registered person may appeal to the Tribunal<sup>1</sup> against the taking of any of the following steps<sup>2</sup> by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup>:

- 2893 (1) the refusal of his application for registration<sup>4</sup>;
- 2894 (2) the imposition of a new condition on his registration<sup>5</sup>;
- 2895 (3) the variation or removal of any condition imposed on his registration<sup>6</sup>;
- 2896 (4) the refusal of an application to vary or remove any such condition<sup>7</sup>;
- 2897 (5) the cancellation of his registration<sup>8</sup>.

An applicant for registration or (as the case may be) a registered person may also appeal to the Tribunal against any determination made by the Chief Inspector which is of a prescribed description<sup>9</sup>.

A person against whom an order has been made by a justice of the peace in order to protect a child from harm<sup>10</sup> may appeal to the Tribunal against the making of the order<sup>11</sup>.

On an appeal, the Tribunal must either confirm the taking of the step, the making of the determination or the making of the order (as the case may be) or direct that it is not to have, or is to cease to have, effect<sup>12</sup>. Unless the Tribunal has confirmed the taking of a step mentioned in head (1) or head (5) above or the making of an order<sup>13</sup> cancelling a person's registration, the Tribunal may also do either or both of the following: (a) impose conditions on the registration of the person concerned; (b) vary or remove any condition previously imposed on his registration<sup>14</sup>.

1 For the meaning of 'the Tribunal' see para 1150 note 5 ante.

2 I.e. the taking of steps under the Childcare Act 2006 Pt 3 (ss 31-98) (as amended).

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 Childcare Act 2006 s 74(1)(a).

5 Ibid s 74(1)(b).

6 Ibid s 74(1)(c).

7 Ibid s 74(1)(d).

8 Ibid s 74(1)(e).

9 Ibid s 74(2). Any determination made by the Chief Inspector as to whether to give consent under the Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 8 (see para 1156 post) is a prescribed determination for the purposes of the Childcare Act 2006 s 74(2): Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 9.

10 I.e. an order made under the Childcare Act 2006 s 72(2) (see para 1153 ante).



- 11 Ibid s 74(3).
- 12 Ibid s 74(4).
- 13 Ie an order made under ibid s 72(2) (see para 1153 ante).
- 14 Ibid s 74(5).

## **UPDATE**

### **1155 Appeals**

NOTE 9--SI 2007/723 (as amended) replaced: Childcare (Disqualification) Regulations 2009, SI 2009/1547.

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### **1156. Disqualification from registration.**

Regulations may provide for a person to be disqualified from registration<sup>1</sup>. The regulations may, in particular, provide for a person to be disqualified from registration if:

- 2898 (1) he is included in the list of persons unsuitable to work with children kept by the Secretary of State<sup>2</sup>;
- 2899 (2) he is subject to a direction under the Education Act 2002<sup>3</sup> on the grounds that he is unsuitable to work with children or on grounds relating to his health<sup>4</sup>;
- 2900 (3) an order of a prescribed kind has been made at any time with respect to him<sup>5</sup>;
- 2901 (4) an order of a prescribed kind has been made at any time with respect to a child who has been in his care<sup>6</sup>;
- 2902 (5) a requirement of a prescribed kind has been imposed at any time with respect to such a child, under or by virtue of any enactment<sup>7</sup>;
- 2903 (6) he has at any time been refused registration under Part 3 Chapter 2<sup>8</sup>, 3<sup>9</sup> or 4<sup>10</sup> of the Childcare Act 2006 or under Part 10<sup>11</sup> or Part 10A<sup>12</sup> of the Children Act 1989<sup>11</sup> or any prescribed enactment, or had any such registration cancelled<sup>13</sup>;
- 2904 (7) he has been convicted of an offence of a prescribed kind or has been discharged absolutely or conditionally for such an offence<sup>14</sup>;
- 2905 (8) he has been given a caution in respect of an offence of a prescribed kind<sup>15</sup>;
- 2906 (9) he has at any time been disqualified from fostering a child privately<sup>16</sup>;
- 2907 (10) a prohibition has been imposed on him at any time under certain provisions of the Children Act 1989 or the Foster Children (Scotland) Act 1984<sup>17</sup> or any prescribed enactment<sup>18</sup>;
- 2908 (11) his rights and powers with respect to a child have at any time been vested in a prescribed authority under a prescribed enactment<sup>19</sup>;
- 2909 (12) if he lives in the same household as another person who is disqualified from registration or he lives in a household in which any such person is employed<sup>20</sup>.

As from a day to be appointed<sup>21</sup> the above list also includes where a person is barred from regulated activity relating to children<sup>22</sup>.

Regulations may provide for a person not to be disqualified from registration<sup>23</sup> by reason of any fact which would otherwise cause him to be disqualified if he has disclosed the fact to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>24</sup> and the Chief Inspector has consented in writing to the person's not being disqualified from registration and has not withdrawn his consent<sup>25</sup>.

As from a day to be appointed the following provisions apply<sup>26</sup>. A person who is disqualified from registration by the regulations must not provide early years or later years provision or be directly concerned in the management of early years or later years provision<sup>27</sup>. No person may employ, in connection with the provision of early years or later years provision, a person who is disqualified from registration by the regulations<sup>28</sup>. A person who contravenes these provisions<sup>29</sup> commits an offence and is liable on summary conviction to imprisonment or a fine or both<sup>30</sup>.

1 Childcare Act 2006 s 75(2). 'Registration' means registration under Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante), Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante) and Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante): s 75(1). A person is disqualified from registration if any of the following apply to him:

- 863 (1) any of the orders or other determinations specified in the Childcare (Disqualification) Regulations 2007, SI 2007/723, Sch 1 has been made with respect to him, which prevents him from being registered in relation to any facility in which children are looked after or from being involved in the management of or otherwise concerned with the provision of any such facility or with respect to a child who has been in his care (reg 3(1), (2));
- 864 (2) an order has been made with respect to him under the Sexual Offences Act 2003 s 104 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 360 et seq, 600) (Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 3(1), (3));
- 865 (3) he has been found to have committed an offence against a child within the meaning of the Criminal Justice and Court Services Act 2000 s 26(1) (see para 667 ante) (Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 3(4));
- 866 (4) he has been found to have committed any offence specified in Sch 2 para 1 or an offence that is related to such an offence or falls within Sch 2 para 2, despite the fact that the statutory offences in Sch 2 have been repealed (reg 3(5));
- 867 (5) he has been found to have committed any offence other than an offence referred to in head (3) or head (4) supra involving bodily injury to, or death of, a child (reg 3(6));
- 868 (6) he has been found to have committed any offence specified in Sch 3 or an offence that is related to such an offence (reg 3(7));
- 869 (7) he has been: (a) found to have committed any offence, committed against a person aged 18 or over, mentioned in the Criminal Justice and Court Services Act 2000 Sch 4 para 2 or an offence that is related to such an offence; or (b) charged with any offence, committed against a person aged 18 or over, mentioned in Sch 4 para 2 or an offence that is related to such an offence in respect of which a relevant order has been imposed by a senior court (Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 3(8));
- 870 (8) he has been found to have done an act which constituted an offence under the law in force in a country outside the United Kingdom and would constitute an offence requiring disqualification from registration under the Childcare (Disqualification) Regulations 2007, SI 2007/723, if it had been done in any part of the United Kingdom (reg 4(1)).

A person must not be disqualified from registration under heads (1)-(7) supra in respect of any order, determination or offence if he has successfully appealed against the order, determination or conviction, a caution in respect of that offence has been withdrawn or set aside or a direction based wholly or in part on the offence has been revoked: reg 3(9).

For these purposes a person has been 'found to have committed' an offence if he has been convicted of an offence, he has been found not guilty of an offence by reason of insanity, he has been found to be under a disability and to have done the act charged against him in respect of such an offence or on or after 6 April 2007 he has been given a caution in respect of an offence by a police officer after he has admitted that offence: reg 2(2). A person has been found to have committed an offence that is 'related to' an offence if he has been found to have committed an offence of attempting, conspiring or incitement to commit that offence or aiding, abetting, counselling or procuring the commission of that offence: reg 2(3).

In head (8) supra a person has been 'found to have done an act which constituted an offence' if, under the law in force in a country outside the United Kingdom he has been convicted of an offence (whether or not he has been punished for it), he has been cautioned in respect of an offence, a court exercising jurisdiction under that law has made in respect of an offence a finding equivalent to a finding that he is not guilty by reason of insanity or such a court has made in respect of an offence a finding equivalent to a finding that he is under a disability and did the act charged against him: reg 4(2). A person must not be disqualified from registration under head (8) supra in respect of any finding if, under the law in force in the country concerned, such finding has been reversed: reg 4(3). An act punishable under the law in force in a country outside the United Kingdom constitutes an offence under that law for the purposes of this regulation however it is described in that law: reg 4(4). There is continuing duty on a person registered under the Childcare Act 2006 Pt 3 Ch 4 to disclose information relating to any order, determination or conviction or disqualification under the Childcare (Disqualification) Regulations 2007, SI 2007/723: see para 1147 ante.

2 Childcare Act 2006 s 75(3)(a). As from a day to be appointed, the provisions of s 75(3)(a), (b) are repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10. At the date at which this volume states the law, no such day had been appointed. The list mentioned in the text is the list kept under the Protection of Children Act 1999 s 1 (prospectively repealed) (see para 648 ante) and a person who is included in the list kept under that provision is disqualified from registration: see the Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 5.

3 Ie the Education Act 2002 s 142 (see EDUCATION vol 15(2) (2006 Reissue) para 782).

4 Childcare Act 2006 s 75(3)(b) (prospectively repealed: see note 2 supra). A person is disqualified from registration if he is subject to a direction made, or which has effect as if made, under the Education Act 2002 s 142 on the grounds set out in s 142(4)(a), (b), (d) (see EDUCATION vol 15(2) (2006 Reissue) para 782) or he is a person in respect of whom an order has been made under the Education and Libraries (Northern Ireland) Order 1986, SI 1986/594, art 70(2)(e) or the Education and Libraries (Northern Ireland) Order 1987, SI 1987/167, art 8: Childcare (Disqualification) Regulations 2007, SI 2007/723, regs 2(1), 6.

5 Childcare Act 2006 s 75(3)(c).

6 Ibid s 75(3)(d).

7 Ibid s 75(3)(e). 'Enactment' means any enactment having effect at any time in any part of the United Kingdom: s 75(6).

8 Ie under ibid Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante).

9 Ie under ibid Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante).

10 Ie under ibid Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

11 The Children Act 1989 Pt X has been repealed.

12 Ie under ibid Pt XA (ss 79A-79X) (as added and amended) (see para 1072 et seq ante).

13 Childcare Act 2006 s 75(3)(f).

14 Ibid s 75(3)(g). A conviction in respect of which a probation order was made before 1 October 1992 (which would not otherwise be treated as a conviction) is to be treated as a conviction for the purposes of s 75: s 75(7).

15 Ibid s 75(3)(h). 'Caution' includes a reprimand or warning within the meaning of the Crime and Disorder Act 1998 s 65 (see para 1235 post): Childcare Act 2006 s 75(6).

16 Ibid s 75(3)(i). The text refers to fostering a child privately within the meaning of the Children Act 1989 (see para 1049 ante).

17 Ie the Children Act 1989 s 69 (see para 1066 ante) or the Foster Children (Scotland) Act 1984 s 10.

18 Childcare Act 2006 s 75(3)(j).

19 Ibid s 75(3)(k).

20 Ibid s 75(4). Regulations provide that a person who lives in the same household as another person who is disqualified from registration or in a household in which any such person is employed is disqualified from registration: Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 7.

21 The Childcare Act 2006 s 75(ba) is added by the Safeguarding Vulnerable Groups Act 2006 s 63(1), Sch 9 para 10 as from a day to be appointed under s 65. At the date at which this volume states the law no such day had been appointed.

22 Childcare Act 2006 s 75(3)(ba) (prospectively added: see note 21 supra). As to when a person is barred from regulated activity relating to children see the Safeguarding Vulnerable Groups Act 2006 s 3(2); and para 685 ante.

23 In particular, regulations may provide for a person not to be disqualified from registration for the purposes of the Childcare Act 2006 s 76 (see the text and notes 26-30 infra).

24 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

25 Childcare Act 2006 s 75(5). Where a person would be disqualified from registration by virtue of the Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 3, 4, 6(1), (3) or 7 but that person has disclosed to the Chief Inspector the facts which would otherwise cause him to be disqualified, the Chief Inspector may give his consent to waive the disqualification and that person must not, in respect of the facts so disclosed, be regarded as disqualified from registration for the purposes of reg 3, 4, 6(1), (3) or 7: reg 8(1). Any such consent given by the Chief Inspector must be in writing and specify the extent to which the disqualification from registration is waived: reg 8(2). In relation to a person who would be disqualified from registration by virtue of reg 3(4), this regulation does not apply where a court has made an order under the Criminal Justice and Court Services Act 2000 s 28(4), s 29(4), or s 29A(2) (as added) (see para 663 et seq ante): Childcare (Disqualification) Regulations 2007, SI 2007/723, reg 8(3).

26 The Childcare Act 2006 s 76 is to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law no such day had been appointed.

27 Ibid s 76(2). See note 30 infra. Section 76 applies to:

- 871 (1) early years provision in respect of which the provider is required by s 33(1) (see para 1118 ante) or s 34(1) (see para 1119 ante) to be registered (s 76(1)(a));
- 872 (2) early years provision in respect of which, but for s 34(2) (see para 1119 ante), the provider would be required to be registered (s 76(1)(b));
- 873 (3) later years provision in respect of which the provider is required by s 52(1) (see para 1127 ante) or s 53(1) (see para 1128 ante) to be registered (s 76(1)(c)); and
- 874 (4) later years provision in respect of which, but for s 53(2) (see para 1128 ante), the provider would be required to be registered (s 76(1)(d)).

28 Ibid s 76(3). See note 30 infra.

29 Ie a person who contravenes ibid s 76(2), (3) (see the text and notes 26-28 supra).

30 Ibid s 76(4), (7). Such a person is liable to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both: see s 76(7). As to the standard scale see para 132 note 2 ante. In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (alteration of penalties for summary offences), the reference to six months is to be read as a reference to 51 weeks: see the Childcare Act 2006 s 76(8). At the date at which this volume states the law, no day had been appointed for the commencement of the Criminal Justice Act 2003 s 281(5). A person who contravenes the Childcare Act 2006 s 76(2) is not guilty of an offence under s 76(4) if he is disqualified from registration by virtue only of regulations under s 75(4) and he proves that he did not know, and had no reasonable grounds for believing, that he was living in the same household as a person who was disqualified from registration or in a household in which such a person was employed: s 76(5). A person who contravenes s 76(3) is not guilty of an offence under s 76(4) if he proves that he did not know, and had no reasonable grounds for believing, that the person whom he was employing was disqualified from registration: s 76(6).

## UPDATE

### 1156 Disqualification from registration

NOTES 1, 2, 4, 20, 25--SI 2007/723 (as amended) replaced: Childcare (Disqualification) Regulations 2009, SI 2009/1547.

TEXT AND NOTE 21--Day appointed is 19 May 2008: SI 2008/1320.

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### **1157. Powers of entry.**

Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> may at any reasonable time enter any premises in England: (1) if he has reasonable cause to believe that early years provision<sup>2</sup> or later years provision<sup>3</sup> is being provided on the premises in breach of registration requirements<sup>4</sup>; (2) on which early years provision or later years provision in respect of which a person is registered<sup>5</sup> is being provided for the purpose of conducting an inspection<sup>6</sup> or for the purpose of determining whether any conditions or requirements imposed<sup>7</sup> are being complied with<sup>8</sup>.

A person so entering premises<sup>9</sup> may<sup>10</sup>:

- 2910 (a) inspect the premises<sup>11</sup>;
- 2911 (b) inspect, and take copies of any records kept by the person providing the child care and any other documents containing information relating to that provision<sup>12</sup>;
- 2912 (c) seize and remove any document or other material or thing found there which he has reasonable grounds to believe may be evidence of a failure to comply with any condition or requirement imposed<sup>13</sup>;
- 2913 (d) take measurements and photographs or make recordings<sup>14</sup>;
- 2914 (e) inspect any children being cared for there, and the arrangements made for their welfare<sup>15</sup>;
- 2915 (f) interview in private the child care provider<sup>16</sup>;
- 2916 (g) interview in private any person caring for children, or living or working, on the premises who consents to be interviewed<sup>17</sup>.

A person entering premises may<sup>18</sup> require any person to afford him such facilities and assistance with respect to matters within the person's control as are necessary to enable him to exercise his powers<sup>19</sup>.

The Chief Inspector may apply to a court<sup>20</sup> for a warrant and if it appears to the court that the Chief Inspector has attempted to exercise a power conferred on him<sup>21</sup> but has been prevented from doing so or is likely to be prevented from exercising any such power, the court may issue a warrant authorising any constable to assist the Chief Inspector in the exercise of the power, using reasonable force if necessary<sup>22</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 For the meaning of 'early years provision' see para 1117 note 6 ante.

3 For the meaning of 'later years provision' see para 1117 note 8 ante.

4 Childcare Act 2006 s 77(1) (amended by the Education and Inspections Act 2006 ss 157, 184, Sch 14 paras 108, 113(1), (2), Sch 18 Pt 5). The text refers to breach of the requirements of the Childcare Act 2006 s 33(1) (see para 1118 ante), s 34(1) (see para 1119 ante), s 52(1) (see para 1127 ante) or s 53(1) (see para 1128 ante). An authorisation given by the Chief Inspector under the Education and Inspections Act 2006 Sch 12 para

9(1) (see EDUCATION) in relation to his functions under the Childcare Act 2006 s 77(1) (as amended) or s 77(2) (as amended) may be given:

875 (a) for a particular occasion or period (s 77(3)(a) (s 77(3) amended by the Education and Inspections Act 2006 Sch 14 paras 108, 113(1), (3));

876 (b) subject to conditions (Childcare Act 2006 s 77(3)(b) (as so amended)).

The Education Act 2005 s 58 (see EDUCATION vol 15(2) (2006 Reissue) para 1293) (inspection of computer records) also applies to the Childcare Act 2006 s 77 (as amended): see s 77(6).

A person commits an offence if he intentionally obstructs a person exercising any power under s 77 (as amended) and is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 77(8), (9). As to the standard scale see para 132 note 2 ante.

5 le under ibid Pt 3 (ss 31-98) (as amended).

6 le an inspection under ibid s 49 (see para 1126 ante) or s 60 (see para 1133 ante).

7 le by or under ibid Pt 3 (as amended).

8 Ibid s 77(2) (amended by the Education and Inspections Act 2006 Sch 14 paras 108, 113(1), (2), Sch 18 Pt 5). Where a person ('the authorised person') proposes to enter domestic premises in pursuance of a power of entry conferred by the Childcare Act 2006 s 77(2) and that person has reasonable cause to believe that the premises are not the home of the person providing the early years or later years provision or that the premises are the home of a child for whom the early years or later years provision is provided, the authorised person may not enter the premises without the consent of an adult who is an occupier of the premises: s 78(1), (2). However, this does not prevent the imposition under s 38 (see para 1121 ante), s 58 (see para 1130 post) or s 66 (see para 1134 post) of a condition requiring a person registered under Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante), Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante) or Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante) to secure that the occupier of any premises on which the registered person provides early years provision or later years provision gives any consent required by s 78(2) (as amended): s 78(3). 'Occupier' does not include the person providing the early years or later years provision: s 78(4).

9 le under ibid s 77 (as amended).

10 This is subject to ibid s 77(3)(b) (as amended) (see note 4 supra).

11 Ibid s 77(4)(a).

12 Ibid s 77(4)(b). 'Documents' and 'records' each include information recorded in any form: s 77(10).

13 Ibid s 77(4)(c). The text refers to any condition or requirement imposed under Pt 3 (ss 31-98) (as amended).

14 Ibid s 77(4)(d).

15 Ibid s 77(4)(e).

16 Ibid s 77(4)(f).

17 Ibid s 77(4)(g).

18 This is subject to ibid s 77(3)(b) (as amended) (see note 4 supra).

19 Ibid s 77(5).

20 'Court' means the High Court, a county court or a magistrates' court but this is subject to any provisions which may be made by virtue of ibid s 78(4) (see note 8 supra) by or under the Children Act 1989 Sch 11 (see para 208 ante): Childcare Act 2006 s 79(5).

21 le a power conferred by ibid s 77 (as amended).

22 Ibid s 79(1), (2). A warrant issued under s 79 must be addressed to and executed by a constable: s 79(3). The Children Act 1989 Sch 11 (see para 208 ante) applies in relation to proceedings under the Childcare Act 2006 s 79 as if they were proceedings under the Children Act 1989: s 79(4).

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### **1158. Supply of information.**

Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> may at any time require any person registered under Part 3 of the Childcare Act<sup>2</sup> to provide him with any information connected with the person's activities as an early years provider or later years provider<sup>3</sup> which the Chief Inspector considers it necessary to have for the purposes of his functions under that Part<sup>4</sup>.

The Chief Inspector must provide prescribed information<sup>5</sup> to Her Majesty's Revenue and Customs, and the relevant local authority, if he takes any of the following steps<sup>5</sup>:

- 2917 (1) grants a person's application for registration<sup>6</sup>;
- 2918 (2) gives notice of his intention to cancel a person's registration<sup>7</sup>;
- 2919 (3) cancels a person's registration<sup>8</sup>;
- 2920 (4) suspends a person's registration<sup>9</sup>;
- 2921 (5) removes a person from the register at that person's request<sup>10</sup>.

The Chief Inspector must also provide prescribed information to Her Majesty's Revenue and Customs, and the relevant local authority, if an order is made in relation to protecting a child in an emergency<sup>11</sup>.

The Chief Inspector may arrange, or be required by regulations to provide, for prescribed information held by him in relation to persons registered<sup>12</sup> to be made available for the purpose of assisting parents or prospective parents in choosing an early years or later years provider or protecting children from harm or neglect<sup>13</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 ie under the Childcare Act 2006 Pt 3 (ss 31-98) (as amended).

3 For the meaning of 'early years provider' see para 1117 note 6 ante. For the meaning of 'later years provider' see para 1117 note 8 ante.

4 Childcare Act 2006 s 82.

5 The information which may be prescribed for the purposes of *ibid* s 83 is:

877 (1) in the case of information to be provided to Her Majesty's Revenue and Customs, information which Her Majesty's Revenue and Customs may require for the purposes of functions in relation to tax credits (s 83(3)(a));

878 (2) in the case of information to be provided to the relevant local authority, information which would assist the local authority in the discharge of its functions under s 12 (see para 1114 ante) (s 83(3)(b)).

'The relevant local authority' means the English local authority for the area in which the person provides (or, as the case may be, has provided) the early years provision or later years provision in respect of which he is (or was) registered: s 83(4). For the meaning of 'English local authority' see para 1105 note 4 ante. As to Her Majesty's Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq.



For the purposes of s 83(1):

- 879 (a) information specified in the Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, Sch 1 Pt 1, Sch 1 Pt 2 para 6(1), (c), (d), (e) is prescribed information which must be provided to Her Majesty's Revenue and Customs when the Chief Inspector takes one of the steps mentioned in head (1), (3), (4) or (5) in the text in relation to a person's registration (reg 4(1));
- 880 (b) information specified in Sch 1 Pts 1, 2 is prescribed information which must be provided to the relevant local authority when the Chief Inspector takes one of the steps mentioned in heads (1)-(5) in the text in relation to a person's registration (reg 5(1));
- 881 (c) information specified in Sch 1 Pt 1, Sch 1 Pt 2 paras 6, 7, 9-13, Sch 1 Pt 3 is prescribed information about a registered person which the Chief Inspector may arrange to be made available for the purpose of assisting parents or prospective parents in choosing an early years or later years provider (reg 6);
- 882 (d) information specified in Sch 1 Pt 1, Sch 3 is prescribed information about a registered person which the Chief Inspector may arrange to be made available for the purpose of protecting children from harm or neglect (reg 7).

For the purposes of regs 4, 5, 6 and 10, information is not to be treated as prescribed information which may or must be disclosed:

- 883 (i) where it includes information as to the identity of any child to whom child care is being or has been provided without the consent of a parent of the child identified (reg 3(1)(a)); or
- 884 (ii) where it includes information as to the identity of a parent or relative of such a child (unless the parent or relative in question is the child care provider) without the consent of the parent or relative identified (reg 3(1)(b)).

For the purposes of regs 4-10, information is not to be treated as prescribed information which may or must be disclosed where the Chief Inspector is required under any enactment, by any rule of law or by the order of a court not to disclose the information: reg 3(2). 'Disclosure' includes making information available, or the provision of information, to a person or body; and 'disclose' must be construed accordingly: reg 3(3). 'Parent' includes any individual who has parental responsibility for a child or who has care of a child: reg 3(2).

5 le under the Childcare Act 2006 Pt 3 (as amended).

6 Ibid s 83(1)(a).

7 Ibid s 83(1)(b).

8 Ibid s 83(1)(c).

9 Ibid s 83(1)(d).

10 Ibid s 83(1)(e).

11 Ibid s 83(2). The text refers to an order made under s 72(2) (see para 1153 ante). For the purposes of s 83(2):

- 885 (1) information that a person's registration has been cancelled and the information specified in the Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, Sch 1 Pt 1 is prescribed as information about that registered person which must be provided to Her Majesty's Revenue and Customs if an order is made under the Childcare Act 2006 s 72(2) (Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, reg 4(2));
- 886 (2) information that a person's registration has been cancelled, that a condition to which the registration is subject has been varied or removed, or that a new condition has been imposed on the registration, and the information specified in Sch 1 Pt 1, is prescribed as information about that registered person which must be provided to the relevant local authority if an order is made under the Childcare Act 2006 s 72(2) (Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, reg 5(2)).

12 le registered under the Childcare Act 2006 Pt 3 (as amended).

13 See *ibid* s 84(1), (3). The information may be made available in such manner and to such persons as the Chief Inspector considers appropriate: s 84(2). Where a written request concerning a registered person has been received from:

887 (1) a child protection agency;

888 (2) a police authority or a chief officer within the meaning of the Police Act 1997 s 126, the Chief Inspector must, pursuant to the Childcare Act 2006 s 84(3), for the purpose of protecting children from harm or neglect provide to that person such of the information mentioned in the Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, Sch 3 as has been requested and is held by him in relation to that registered person: reg 8(1), (2). 'Child protection agency' means the National Society for the Prevention of Cruelty to Children and any body or authority exercising within the United Kingdom statutory functions relating to the protection of children: reg 8(3).

Where a written request concerning a registered person has been received from one of the following:

889 (a) a fostering agency within the meaning the Care Standards Act 2000 s 4(4) (see para 904 ante);

890 (b) a voluntary adoption agency within the meaning of s 4(7) (see para 985 ante);

891 (c) the National Assembly for Wales;

892 (d) the Scottish Commission for the Regulation of Care;

893 (e) a Health and Social Services Board in Northern Ireland;

894 (f) a body acting on behalf of the Crown in the Channel Islands or the Isle of Man; and

895 (g) the national authority of any other member state of the European Economic Area having functions comprising the regulation of child care,

the Chief Inspector must, pursuant to the Childcare Act 2006 s 84(3), for the purpose of protecting children from harm or neglect provide to that person such of the information specified in the Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, Sch 1 Pt 1, Pt 2 paras 6, 7, 9, 10 and Sch 2 as has been requested and is held by him in relation to that registered person: reg 9(1)-(3). The information is not to be treated as prescribed information which must be provided to a prescribed person where the information has previously been provided by the Chief Inspector to that prescribed person: reg 9(4).

Where a written request concerning a registered person has been received from a person prescribed the Chief Inspector must, pursuant to the Childcare Act 2006 s 84(3), for the purpose of assisting parents in choosing an early years or later years provider or protecting children from harm or neglect provide to that person such of the information in the Child Care (Supply and Disclosure of Information) (England) Regulations 2007, SI 2007/722, Sch 1 Pt 1 paras 1-3, Sch 1 Pt 2 paras 13, 14 and Sch 1 Pt 3 para 16 as has been requested and is held by him in relation to that registered person: reg 10(1), (3). The prescribed persons for these purposes are the parents of children to whom child care is being or has been provided by the registered person: reg 10(2). Any information so provided is not to be treated as prescribed information: (i) where the information is available to the parent, to whom it would fall to be provided, by other means reasonably at his disposal; (ii) where to provide the information would involve disproportionate effort or expense; (iii) where the circumstances indicate that the information is or may be sought in contemplation or furtherance of civil proceedings against the Chief Inspector or any other person or body; or (iv) where the information has previously been provided by the Chief Inspector to that parent: reg 10(4).

## UPDATE

### 1158 Supply of information

NOTE 5--SI 2007/722 regs 4(1), 7 amended: SI 2008/961.

NOTE 11--SI 2007/722 regs 4(2), 5(2) amended: SI 2008/961.

NOTE 13--SI 2007/722 regs 9(3), 10(3) amended: SI 2008/961.

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### **1159. Offences and criminal proceedings.**

A person commits an offence if in making an application for registration<sup>1</sup> he knowingly makes a statement which is false or misleading in a material particular<sup>2</sup>. A person guilty of such an offence is liable on summary conviction to a fine<sup>3</sup>. Proceedings for an offence under Part 3 of the Childcare Act 2006<sup>4</sup> or regulations made under it may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings comes to his knowledge<sup>5</sup>.

Where an offence is committed by a body corporate, if the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly<sup>6</sup>.

Proceedings for an offence<sup>7</sup> which is alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in the name of any of its members)<sup>8</sup>.

1    Ie under the Childcare Act 2006 Pt 3 Ch 2-4 (ss 33-67).

2    Ibid s 85(1).

3    Ibid s 85(2). The fine must not exceed level 5 on the standard scale: see s 85(2). As to the standard scale see para 132 note 2 ante.

4    Ie an offence under ibid Pt 3 (ss 31-89) (as amended).

5    Ibid s 86(1). No such proceedings may be brought by virtue of s 86(1) more than three years after the commission of the offence: s 86(2).

6    Ibid s 87.

7    Ie an offence under ibid Pt 3 (as amended).

8    Ibid s 88(1). For the purpose of any such proceedings, rules of court relating to the service of documents are to have effect as if the association were a body corporate: s 88(2). In proceedings for an offence under Pt 3 (as amended) brought against an unincorporated association, the Criminal Justice Act 1925 s 33 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1161) and the Magistrates' Courts Act 1980 Sch 3 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1161) (procedure) apply as they do in relation to a body corporate: Childcare Act 2006 s 88(3). A fine imposed on an unincorporated association on its conviction of an offence under Pt 3 (as amended) is to be paid out of the funds of the association: s 88(4). If an offence under Pt 3 (as amended) by an unincorporated association is shown to have been committed with the consent or connivance of an officer of the association or a member of its governing body or to be attributable to any neglect on the part of such an officer or member, the officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly: s 88(5).

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# **1160. Consent to disclosure withheld.**

Where Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup>:

- 2922 (1) is determining, for the purpose of deciding whether to grant an application for registration<sup>2</sup>, whether the prescribed requirements for registration are satisfied and are likely to be continued to be satisfied<sup>3</sup>; or
- 2923 (2) is determining, for the purpose of deciding whether to cancel the registration of any person<sup>4</sup>, whether the prescribed requirements for registration have ceased, or will cease, to be satisfied<sup>5</sup>,

the Chief Inspector may, if regulations so provide and he thinks it appropriate to do so, treat the prescribed requirements for registration as not being satisfied or (as the case may be) as having ceased to be satisfied<sup>6</sup> if for the purpose of his determination:

- 2924 (a) the Chief Inspector has requested a person ('A') to consent to the disclosure by another person ('B') to the Chief Inspector of information which relates to A<sup>7</sup>, is held by B<sup>8</sup> and is of a prescribed description<sup>9</sup>; and
- 2925 (b) A does not give his consent or withdraws his consent after giving it<sup>10</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 Ie under the Childcare Act 2006 Pt 3 Ch 2 (ss 31-51) (see para 1117 et seq ante), Pt 3 Ch 3 (ss 52-61) (see para 1127 et seq ante) or Pt 3 Ch 4 (ss 62-67) (see para 1134 et seq ante).

3 Ibid s 90(1)(a).

4 Ie under ibid s 68(2)(a) (see para 1149 ante).

5 Ibid s 90(1)(b).

6 The Chief Inspector may, in the circumstances set out in ibid s 90(2), treat the prescribed requirements for registration as not being satisfied or (as the case may be) as having ceased to be satisfied: Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 11.

7 Childcare Act 2006 s 90(2)(a)(i).

8 Ibid s 90(2)(a)(ii).

9 Ibid s 90(2)(a)(iii). Information is of a prescribed description for the purposes of s 90(2)(a)(iii) if it:

896 (1) confirms the identity of A (Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 12(1), (2)(a));

897 (2) is information about A contained in an enhanced criminal record certificate (reg 12(1), (2)(b));

898 (3) confirms relevant qualifications claimed by A (reg 12(1), (2)(c));

- 899 (4) is information about the health of A held by a medical practitioner (reg 12(1), (2)(d));
- 900 (5) is information, other than information of a kind referred to in heads (1)-(4) above, about the character, capacity, employment record or other relevant experience of A held by an educational institution currently or formerly attended by A, an employer or former employer of A or a medical practitioner (reg 12(1), (2)(e));
- 901 (6) is information relating to the character of A held by the governing body or proprietor of a school which was or is attended by a child of A or a child for whom A has parental responsibility (reg 12(1), (2)(f));
- 902 (7) is information about A held by a local authority in connection with the exercise of its social services functions (reg 12(1), (2)(g));
- 903 (8) is information about A, whether or not of a kind described in heads (1)-(7) above, held by the National Assembly for Wales in pursuance of its functions as registration authority under the Children Act 1989 Pt XA (ss 79A-79X) (as added and amended; prospectively amended) (see para 1163 et seq post), the Scottish Commission for the Regulation of Care, pursuant to the Regulation of Care (Scotland) Act 2001 Pt 1, a Health and Social Services Board pursuant to the Children (Northern Ireland) Order 1995, SI 1995/755, Pt 11, a body acting on behalf of the Crown in the Channel Islands or the Isle of Man, or the national authority of any other member state of the European Economic Area having functions comprising the regulation of child care (Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 12(1), (2)(h)).

'Relevant qualification' means a qualification evidencing competence, or level of competence, in an area that is relevant to any of the Chief Inspector's functions under the Childcare Act 2006 s 62(3)(b), s 63(4)(b) or s 68(2): Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 12(3). 'Social services functions' means functions which are social services functions for the purposes of the Local Authority Social Services Act 1970 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006): Childcare (Voluntary Registration) Regulations 2007, SI 2007/730, reg 12(3). For the meaning of 'enhanced criminal record certificate' see para 1134 note 9 ante.

10 Childcare Act 2006 s 90(2)(b).

## UPDATE

### 1160 Consent to disclosure withheld

TEXT AND NOTES 6-10--The Chief Inspector may, in the circumstances set out in the Childcare Act 2006 s 90(2), treat the prescribed requirements for registration as not being satisfied or, as the case may be, as having ceased to be satisfied: Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 4.

NOTES 6, 9--SI 2007/730 revoked: SI 2008/975.

NOTE 9--For information of a prescribed description for the purposes of the Childcare Act 2006 s 90(2)(a)(iii), see now SI 2008/976, reg 5.

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### **1161. Co-operation between authorities.**

If it appears to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>1</sup> that any English local authority<sup>2</sup> could, by taking any specified action, help in the exercise of any of his functions<sup>3</sup>, he may request the help of the authority, specifying the action in question<sup>4</sup>. An authority whose help is requested must comply with the request if it is compatible with its own statutory and other duties and does not unduly prejudice the discharge of any of its functions<sup>5</sup>.

1 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

2 For the meaning of 'English local authority' see para 1105 note 4 ante.

3 Ie under the Childcare Act 2006 Pt 3 (ss 31-89) (as amended).

4 Ibid s 91(1).

5 Ibid s 91(2).

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### **1162. Combined certificates of registration.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. The following applies where Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> is required<sup>3</sup> to issue more than one certificate of registration to a person<sup>4</sup>. If the Chief Inspector considers it appropriate, he may combine any two or more of those certificates in a single certificate (a 'combined certificate')<sup>5</sup>. A combined certificate of registration must contain prescribed information about prescribed matters<sup>6</sup>. If there is a change of circumstances which requires the amendment of a combined certificate of registration, the Chief Inspector must give the registered person an amended combined certificate<sup>7</sup>. If the Chief Inspector is satisfied that a combined certificate of registration has been lost or destroyed, the Chief Inspector must give the registered person a copy, on payment by that person of any prescribed fee<sup>8</sup>.

1 The Childcare Act 2006 Pt 3 (ss 31-98) is mainly to be brought into force as from a day to be appointed by order made under ss 109(2), 110(1), (2). At the date at which this volume states the law s 92 had only been brought into force for the purpose of making regulations: see the Childcare Act 2006 (Commencement No 1) Order 2006, SI 2006/3360, art 2(d).

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 He required by virtue of the Childcare Act 2006 Pt 3 (ss 31-98) (as amended).

4 Ibid s 92(1).

5 Ibid s 92(2).

6 Ibid s 92(3). At the date at which this volume states the law no regulations had been made prescribing such information or matters.

7 Ibid s 92(4).

8 Ibid s 92(5).

### **UPDATE**

#### **1162 Combined certificates of registration**

TEXT AND NOTES--As to the content of a combined certificate of registration given in accordance with the Childcare Act 2006 s 92, see the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, SI 2008/976, reg 7.

TEXT AND NOTE 1--Childcare Act 2006 s 92 in force 1 September 2008 for all purposes: SI 2008/2261.

NOTE 8--For the purposes of the Childcare Act 2006 s 92(5), the prescribed fee for a copy of a certificate of registration or combined certificate of registration that has been lost or destroyed is £7: Childcare (Fees) Regulations 2008, SI 2008/1804, reg 17.





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### **(iii) Child Minding, Child Care and Day Care in Wales**

#### ***A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989***

##### **(A) CHILD MINDERS AND DAY CARE PROVIDERS**

##### **1163. Definition of child minder.**

A child minder is someone who looks after one or more children under the age of eight on domestic premises<sup>1</sup> for reward<sup>2</sup>. However, the following people do not act as a child minder when looking after a child:

- 2926 (1) the parent, or a relative, of the child<sup>3</sup>;
- 2927 (2) a person who has parental responsibility for the child<sup>4</sup>;
- 2928 (3) a person who is a local authority foster parent in relation to the child<sup>5</sup>;
- 2929 (4) a person who is a foster parent with whom the child has been placed by a voluntary organisation<sup>6</sup>; or
- 2930 (5) a person who fosters the child privately<sup>7</sup>.

Where a person:

- 2931 (a) looks after a child for the parents ('P1')<sup>8</sup>; or
- 2932 (b) in addition to that work, looks after another child for different parents ('P2')<sup>9</sup>,

and the work consists (in a case within head (a) above) of looking after the child wholly or mainly in P1's home or (in a case within head (b) above) of looking after the children wholly or mainly in P1's home or P2's home or both, the work is not to be treated as child minding<sup>10</sup>.

1 As to the meaning of 'domestic premises', and for the meaning of 'premises', see para 1072 note 2 supra.

2 See the Children Act 1989 s 79A(2) (s 79A added by the Care Standards Act 2000 s 79(1)). However, the Children Act 1989 Pt XA (ss 79A-79X) (as added and amended) does not apply in relation to a person who acts as a child minder, or provides day care on any premises, unless the period, or the total of the periods, in any day which he spends looking after children or (as the case may be) during which the children are looked after on the premises exceeds two hours: s 79A(7) (as so added). In determining whether a person is required to register under Pt XA (as added and amended) for child minding, any day on which he does not act as a child minder at any time between 2 am and 6 pm is to be disregarded: s 79A(8) (as so added).

3 Ibid s 79A(3)(a) (as added: see note 2 supra). For the meaning of 'child' see para 3 ante.

4 Ibid s 79A(3)(b) (as added: see note 2 supra). For the meaning of 'parental responsibility' see para 134 ante.

5 Ibid s 79A(3)(c) (as added: see note 2 supra). For the meaning of 'local authority foster parent' see para 249 note 13 ante. For the meaning of 'local authority' see para 248 note 10 ante.

6 Ibid s 79A(3)(d) (as added: see note 2 supra). For the meaning of 'voluntary organisation' see para 248 note 10 ante.

7 Ibid s 79A(3)(e) (as added: see note 2 supra).

8 Ibid s 79A(4)(a) (as added: see note 2 supra). For the purposes of s 79A(4) (as added), 'parent', in relation to a child includes: (1) a person who is not a parent of the child but has parental responsibility for the child; (2) a person who is a relative of the child: s 79A(5) (as so added).

9 Ibid s 79A(4)(b) (as added: see note 2 supra).

10 Ibid s 79A(4) (as added: see note 2 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(A) Child Minders and Day Care Providers/1164. Qualification for registration for child minding and day care.

#### **1164. Qualification for registration for child minding and day care.**

A person is qualified for registration for child minding<sup>1</sup> if:

- 2933 (1) he, and every other person looking after children on any premises<sup>2</sup> on which he is or is likely to be child minding, is suitable to look after children under the age of eight<sup>3</sup>;
- 2934 (2) every person living or employed on the premises in question is suitable to be in regular contact with children under the age of eight<sup>4</sup>;
- 2935 (3) the premises in question are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises<sup>5</sup>; and
- 2936 (4) he is complying with regulations<sup>6</sup> governing child minders and day care providers<sup>7</sup> and with any conditions imposed<sup>8</sup>.

A person is qualified for registration for providing day care<sup>9</sup> on particular premises if:

- 2937 (a) he has made adequate arrangements to ensure that every person (other than himself and the responsible individual<sup>10</sup>) looking after children on the premises is suitable to look after children under the age of eight; and every person (other than himself and the responsible individual) living or working on the premises is suitable to be in regular contact with children under the age of eight<sup>11</sup>;
- 2938 (b) the responsible individual is suitable to look after children under the age of eight, or if he is not looking after such children, is suitable to be in regular contact with them<sup>12</sup>;
- 2939 (c) the premises are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises<sup>13</sup>; and
- 2940 (d) he is complying with regulations governing child minders and day care providers<sup>14</sup> and with any conditions imposed<sup>15</sup>.

1 See para 1072 ante. For the meaning of 'child' see para 3 ante. Where, for the purposes of determining a person's qualification for registration the registration authority requests any person ('A') to consent to the disclosure to the authority by another person ('B') of any information relating to A which is held by B and is of a prescribed description, and A does not give his consent (or withdraws it after having given it), the registration authority may, if regulations so provide and it thinks it appropriate to do so, regard A as not suitable to look after children under the age of eight, or not suitable to be in regular contact with such children: Children Act 1989 s 79B(5A) (added by the Education Act 2002 s 152, Sch 13 para 1).

The Children Act 1989 s 78B(2) (as added) provides that the registration authority in Wales is the National Assembly for Wales. As from a day to be appointed the Children Act 1989 is amended by the Childcare Act 2006 s 103(1), Sch 2 para 6 so as to apply to Wales only: see para 1070 ante. References to the registration authority are consequently prospectively amended so as to refer instead to the Assembly and 'the Assembly' means the National Assembly for Wales: see the Children Act 1989 s 79B(2) (prospectively substituted by the Childcare Act 2006 Sch 2 para 7). By virtue of the Government of Wales Act 2006 such powers of the Assembly are now

conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'premises' see para 1072 note 2 ante.

3 Children Act 1989 s 79B(3)(a) (s 79B added by the Care Standards Act 2000 s 79(1)).

4 Children Act 1989 s 79B(3)(b) (as added: see note 3 supra).

5 Ibid s 79B(3)(c) (as added: see note 3 supra).

6 For these purposes, 'regulations' means regulations made by the Welsh Ministers: s 79B(7)(b) (as so added). As from a day to be appointed, s 79B(7) (as added) is substituted by the Childcare Act 2006 s 103(1), Sch 2 para 7(c) but not so as materially to affect its meaning. At the date at which this volume states the law no such day had been appointed.

7 The regulations under the Children Act 1989 s 79C (as added) : see paras 1074 ante, 1165 post.

8 Ibid s 79B(3)(d) (as added (see note 3 supra); and amended by the Children Act 2004 s 48, Sch 4 paras 1, 2(1)).

9 For the meaning of 'day care' see para 1072 note 3 ante.

10 For these purposes, 'the responsible individual' means:

904 (1) in a case of one individual working on the premises in the provision of day care, that person (Children Act 1989 s 79B(5ZA)(a) (s 79B(5ZA) added by the Children Act 2004 s 48, Sch 4 paras 1, 6(c));

905 (2) in a case of two or more individuals so working, the individual so working who is in charge (Children Act 1989 s 79B(5ZA)(b) (as so added)).

11 Ibid s 79B(4)(a) (s 79B as added (see note 3 supra); s 79B(4)(a), (b) substituted by the Children Act 2004 Sch 4 paras 1, 6(a)). For the purposes of head (a) in the text a person is not treated as working on the premises in question if none of his work is done in the part of the premises in which children are looked after, or he does not work on the premises at times when children are looked after there: Children Act 1989 s 79B(5) (as so added; and amended by the Children Act 2004 Sch 4 paras 1, 6(b)).

12 Children Act 1989 s 79B(4)(b) (as added and substituted: see notes 3, 11 supra).

13 Ibid s 79B(4)(c) (as added: see note 3 supra).

14 The regulations under ibid s 79C (as added): see para 1074 ante.

15 Ibid s 79B(4)(d) (as added: see note 3 supra).

## UPDATE

### 1164 Qualification for registration for child minding and day care

NOTES 1, 6--Day appointed in relation to 2006 Act Sch 2 paras 6, 7 is 1 September 2008: SI 2008/2261.

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### **1165. Regulations etc governing child minders and day care providers.**

The appropriate body<sup>1</sup> may make regulations<sup>2</sup> governing the activities of registered persons who act as child minders<sup>3</sup>, or provide day care<sup>4</sup>, on premises in Wales<sup>5</sup>.

The regulations may deal with the following matters (among others):

- 2941 (1) the welfare and development of the children concerned<sup>6</sup>;
- 2942 (2) suitability to look after, or be in regular contact with, children under the age of eight<sup>7</sup>;
- 2943 (3) qualifications and training<sup>8</sup>;
- 2944 (4) the maximum number of children who may be looked after and the number of persons required to assist in looking after them<sup>9</sup>;
- 2945 (5) the maintenance, safety and suitability of premises and equipment<sup>10</sup>;
- 2946 (6) the keeping of records<sup>11</sup>;
- 2947 (7) the provision of information<sup>12</sup>.

If the regulations require any person (other than the registration authority<sup>13</sup>) to have regard to or to meet factors, standards and other matters prescribed by or referred to in the regulations, they may also provide for any allegation that the person has failed to do so to be taken into account by the registration authority in the exercise of its functions<sup>14</sup>, or in any proceedings<sup>15</sup>.

Regulations may provide that a registered person who without reasonable excuse contravenes, or otherwise fails to comply with, any requirement of the regulations is guilty of an offence<sup>16</sup>.

1 The Children Act 1989 s 79C (as added) refers to the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.

2 For the meaning of 'regulations' see para 1164 note 1 ante. As to such regulations see the Child Minding and Day Care (Wales) Regulations 2002, SI 2002/812 (amended by SI 2002/2171; SI 2002/2622; SI 2003/2708; SI 2004/2414; SI 2005/1541; SI 2005/2303; SI 2005/2929; SI 2006/3251); and the Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695.

3 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79C(2) (s 79C added by the Care Standards Act 2000 s 79(1)).

6 Children Act 1989 s 79C(3)(a) (as added: see note 5 supra).

7 Ibid s 79C(3)(b) (as added: see note 5 supra).

8 Ibid s 79C(3)(c) (as added: see note 5 supra).

9 Ibid s 79C(3)(d) (as added: see note 5 supra).

10 Ibid s 79C(3)(e) (as added: see note 5 supra).

- 11 Ibid s 79C(3)(f) (as added: see note 5 supra).
- 12 Ibid s 79C(3)(g) (as added: see note 5 supra).
- 13 As to the registration authority see para 1164 note 1 ante.
- 14 Ie its functions under the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).
- 15 Ibid s 79C(6) (as added: see note 5 supra). The proceedings mentioned in the text are proceedings under Pt XA (as added; prospectively amended): s 79C(6) (as so added).
- 16 Ibid s 79C(7)(a) (as added: see note 5 supra). Regulations may also provide that a person who is guilty of an offence under s 79C(7)(a) (as added) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79C(7)(b) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

## **UPDATE**

### **1165 Regulations etc governing child minders and day care providers**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--SI 2004/2695 amended: SI 2008/2691, SI 2009/2541. SI 2002/812 further amended: SI 2009/2541, SI 2009/3265.

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## (B) REGISTRATION

### **1166. Requirement to register.**

No person may act as a child minder<sup>1</sup> in Wales unless he is registered<sup>2</sup> for child minding by the appropriate body<sup>3</sup>. Where it appears to the registration authority<sup>4</sup> that a person has contravened this requirement, the authority may serve a notice ('an enforcement notice') on him<sup>5</sup>. An enforcement notice has effect for a period of one year beginning with the date on which it is served<sup>6</sup>. If a person in respect of whom an enforcement notice has effect contravenes the provision requiring him to register<sup>7</sup> without reasonable excuse (whether the contravention occurs in England or Wales), he is guilty of an offence<sup>8</sup>.

No person may provide day care on any premises unless he is registered<sup>9</sup> for providing day care on those premises by the registration authority<sup>10</sup>. If any person without reasonable excuse contravenes the provision requiring him so to register<sup>11</sup>, he is guilty of an offence<sup>12</sup>.

1 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

2 le registered under the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

3 Ibid s 79D(1)(b) (s 79D added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79D (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. The Children Act 1989 s 79D (as added) refers to the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante. At the date at which this volume states the law no such day had been appointed.

4 The registration authority is the National Assembly for Wales: see, however, note 3 supra; and para 1164 note 1 ante.

5 Children Act 1989 s 79D(2) (as added and prospectively amended: see note 3 supra).

6 Ibid s 79D(3) (as added: see note 3 supra).

7 le under ibid s 79D(1) (as added).

8 Ibid s 79D(4) (as added and prospectively amended: see note 3 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79D(7) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

9 See note 2 supra.

10 Children Act 1989 s 79D(5) (as added and prospectively amended: see note 3 supra).

11 le ibid s 79D(5) (as added and prospectively amended).

12 Ibid s 79D(6) (as added and prospectively amended: see note 3 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79D(7) (as so added and prospectively amended).

## **UPDATE**

**1166 Requirement to register**

NOTE 3--Day appointed is 1 September 2008: SI 2008/2261.



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### **1167. Applications for registration.**

A person who wishes to be registered<sup>1</sup> in relation to child minding<sup>2</sup> and day care<sup>3</sup> for children must make an application to the registration authority<sup>4</sup>. The application must:

- 2948 (1) give prescribed information about prescribed matters<sup>5</sup>; and
- 2949 (2) give any other information which the registration authority reasonably requires the applicant to give<sup>6</sup>.

Where a person provides, or proposes to provide, day care on different premises, he must make a separate application in respect of each of them<sup>7</sup>.

Where the registration authority has sent the applicant notice<sup>8</sup> of its intention to refuse such an application, the application may not be withdrawn without the consent of the authority<sup>9</sup>.

A person who, in such an application, knowingly makes a statement which is false or misleading in a material particular is guilty of an offence<sup>10</sup>.

1 le registered under the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

2 As to when a person is a child minder see para 1072 ante.

3 For the meaning of 'day care' see para 1072 note 3 ante.

4 Children Act 1989 s 79E(1) (s 79E added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79E (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law no such day had been appointed. As to the registration authority see para 1164 note 1 ante.

5 Children Act 1989 s 79E(2)(a) (as added: see note 4 supra). As to the information and documentation to be provided on an application for registration see the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, regs 16, 17, Schs 7, 8 (amended by SI 2002/2622, SI 2003/2709).

6 Children Act 1989 s 79E(2)(b) (as added and prospectively amended: see note 4 supra). See note 5 supra.

7 Ibid s 79E(3) (as added: see note 4 supra).

8 le under ibid s 79L(1) (as added): see para 1091 ante.

9 Ibid s 79E(4) (as added: see note 4 supra).

10 Ibid s 79E(5) (as added: see note 4 supra). Such a person is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: s 79E(5) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

### **UPDATE**

### **1167 Applications for registration**

NOTE 5--SI 2002/919 Sch 8 further amended: SI 2009/2541, SI 2009/3265.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/ (B) Registration/1168. Disqualification for registration; scope of regulations.

### **1168. Disqualification for registration; scope of regulations.**

Regulations<sup>1</sup> may provide for a person to be disqualified for registration<sup>2</sup> for child minding<sup>3</sup> or providing day care<sup>4</sup>. The regulations may, in particular, provide for a person to be disqualified where<sup>5</sup>:

- 2950 (1) he is included in the list kept under the Protection of Children Act 1999<sup>6</sup>;
- 2951 (2) he is included on the grounds mentioned in the Education Reform Act 1988<sup>7</sup> in the list kept for the purposes of regulations made under that Act<sup>8</sup>;
- 2952 (3) an order of a prescribed kind has been made at any time with respect to him<sup>9</sup>;
- 2953 (4) an order of a prescribed kind has been made at any time with respect to any child<sup>10</sup> who has been in his care<sup>11</sup>;
- 2954 (5) a requirement of a prescribed kind has been imposed at any time with respect to such a child under or by virtue of any enactment<sup>12</sup>;
- 2955 (6) he has at any time been refused registration under Part X or Part XA<sup>13</sup> of the Children Act 1989, or any prescribed enactment, or has had any such registration cancelled<sup>14</sup>;
- 2956 (7) he has been convicted of any offence of a prescribed kind or has been discharged absolutely or conditionally for any such offence<sup>15</sup>;
- 2957 (8) he has at any time been disqualified from fostering a child privately<sup>16</sup>;
- 2958 (9) a prohibition has been imposed on him at any time under the provisions providing a power to prohibit private fostering<sup>17</sup> or any prescribed enactment<sup>18</sup>; or
- 2959 (10) his rights and powers with respect to a child have at any time been vested in a prescribed authority under a prescribed enactment<sup>19</sup>.

As from a day to be appointed, the regulations may also provide for a person to be disqualified where:

- 2960 (a) he is barred from regulated activity relating to children<sup>20</sup>;
- 2961 (b) he has been given a caution in respect of any offence of a prescribed kind<sup>21</sup>.

Regulations may provide for a person who lives in the same household as a person who is himself disqualified for registration for child minding or providing day care, or in a household at which any such person is employed, to be disqualified for registration for child minding or providing day care<sup>22</sup>.

Regulations may provide for a person not to be disqualified for registration<sup>23</sup> by reason of any fact which would otherwise cause him to be disqualified if he has disclosed the fact to the registration authority and the registration authority has consented in writing and has not withdrawn that consent<sup>24</sup>.

A person who is disqualified for registration for providing day care must not provide day care or be concerned in the management of any provision of day care<sup>25</sup>. No person may employ, in

connection with the provision of day care, a person who is disqualified for registration for providing day care<sup>26</sup>. If any person acts as a child minder at any time when he is disqualified for registration for child minding, or contravenes any of the relevant provisions<sup>27</sup>, he is guilty of an offence<sup>28</sup>.

1 For the meaning of 'regulations' see para 1073 note 7 ante. As to the regulations that have been made see the Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695.

2 As to registration see para 1073 et seq ante.

3 As to when a person is a child minder see para 1072 ante.

4 Children Act 1989 s 79B(9), Sch 9A para 4(1) (s 79B(9), Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). As from a day to be appointed, the Children Act 1989 Sch 9A para 4 (as added) is prospectively amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. For the meaning of 'day care' see para 1072 note 3 ante. At the date at which this volume states the law no such day had been appointed.

5 Children Act 1989 Sch 9A para 4(2) (as added and prospectively amended: see note 4 supra).

6 Ibid Sch 9A para 4(2)(a) (as added: see note 4 supra). As from a day to be appointed, this provision is repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10. At the date at which this volume states the law, no such day had been appointed. As to the list kept under the Protection of Children Act 1999 s 1 (as amended) see para 648 ante.

7 I.e. the grounds mentioned in the Education Reform Act 1988 s 218(6ZA)(c) (as added): see EDUCATION vol 15(2) (2006 Reissue) para 776. As from a day to be appointed the Education Reform Act 1988 s 218 has been repealed by the Education Act 2002 ss 146, 215(2), Sch 22 Pt 3. At the date at which this volume states the law, this repeal is only partly in force in relation to Wales.

8 Children Act 1989 Sch 9A para 4(2)(b) (as added (see note 4 supra); substituted by the Education Act 2002 s 215(1), Sch 21 para 9; and prospectively amended by the Childcare Act 2006 ss 102(1), (2)(a)). As from a day to be appointed this provision is prospectively repealed by the Safeguarding Vulnerable Groups Act 2006 s 63(2), Sch 10. At the date at which this volume states the law, no such day had been appointed. As to the list kept for the purposes of regulations made under the Education Reform Act 1988 s 218(6) (as amended; prospectively repealed) see EDUCATION.

9 Children Act 1989 Sch 9A para 4(2)(c) (as added: see note 4 supra).

10 For the meaning of 'child' see para 3 ante.

11 Children Act 1989 Sch 9A para 4(2)(d) (as added: see note 4 supra).

12 Ibid Sch 9A para 4(2)(e) (as added: see note 4 supra). For the purposes of Sch 9A para 4 (as added), 'enactment' means any enactment having effect, at any time, in any part of the United Kingdom: Sch 9A para 4(6). As from a day to be appointed, this provision is substituted by the Childcare Act 2006 s 102(1), (3) but not so as to materially affect its meaning. At the date at which this volume states the law, no such day had been appointed. For the meaning of 'United Kingdom' see para 102 note 7 ante.

13 I.e. the Children Act 1989 Pt X (ss 71-79) (repealed in relation to England and Wales), Pt XA (ss 79A-79X) (as added; prospectively amended). As from a day to be appointed head (6) in the text also includes where registration has been refused under the Childcare Act 2006 Sch 9A para 4(2)(f) (amended by the Childcare Act 2006 s 103(1), Sch 2 para 18(1), (4)(b)). At the date at which this volume states the law no such day had been appointed.

14 Children Act 1989 Sch 9A para 4(2)(f) (as added: see note 4 supra).

15 Ibid Sch 9A para 4(2)(g) (as added (see note 4 supra); and amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 Pt 1 paras 59, 61(1), (2), Sch 37 Pt 7). As to absolute and conditional discharges see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

16 Children Act 1989 Sch 9A para 4(2)(h) (as added: see note 4 supra). As to fostering children privately see para 1049 et seq ante.

17 I.e. under ibid s 69 (see para 1066 ante), or under the Foster Children (Scotland) Act 1984 s 10.

18 Children Act 1989 Sch 9A para 4(2)(j) (as added: see note 4 supra).

19 Ibid Sch 9A para 4(2)(k) (as added: see note 4 supra).

20 Ibid Sch 9A para 4(2)(ba). As from a day to be appointed, this provision is added by the Safeguarding Vulnerable Groups Act 2006 s 63(1), Sch 9 Pt 1 para 1. At the date at which this volume states the law, no such day had been appointed.

21 Children Act 1989 Sch 9A para 4(2)(ga). As from a day to be appointed, this provision is added by the Childcare Act 2006 s 102(1), (2)(b). At the date at which this volume states the law, no such day had been appointed.

22 Children Act 1989 Sch 9A para 4(3) (as added and prospectively amended: see note 4 supra). If any person contravenes Sch 9A para 4(3)-(5) (as added; prospectively amended) he is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both: Sch 9A para 5(1)(b), (4) (as so added and prospectively amended). As from a day to be appointed Sch 9A para 5(1) (as added; prospectively amended) is further amended by the Childcare Act 2006 s 103(1), Sch 2 para 18(1), (5) so as to refer instead to where a person contravenes the Children Act 1989 Sch 9A para 4(4) (as added, amended and prospectively amended) or Sch 9A para 4(5) (as so added, amended and prospectively amended). At the date at which this volume states the law, no such day had been appointed. As to the standard scale see para 132 note 2 ante.

Until a day to be appointed, where a person contravenes Sch 9A para 4(4) (as added, amended and prospectively amended) such a person is not guilty of an offence if he proves that he did not know and had no reasonable grounds for believing that the person in question was living or employed in the household: Sch 9A para 5(2) (as so added). As from a day to be appointed Sch 9A para 5(2) (as added) is substituted by the Childcare Act 2006 s 103(1), Sch 2 para 18(1), (5) so that where a person contravenes the Children Act 1989 Sch 9A para 4(4) (as added, amended and prospectively amended) he is not guilty of an offence if he is disqualified for registration by virtue only of regulations made under Sch 9A para 4(3) (as added and prospectively amended) and he proves that he did not know and had no reasonable grounds for believing that he was living in the same household as a person who was disqualified for registration or in a household in which such a person was employed. At the date at which this volume states the law, no such day or days had been appointed.

23 As from a day to be appointed, the regulations may in particular provide for a person not to be disqualified for registration for the purposes of ibid Sch 9A para 4(4), (5) (as added, amended and prospectively amended): Sch 9A para 4(3A) (Sch 9A as added (see note 4 supra); Sch 9A para 4(3A) added by the Education Act 2002 s 152, Sch 13 para 6; and prospectively amended by the Children Act 2004 s 48, Sch 4 paras 1, 5). At the date at which this volume states the law no such day had been appointed.

24 Children Act 1989 Sch 9A para 4(3A) (as added (see notes 4, 23 supra); and prospectively amended (see note 4 supra)).

25 Ibid Sch 9A para 4(4) (as added (see note 4 ante); amended by the Children Act 2004 ss 48, 64, Sch 4 paras 1, 8, Sch 5 Pt 2; and prospectively amended (see note 4 supra)). See note 22 supra.

26 Children Act 1989 Sch 9A para 4(5) (as added and prospectively amended (see note 4 supra)). See note 22 supra.

27 Ie ibid Sch 9A para 4(5) (as added and prospectively amended).

28 Ibid Sch 9A para 5(1)(a) (as added and prospectively amended: see note 4 supra). See note 22 supra. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

## UPDATE

### 1168 Disqualification for registration; scope of regulations

NOTE 1--SI 2004/2695 amended: SI 2008/2691, SI 2009/2541.

NOTE 7--Repeal now fully in force in relation to Wales: SI 2007/3611.

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### **1169. Grant or refusal of registration.**

If, on an application by a person for registration<sup>1</sup> for child minding<sup>2</sup> the registration authority<sup>3</sup> is of the opinion that the applicant is, and will continue to be, qualified for registration for child minding the authority must grant the application, otherwise it must refuse it<sup>4</sup>.

If, on an application by any person for registration<sup>5</sup> for providing day care<sup>6</sup> on any premises the registration authority is of the opinion that the applicant is, and will continue to be, qualified for registration for providing day care on those premises the authority must grant the application, otherwise it must refuse it<sup>7</sup>.

An application may, as well as being granted subject to any conditions the authority thinks necessary or expedient for the purpose of giving effect to regulations governing child minders and day care providers<sup>8</sup>, be granted subject to any other conditions the authority thinks fit to impose<sup>9</sup>. The registration authority may, as it thinks fit, vary or remove any condition to which the registration is subject or impose a new condition<sup>10</sup>. A registered person who without reasonable excuse contravenes, or otherwise fails to comply with, any condition imposed on his registration is guilty of an offence<sup>11</sup>.

Any register kept by a registration authority of persons who act as child minders or provide day care must be open to inspection by any person at all reasonable times<sup>12</sup>.

1    le an application under the Children Act 1989 s 79E (as added and prospectively amended) see para 1167 ante.

2    As to when a person is a child minder see para 1072 ante.

3    As to the registration authority see para 1164 note 1 ante.

4    Children Act 1989 s 79F(1) (s 79F added by the Care Standards Act 2000 s 79(1); and amended by the Children Act 2004 ss 48, 64, Sch 4 paras 1, 3(2), Sch 5 Pt 2). As from a day to be appointed, the Children Act 1989 s 79F (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed. The applicant must be, and must continue to be, qualified for registration for child minding so far as the conditions of the Children Act 1989 s 79B(3) (as added) (see para 1164 ante) are applicable.

5    See note 1 supra.

6    For the meaning of 'day care' see para 1072 note 3 ante.

7    Children Act 1989 s 79F(2) (as added (see note 4 supra); amended by the Children Act 2004 ss 48, 64, Sch 4 paras 1, 2(2), Sch 5 Pt 2; and prospectively amended (see note 4 supra)). The applicant must be, and must continue to be, qualified for registration for providing day care so far as the conditions of the Children Act 1989 s 79B(4) (as added) are applicable: see para 1164 notes 11-15 ante.

8    le regulations under *ibid* s 79C (as added and prospectively amended): see para 1165 ante.

9    Ibid s 79F(3) (as added and prospectively amended: see note 4 supra).

10   Ibid s 79F(4) (as added and prospectively amended: see note 4 supra).

11   Ibid s 79F(6) (as added: see note 4 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79F(7) (as so added). As to the standard scale

see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

12 Ibid s 79F(5) (as added and prospectively amended: see note 4 supra).

## **UPDATE**

### **1169 Grant or refusal of registration**

NOTE 4--Day appointed is 1 September 2008: SI 2008/2261.

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### **1170. Certificates of registration.**

If an application for registration<sup>1</sup> is granted, the registration authority<sup>2</sup> must give the applicant a certificate of registration<sup>3</sup>. A certificate of registration<sup>4</sup> must give prescribed information about prescribed matters<sup>5</sup>. Where, due to a change of circumstances, any part of the certificate requires to be amended, the registration authority must issue an amended certificate<sup>6</sup>. Where the registration authority is satisfied that the certificate has been lost or destroyed, the authority must issue a copy, on payment by the registered person of any prescribed fee<sup>7</sup>.

1 As to registration see para 1073 et seq ante.

2 As to the registration authority see para 1164 note 1 ante.

3 Children Act 1989 s 79B(9), Sch 9A para 6(1) (s 79B(9), Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). The Children Act 1989 Sch 9A (as added) is prospectively amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed. As to the particulars that must be contained within a certificate of registration given under the Children Act 1989 Sch 9A para 6(1) (as added) see the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, regs 16, 18 (amended by SI 2003/2709). Regulations may require registered persons to pay to the registration authority at prescribed times an annual fee of a prescribed amount: Children Act 1989 Sch 9A para 7 (as so added and prospectively amended; and amended by the Children Act 2004 s 48, Sch 4 paras 1, 4). For the purposes of the Children Act 1989 Sch 9A para 7 (as added, amended and prospectively amended) the prescribed fee is nil: see the Care Standards Act 2000 and the Children Act 1989 (Abolition of Fees) (Wales) Regulations 2006, SI 2006/878, reg 4(2).

4 For the purposes of the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended), a person is registered for providing child minding, or registered for providing day care on any premises, if a certificate of registration to that effect is in force in respect of him: Sch 9A para 6(5) (as added and prospectively amended: see note 3 supra). For the meanings of 'child minding' and 'premises' see para 1072 note 2 ante. For the meaning of 'day care' see para 1072 note 3 ante.

5 Ibid Sch 9A para 6(2) (as added: see note 3 supra). As to prescribed matters to be contained within a certificate of registration given under Sch 9A para 6(1) see the Registration of Social Care and Independent Health Care (Wales) Regulations 2002, SI 2002/919, reg 18 (amended by SI 2003/2709).

6 Children Act 1989 Sch 9A para 6(3) (as added and prospectively amended: see note 3 supra).

7 Ibid Sch 9A para 6(4) (as added and prospectively amended: see note 3 supra).

### **UPDATE**

### **1170 Certificates of registration**

NOTE 3--Day appointed is 1 September 2008: SI 2008/2261.



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### **1171. Cancellation of registration.**

The registration authority<sup>1</sup> may cancel the registration of any person if:

2962 (1) in the case of a person registered for child minding<sup>2</sup>, the authority is of the opinion that the person has ceased or will cease to be qualified for registration for child minding<sup>3</sup>; and

2963 (2) in the case of a person registered for providing day care<sup>4</sup> on any premises, the authority is of the opinion that the person has ceased or will cease to be qualified for registration for providing day care on those premises<sup>5</sup>,

or if a fee which is due from the person has not been paid<sup>6</sup>. Any such cancellation<sup>7</sup> must be in writing<sup>8</sup>.

Where a requirement to make any changes or additions to any services, equipment or premises has been imposed on a registered person<sup>9</sup>, his registration must not be cancelled on the ground of any defect or insufficiency in the services, equipment or premises if<sup>10</sup>: (a) the time set for complying with the requirements has not expired<sup>11</sup>; and (b) it is shown that the defect or insufficiency is due to the changes or additions not having been made<sup>12</sup>. Any cancellation must be in writing<sup>13</sup>.

1 As to the registration authority see para 1164 note 1 ante.

2 As to when a person is a child minder see para 1072 ante.

3 Children Act 1989 s 79G(1)(a) (s 79G added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79G (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79G(1)(b) (as added and prospectively amended: see note 3 supra).

6 Ibid s 79G(1) (as added (see note 3 supra); amended by Children Act 2004 s 48, Sch 4 paras 1, 4(1); and prospectively amended (see note 3 supra)).

7 Ie any cancellation under the Children Act 1989 s 79G (as added and prospectively amended).

8 Ibid s 79G(3) (as added: see note 3 supra).

9 Ie under ibid s 79F(3) (as added and prospectively amended): see para 1169 ante.

10 Ibid s 79G(2) (as added (see note 3 supra); amended by the Children Act 2004 ss 48, 64, Sch 4 paras 1, 2(2), Sch 5 Pt 2; and prospectively amended (see note 3 supra)).

11 Children Act 1989 s 79G(2)(a) (as added: see note 3 supra).

12 Ibid s 79G(2)(b) (as added: see note 3 supra).

13 Ibid s 79G(3) (as added: see note 3 supra).

**UPDATE**

**1171 Cancellation of registration**

NOTE 3--Day appointed is 1 September 2008: SI 2008/2261.

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### **1172. Suspension of registration.**

Regulations<sup>1</sup> may provide for the registration of any person for acting as a child minder<sup>2</sup> or providing day care<sup>3</sup> to be suspended for a prescribed period by the registration authority<sup>4</sup> in prescribed circumstances<sup>5</sup>. Any regulations so made must include provision conferring on the person concerned a right of appeal to the Tribunal<sup>6</sup> against suspension<sup>7</sup>.

A person registered for child minding by the appropriate body<sup>8</sup> must not act as a child minder in Wales at a time when that registration is suspended in accordance with the regulations<sup>9</sup>. A person registered for providing day care on any premises must not provide day care<sup>10</sup> on those premises at any time when that registration is so suspended<sup>11</sup>.

1 For the meaning of 'regulations' see para 1073 note 7 ante. As to regulations made under the following provisions see the Suspension of Day Care Providers and Child Minders (Wales) Regulations 2004, SI 2004/3282.

2 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

3 For the meaning of 'day care' see para 1072 note 3 ante.

4 As to the registration authority see para 1164 note 1 ante.

5 Children Act 1989 s 79H(1) (s 79H added by the Care Standards Act 1999 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79H (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

6 As to the Tribunal see para 708 et seq ante.

7 Children Act 1989 s 79H(2) (as added: see note 5 supra).

8 I.e a person registered under ibid Pt XA (ss 79A-79X) (as added). The Children Act 1989 s 79H (as added) refers to the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.

9 Children Act 1989 s 79H(4) (s 79H(3)-(6) added by the Education Act 2002 s 152, Sch 13 para 2). If a person contravenes the Children Act 1989 s 79H(4) (as added) without reasonable excuse, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79H(6) (as so added). As to the standard scale see para 132 note 2 ante.

10 See note 8 supra.

11 Children Act 1989 s 79H(5) (as added: see note 9 supra). If a person contravenes s 79H(5) (as added) without reasonable excuse, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79H(6) (as so added).

## **UPDATE**

### **1172 Suspension of registration**

NOTE 1--SI 2004/3282 amended: SI 2008/2689.

NOTE 5--Day appointed is 1 September 2008: SI 2008/2261.

TEXT AND NOTES 6, 7--Appeals now lie to the First-tier Tribunal: see the Children Act 1989 s 79H(2) (amended by SI 2008/2833).

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### **1173. Resignation of registration.**

A person who is registered for acting as a child minder<sup>1</sup> or providing day care<sup>2</sup> may by notice in writing to the registration authority<sup>3</sup> resign his registration<sup>4</sup>. However, a person may not give such a notice:

- 2964 (1) if the registration authority has sent him a notice of its intention to cancel the registration<sup>5</sup>, unless the authority has decided not to take that step<sup>6</sup>; or
- 2965 (2) if the registration authority has sent him a notice of its decision to cancel the registration<sup>7</sup> and the time within which an appeal may be brought has not expired or, if an appeal has been brought, it has not been determined<sup>8</sup>.

1 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

2 For the meaning of 'day care' see para 1072 note 3 ante.

3 As to the registration authority see para 1164 note 1 ante.

4 Children Act 1989 s 79J(1) (s 79J added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79J (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

5 Ie a notice under the Children Act 1989 s 79L(1) (as added) (see para 1175 post).

6 Ibid s 79J(2)(a) (as added and prospectively amended: see note 4 supra).

7 Ie under ibid s 79L(5) (as added): see para 1175 post.

8 Ibid s 79J(2)(b) (as added and prospectively amended: see note 4 supra).

### **UPDATE**

### **1173 Resignation of registration**

NOTE 4--Day appointed is 1 September 2008: SI 2008/2261.

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#### **1174. Protection of children in an emergency.**

If, in the case of any person registered for acting as a child minder<sup>1</sup> or providing day care<sup>2</sup>:

2966 (1) the registration authority<sup>3</sup> applies to a justice of the peace for an order cancelling the registration<sup>4</sup>, varying or removing any condition to which the registration is subject<sup>5</sup>, or imposing a new condition<sup>6</sup>; and

2967 (2) it appears to the justice that a child who is being, or may be, looked after by that person, or (as the case may be) in accordance with the provision for day care made by that person, is suffering, or is likely to suffer, significant harm<sup>7</sup>,

the justice may make the order<sup>8</sup>. Any cancellation, variation, removal or imposition has effect from the time when the order is made<sup>9</sup>.

An application under heads (1) and (2) above may be made without notice<sup>10</sup>. An order resulting from such an application must be made in writing<sup>11</sup>. Where an order has been made, the registration authority must, as soon as is reasonably practicable after the making of the order, notify the local authority in whose area the person concerned acts or acted as a child minder, or provides or provided day care, of the making of the order<sup>12</sup>.

1 For the meanings of 'act as a child minder' and 'child minder' see para 1072 ante.

2 For the meaning of 'day care' see para 1072 note 3 ante.

3 As to the registration authority see para 1164 note 1 ante.

4 See para 1171 ante.

5 See para 1171 ante.

6 Children Act 1989 s 79K(1)(a) (s 79K(1)-(4), (6) added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79K (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning; see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

7 Children Act 1989 s 79K(1)(b) (as added: see note 6 supra).

8 Ibid s 79K(1) (as added and prospectively amended: see note 6 supra).

9 Ibid s 79K(2) (as added: see note 6 supra).

10 Ibid s 79K(3) (as added: see note 6 supra).

11 Ibid s 79K(4) (as added: see note 6 supra).

12 Ibid s 79K(6) (as added: see note 6 supra). Where such an order is made the registration authority must also serve on the registered person as soon as is reasonably practicable after the making of the order: (1) a copy of the order; (2) a copy of any written statement of the authority's reasons for making the application for the order which supported that application; and (3) notice of any right of appeal conferred by s 79M (as added, amended and prospectively amended) (see para 1176 post): s 79K(5) (as so added; and prospectively amended (see note 6 supra)).

**UPDATE**

**1174 Protection of children in an emergency**

NOTE 6--Day appointed is 1 September 2008: SI 2008/2261.

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### **1175. Notice of intention to take steps.**

Not less than 14 days before:

- 2968 (1) refusing an application for registration<sup>1</sup>;
- 2969 (2) cancelling a registration<sup>2</sup>;
- 2970 (3) removing or varying any condition to which a registration is subject or imposing a new condition<sup>3</sup>; or
- 2971 (4) refusing to grant an application for the removal or variation of any condition to which a registration is subject<sup>4</sup>,

the registration authority<sup>5</sup> must send to the applicant, or (as the case may be) registered person, notice in writing of its intention to take the step in question<sup>6</sup>. Every such notice must give the authority's reasons for proposing to take the step, and inform the person concerned of his rights under these provisions<sup>7</sup>.

Where the recipient of such a notice informs the authority in writing of his desire to object to the step being taken, the authority must afford him an opportunity to do so<sup>8</sup>. Any objection so made may be made orally or in writing, by the recipient of the notice or a representative<sup>9</sup>. If the authority, after giving the person concerned an opportunity to object to the step being taken, decides nevertheless to take it, it must send him written notice of its decision<sup>10</sup>.

1 Children Act 1989 s 79L(1)(a) (s 79L added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79L (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed. As to the refusal of an application for registration see para 1169 ante.

2 Children Act 1989 s 79L(1)(b) (as added: see note 1 supra). As to the cancellation of a registration see para 1171 ante. A step of a kind mentioned in head (2) or head (3) in the text must not take effect until the expiry of the time within which an appeal under s 79M (as added, amended and prospectively amended) (see para 1176 post) may be brought or, where such an appeal is brought, before its determination: s 79L(6) (as so added; and prospectively amended (see note 1 supra)). This does not prevent a step from taking effect before the expiry of the time within which an appeal may be brought if the person concerned notifies the registration authority in writing that he does not intend to appeal: s 79L(7) (as so added and prospectively amended).

3 Ibid s 79L(1)(c) (as added: see note 1 supra). As to the removal or variation of any condition, or the imposition of a new condition see para 1174 ante. See note 2 supra.

4 Ibid s 79L(1)(d) (as added: see note 1 supra). As to the refusal to grant an application for the removal or variation of a condition see para 1174 ante.

5 As to the registration authority see para 1164 note 1 ante.

6 Children Act 1989 s 79L(1) (as added and prospectively amended: see note 1 supra).

7 Ibid s 79L(2) (as added and prospectively amended: see note 1 supra).

8 Ibid s 79L(3) (as added and prospectively amended: see note 1 supra).

9 Ibid s 79L(4) (as added: see note 1 supra).



10 Ibid s 79L(7) (as added and prospectively amended: see note 1 supra).

**UPDATE**

**1175 Notice of intention to take steps**

NOTE 1--Day appointed is 1 September 2008: SI 2008/2261.

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### **1176. Appeals.**

An appeal against:

- 2972 (1) the refusal of an application for registration<sup>1</sup>, the cancellation of a registration<sup>2</sup>, the removal or variation of any condition to which a registration is subject or the imposition of a new condition<sup>3</sup>, or the refusal to grant an application for the removal or variation of any condition to which a registration is subject<sup>4</sup>;
- 2973 (2) an order under the provisions relating to the protection of children in an emergency<sup>5</sup>; or
- 2974 (3) a determination made by under Part XA of the Children Act 1989 by the registration authority (other than under head (1) or head (2) above)<sup>6</sup>,

lies to the Tribunal<sup>7</sup>.

On an appeal, the Tribunal may:

- 2975 (a) confirm the taking of the step or the making of the order or direct that it is not to have, or is to cease to have, effect<sup>8</sup>; and
- 2976 (b) impose, vary or cancel any condition<sup>9</sup>.

1 As to the refusal of an application for registration see para 1169 ante.

2 As to the cancellation of a registration see para 1171 ante.

3 As to the removal or variation of any condition, or the imposition of a new condition see para 1174 ante.

4 Children Act 1989 s 79M(1)(a) (s 79M added by the Care Standards Act 2000 s 79(1); and the Children Act 1989 s 79M(1) amended by the Education Act 2002 s 215(2), Sch 22 Pt 3). As from a day to be appointed, the Children Act 1989 s 79M (as added and amended) is further amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed. Such an appeal as is mentioned in the Children Act 1989 s 79M(1)(a) (as added and amended) is an appeal against the taking of any of the steps mentioned in s 79L (as added; prospectively amended) (see para 1175 ante). As to the refusal to grant an application for the removal or variation of a condition see para 1174 ante.

5 Ibid s 79M(1)(b) (as added: see note 4 supra). As to emergency protection orders under s 79K (as added; prospectively amended) see para 1174 ante.

6 Ibid s 79M(1)(c) (s 79M as added (see note 4 supra); s 79M(1)(c) added by the Education Act 2002 s 148, Sch 13 para 3(1), (2); and prospectively amended (see note 4 supra)). As to prescribed determinations see the Disqualification from Caring for Children (Wales) Regulations 2004, SI 2004/2695, reg 8.

7 Children Act 1989 s 79M(1) (as added, amended and prospectively amended: see note 4 supra).

8 Ibid s 79M(2)(a) (as added (see note 4 supra); and amended by the Education Act 2002 Sch 13 para 3(1), (3)).

9 Children Act 1989 s 79M(2)(b) (as added: see note 4 supra).

### **UPDATE**

## **1176 Appeals**

TEXT AND NOTES--Appeals now lie to the First-tier Tribunal: see the Children Act 1989 s 79M (amended by SI 2008/2833).

NOTE 4--Day appointed is 1 September 2008: SI 2008/2261.

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### **1177. Requirement for certificate of suitability.**

The following provisions<sup>1</sup> apply to any person not required to register under Part XA of the Children Act 1989<sup>2</sup> who looks after, or provides care for, children<sup>3</sup> when<sup>4</sup>:

- 2977 (1) the period, or the total of the periods, in any week which he spends looking after children or (as the case may be) during which the children are looked after exceeds five hours<sup>5</sup>; and
- 2978 (2) he would be required to register<sup>6</sup> if the children were under the age of eight<sup>7</sup>.

Regulations<sup>8</sup> may require a person to whom these provisions apply to hold a certificate issued by the registration authority<sup>9</sup> as to his suitability, and the suitability of each prescribed person, to look after children<sup>10</sup>. The regulations may make provision about:

- 2979 (a) applications for certificates<sup>11</sup>;
- 2980 (b) the matters to be taken into account by the registration authority in determining whether to issue certificates<sup>12</sup>;
- 2981 (c) the information to be contained in certificates<sup>13</sup>; and
- 2982 (d) the period of their validity<sup>14</sup>.

The regulations may provide that a person to whom these provisions apply is guilty of an offence if he does not hold a certificate as required by the regulations, or if, being a person who holds such a certificate, he fails to produce it when reasonably required to do so by a prescribed person<sup>15</sup>. The regulations may also provide that a person who, for the purpose of obtaining such a certificate, knowingly makes a statement which is false or misleading in a material particular is guilty of an offence<sup>16</sup>.

1    Ie the Children Act 1989 s 79W (added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 s 79W (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

2    Ie the Children Act 1989 Pt XA (ss 79A-79X) (as added and amended; prospectively amended).

3    References in *ibid* s 79W (as added; prospectively amended) to children are to those under the age of 15 or, in the case of disabled children, 17: s 79W(1) (as added: see note 1 supra).

4    *Ibid* s 79W(1) (as added and prospectively amended: see note 1 supra).

5    *Ibid* s 79W(2) (as added: see note 1 supra).

6    Ie under *ibid* Pt XA (ss 79A-79X) (as added, amended and prospectively amended).

7    *Ibid* s 79W(3) (as added: see note 1 supra).

8    For the meaning of 'regulations' see para 1164 note 6 ante. At the date at which this volume states the law no such regulations had been made.

- 9 As to the registration authority see para 1164 note 1 ante.
- 10 Children Act 1989 s 79W(4) (as added and prospectively amended: see note 1 supra).
- 11 Ibid s 79W(5)(a) (as added: see note 1 supra).
- 12 Ibid s 79W(5)(b) (as added and prospectively amended: see note 1 supra).
- 13 Ibid s 79W(5)(c) (as added: see note 1 supra).
- 14 Ibid s 79W(5)(d) (as added: see note 1 supra).
- 15 Ibid s 79W(6) (as added: see note 1 supra). The regulations may provide that a person guilty of an offence under the regulations is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 79W(8) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.
- 16 Ibid s 79W(7) (as added: see note 1 supra). As to the penalty for a person guilty of an offence under the regulations see note 15 supra.

## **UPDATE**

### **1177 Requirement for certificate of suitability**

NOTE 1--Day appointed is 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(C) Inspection of Child Minding and Day Care Provision/1178. Training provisions etc in relation to Wales.

## (C) INSPECTION OF CHILD MINDING AND DAY CARE PROVISION

### **1178. Training provisions etc in relation to Wales.**

The appropriate body<sup>1</sup> may secure the provision of training for persons who provide or assist in providing child minding<sup>2</sup> or day care<sup>3</sup>, or intend to do so<sup>4</sup>.

1 The Children Act 1989 s 79S (as added) refers to the National Assembly for Wales; by virtue of the Government of Wales Act 2006 these powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.

2 As to when a person is a child minder see para 1072 ante.

3 For the meaning of 'day care' see para 1072 note 3 ante.

4 Children Act 1989 s 79S(1) (s 79S added by the Care Standards Act 2000 s 79(1)). Additional functions may also be specified in regulations in relation to child minding and day care provided in Wales: see the Children Act 1989 s 79S(2) (as so added). However, until a day to be appointed, the regulations may only specify a function corresponding to a function which is exercisable by virtue of s 79N(5) (as added; prospectively repealed) (see para 1094 ante) by Her Majesty's Chief Inspector of Education, Children's Services and Skills in relation to child minding and day care provided in England: see s 79S(2) (as so added; and prospectively amended by the Childcare Act 2006 s 103, Sch 2 para 13, Sch 2 Pt 2). For the meaning of 'regulations' see para 1073 note 7 ante. At the date at which this volume states the law no such day had been appointed, and no regulations had been made. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

## **UPDATE**

### **1178 Training provisions etc in relation to Wales**

NOTE 4--Day appointed is 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(C) Inspection of Child Minding and Day Care Provision/1179. Inspection of provision of child minding and day care.

### **1179. Inspection of provision of child minding and day care.**

The appropriate body<sup>1</sup> may at any time require any registered person<sup>2</sup> to provide it with any information connected with the person's activities as a child minder<sup>3</sup> or provision of day care<sup>4</sup> which the appropriate body considers it necessary to have for the purposes of its functions under Part XA of the Children Act 1989<sup>5</sup>.

Regulations<sup>6</sup> may make provision for:

- 2983 (1) the inspection of the quality and standards of child minding provided in Wales by registered persons and of day care provided by registered persons on premises in Wales<sup>7</sup>; and
- 2984 (2) the publication of reports of the inspections in such manner as the appropriate body considers appropriate<sup>8</sup>.

The regulations may provide for the inspections to be organised by the appropriate body, or Her Majesty's Chief Inspector of Education and Training in Wales, or any other person, under arrangements made with the appropriate body<sup>9</sup>.

1 The Children Act 1989 s 79T (as added) refers to the National Assembly for Wales; by virtue of the Government of Wales Act 2006 such powers are now conferred on the Welsh Ministers (see para 155 ante). However, in practice the body dealing with matters relating to children's services in Wales is the Care and Social Services Inspectorate Wales: see para 198 ante.

2 As to registration see para 1073 et seq ante.

3 As to when a person is a child minder see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79T(1) (s 79T added by the Care Standards Act 2000 s 79(1)). As to the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended) see para 1163 et seq ante.

6 For the meaning of 'regulations' see para 1073 note 7 ante. The regulations may provide for the Education Act 2005 s 29(2)-(4) (see EDUCATION vol 15(2) (2006 Reissue) para 1247) to apply with modifications in relation to the publication of reports under the regulations: Children Act 1989 s 79T(4) (as added (see note 5 supra); and amended by the Education Act 2005 s 53, Sch 7 Pt 1 para 5(1), (3)). At the date at which this volume states the law no such regulations had been made.

7 Children Act 1989 s 79T(2)(a) (as added (see note 5 supra); and amended by the Education Act 2005 ss 53, 123, Sch 7 Pt 1 para 5(1), (2), Sch 19 Pt 1).

8 Children Act 1989 s 79T(2)(b) (as added: see note 5 supra).

9 Ibid s 79T(3) (as added: see note 5 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(D) Rights of Entry/1180. Rights of entry etc.

## (D) RIGHTS OF ENTRY

### **1180. Rights of entry etc.**

A person authorised for these purposes by the registration authority<sup>1</sup> may at any reasonable time enter any premises<sup>2</sup> in on which child minding<sup>3</sup> or day care<sup>4</sup> is at any time provided<sup>5</sup>. Where such a person has reasonable cause to believe that a child<sup>6</sup> is being looked after on any premises in contravention of Part XA of the Children Act 1989<sup>7</sup>, he may enter those premises at any reasonable time<sup>8</sup>.

A person entering premises<sup>9</sup> may<sup>10</sup>:

- 2985 (1) inspect the premises<sup>11</sup>;
- 2986 (2) inspect, and take copies of any records<sup>12</sup> kept by the person providing the child minding or day care, and any other documents<sup>13</sup> containing information relating to its provision<sup>14</sup>;
- 2987 (3) seize and remove any document or other material or thing found there which he has reasonable grounds to believe may be evidence of a failure to comply with any condition or requirement imposed<sup>15</sup>;
- 2988 (4) require any person to afford him such facilities and assistance with respect to matters within the person's control as are necessary to enable him to exercise his powers<sup>16</sup>;
- 2989 (5) take measurements and photographs or make recordings<sup>17</sup>;
- 2990 (6) inspect any children being looked after there, and the arrangements made for their welfare<sup>18</sup>;
- 2991 (7) interview in private the person providing the child minding or day care<sup>19</sup>; and
- 2992 (8) interview in private any person looking after children, or living or working, there who consents to be interviewed<sup>20</sup>.

1 He for the purposes of the Children Act 1989 s 79U(1) (as added; prospectively amended). As to the registration authority see para 1164 note 1 ante. A person exercising any power conferred by s 79U (as added; prospectively amended) must, if so required, produce some duly authenticated document showing his authority to do so: s 79U(6) (s 79U added by the Care Standards Act 2000 s 79(1)). It is an offence wilfully to obstruct a person exercising any such power and any person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Children Act 1989 s 79U(7), (8) (as so added). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

2 For the meaning of 'premises' see para 1072 note 2 ante.

3 As to when a person is a child minder see para 1072 ante.

4 For the meaning of 'day care' see para 1072 note 3 ante.

5 Children Act 1989 s 79U(1) (added by the Care Standards Act 2000 s 49(1)). As from a day to be appointed, the Children Act 1989 s 79U (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed. If a person attempting to exercise powers under s 79U (as added, amended and prospectively amended) is, or is likely to be, refused entry, he may be granted a warrant authorising the



assistance of a constable: s 102(1), (6)(a) (amended by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (22)). As to the application for, and grant of, such a warrant see the Children Act 1989 s 102(2)-(5) (as amended); and para 285 ante. Authorisation under s 79U(1), (2) (as added; prospectively amended) may be given: (1) for a particular occasion or period; (2) subject to conditions: s 79U(2A) (s 79U as so added; s 79U(2A) added by the Education Act 2002 s 152, Sch 15 para 5(1), (4)).

6 For the meaning of 'child' see para 3 ante.

7 Ie the Children Act 1989 Pt XA (ss 79A-79X) (as added and amended; prospectively amended).

8 Ibid s 79U(2) (as added and prospectively amended: see note 5 supra).

9 Ie under ibid s 79U (as added and prospectively amended) subject to any conditions imposed under s 79(2A)(b) (as added) (see note 5 supra).

10 Ibid s 79U(3) (as added (see note 5 supra); amended by the Education Act 2002 s 152, Sch 13 para 5(1), (5)). The Education Act 2005 s 58 (inspection of computer records) (see EDUCATION vol 15(2) (2006 Reissue) para 1293) applies as it applies for the purposes of the Education Act 2005 Pt 1 (ss 5-63); Children Act 1989 s 79U(4) (as so added; and amended by the Education Act 2005 s 53, Sch 7 Pt 1 para 6).

11 Children Act 1989 s 79U(3)(a) (as added: see note 5 supra).

12 'Records' includes information recorded in any form: ibid s 79U(9) (as added: see note 5 supra).

13 'Documents' includes information recorded in any form: ibid s 79U(9) (as added: see note 5 supra).

14 Ibid s 79U(3)(b) (as added: see note 5 supra).

15 Ibid s 79U(3)(c) (as added: see note 5 supra). The text refers to any condition or requirement imposed by or under Pt XA (as added) (see para 1070 ante): s 79U(3)(c) (as so added).

16 Ibid s 79U(3)(d) (as added: see note 5 supra). The text refers to powers exercised under s 79U (as added and prospectively amended): s 79U(3)(d) (as so added).

17 Ibid s 79U(3)(e) (as added: see note 5 supra).

18 Ibid s 79U(3)(f) (as added: see note 5 supra).

19 Ibid s 79U(3)(g) (as added: see note 5 supra).

20 Ibid s 79U(3)(h) (as added: see note 5 supra).

## UPDATE

### 1180 Rights of entry etc

NOTE 5--Day appointed is 1 September 2008: SI 2008/2261.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(E) Exemptions/1181. Exemption of certain schools.

## (E) EXEMPTIONS

### **1181. Exemption of certain schools.**

Except in prescribed circumstances<sup>1</sup>, Part XA of the Children Act 1989<sup>2</sup> does not apply to the provision of day care<sup>3</sup> made by:

- 2993 (1) the person carrying on the establishment in question as part of the establishment's activities<sup>4</sup>; or
- 2994 (2) a person employed to work at that establishment and authorised to make that provision as part of the establishment's activities<sup>5</sup>, for any child looked after in:  
 .89
  - 154. (a) a maintained school<sup>6</sup>;
  - 155. (b) a school assisted<sup>7</sup> by a local education authority<sup>8</sup>;
  - 156. (c) a school in respect of which payments are made under the Education Act 1996<sup>9</sup>; or
  - 157. (d) an independent school<sup>10</sup>.

.90

1 As to such prescribed circumstances see the Day Care (Application to Schools) (Wales) Regulations 2003, SI 2005/118.

2 I.e. the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

3 Ibid s 79B(9), Sch 9A para 1(1) (Sch 9A added by the Care Standards Act 2000 s 79, Sch 3). For the meaning of 'day care' see para 1072 note 3 ante.

4 Children Act 1989 Sch 9A para 1(2)(a) (as added: see note 3 supra).

5 Ibid Sch 9A para 1(2)(b) (as added: see note 3 supra).

6 Ibid Sch 9A para 1(1)(a) (as added: see note 3 supra). For the purposes of Sch 9A para 1(1) (as added), 'maintained school' has the meaning given by the School Standards and Framework Act 1998 s 20(7) (see EDUCATION vol 15(1) (2006 Reissue) para 94); Children Act 1989 Sch 9A para 1(3) (as so added).

7 For the purposes of ibid Sch 9A para 1(1) (as added), 'assisted' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 45); Children Act 1989 Sch 9A para 1(3) (as added: see note 3 supra).

8 Ibid Sch 9A para 1(1)(b) (as added: see note 3 supra).

9 Ibid Sch 9A para 1(1)(c) (as added: see note 3 supra). As to payments under the Education Act 1996 s 485 see EDUCATION vol 15(1) (2006 Reissue) para 69.

10 Children Act 1989 Sch 9A para 1(1)(d) (as added: see note 3 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/A. CHILD MINDING, CHILD CARE AND DAY CARE UNDER THE CHILDREN ACT 1989/(E) Exemptions/1182. Exemption for other establishments.

### **1182. Exemption for other establishments.**

Part XA of the Children Act 1989<sup>1</sup> does not apply to provision of day care made by<sup>2</sup>:

- 2995 (1) the department, authority or other person carrying on the establishment in question as part of the establishment's activities<sup>3</sup>; or
  - 2996 (2) a person employed to work at that establishment and authorised to make that provision as part of the establishment's activities<sup>4</sup>, for any child looked after:
- .91**
- 158. (a) in an appropriate children's home<sup>5</sup>;
  - 159. (b) in a care home<sup>6</sup>;
  - 160. (c) as a patient in a hospital (within the meaning of the Care Standards Act 2000)<sup>7</sup>; or
  - 161. (d) in a residential family centre<sup>8</sup>.
- .92**

Part XA of the Children Act 1989 does not apply to provision of day care in a hotel, guest house or other similar establishment for children staying in that establishment where the provision only takes place between 6 pm and 2 am and the person providing the care is doing so for no more than two different clients at the same time<sup>9</sup>.

1    Ie the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

2    Ibid s 79B(9), Sch 9A para 2(1) (added by the Care Standards Act 2000 s 79(1), (2), Sch 3). For the meaning of 'day care' see para 1072 note 3 ante.

3    Children Act 1989 Sch 9A para 2(2)(a) (as added: see note 2 supra).

4    Ibid Sch 9A para 2(2)(b) (as added: see note 2 supra).

5    Ibid Sch 9A para 2(1)(a) (as added: see note 2 supra). For the meaning of 'appropriate children's home' see para 877 note 9 ante.

6    Ibid Sch 9A para 2(1)(b) (as added: see note 2 supra).

7    Ibid Sch 9A para 2(1)(c) (as added: see note 2 supra). For the meaning of 'hospital' see para 283 note 3 ante.

8    Ibid Sch 9A para 2(1)(d) (as added: see note 2 supra).

9    Ibid Sch 9A para 2A(1) (Sch 9A as added (see note 2 supra); Sch 9A para 2A added by the Children Act 2004 s 48, Sch 4 paras 1, 7). For these purposes, a 'client' is a person at whose request (or persons at whose joint request) day care is provided for a child: Children Act 1989 Sch 9A para 2A(2) (as so added).

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### **1183. Exemption for occasional facilities.**

Where day care<sup>1</sup> is provided on particular premises on less than six days in any year<sup>2</sup>, that provision must be disregarded for the purposes of Part XA of the Children Act 1989<sup>3</sup> if the person making it has notified the registration authority<sup>4</sup> in writing before the first occasion on which the premises<sup>5</sup> concerned are so used in that year<sup>6</sup>.

1 For the meaning of 'day care' see para 1072 note 3 ante.

2 For the purposes of the Children Act 1989 s 79B(9), Sch 9A para 3(1) (as added), 'year' means the year beginning with the day (after the commencement of Sch 9 para 5 (prospectively repealed: see para 1070 ante)) on which the day care in question was or is first provided on the premises concerned and any subsequent year: Sch 9A para 3(2) (Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3). As from a day to be appointed, the Children Act 1989 Sch 9A para 3(1) (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

3 Ie the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

4 As to the registration authority see para 1073 note 2 ante.

5 For the meaning of 'premises' see para 1072 note 2 ante.

6 Children Act 1989 Sch 9A para 3(1) (added by the Care Standards Act 2000 s 79, Sch 3).

### **UPDATE**

### **1183 Exemption for occasional facilities**

NOTE 2--Day appointed is 1 September 2008: SI 2008/2261.

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## (F) OFFENCES

### 1184. Offences.

It is an offence:

- 2997 (1) for a registered person, without reasonable excuse, to contravene, or otherwise fail to comply with, any requirement of any regulations governing child minders and day care providers<sup>1</sup>;
- 2998 (2) for a person, in respect of whom an enforcement notice has effect, to act as a child minder in England or Wales unless he is registered for child minding<sup>2</sup> under Part XA of the Children Act 1989<sup>3</sup>;
- 2999 (3) for a person to provide day care on premises unless he is registered under Part XA of the Children Act 1989 for providing day care on those premises by the registration authority<sup>4</sup>;
- 3000 (4) for a person who, in an application for registration<sup>5</sup>, knowingly makes a statement which is false or misleading in a material particular<sup>6</sup>;
- 3001 (5) for a person to act as a child minder at any time when he is disqualified for registration for child minding<sup>7</sup>;
- 3002 (6) for a person to contravene the provision<sup>8</sup> that provides that regulations may provide for a person who lives in the same household as a person who is himself disqualified for registration for child minding or providing day care, or in a household at which any such person is employed, to be disqualified for registration for child minding or providing day care<sup>9</sup>;
- 3003 (7) for a person who is disqualified for registration for providing day care to provide day care, or to be concerned in the management of, or have any financial interest in, any provision of day care<sup>10</sup>;
- 3004 (8) for a person to employ, in connection with the provision of day care, a person who is disqualified for registration for providing day care<sup>11</sup>;
- 3005 (9) for a registered person, without reasonable excuse, to contravene or otherwise fail to comply with any condition imposed on his registration<sup>12</sup>;
- 3006 (10) for a person who is required to hold a certificate of suitability<sup>13</sup> not to hold such a certificate or to fail to produce it when reasonably required to do so by a prescribed person<sup>14</sup>; or
- 3007 (11) for a person, for the purpose of obtaining a certificate of suitability, knowingly to make a statement which is false or misleading in a material particular<sup>15</sup>.

1 See the Children Act 1989 s 79C(7)(a) (as added); and para 1165 ante. For the meaning of 'day care' see para 1072 note 3 ante.

2 As to when a person is a child minder see para 1072 ante.

3 See the Children Act 1989 s 79D(4) (as added; prospectively amended); and 1166 ante.

4 See *ibid* s 79D(5) (as added; prospectively amended); and para 1166 ante. As to the registration authority see para 1164 note 1 ante.

5     le an application for registration under ibid Pt XA (ss 79A-79X) (as added and amended; prospectively amended): see para 1167 ante.

6     See ibid s 79E(5) (as added); and para 1167 ante.

7     See ibid Sch 9A para 5(1) (as added; prospectively amended); and para 1168 ante.

8     le ibid Sch 9A para 4(3) (as added; prospectively amended): see para 1168 ante.

9     See ibid Sch 9A paras 4(3), 5(1) (as added; prospectively amended); and para 1168 ante. As from a day to be appointed Sch 9A para 5(1) (as added; prospectively amended) is further amended so as to no longer include such an offence: see para 1168 ante. At the date at which this volume states the law no such day had been appointed.

10    See ibid Sch 9A paras 4(4), 5(1) (as added and amended; prospectively amended); and para 1168 ante.

11    See ibid Sch 9A paras 4(5), 5(1) (as added; prospectively amended); and para 1168 ante.

12    See ibid s 79F(6) (as added); and para 1169 ante.

13    le required by regulations made under ibid s 79W (as added; prospectively amended): see para 1177 ante.

14    See ibid s 79W(6) (as added); and para 1177 ante.

15    See ibid s 79W(7) (as added); and para 1177 ante.

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### **1185. Time limit for proceedings.**

Proceedings for an offence under Part XA of the Children Act 1989<sup>1</sup> or regulations<sup>2</sup> made under that Part may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge<sup>3</sup>. However, no such proceedings may be brought<sup>4</sup> more than three years after the commission of the offence<sup>5</sup>.

1    Ie the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

2    For the meaning of 'regulations' see para 1073 note 7 ante.

3    Children Act 1989 s 79X (added by the Care Standards Act 2000 s 79(1)).

4    Ie by virtue of the Children Act 1989 s 79X (as added).

5    Ibid s 79X (as added: see note 3 supra).

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## (G) ROLE OF LOCAL AUTHORITIES

### **1186. Function of local authorities.**

Each local authority<sup>1</sup> must, in accordance with regulations<sup>2</sup>, secure the provision<sup>3</sup>:

- 3008 (1) of information and advice about child minding<sup>4</sup> and day care<sup>5</sup>; and
- 3009 (2) of training for persons who provide or assist in providing child minding or day care<sup>6</sup>.

1 For the meaning of 'local authority' see para 248 note 10 ante.

2 For the meaning of 'regulations' see para 1073 note 7 ante. At the date at which this volume states the law no such regulations had been made.

3 Children Act 1989 s 79V (added by the Care Standards Act 2000 s 79(1)). As from a day to be appointed, the Children Act 1989 Sch 9A para 3(1) (as added) is amended by the Childcare Act 2006 but not so as materially to affect its meaning: see para 1164 note 1 ante. At the date at which this volume states the law, no such day had been appointed.

4 As to when a person is a child minder see para 1072 ante.

5 Children Act 1989 s 79V(a) (as added: see note 3 supra). For the meaning of 'day care' see para 1072 note 3 ante.

6 Ibid s 79V(b) (as added: see note 3 supra).



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### **1187. Co-operation between authorities.**

Where it appears to the National Assembly for Wales<sup>1</sup> that any local authority<sup>2</sup> in Wales could, by taking any specified action, help in the exercise of any of its functions under Part XA of the Children Act 1989<sup>3</sup>, the Assembly may request the help of that authority specifying the action in question<sup>4</sup>. An authority whose help is so requested must comply with the request if it is compatible with its own statutory or other duties and obligations and does not unduly prejudice the discharge of any of its functions<sup>5</sup>.

1 As to the Assembly see para 1164 note 1 *supra*.

2 For the meaning of 'local authority' see para 248 note 10 *ante*.

3 I.e. the Children Act 1989 Pt XA (ss 79A-79X) (as added; prospectively amended).

4 *Ibid* s 79B(9), Sch 9A para 8(2) (s 79B(9), Sch 9A added by the Care Standards Act 2000 s 79(1), (2), Sch 3).

5 Children Act 1989 Sch 9A para 8(3) (as added: see note 4 *supra*).

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## ***B. CHILD CARE UNDER THE CHILDCARE ACT 2006***

### **1188. Duties imposed by the Childcare Act 2006.**

The Childcare Act 2006, much of which is not yet in force, imposes duties on local authorities in relation to children. The Childcare Act 2006 applies to England and Wales<sup>1</sup>: Part 1 of the Act<sup>2</sup> imposes duties on English local authorities<sup>3</sup> and Part 2 of the Act<sup>4</sup> imposes them on Welsh local authorities<sup>5</sup>.

<sup>1</sup> The Childcare Act 2006 applies to England and Wales only, except in relation to any amendments or repeals made by the Act which apply to the same extent as the provision amended or repealed: see s 111(2), (3).

<sup>2</sup> *le ibid* Pt 1 (ss 1-21) (see para 1106 et seq ante).

<sup>3</sup> As to the meaning of 'English local authority' see para 1105 note 4 ante.

<sup>4</sup> *le ibid* ss 22-30 (see para 1189 et seq post). Section 101 (see para 1194 post) also imposes duties in relation to Wales only.

<sup>5</sup> As to the meaning of 'Welsh local authority' see para 1105 note 6 ante. For the purposes of the Education Act 1997 s 38 (inspection of local education authorities) (see EDUCATION vol 15(2) (2006 Reissue) para 1350), the functions conferred on a Welsh local authority by or under the Childcare Act 2006 Pt 2 (ss 22-30) are to be regarded as functions conferred on a local authority in its capacity as such: s 28.

The Education Act 1996 s 496 (power to prevent unreasonable exercise of functions) (see EDUCATION vol 15(1) (2006 Reissue) para 57) applies in relation to a Welsh local authority and the powers conferred or duties imposed on it by or under the Childcare Act 2006 Pt 2 as it applies in relation to a local education authority in Wales and the powers conferred or duties imposed on it by or under the Education Act 1996: s 29(1). The Education Act 1996 s 497 (general default powers) (see EDUCATION vol 15(1) (2006 Reissue) para 58) applies in relation to the duties imposed on a Welsh local authority by or for the purposes of the Childcare Act 2006 Pt 2 as it applies in relation to the duties imposed on a local education authority in Wales by or for the purposes of the Education Act 1996: s 29(2). The Education Act 1996 s 497A (as added) (power to secure proper performance of local education authority's functions) (see EDUCATION vol 15(1) (2006 Reissue) para 56) applies in relation to a Welsh local authority's functions under the Childcare Act 2006 Pt 2 as it applies in relation to the functions of a local education authority in Wales mentioned in s 29(1): s 29(3). The Education Act 1996 ss 497AA, 497B (both as added) (see EDUCATION vol 15(1) (2006 Reissue) para 56) apply accordingly where powers under s 497A (as added) are exercised in relation to any of the functions of a Welsh local authority under the Childcare Act 2006 Pt 2: s 29(4). In the application of the Education Act 1996 ss 497A(2)-(7), 497AA, 497B (all as added) in relation to a Welsh local authority's functions under the Childcare Act 2006 Pt 2, references to the local education authority are to be read as references to the local authority: s 29(5). In the Education Act 1996 s 497A(5) (as added) the reference to functions to which s 497A (as added) applies includes (for all purposes) functions of a Welsh local authority under the Childcare Act 2006 Pt 2: s 29(6).

## **UPDATE**

### **1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1189. Duty to secure sufficient child care for working parents.

### **1189. Duty to secure sufficient child care for working parents.**

As from a day to be appointed the following provisions apply<sup>1</sup>. A Welsh local authority<sup>2</sup> must secure, so far as is reasonably practicable, that the provision of child care<sup>3</sup> (whether or not by it) is sufficient to meet the requirements of parents<sup>4</sup> in its area who require child care in order to enable them to take up, or remain in, work or to undertake education or training which could reasonably be expected to assist them to obtain work<sup>5</sup>.

In determining whether the provision of child care is sufficient to meet those requirements, a local authority:

- 3010 (1) must have regard to the needs of parents in its area for the provision of child care in respect of which the child care element<sup>6</sup> of working tax credit is payable, the provision of child care which is suitable for disabled children<sup>7</sup> and the provision of child care involving the use of the Welsh language<sup>8</sup>; and
- 3011 (2) may have regard to any child care which it expects to be available outside its area<sup>9</sup>.

1 The Childcare Act 2006 Pt 2 (ss 22-30) is mainly to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 As to the meaning of 'Welsh local authority' see para 1105 note 6 ante. In discharging its duty under *ibid* s 22(1), a local authority must have regard to any guidance given: s 22(3).

3 For the purposes of *ibid* Pt 2 (ie ss 22-30), 'child care' means: (1) child minding or day care within the meaning of the Children Act 1989 Pt XA (ss 79A-79X) (as added and amended; prospectively amended) (see para 1072 ante) in respect of which the provider is required to be registered under Pt XA (as added and amended; prospectively amended); (2) care provided by a person of a description approved in accordance with a scheme made under the Tax Credits Act 2002 s 12(5) (see SOCIAL SECURITY AND PENSIONS): Childcare Act 2006 s 30.

Except in relation to a disabled child, s 22 does not apply in relation to child care for a child on or after 1 September next following the date on which he attains the age of 14: s 22(5).

4 'Parent' includes any individual who has parental responsibility for a child or who has care of a child: *ibid* s 22(6). For the meaning of 'parental responsibility' see para 134 ante; definition applied by s 106.

5 *Ibid* s 22(1).

6 'Child care element', in relation to working tax credit, is to be read in accordance with the Tax Credits Act 2002 s 12 (see SOCIAL SECURITY AND PENSIONS): Childcare Act 2006 s 22(6).

7 'Disabled child' means a child who has a disability for the purposes of the Disability Discrimination Act 1995 (see DISCRIMINATION vol 13 (2007 Reissue) para 511): Childcare Act 2006 s 22(6).

8 *Ibid* s 22(2)(a). Section 22(2) (and s 22(6) so far as relating to s 22(2)) may be amended by order so as to modify the matters to which a local authority must or may have regard in determining whether the provision of child care is sufficient: s 22(4).

9 *Ibid* s 22(2)(b).

### **UPDATE**

**1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

**1189 Duty to secure sufficient child care for working parents**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1190. Powers to assist or make arrangements for those providing child care.

### **1190. Powers to assist or make arrangements for those providing child care.**

As from a day to be appointed the following provisions apply<sup>1</sup>. A Welsh local authority<sup>2</sup> may assist any person who provides or proposes to provide child care<sup>3</sup>. It may also make arrangements with any other person for the provision of child care<sup>4</sup>. The assistance which a local authority may give includes financial assistance and the arrangements which a local authority may make include arrangements involving the provision of financial assistance by the authority<sup>5</sup>.

Where a Welsh local authority make arrangements with a person (other than the governing body of a maintained school<sup>6</sup>) for the provision by that person of child care in consideration of financial assistance provided by the authority under the arrangements with a view to securing that the provider of the child care meets any requirements imposed on him by the arrangements<sup>7</sup>, the requirements imposed by the arrangements may, in particular, if any specified conditions are not satisfied, require the repayment of the whole or any part of any financial assistance provided by the local authority under the arrangements<sup>8</sup>.

1 The Childcare Act 2006 Pt 2 (ss 22-30) is mainly to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 As to the meaning of 'Welsh local authority' see para 1105 note 6 ante. In exercising its functions under *ibid* s 23, a Welsh local authority must have regard to any guidance given: s 23(3).

3 *Ibid* s 23(1)(a). For the meaning of 'child care' see para 1189 note 3 ante.

4 *Ibid* s 23(1)(b).

5 *Ibid* s 23(2).

6 For the meaning of 'maintained school' see para 1111 note 5 ante.

7 Childcare Act 2006 s 24(1), (2).

8 *Ibid* s 24(3).

### **UPDATE**

#### **1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1191. Powers to provide child care.

### **1191. Powers to provide child care.**

As from a day to be appointed the following provisions apply<sup>1</sup>. A Welsh local authority<sup>2</sup> may provide child care<sup>3</sup>. The authority may enter into an agreement under which payments are made to the authority for the provision by the authority of child care for a child<sup>4</sup>.

1 The Childcare Act 2006 Pt 2 (ss 22-30) is mainly to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 As to the meaning of 'Welsh local authority' see para 1105 note 6 ante. In exercising its functions under *ibid* s 23, a Welsh local authority must have regard to any guidance given: s 23(3).

3 *Ibid* s 23(1)(c). For the meaning of 'child care' see para 1189 note 3 ante.

4 *Ibid* s 25(1). This does not apply to child care provided under the Children Act 1989 s 18 (see paras 844, 860 ante) (day care for pre-school and other children), provision as to charges for such care being made by s 29 (see para 934 ante): Childcare Act 2006 s 25(2).

### **UPDATE**

#### **1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1192. Assessment of child care provision.

### **1192. Assessment of child care provision.**

As from a day to be appointed the following provisions apply<sup>1</sup>. Regulations<sup>2</sup> may require a Welsh local authority<sup>3</sup> to prepare assessments at prescribed intervals of the sufficiency of the provision of child care (whether or not by the authority) in its area and review any such assessments prepared by it<sup>4</sup>.

1 The Childcare Act 2006 Pt 2 (ss 22-30) is mainly to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 Regulations under *ibid* s 26 may make provision for the manner in which an assessment or review is to be prepared and, in particular, may require the local authority to consult such persons, or persons of such a description, as may be prescribed and have regard to any guidance given: s 26(2). At the date at which this volume states the law no such regulations had been made. As to regulations made under the Childcare Act 2006 generally see para 1106 note 9 ante.

3 As to the meaning of 'Welsh local authority' see para 1105 note 6 ante.

4 See the Childcare Act 2006 s 26(1). For the meaning of 'child care' see para 1189 note 3 ante. Except in relation to a disabled child, s 22 (see para 1189 ante) does not apply in relation to child care for a child on or after 1 September next following the date on which he attains the age of 14: s 22(5); applied by s 26(3).

### **UPDATE**

#### **1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

### **1192 Assessment of child care provision**

NOTE 2--See Childcare Act 2006 (Local Authority Assessment) (Wales) Regulations 2008, SI 2008/169.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1193. Duty to provide information, advice and assistance to parents or prospective parents.

### **1193. Duty to provide information, advice and assistance to parents or prospective parents.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A Welsh local authority<sup>2</sup> must establish and maintain a service providing information, advice and assistance in accordance with the following provisions<sup>3</sup>.

The service must provide to parents or prospective parents<sup>4</sup> information which is of a prescribed description<sup>5</sup> and relates to any of the following:

- 3012 (1) the provision of child care in the area of the local authority<sup>6</sup>;
- 3013 (2) any other services or facilities, or any publications, which may be of benefit to parents or prospective parents in its area<sup>7</sup>;
- 3014 (3) any other services or facilities, or any publications, which may be of benefit to children or young persons in its area<sup>8</sup>.

The service must provide advice and assistance to parents or prospective parents who use, or propose to use, child care provided in the area of the local authority<sup>9</sup>. The service must be established and maintained in the manner which is best calculated to facilitate access to the service by persons in the local authority's area who may benefit from it, including, in particular, persons who might otherwise have difficulty in taking advantage of the service<sup>10</sup>.

1 The Childcare Act 2006 Pt 2 (ss 22-30) is mainly to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 As to the meaning of 'Welsh local authority' see para 1105 note 6 ante. In exercising its functions under *ibid* s 27, a local authority must have regard to any guidance given from time to time by the Welsh Ministers: s 27(7).

3 *Ibid* s 27(1).

4 For the purpose of *ibid* s 27, 'parent' means a parent of a child or young person and includes any individual who has parental responsibility for a child or who has care of a child; 'prospective parent' means a pregnant woman or any other person who is likely to become, or is planning to become, a parent; and 'young person' means a person who has attained the age of 18 but has not attained the age of 20: s 27(9). The service may, in addition to providing information which it is required to provide under s 27(2), provide information relating to any of the matters mentioned in heads (1)-(3) in the text to such persons as the local authority considers appropriate: s 27(4).

5 In prescribing information for the purpose of *ibid* s 27(2), the Welsh Ministers must have regard to the needs of the parents of disabled children or young persons for information relating to the provision of child care which is suitable for disabled children and other services or facilities, or publications, which may be of particular benefit to the parents of disabled children or young persons or to disabled children or young persons: s 27(3). For the purposes of s 27, a child or young person is disabled if he has a disability for the purposes of the Disability Discrimination Act 1995 (see DISCRIMINATION vol 13 (2007 Reissue) para 511): Childcare Act 2006 s 27(8).

6 *Ibid* s 27(2)(a).

7 *Ibid* s 27(2)(b).



8 Ibid s 27(2)(c).

9 Ibid s 27(5).

10 Ibid s 27(6).

## **UPDATE**

### **1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

#### **1193 Duty to provide information, advice and assistance to parents or prospective parents**

TEXT AND NOTES--See Childcare Act 2006 (Provision of Information) (Wales) Regulations 2008, SI 2008/170 (amended by SI 2008/1716).

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(12) CHILD MINDING, CHILD CARE AND DAY CARE/(iii) Child Minding, Child Care and Day Care in Wales/B. CHILD CARE UNDER THE CHILDCARE ACT 2006/1194. Provision of information about children.

#### **1194. Provision of information about children.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Regulations<sup>2</sup> may make provision, in relation to Wales, requiring:

- 3015 (1) a person who is registered under Part XA of the Children Act 1989<sup>3</sup> to provide child minding or day care<sup>4</sup>; and
- 3016 (2) a person who provides funded nursery education<sup>5</sup>,

to provide to the relevant person<sup>6</sup> such individual child information<sup>7</sup> as may be prescribed<sup>8</sup>.

1 The Childcare Act 2006 s 101 is to be brought into force by order made by the Welsh Ministers under ss 109(2), 110(1), (3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see para 155 ante.

2 'Regulations' means regulations made by the Welsh Ministers: *ibid* s 101(9). Regulations under s 101 may provide that, in such circumstances as may be prescribed, the provision of information to a person other than the Welsh Ministers is to be treated, for the purposes of any provision of such regulations or s 101, as compliance with any requirement imposed by or by virtue of any such provision and relating to the provision of information to the Welsh Ministers: s 101(8).

3 *Ie* the Children Act 1989 Pt XA (ss 79A-79X) (as added) (see paras 1163 et seq ante).

4 Childcare Act 2006 s 101(1)(a). 'Child minding' and 'day care' have the same meanings as in the Children Act 1989 Pt XA (as added) (see para 1072 note 3 ante).

5 Childcare Act 2006 s 101(1)(b). 'Funded nursery education' means nursery education, within the meaning of the School Standards and Framework Act 1998 Pt 5 (ss 117-124) (see EDUCATION vol 15(1) (2006 Reissue) para 85) which is provided by any person under arrangements made with that person by a local education authority in Wales in pursuance of the duty imposed on the authority by s 118 (duty of local education authority to secure sufficient nursery education: see EDUCATION vol 15(1) (2006 Reissue) para 86) and in consideration of financial assistance provided by the authority under those arrangements, other than such education provided by a school for its pupils: Childcare Act 2006 s 101(9).

6 'The relevant person' means one or more of the following: (1) the Welsh Ministers; and (2) any prescribed person: *ibid* s 101(2). As to the Welsh Ministers see para 155 ante. The Welsh Ministers may provide any individual child information to any information collator, to any prescribed person or to any person falling within a prescribed category: s 101(4). Any information collator may provide any individual child information to the Welsh Ministers or to any other information collator and may at such times as the Welsh Ministers may determine or in prescribed circumstances provide such individual child information as may be prescribed to any prescribed person or to any person falling within a prescribed category: s 101(5). Any person holding any individual child information (other than the Welsh Ministers or an information collator) may provide that information to the Welsh Ministers, any information collator or any prescribed person: s 101(6). No information received under or by virtue of s 101 is to be published in any form which includes the name of the child or children to whom it relates: s 101(7).

'Information collator' means any body which, for the purposes of or in connection with the functions of the Welsh Ministers relating to child minding, day care or funded nursery education (as the case may be), is responsible for collating or checking information relating to children for whom such provision is made: s 101(9).

7 'Individual child information' means information relating to and identifying individual children for whom child minding, day care or funded nursery education is being or has been provided, whether obtained under *ibid* s 101(1) or otherwise: s 101(9).

8 Ibid s 101(1).

**UPDATE**

**1188-1194 Child Care under the Childcare Act 2006**

These provisions are now in force: SI 2008/17.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(13) ACCOMMODATION BY BODIES OTHER THAN RESPONSIBLE AUTHORITIES/1195. Accommodation in care homes or independent hospitals.

## **(13) ACCOMMODATION BY BODIES OTHER THAN RESPONSIBLE AUTHORITIES**

### **1195. Accommodation in care homes or independent hospitals.**

Where a child<sup>1</sup> is provided with accommodation by any local health board<sup>2</sup>, special health authority<sup>3</sup>, primary care trust<sup>4</sup>, national health service trust<sup>5</sup>, NHS foundation trust or local education authority<sup>6</sup> for a consecutive period of at least three months, or with the intention of accommodating him for at least that period, the authority in question (the 'accommodating authority') must notify the responsible authority<sup>7</sup>. In such a case, the accommodating authority must also notify the responsible authority when it ceases to accommodate the child<sup>8</sup>.

Where a local authority has been notified under the above provisions it must:

- 3017 (1) take such steps as are reasonably practicable to enable it to determine whether the child's welfare is adequately safeguarded and promoted while he is accommodated by the accommodating authority<sup>9</sup>; and
- 3018 (2) consider the extent to which, if at all, it should exercise any of its functions<sup>10</sup> under the Children Act 1989 with respect to the child<sup>11</sup>.

1 For the meaning of 'child' see para 3 ante.

2 As to local health boards see HEALTH SERVICES vol 54 (2008) PARA 74.

3 As to special health authorities see HEALTH SERVICES vol 54 (2008) PARA 136 et seq.

4 As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

5 As to national health service trusts see HEALTH SERVICES vol 54 (2008) PARA 155 et seq.

6 As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

7 Children Act 1989 s 85(1) (amended by the National Health Service and Community Care Act 1990 s 66(1), Sch 9 para 36(5); the Health Authorities Act 1995 s 2(1), Sch 1 para 118(9); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 75, 81; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 24(1), (9); and the References to Health Authorities Order 2007, SI 2007/961, art 3, Schedule para 20(1), (2)(h)). For these purposes, 'responsible authority' means: (1) the local authority appearing to the accommodating authority to be the authority within whose area the child was ordinarily resident immediately before being accommodated; or (2) where it appears to the accommodating authority that a child was not ordinarily resident within the area of any local authority, the local authority within whose area the accommodation is situated: Children Act 1989 s 85(3). For the meaning of 'local authority' see para 138 note 13 ante. As to the ordinary residence of a child see s 105(6) (as amended); and para 271 note 8 ante.

8 Ibid s 85(2).

9 Ibid s 85(4)(a).

10 As to the meaning of 'functions' see para 156 note 23 ante.

11 Children Act 1989 s 85(4)(b).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/11. SUPPORT FOR CHILDREN BY LOCAL AUTHORITIES ETC/(13) ACCOMMODATION BY BODIES OTHER THAN RESPONSIBLE AUTHORITIES/1196. Children accommodated in care homes or independent hospitals.

### **1196. Children accommodated in care homes or independent hospitals.**

Where a child<sup>1</sup> is provided with accommodation in a care home<sup>2</sup> or independent hospital<sup>3</sup> for a consecutive period of at least three months, or with the intention, on the part of the person taking the decision to accommodate him, of accommodating him for at least that period, the person carrying on the home must notify the local authority<sup>4</sup> for the area in which the home is carried on<sup>5</sup>. In such a case, the person carrying on the home must also notify that authority when he ceases to accommodate the child in the home<sup>6</sup>. Where a local authority has been notified under the above provisions it must:

- 3019 (1) take such steps as are reasonably practicable to enable it to determine whether the child's welfare is adequately safeguarded and promoted while he is accommodated in the home<sup>7</sup>; and
- 3020 (2) consider the extent to which, if at all, it should exercise any of its functions<sup>8</sup> under the Children Act 1989 with respect to the child<sup>9</sup>.

If the person carrying on any home fails, without reasonable excuse, to comply with the above provisions he is guilty of an offence<sup>10</sup>.

A person authorised by a local authority may enter any care home or independent hospital within the authority's area for the purpose of establishing whether the requirements of the above provisions have been complied with<sup>11</sup>. Any person exercising the power of entry must, if so required, produce some duly authenticated document showing his authority to do so<sup>12</sup>. Any person intentionally obstructing another in the exercise of the power of entry is guilty of an offence<sup>13</sup>.

1 For the meaning of 'child' see para 3 ante.

2 For the meaning of 'care home' see para 985 note 1 ante; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 s 116, Sch 4 para 14(1), (23)(a)(ii)).

3 For the meaning of 'independent hospital' see para 983 note 6 ante; definition applied by the Children Act 1989 s 105(1) (definition added by the Care Standards Act 2000 Sch 4 para 14(1), (23)(a)(vi)).

4 For the meaning of 'local authority' see para 248 note 10 ante.

5 Children Act 1989 s 86(1) (amended by the Care Standards Act 2000 Sch 4 para 14(1), 20(b)).

6 Children Act 1989 s 86(2).

7 Ibid s 86(3)(a).

8 As to the meaning of 'functions' see para 156 note 23 ante.

9 Children Act 1989 s 86(3)(b).

10 Ibid s 86(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 86(8). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

11 Ibid s 86(5) (amended by the Care Standards Act 2000 Sch 4 para 14(1), (20)). If a person attempting to exercise powers under the Children Act 1989 s 86 (as amended) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: s 102(1), (6)(a). As to the application for, and grant of, such a warrant see s 102(2)-(5) (as amended); and para 285 ante.

12 Ibid s 86(7).

13 Ibid s 86(6). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 86(8).

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**1197. Welfare of children accommodated in independent schools, boarding schools and colleges.**

Where a school or college<sup>1</sup> provides accommodation for any child<sup>2</sup>, it is the duty of the relevant person<sup>3</sup> to safeguard and promote the child's welfare<sup>4</sup>. This provision does not apply, however, in relation to a school or college which is a children's home<sup>5</sup>. Where Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>6</sup> is of the opinion that there has been a failure to comply with the duty to safeguard and promote the child's welfare<sup>7</sup> in relation to a child provided with accommodation by a school or college in England he must<sup>8</sup>:

- 3021 (1) in the case of a school other than an independent school or a special school, notify the local education authority for the area in which the school is situated<sup>9</sup>;
- 3022 (2) in the case of a special school which is maintained by a local education authority, notify that authority<sup>10</sup>;
- 3023 (3) in any other case, notify the Secretary of State<sup>11</sup>.

Where the National Assembly for Wales is of the opinion that there has been a failure to comply with the duty to safeguard and promote the child's welfare<sup>12</sup> in relation to a child provided with accommodation by a school or college in Wales it must<sup>13</sup>:

- 3024 (a) in the case of a school other than an independent school or a special school, notify the local education authority for the area in which the school is situated<sup>14</sup>;
- 3025 (b) in the case of a special school which is maintained by a local education authority, notify that authority<sup>15</sup>.

Where accommodation is provided for a child by any school or college the appropriate authority<sup>16</sup> must take such steps as are reasonably practicable to enable it to determine whether the child's welfare is adequately safeguarded and promoted while he is accommodated by the school<sup>17</sup>.

Where accommodation is, or is to be, provided for a child by any school or college, a person authorised by the appropriate authority may, for the purposes of enabling that authority to discharge its duty<sup>18</sup>, enter at any time premises which are, or are to be, premises of the school or college<sup>19</sup>. Any person exercising this power may carry out such inspection of premises, children and records as is prescribed by regulations made by the Secretary of State<sup>20</sup> for these purposes<sup>21</sup>. Any person exercising that power must, if asked to do so, produce some duly authenticated document showing his authority to exercise the power<sup>22</sup>. Any person authorised by the regulations to inspect records:

- 3026 (i) is entitled at any reasonable time to have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been in use in connection with the records in question<sup>23</sup>; and

- 3027 (ii) may require the person by whom or on whose behalf the computer is or has been so used or any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material, to afford him such assistance as he may reasonably require<sup>24</sup>.

Any person who intentionally obstructs another in the exercise of any power conferred by these provisions or the regulations is guilty of an offence<sup>25</sup>.

1 For the meaning of 'school' see para 271 note 8 ante. 'College' means an institution within the further education sector as defined in the Further and Higher Education Act 1992 s 91 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 579); Children Act 1989 s 87(10) (definition added by the Care Standards Act 2000 s 105(1), (4)).

2 For the meaning of 'child' see para 3 ante.

3 For these purposes, 'relevant person' means: (1) in relation to an independent school, the proprietor of the school; (2) in relation to any other school, or an institution designated under the Further and Higher Education Act 1992 s 28, the governing body of the school or institution; (3) in relation to an institution conducted by a further education corporation, the corporation: Children Act 1989 s 87(11) (added by the Care Standards Act 2000 s 105(1), (4)). However, where a person other than the proprietor of an independent school is responsible for conducting the school, references to the relevant person include references to the person so responsible: Children Act 1989 s 87(12) (added by the Care Standards Act 2000 s 105(1), (4)). 'Further education corporation' means a body corporate established under the Further and Higher Education Act 1992 s 15 or s 16 (as amended) or which has become a further education corporation by virtue of s 47 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) para 580): s 17(1) (amended by the Teaching and Higher Education Act 1998 s 44(1), Sch 3 para 7); applied by the Children Act 1989 s 87(10) (definition added by the Care Standards Act 2000 s 105(1), (4)).

4 Children Act 1989 s 87(1) (s 87(1)-(5) substituted by the Care Standards Act 2000 s 105(1), (2)).

5 Children Act 1989 s 87(2) (as substituted: see note 4 supra). For the meaning of 'children's home' see para 983 ante.

6 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

7 I.e. the duty under the Children Act 1989 s 87(1) (substituted): see the text and notes 1-4 supra.

8 Ibid s 87(4) (substituted by the Care Standards Act 2000 s 105(1), (2); and amended by the Education and Inspections Act 2006 s 157, Sch 14 paras 9, 16(1), (2)).

9 Children Act 1989 s 87(4)(a) (as substituted: see note 8 supra).

10 Ibid s 87(4)(b) (as substituted: see note 8 supra).

11 Ibid s 87(4)(c) (as substituted: see note 8 supra). As to the Secretary of State see para 155 ante.

12 I.e. the duty under ibid s 87(1) (as substituted): see the text and notes 1-4 supra.

13 Ibid s 87(4A) (added by the Care Standards Act 2000 s 105(1), (2); and amended by the Education and Inspections Act 2006 Sch 14 paras 9, 16(1), (3)).

14 Children Act 1989 s 87(4A)(a) (as added and amended: see note 13 supra).

15 Ibid s 87(4A)(b) (as added and amended: see note 13 supra).

16 'Appropriate authority' means, in relation to England, Her Majesty's Chief Inspector of Education, Children's Services and Skills ('the Chief Inspector for England') and, in relation to Wales, the National Assembly for Wales: ibid s 87(10) (substituted by the Care Standards Act 2000 s 105(1), (4); and amended by the Education and Inspections Act 2006 Sch 14 paras 16(1), (5)).

18 I.e. its duty under the Children Act 1989 s 87 (as amended).

19 Ibid s 87(5) (substituted by the Care Standards Act 2000 s 105(1), (2)). Where the Chief Inspector for England or the National Assembly exercises the power conferred by the Children Act 1989 s 87(5) (as



substituted) in relation to a child, it must publish a report on whether the child's welfare is adequately safeguarded and promoted while he is accommodated by the school or college: s 87(9A) (s 87(9A)-(9C) added by the Health and Social Care (Community Health and Standards) Act 2003 s 111). The Chief Inspector for England or National Assembly must send a copy of such a report to the school or college concerned, and make copies available for inspection at the offices of the Chief Inspector for England or National Assembly by any person at any reasonable time; and any person who requests a copy of a report so published is entitled to have one on payment of such reasonable fee (if any) as the Chief Inspector for England or the National Assembly (as the case may be) considers appropriate: Children Act 1989 s 87(9B), (9C) (as so added).

20 As to the regulations made see the National Care Standards Commission (Inspection of Schools and Colleges) Regulations 2002, SI 2002/552 (which apply to England); and the Inspection of Boarding Schools and Colleges (Powers and Fees) (Wales) Regulations 2002, SI 2002/3161.

21 Children Act 1989 s 87(6) (amended by the Care Standards Act 2000 s 105(1), (3)). If a person attempting to exercise powers under the Children Act 1989 s 87 (as amended) is, or is likely to be, refused entry, he may be granted a warrant authorising the assistance of a constable: s 102(1), (6)(a). As to the application for, and grant of, such a warrant see s 102(3) (amended by Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 10(c)); and the Children Act 1989 s 102(3A) (added by the Health Act 1999 (Consequential Amendments) (Nursing and Midwifery) Order 2004, SI 2004/1771, art 3, Schedule, para 4(c)). As to the making of regulations generally see the Children Act 1989 s 104 (amended); and para 161 ante.

22 Ibid s 87(7).

23 Ibid s 87(8)(a).

24 Ibid s 87(8)(b).

25 Ibid s 87(9). Any person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 87(9). As to the standard scale see para 132 note 2 ante. As to offences under the Children Act 1989 committed by bodies corporate see para 551 note 3 ante.

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### **1198. Suspension of duty to inspect.**

The Secretary of State and Welsh Ministers<sup>1</sup> may appoint a person to be an inspector<sup>2</sup> if<sup>3</sup>:

- 3028 (1) that person already acts as an inspector for other purposes in relation to schools or colleges<sup>4</sup> which provide accommodation for any child<sup>5</sup>; and
- 3029 (2) the Secretary of State is or the Welsh Ministers are satisfied that the person is an appropriate person to determine whether the welfare of children provided with accommodation by such schools or colleges is adequately safeguarded and promoted while they are accommodated by them<sup>6</sup>.

The Secretary of State or the Welsh Ministers must terminate a person's appointment to be an inspector for these purposes<sup>7</sup> if that person so requests, or the Secretary of State or Welsh Ministers cease, in relation to that person, to be satisfied that he is such a person as is mentioned in head (2) above<sup>8</sup>. The Secretary of State must give notice of the termination of that person's appointment to the appropriate authority<sup>9</sup>.

Where:

- 3030 (a) the relevant person enters into an agreement in writing with a person so appointed as an inspector<sup>10</sup>;
- 3031 (b) the agreement provides for the person so appointed to have in relation to the school or college the function of determining whether the duty to safeguard and promote the child's welfare<sup>11</sup> is being complied with<sup>12</sup>; and
- 3032 (c) the appropriate authority receives from the inspector notice in writing that the agreement has come into effect<sup>13</sup>,

the authority's duty to take such steps as are reasonably practicable to enable it to determine whether the child's welfare is adequately safeguarded and promoted while he is accommodated by the school<sup>14</sup> is suspended in relation to the school or college<sup>15</sup>. Where such a duty of a local authority is so suspended, it ceases to be so suspended if the authority receives<sup>16</sup>: (i) a notice of the termination of a person's appointment as inspector<sup>17</sup> relating to the person with whom the proprietor of the school entered into the relevant agreement<sup>18</sup>; or (ii) a notice<sup>19</sup> that the relevant agreement has ceased to have effect<sup>20</sup>. Where such a duty of an appropriate authority in relation to any school or college is so suspended under these provisions and the relevant agreement ceases to have effect, the inspector must give to the authority notice in writing of the fact that it has ceased to have effect<sup>21</sup>.

1 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

2 Ie an inspector for the purposes of the Children Act 1989 s 87A (as added, amended, and substituted).

3 Ibid s 87A(1) (s 87A added by the Deregulation and Contracting Out Act 1994 s 38; and substituted by the Care Standards Act 2000 s 106(1)).

4 For the meaning of 'school' see para 271 note 8 ante. For the meaning of 'college' see para 1197 note 1 ante.

- 5 Children Act 1989 s 87A(1)(a) (as added and substituted: see note 3 supra). For the meaning of 'child' see para 3 ante.
- 6 Ibid s 87A(1)(b) (as added and substituted: see note 3 supra).
- 7 Ie under ibid s 87A(1) (as added and substituted): see the text and notes 1-6 supra.
- 8 Ibid s 87A(4) (as added and substituted: see note 3 supra).
- 9 Ibid s 87A(4) (as added and substituted: see note 3 supra). For the meaning of 'appropriate authority' see para 1197 note 16 ante.
- 10 Ibid s 87A(2)(a) (as added and substituted: see note 3 supra). For the meaning of 'relevant person' see para 1197 note 3 ante.
- 11 Ie the duty under ibid s 87(1) (as substituted): see para 1197 ante.
- 12 Ibid s 87A(2)(b) (as added and substituted: see note 3 supra).
- 13 Ibid s 87A(2)(c) (as added and substituted: see note 3 supra).
- 14 Ie the duty under ibid s 87(3) (as substituted): see para 1197 ante.
- 15 Ibid s 87A(2) (as added and substituted: see note 3 supra).
- 16 Ibid s 87A(3) (as added and substituted: see note 3 supra).
- 17 Ie a notice under ibid s 87A(4) (as added and substituted): see the text and notes 6-9 supra.
- 18 Ibid s 87A(3)(a) (as added and substituted: see note 3 supra). References to the relevant agreement in relation to the suspension of the appropriate authority's duty under s 87(3) (see para 1197 ante) as regards any school or college, are to the agreement by virtue of which the appropriate authority's duty under that provision as regards that school or college is suspended: s 87A(6) (as so added and substituted).
- 19 Ie a notice under ibid s 87A(5) (as added and substituted): see the text and note 21 infra.
- 20 Ibid s 87A(3)(b) (as added and substituted: see note 3 supra).
- 21 Ibid s 87A(5) (as added and substituted: see note 3 supra).

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### **1199. Duties of inspector.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may impose on an authorised inspector<sup>2</sup> such requirements relating to, or in connection with, the carrying out under substitution agreements<sup>3</sup> of the function of determining whether the duty to safeguard and promote the child's welfare<sup>4</sup> is being complied with, as the Secretary of State thinks or the Welsh Ministers think fit<sup>5</sup>. Where, in the course of carrying out such a function under a substitution agreement, it appears to an authorised inspector that there has been a failure to comply with the duty to safeguard and promote a child's welfare<sup>6</sup> in the case of a child provided with accommodation by the school or college<sup>7</sup> to which the agreement relates, the inspector must give notice of that fact<sup>8</sup>:

- 3033 (1) in the case of a school other than an independent school or a special school, to the local education authority for the area in which the school is maintained<sup>9</sup>;
- 3034 (2) in the case of a special school which is maintained by a local education authority, to that authority<sup>10</sup>;
- 3035 (3) in any other case, to the Secretary of State or the Welsh Ministers<sup>11</sup>.

Where, in the course of carrying out such a function under a substitution agreement, it appears to an authorised inspector that a child<sup>12</sup> provided with accommodation by the school or college to which the agreement relates is suffering, or is likely to suffer, significant harm<sup>13</sup>, the inspector must<sup>14</sup>:

- 3036 (a) give notice of that fact to the local authority in whose area the school or college is situated<sup>15</sup>; and
- 3037 (b) where the inspector is required to make inspection reports to the Secretary of State or Welsh Ministers, supply that local authority with a copy of the latest inspection report to have been made by the inspector to the Secretary of State or Welsh Ministers in relation to the school or college<sup>16</sup>.

1 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

2 I.e. a person appointed under the Children Act 1989 s 87A(1) (as added, amended and substituted): see para 1198 ante.

3 For these purposes, 'substitution agreement' means an agreement by virtue of which the duty of the appropriate authority under *ibid* s 87(3) (as substituted) (see para 1197 ante) in relation to the school or college is suspended: s 87B(4)(b) (s 87B added by the Deregulation and Contracting Out Act 1994 s 38; Children Act 1989 s 87B(4) substituted by the Care Standards Act 2000 s 106(2)(c)). For the meaning of 'appropriate authority' see para 1197 note 16 ante. For the meaning of 'college' see para 1197 note 1 ante.

4 I.e. the function mentioned in the Children Act 1989 s 87A(2)(b) (as added and amended): see para 1198 ante.

5 *Ibid* s 87B(1) (as added: see note 3 supra).

6 I.e. under *ibid* s 87(1) (as substituted): see para 1197 ante.

7 For the meaning of 'school' see para 271 note 8 ante.

8 Children Act 1989 s 87B(2) (as added (see note 3 supra); and amended by the Care Standards Act 2000 s 106(2)(a)).

9 Children Act 1989 s 87B(2)(a) (s 87B as added (see note 3 supra); and s 87B(2)(a)-(c) added by the Care Standards Act 2000 s 106(2)(b)).

10 Children Act 1989 s 87B(2)(b) (s 87B as added (see note 3 supra); s 87B(2)(b) as added (see note 9 supra)). As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

11 Ibid s 87B(2)(c) (s 87B as added (see note 3 supra); s 87B(2)(c) as added (see note 9 supra)).

12 For the meaning of 'child' see para 3 ante.

13 For the meaning of 'harm' see para 274 ante. As to whether harm suffered by a child is significant see para 274 ante.

14 Children Act 1989 s 87B(3) (as added (see note 3 supra); and amended by the Care Standards Act 2000 s 106(2)(a)).

15 Children Act 1989 s 87B(3)(a) (as added (see note 3 supra); and amended (see note 14 supra)).

16 Ibid s 87B(3)(b) (as added (see note 3 supra); and amended (see note 14 supra)).

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## **1200. Boarding schools: national minimum standards.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may prepare and publish statements of national minimum standards for safeguarding and promoting the welfare of children<sup>2</sup> for whom accommodation is provided in a school or college<sup>3</sup>. The Secretary of State or the Welsh Ministers must keep the standards set out in the statements under review and may publish amended statements whenever he considers or they consider it appropriate to do so<sup>4</sup>. Before issuing a statement, or an amended statement which in the opinion of the Secretary of State or the Welsh Ministers effects a substantial change in the standards, he or they must consult any persons he considers or they consider appropriate<sup>5</sup>. The standards must be taken into account:

- 3038 (1) in the making by the appropriate authority<sup>6</sup> of any determination<sup>7</sup> as to whether the school or college has failed to comply with the duty to safeguard and promote a child's welfare<sup>8</sup>;
- 3039 (2) in the making by an inspector<sup>9</sup> of any determination<sup>10</sup> as to whether the school or college to which a substitution agreement relates has failed to comply with the duty to safeguard and promote a child's welfare<sup>11</sup>;
- 3040 (3) in any proceedings under any other enactment in which it is alleged that the person has failed to comply with the duty<sup>12</sup> to safeguard and promote a child's welfare<sup>13</sup>.

1 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

2 For the meaning of 'child' see para 3 ante.

3 Children Act 1989 s 87C(1) (s 87C added by the Care Standards Act 2000 s 107). For the meaning of 'school' see para 271 note 8 ante. For the meaning of 'college' see para 1197 note 1 ante.

4 Children Act 1989 s 87C(2) (as added: see note 3 supra).

5 Ibid s 87C(3) (as added: see note 3 supra).

6 For the meaning of 'appropriate authority' see para 1197 note 16 ante.

7 Ie a determination under the Children Act 1989 s 87(4) (as substituted), s 87(4A) (as added): see para 1197 ante.

8 Ibid s 87C(4)(a) (as added: see note 3 supra).

9 Ie a person appointed under ibid s 87A(1) (as added and substituted): see para 1198 ante.

10 Ie a determination under ibid s 87B(2) (as added and amended): see para 1199 ante.

11 Ibid s 87C(4)(b) (as added: see note 3 supra).

12 Ie under ibid s 87(1) (as substituted): see para 1197 ante.

13 Ibid s 87C(4)(c) (as added: see note 3 supra).

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### **1201. Annual fee for boarding school inspections.**

The Secretary of State or the Welsh Ministers<sup>1</sup> may by regulations<sup>2</sup> require the relevant person<sup>3</sup> to pay the appropriate authority<sup>4</sup> an annual fee of such amount, and within such time, as the regulations may specify<sup>5</sup>. Such regulations may be made in relation to any school<sup>6</sup> or college<sup>7</sup> in respect of which the appropriate authority is required<sup>8</sup> to take such steps as are reasonably practicable to enable it to determine whether the child's welfare is adequately safeguarded and promoted while he is accommodated by the school or college<sup>9</sup>.

1 As to the Secretary of State see para 155 ante. As to the Welsh Ministers see para 155 ante.

2 As to the making of regulations generally see the Children Act 1989 s 104 (amended); and para 161 ante.

3 For the meaning of 'relevant person' see para 1197 note 3 ante.

4 Children Act 1989 s 87D(1) (s 87D added by the Care Standards Act 2000 s 108). For the meaning of 'appropriate authority' see para 1197 note 16 ante.

5 Children Act 1989 s 87D(2) (as added: see note 4 supra). A fee payable by virtue of s 87D (as added) may, without prejudice to any other method of recovery, be recovered summarily as a civil debt: s 87D(3) (as so added). As to the prescribed fees see Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2007, SI 2007/694; and EDUCATION.

6 For the meaning of 'school' see para 271 note 8 ante.

7 For the meaning of 'college' see para 1197 note 1 ante.

8 Ie under the Children Act 1989 s 87(3) (as substituted): see para 1197 ante.

9 Ibid s 87D(2) (as added: see note 4 supra).

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## **(14) RESIDENTIAL FAMILY CENTRES**

### **1202. Establishments exempted from being a residential family centre.**

For the purposes of the Care Standards Act 2000, an establishment is excepted from being a residential family centre if:

- 3041 (1) it is a health service hospital, an independent hospital, an independent clinic or a care home<sup>1</sup>;
- 3042 (2) it is a hostel or a domestic violence refuge<sup>2</sup>; or
- 3043 (3) the main purpose of the establishment is to provide accommodation together with other services or facilities to adults, and the fact that those adults may be parents, or may be accompanied by their children, is incidental to the main purpose of the establishment<sup>3</sup>.

1 Residential Family Centres Regulations 2002, SI 2002/3213, reg 3(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 3(a).

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 3(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 3(b).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 3(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 3(c).



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### **1203. Statement of purpose and resident's guide.**

The registered person<sup>1</sup> must compile in relation to the residential family centre a written statement ('the statement of purpose') which must consist of a statement as to specified matters<sup>2</sup>. The registered person must provide a copy of the statement of purpose to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>3</sup> or, as the case may be, the appropriate office in relation to Wales<sup>4</sup> and must make a copy of it available, upon request, for inspection by any person who works at the residential family centre, any resident, and any local authority exercising any functions under the Children Act 1989 in relation to any resident<sup>5</sup>.

The registered person must produce a written guide to the residential family centre (the 'resident's guide') which must include a summary of the statement of purpose, and must supply a copy of it to the Chief Inspector or, as the case may be, the appropriate office in relation to Wales, and to each parent<sup>6</sup> accommodated in the residential family centre<sup>7</sup>.

The registered person must keep under review and where appropriate revise the statement of purpose and resident's guide and notify the Chief Inspector or, as the case may be, the appropriate office in relation to Wales within 28 days of any such revision<sup>8</sup>.

The registered person must ensure that the residential family centre is at all times conducted in a manner which is consistent with its statement of purpose<sup>9</sup>.

1 The 'registered person', in relation to a residential family centre, means a person who is registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended) as the manager of the residential family centre: Residential Family Centres Regulations 2002, SI 2002/3213, reg 2(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(1). The 'registered manager', in relation to a residential family centre, means a person who is registered under the Care Standards Act 2000 Pt II (as amended) as the manager of the residential family centre: Residential Family Centres Regulations 2002, SI 2002/3213, reg 2(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(1). Where the registered person is convicted of any criminal offence, whether in England, Wales or elsewhere, he must give notice in writing to the Chief Inspector, or as the case may be, the appropriate office in relation to Wales of the date and place of the conviction, the offence of which he was convicted and the penalty imposed on him in respect of the offence: Residential Family Centres Regulations 2002, SI 2002/3213, reg 9; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 9. Where there is more than one registered person in respect of a residential family centre, anything which is required under the Residential Family Centres Regulations 2002, SI 2002/3213 (as amended) or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, must if done by one of the registered persons not be required to be done by any of the other registered persons: Residential Family Centres Regulations 2002, SI 2002/3213, reg 32; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 32.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(1). The text refers to the matters listed in the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 1 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, Sch 1.

3 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

4 As to the appropriate office see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(2) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(2).

6 For the meaning of 'parent' see para 983 note 2 ante.

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(3) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(3).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(4) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(4).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(5); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(5). Nothing in the Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(5), 14(1), 21(1) or, as the case may be the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(5), 14(1) or 21(1) may require or authorise the registered person to contravene or not comply with any other provision of those regulations or the conditions for the time being in force in relation to the registration of the registered person under the Care Standards Act 2000 Pt II (as amended): Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(6); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(6).

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#### **1204. Fitness of registered provider.**

A person must not carry on a residential family centre unless he is fit to do so<sup>1</sup>. A person is not fit to carry on a residential family centre in England unless the person:

- 3044 (1) is an individual who carries on the residential family centre otherwise than in partnership with others and satisfies the specified requirements<sup>2</sup>;
- 3045 (2) is an individual who carries on the residential family centre in partnership with others and he and each of his partners satisfies the specified requirements<sup>3</sup>;
- 3046 (3) is a partnership and each of the partners satisfies the specified requirements<sup>4</sup>; or
- 3047 (4) is an organisation and the organisation has given notice to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>5</sup> of the name, address and position in the organisation of an individual ('the responsible individual')<sup>6</sup> who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the residential family centre and that individual satisfies the specified requirements<sup>7</sup>.

A person is not fit to carry on a residential family centre in Wales unless the person:

- 3048 (a) is an individual who satisfies the specified requirements<sup>8</sup>; or
- 3049 (b) is an organisation and the organisation has given notice of the name, address and position in the organisation of the responsible individual who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the residential family centre and that individual satisfies the specified requirements<sup>9</sup>.

The specified requirements in relation to heads (1) to (4) and (a), (b) above are that:

- 3050 (i) he is of integrity and good character<sup>10</sup>;
- 3051 (ii) he is physically and mentally fit to carry on the residential family centre<sup>11</sup>;  
and
- 3052 (iii) full and satisfactory information is available in respect of certain matters<sup>12</sup>.

A person must not carry on a residential family centre if that person has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged and the bankruptcy order has not been annulled or rescinded or he has made a composition or arrangement with his creditors, and has not been discharged in respect of it<sup>13</sup>.

1 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(1). As to transitional provisions in relation to Wales see reg 34.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(2)(a)(i).

3 Ibid reg 5(2)(a)(ii).

4 Ibid reg 5(2)(b).

5 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

6 Where the responsible individual is convicted of any criminal offence, whether in England, Wales or elsewhere, he must give notice in writing to the Chief Inspector or, as the case may be, the appropriate office in relation to Wales of the date and place of the conviction, the offence of which he was convicted and the penalty imposed on him in respect of the offence: Residential Family Centres Regulations 2002, SI 2002/3213, reg 9; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 9. As to the appropriate office in relation to Wales see reg 2(5).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(2)(c) (amended by SI 2007/603).

8 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(2)(a).

9 Ibid reg 5(2)(b).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(3)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(3)(a).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(3)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(3)(b).

12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(3)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(3)(c). As to the matters mentioned in the text see the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 2; and the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(4), Sch 2.

13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 5(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 5(5).

## **UPDATE**

### **1204 Fitness of registered provider**

NOTE 12--SI 2003/781 reg 5(3)(c) substituted, reg 5(4) revoked, Sch 2 amended: SI 2009/2541. SI 2002/3213 Sch 2 amended: SI 2009/1895.

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### **1205. Appointment and fitness of manager.**

The registered provider<sup>1</sup> must appoint an individual to manage a residential family centre if:

- 3053 (1) there is no registered manager in respect of the residential family centre<sup>2</sup>;  
and
- 3054 (2) the registered provider:  
.93
- 162. (a) is an organisation or a partnership<sup>3</sup>;
- 163. (b) is not a fit person to manage a residential family centre<sup>4</sup>; or
- 164. (c) is not, or does not intend to be, in full time day to day charge of the residential family centre<sup>5</sup>.

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Where the registered provider appoints a person to manage the residential family centre, he must give notice to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>6</sup> or, as the case may be, the appropriate office in relation to Wales<sup>7</sup> of the name of the person so appointed and the date on which the appointment is to take effect<sup>8</sup>.

A person must not manage a residential family centre unless he is fit to do so<sup>9</sup>. A person is not fit to manage a residential family centre unless:

- 3055 (i) the person is of suitable integrity and good character to manage the residential family centre<sup>10</sup>;
- 3056 (ii) having regard to the size of the residential family centre, the statement of purpose, and the number and needs of the residents:  
.95
- 165. (a) the person has the qualifications, skills and experience necessary to manage the centre<sup>11</sup>; and
- 166. (b) the person is physically and mentally fit to do so<sup>12</sup>;
- .96
- 3057 (iii) full and satisfactory information is available in relation to the person in respect of certain matters<sup>13</sup>.

1 The 'registered provider', in relation to a residential family centre, means a person who is registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended) as the person carrying on the residential family centre: Residential Family Centres Regulations 2002, SI 2002/3213, reg 2(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(1). As to the registered provider see para 1204 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 6(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 6(1)(a).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 6(1)(b)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 6(1)(b)(i).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 6(1)(b)(ii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 6(1)(b)(ii).

- 5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 6(1)(b)(iii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 6(1)(b)(iii).
- 6 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.
- 7 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).
- 8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 6(2) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 6(2).
- 9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 7(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(1).
- 10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 7(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(2)(a).
- 11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 7(2)(b)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(2)(b)(i).
- 12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 7(2)(b)(ii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(2)(b)(ii).
- 13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 7(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(2)(c). As to the information to be provided see the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 2 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 7(3), Sch 2.

## **UPDATE**

### **1205 Appointment and fitness of manager**

NOTE 13--SI 2003/781 reg 7(2)(c) substituted, reg 7(3) revoked, Sch 2 amended: SI 2009/2541. SI 2002/3213 Sch 2 amended: SI 2009/1895.

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**1206. Registered person: general requirements.**

The registered provider<sup>1</sup> and the registered manager<sup>2</sup> must, having regard to the size of the residential family centre, the statement of purpose<sup>3</sup>, and the number and needs of the residents, carry on or manage the centre (as the case may be) with sufficient care, competence and skill<sup>4</sup>.

If the registered provider is

- 3058 (1) an individual, he must undertake; or
- 3059 (2) an organisation, it must ensure that the responsible individual undertakes,

from time to time such training as is appropriate to ensure that he has the skills necessary for carrying on the residential family centre<sup>5</sup>.

The registered manager must undertake from time to time such training as is appropriate to ensure that he has the skills necessary for managing the residential family centre<sup>6</sup>.

1 For the meaning of 'registered provider' see para 1205 note 1 ante.

2 For the meaning of 'registered manager' see para 1203 note 1 ante.

3 As to the statement of purpose see para 1203 ante.

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 8(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 8(1).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 8(2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 8(2).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 8(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 8(3).

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### **1207. Health and welfare of residents.**

The registered person<sup>1</sup> must ensure that the residential family centre is conducted so as to:

- 3060 (1) promote and make proper provision for the health and welfare of residents<sup>2</sup>;
- 3061 (2) make such provision for the care, treatment, education and supervision of residents as is appropriate to their age and needs<sup>3</sup>.

The registered person must, so far as is practicable, ascertain and take into account the wishes and feelings of residents when making decisions concerning their health and welfare or the manner in which they are treated<sup>4</sup>. The registered person must also make suitable arrangements to ensure that the residential family centre is conducted in a manner which respects the privacy and dignity of residents and with due regard to the sex, religious persuasion, racial origin, and cultural and linguistic background and any disability of residents<sup>5</sup>.

In complying with the above provisions, the registered person must, wherever there is a conflict between the interests of the members of a family, treat the welfare of the child in that family as paramount<sup>6</sup>.

The registered person must also:

- 3062 (a) make arrangements for residents to have access to such medical advice or treatment as may be necessary<sup>7</sup>;
- 3063 (b) make arrangements for the recording, handling, safe keeping, safe administration and disposal of medicines received into the residential family centre<sup>8</sup>;
- 3064 (c) make suitable arrangements to prevent infection, toxic conditions and the spread of infection at the residential family centre<sup>9</sup>;
- 3065 (d) ensure that all parts of the residential family centre to which residents have access are so far as reasonably practicable free from hazards to their safety<sup>10</sup>;
- 3066 (e) ensure that any activities in which residents participate are so far as reasonably practicable free from avoidable risks<sup>11</sup>;
- 3067 (f) ensure that unnecessary risks to the health or safety of residents are identified and so far as possible eliminated<sup>12</sup>; and
- 3068 (g) make arrangements, by training persons working at the residential family centre or by other measures, to prevent residents being harmed or suffering abuse or being placed at risk of harm or abuse<sup>13</sup>.

The registered person must ensure that no resident is subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that or any other resident and there are exceptional circumstances<sup>14</sup>. On any occasion on which a resident is subject to physical restraint, the registered person must record the circumstances, including the nature of the restraint<sup>15</sup>.



The registered person must ensure that persons working at the residential family centre use no form of corporal punishment at any time on any child or parent under the age of 18 who is accommodated in the residential family centre<sup>16</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 10(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 10(1)(a).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 10(1)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 10(1)(b).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 10(2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 10(2).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 10(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 10(3).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 10(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 10(4).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(1).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(2).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(3).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(4)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(4)(a).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(4)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(4)(b).

12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(4)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(4)(c).

13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(5); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(5).

14 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(6); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(6).

15 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(7); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(7).

16 Residential Family Centres Regulations 2002, SI 2002/3213, reg 11(8); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 11(8).

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### **1208. Arrangements for the protection of children.**

The registered person<sup>1</sup> must prepare and implement a written child protection policy which:

- 3069 (1) is intended to safeguard children accommodated in the residential family centre from abuse or neglect<sup>2</sup>; and
- 3070 (2) sets out the procedure to be followed in the event of any allegation of abuse or neglect<sup>3</sup>.

The procedure under head (2) above must in particular provide for:

- 3071 (a) liaison and co-operation with any local authority which is making child protection enquiries in relation to any child accommodated in the residential family centre<sup>4</sup>;
- 3072 (b) the prompt referral to the local authority in whose area the residential family centre is situated, of any allegations of abuse or neglect affecting any child accommodated in the residential family centre<sup>5</sup>;
- 3073 (c) notification<sup>6</sup> of the instigation and outcome of any child protection enquiries involving any child accommodated in the residential family centre, to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>7</sup> and the child's placing authority<sup>8</sup> or, as the case may be, the appropriate office in relation to Wales<sup>9</sup>;
- 3074 (d) written records to be kept of any allegation of abuse or neglect, and of the action taken in response<sup>10</sup>;
- 3075 (e) consideration to be given in each case to the measures which may be necessary to protect children in the residential family centre following an allegation of abuse or neglect<sup>11</sup>;
- 3076 (f) a requirement for persons working at the residential family centre to report any concerns about the welfare or safety of any child accommodated in the residential family centre to one of the following:

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- 167. (i) the registered person;
- 168. (ii) a police officer;
- 169. (iii) an officer of the Chief Inspector or, as the case may be, an officer of the appropriate office in relation to Wales;
- 170. (iv) an officer of the local authority in whose area the residential family centre is situated; or
- 171. (v) an officer of the National Society for the Prevention of Cruelty to Children<sup>12</sup>;

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- 3077 (g) arrangements to be made for residents and persons working at the residential family centre to have access at all times and in an appropriate form, to information which would enable them to contact the local authority in whose area the residential family centre is situated, or the Chief Inspector or, as the case may be, the appropriate office in relation to Wales, concerning the welfare or safety of children accommodated in the residential family centre<sup>13</sup>.

The registered person must prepare and implement a written policy for the prevention of bullying in the residential family centre which includes, in particular, a procedure for dealing with an allegation of bullying<sup>14</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(1)(a). 'Child' also includes any parent who is under the age of 18: Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(3)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(3)(b).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(1)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(1)(b).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(a). 'Child protection enquiries' means any enquiries carried out by a local authority in the exercise of any of its functions conferred by or under the Children Act 1989 relating to the protection of children: Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(3)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(3)(a).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(b).

6 In England this must be in accordance with the Residential Family Centres Regulations 2002, SI 2002/3213, reg 26 (see para 1219 post).

7 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

8 'Placing authority' means, in relation to a family, the local authority or other body that has arranged for the family to be accommodated in a residential family centre: Residential Family Centres Regulations 2002, SI 2002/3213, reg 2(1).

9 Ibid reg 12(2)(c) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(c). As to the appropriate office in relation to Wales see reg 2(5).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(d).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(e); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(e).

12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(f); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(f).

13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(2)(g); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(2)(g).

14 Residential Family Centres Regulations 2002, SI 2002/3213, reg 12(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 12(4).

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### **1209. Placements.**

The registered person<sup>1</sup> must, before providing a family with accommodation in the residential family centre, or if that is not reasonably practicable, as soon as possible thereafter, draw up in consultation with the placing authority a written plan ('the placement plan') setting out, in particular :

- 3078 (1) the facilities and services to be provided during the course of the placement;
- 3079 (2) the objectives and intended outcome of the placement<sup>2</sup>.

The registered person must keep under review and revise the placement plan as necessary<sup>3</sup>. In preparing or reviewing the placement plan the registered person must, so far as practicable, seek and take account of the views of the members of the family and take account of any relevant assessment or other report relating to any member of the family which may be provided by the placing authority<sup>4</sup>. The registered person must supply a copy of the placement plan and any revision of it to the placing authority and to the parent<sup>5</sup> within the family to which it relates<sup>6</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 13(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 13(1).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 13(2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 13(2).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 13(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 13(3).

5 For the meaning of 'parent' see para 983 note 2 ante.

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 13(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 13(4).

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### **1210. Facilities and services.**

The registered person<sup>1</sup> must provide facilities and services to residents in accordance with the statement of purpose<sup>2</sup>.

The registered person must have regard to the size of the residential family centre and the number and needs of residents:

- 3080 (1) provide telephone facilities which are suitable for the needs of residents, and make arrangements to enable residents to use such facilities in private<sup>3</sup>;
- 3081 (2) provide in rooms occupied by families adequate furniture, bedding and other furnishings, including curtains, floor coverings, and equipment<sup>4</sup>;
- 3082 (3) provide adequate laundry facilities for parents to wash, dry and iron clothes and linen for their families<sup>5</sup>;
- 3083 (4) provide sufficient and suitable cleaning materials and equipment<sup>6</sup>;
- 3084 (5) provide sufficient and suitable kitchen equipment, crockery, cutlery and utensils, and adequate facilities for the storage of food<sup>7</sup>;
- 3085 (6) provide suitable facilities for parents to prepare food for their families, and suitable dining facilities for residents<sup>8</sup>;
- 3086 (7) take adequate precautions against risk of accidents, including the training of persons working at the residential family centre in first aid<sup>9</sup>;
- 3087 (8) provide a place where the money and valuables of residents may be deposited for safe keeping<sup>10</sup>; and
- 3088 (9) provide adequate facilities for recreation and leisure<sup>11</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(1). This is expressed as being subject to the Residential Family Centres Regulations 2002, SI 2002/3213, reg 4(6) or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(6) (see para 1203 ante). For the statement of purpose see para 1203 ante.

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(a).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(b).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(c).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(d).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(e); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(e).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(f); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(f).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(g); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(g).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(h); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(h).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 14(2)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 14(2)(i).

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### **1211. Staffing of residential family centres and fitness of workers.**

The registered person<sup>1</sup> must ensure that there is, having regard to the statement of purpose<sup>2</sup> of the residential family centre, its size and the numbers and needs of its residents and the need to safeguard and promote the health and welfare of residents, a sufficient number of suitably qualified, competent and experienced persons working for the residential family centre<sup>3</sup>.

The registered person must not employ a person to work at the residential family centre unless that person is fit to work at a residential family centre<sup>4</sup> or allow a person, who is employed by a person other than the registered person in a position in which he may in the course of his duties have regular contact with residents, to work at the residential family centre unless that person is fit to work at a residential family centre<sup>5</sup>.

A person is not fit to work at a residential family centre unless:

- 3089 (1) he has the qualifications, skills and experience necessary for the work he is to perform<sup>6</sup>;
- 3090 (2) he is physically and mentally fit for the work he is to perform<sup>7</sup>; and
- 3091 (3) full and satisfactory information is available in relation to him in respect of specified matters<sup>8</sup>; and
- 3092 (4) in relation to England, he is of integrity and good character<sup>9</sup>.

The registered person must ensure that all permanent appointments are subject to the satisfactory completion of a period of probation and provide all employees with a job description outlining their responsibilities<sup>10</sup>.

The registered person must operate a disciplinary procedure which, in particular:

- 3093 (a) provides for the suspension of an employee where necessary in the interests of the safety or welfare of children accommodated in the residential family centre<sup>11</sup>;
- 3094 (b) provides that the failure on the part of an employee to report an incident of abuse, or suspected abuse of a child<sup>12</sup> accommodated in the residential family centre, to an appropriate person is a ground on which disciplinary proceedings may be instituted<sup>13</sup>.

The registered person must ensure that all persons employed by him receive appropriate training, supervision and appraisal and are enabled from time to time to obtain further qualifications appropriate to the work they perform<sup>14</sup>.

The registered person must make arrangements to enable persons working at the residential family centre to inform the registered person and Her Majesty's Chief Inspector of Education, Children's Services and Skills or, as the case may be, the appropriate office in relation to Wales, about any matter relating to the conduct of the residential family centre so far as it may affect the health or welfare of residents<sup>15</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 As to the statement of purpose see para 1203 ante.

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 15; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 15.

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(1)(a).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(1)(b), (2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(1)(b), (2). The registered person must take reasonable steps to ensure that any person working at the residential family centre who is not employed by him and to whom the Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(2) or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(2) does not apply is appropriately supervised while carrying out his duties: Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(6); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(6).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(3)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(3)(a).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(3)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(3)(b).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(3)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 16(3)(c). The text refers to matters specified under the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 2 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, Sch 2. In relation to England, the registered person must ensure that any offer of employment to a person is subject to the Residential Family Centres Regulations 2002, SI 2002/3213, reg 16(3)(d) being complied with in relation to that person and, unless reg 16(5) applies, no person starts work at a residential family centre until such time as reg 16(3)(d) has been complied with in relation to him: reg 16(4). Where the following conditions apply, the registered person may permit a person to start work at the residential family centre notwithstanding reg 16(4)(b): (1) the registered person has taken all reasonable steps to obtain full information in respect of each of the matters specified in Sch 2 in respect of that person, but the enquiries in relation to any of the matters specified in Sch 2 paras 3-6 are incomplete; (2) full and satisfactory information in respect of that person has been obtained in relation to the matters specified in Sch 2 paras 1, 2; (3) the registered person considers that the circumstances are exceptional; and (4) pending receipt of, and satisfying himself with regard to, any outstanding information, the registered person ensures that the person is appropriately supervised while carrying out his duties: reg 16(5).

9 Ibid reg 16(3)(a).

10 Ibid reg 17(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(1).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 17(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(2)(a).

12 For these purposes, 'child' also includes a parent who is under the age of 18: Residential Family Centres Regulations 2002, SI 2002/3213, reg 17(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(4).

13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 17(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(2)(b). For these purposes, the appropriate person is: (1) the registered person; (2) an officer of the Chief Inspector (ie Her Majesty's Chief Inspector of Education, Children's Services and Skills) or, as the case may be, the appropriate office in relation to Wales; (3) a police officer; (4) an officer of the local authority in whose area the residential family centre is situated; or (5) an officer of the National Society for the Prevention of Cruelty to Children: Residential Family Centres Regulations 2002, SI 2002/3213, reg 17(3) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(3). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the appropriate office in relation to Wales see reg 2(5).

14 Residential Family Centres Regulations 2002, SI 2002/3213, reg 17(5); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 17(5).

15 Residential Family Centres Regulations 2002, SI 2002/3213, reg 18; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 18.

## UPDATE

### 1211 Staffing of residential family centres and fitness of workers



NOTE 8--SI 2003/781 Sch 2 amended: SI 2009/2541. SI 2002/3213 Sch 2 amended: SI 2009/1895.

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## **1212. Records.**

The registered person<sup>1</sup> must maintain in respect of each family accommodated in the residential family centre a record which:

- 3095 (1) includes the information, documents and other specified records<sup>2</sup> relating to the members of the family<sup>3</sup>;
- 3096 (2) is kept up to date<sup>4</sup>;
- 3097 (3) is retained in the residential family centre so long as the family to which it relates is accommodated there<sup>5</sup>; and
- 3098 (4) is retained in a place of security for a period of 15 years from the date of the last entry<sup>6</sup>.

The record must be kept securely and may not be disclosed to any person except in accordance with any provision of, or made under, or by virtue of, a statute under which access to such records is authorised or any court order authorising access to such records<sup>7</sup>.

The registered person must also maintain specified records<sup>8</sup> in respect of the residential family centre and ensure that such records are kept up to date and retained for a period of not less than three years from the date of the last entry<sup>9</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 1203 note 1 ante.

<sup>2</sup> I.e. the records specified in the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 2 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, Sch 2.

<sup>3</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(1)(a).

<sup>4</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(1)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(1)(b).

<sup>5</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(1)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(5).

<sup>6</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(1)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(1)(c).

<sup>7</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(2); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(2).

<sup>8</sup> I.e. records specified in the Residential Family Centres Regulations 2002, SI 2002/3213, Sch 4 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, Sch 4.

<sup>9</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(4); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(4)(a), (c). In relation to England such records must be retained in the residential family centre: Residential Family Centres Regulations 2002, SI 2002/3213, reg 19(4)(b). In relation to Wales, the registered person must ensure that the records are at all times available for inspection in the residential family centre by any person authorised by the appropriate office to enter and inspect the residential family centre: Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19(4)(b). As to the appropriate office see reg 2(5).

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### **1213. Fitness of premises.**

The registered person<sup>1</sup> must not use premises for the purposes of a residential family centre unless the premises are suitable for the purpose of achieving the aims and objectives set out in the statement of purpose and the location of the premises is appropriate to the needs of residents<sup>2</sup>.

The registered person must ensure that:

- 3099 (1) the physical design and layout of the premises to be used as the residential family centre meet the needs of families<sup>3</sup>;
- 3100 (2) the premises to be used as the residential family centre are of sound construction and kept in a good state of repair externally and internally<sup>4</sup>;
- 3101 (3) all parts of the residential family centre are kept clean and reasonably decorated<sup>5</sup>;
- 3102 (4) adequate private and communal accommodation is provided for families<sup>6</sup>;
- 3103 (5) the size and layout of rooms occupied or used by families are suitable for their needs, and each family is provided with at least one room for its exclusive use<sup>7</sup>;
- 3104 (6) suitable facilities are provided for residents to meet, in private, any person authorised by Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>8</sup> or, as the case may be, the appropriate office in relation to Wales<sup>9</sup>;
- 3105 (7) there are provided at appropriate places in the premises sufficient numbers of lavatories, and of wash-basins, baths and showers fitted with a hot and cold water supply<sup>10</sup>;
- 3106 (8) the premises are equipped with what is reasonably necessary, and adapted as necessary, in order to meet the needs arising from the disability of any disabled resident<sup>11</sup>;
- 3107 (9) suitable facilities are provided for private study for any resident requiring them<sup>12</sup>;
- 3108 (10) external grounds which are suitable for, and safe for use by, residents are provided and appropriately maintained<sup>13</sup>;
- 3109 (11) adequate ventilation, heating and lighting is provided in all parts of the residential family centre which are used by residents<sup>14</sup>.

The registered person must provide for persons working at the residential family centre:

- 3110 (a) suitable facilities and accommodation, other than sleeping accommodation, including facilities for the purpose of changing and storage facilities<sup>15</sup>;
- 3111 (b) sleeping accommodation where the provision of such accommodation is needed for persons working at the residential family centre in connection with their work<sup>16</sup>.

<sup>1</sup> For the meaning of 'registered person' see para 1203 note 1 ante.

<sup>2</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(1). These provisions are subject to the Residential Family Centres

Regulations 2002, SI 2002/3213, reg 4(6) or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 4(6) (see para 1203 ante).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(a).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(b).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(c).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(d).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(e); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(e).

8 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(f) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(f). As to the appropriate office in relation to Wales see reg 2(5).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(g); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(g).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(h); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(h).

12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(i).

13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(j); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(j).

14 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(2)(k); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(2)(k).

15 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(3)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(3)(a).

16 Residential Family Centres Regulations 2002, SI 2002/3213, reg 21(3)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 21(3)(b).

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## **1214. Fire precautions.**

The registered person<sup>1</sup> must after consultation with the fire and rescue authority<sup>2</sup>:

- 3112 (1) take adequate precautions against the risk of fire, including the provision of suitable fire equipment<sup>3</sup>;
  - 3113 (2) provide adequate means of escape<sup>4</sup>;
  - 3114 (3) make adequate arrangements:
- .99**
- 172. (a) for detecting, containing and extinguishing fires<sup>5</sup>;
  - 173. (b) for giving warnings of fires<sup>6</sup>;
  - 174. (c) for the evacuation, in the event of fire, of all persons in the residential family centre and safe placement of residents<sup>7</sup>;
  - 175. (d) for the maintenance of all fire equipment<sup>8</sup>; and
  - 176. (e) for reviewing fire precautions, and testing fire equipment, at suitable intervals<sup>9</sup>;

**.100**

- 3115 (4) make arrangements for persons working at the residential family centre to receive suitable training in fire prevention<sup>10</sup>; and
- 3116 (5) ensure, by means of fire drills and practices at suitable intervals, that the persons working at the residential family centre and, so far as practicable, residents, are aware of the procedure to be followed in case of fire, including the procedure for saving life<sup>11</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1) (amended by SI 2005/1541; SI 2006/484); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1) (amended by SI 2005/1541; SI 2005/2929). Where the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541 (see FIRE SERVICES) applies to the residential family centre the Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1) or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1) does not apply and the registered person must ensure that the requirements of the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, and any regulations made under it, except for art 23 (duties of employees), are complied with in respect of the premises: Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1A) (added by SI 2005/1541); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1A) (added by SI 2005/2929). For these purposes, 'fire and rescue authority' means a fire and rescue authority under the Fire and Rescue Services Act 2004 for the area in which a residential family centre is situated: Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(2) (substituted by SI 2004/3168); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(2) (substituted by SI 2005/2929).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(a).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(b).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(c)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(c)(i).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(c)(ii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(c)(ii).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(c)(iii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(c)(iii).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22; Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(c)(iv).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(c)(v); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(c)(v).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(d).

11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 22(1)(e); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 22(1)(e).

## **UPDATE**

### **1214 Fire precautions**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **1215. Review of quality of care in England.**

The registered person<sup>1</sup> must establish and maintain a system for reviewing at appropriate intervals, and improving, the quality of care provided at the residential family centre<sup>2</sup>. Such a system must provide for consultation with residents<sup>3</sup>. The registered person must supply to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> a report in respect of any review conducted by him for these purposes, and make a copy of the report available to residents<sup>5</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 23(1).

3 Ibid reg 23(3).

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 23(1).

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### **1216. Review of quality of care in Wales.**

The registered person<sup>1</sup> must make suitable arrangements to establish and maintain a system for monitoring, reviewing and improving the quality of care given to residents<sup>2</sup>. The system established must make provision for the quality of care to be reviewed at least annually and for the registered person to obtain the views of residents, representatives of residents, any local authority who has arranged for the accommodation of a resident at the residential family centre, and staff employed at the residential family centre, on the quality of care provided, as part of any review undertaken<sup>3</sup>. Following a review of the quality of care, the registered person must within 28 days prepare a report of that review and make a copy of the report available in an appropriate format when requested by residents, representatives of residents, any local authority who has arranged for the accommodation of a resident at the residential family centre, staff employed at the residential family centre, and the appropriate office in relation to Wales<sup>4</sup>.

The appropriate office in relation to Wales can at any time request the registered person to undertake an assessment of the service provided to residents at the residential family centre<sup>5</sup>. Within 28 days of receiving such a request the registered person must supply to the appropriate office in relation to Wales the assessment in the required form<sup>6</sup>. The registered person must take reasonable steps to ensure that the assessment is not misleading nor inaccurate<sup>7</sup>. A compliance notification may be issued requiring the registered person to take action to comply with relevant provisions<sup>8</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 23(1) (reg 23 substituted by SI 2006/3251).

3 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 23(2) (as substituted: see note 2 supra).

4 Ibid reg 23(3) (as substituted: see note 2 supra). As to the appropriate office in relation to Wales see reg 2(5).

5 Ibid reg 23A(1) (reg 23A added by SI 2006/3251).

6 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 23A(2) (as added: see note 5 supra).

7 Ibid reg 23A(3) (as added: see note 5 supra).

8 See ibid reg 23B (added by SI 2006/3251).



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### **1217. Financial provision.**

The registered person<sup>1</sup> must carry on the residential family centre in such manner as is likely to ensure that it will be financially viable for the purpose of achieving the aims and objectives set out in the statement of purpose<sup>2</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 24(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 24(1). As to the statement of purpose see para 1203 ante.

In relation to England, the registered person must ensure that adequate accounts are maintained and kept up to date in respect of the residential family centre and supply a copy of the accounts to Her Majesty's Chief Inspector of Education, Children's Services and Skills at his request: Residential Family Centres Regulations 2002, SI 2002/3213, reg 24(2) (amended by SI 2007/603). The registered person must, if the Chief Inspector so requests, provide the Chief Inspector with such information and documents as he may require for the purpose of considering the financial viability of the residential family centre, including the annual accounts of the residential family centre certified by an accountant and a certificate of insurance for the registered provider in respect of liability which may be incurred by him in relation to the residential family centre in respect of death, injury, public liability, damage or other loss: Residential Family Centres Regulations 2002, SI 2002/3213, reg 24(3) (amended by SI 2007/603). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

In relation to Wales, the registered person must provide the appropriate office with such information and documents as it may require for the purpose of considering the financial viability of the residential family centre, including: (1) the annual accounts of the residential family centre certified by an accountant; (2) a reference from a bank expressing an opinion as to the registered provider's financial standing; (3) information as to the financing and financial resources of the residential family centre; (4) where the registered provider is a company, information as to any of its associated companies; (5) a certificate of insurance for the registered provider in respect of liability which may be incurred by him in relation to the residential family centre in respect of death, injury, public liability, damage or other loss: Residential Family Centre (Wales) Regulations 2003, SI 2003/781, reg 24(2). For these purposes, a company is an associated company of another if one of them has control of the other or both are under the control of the same person: reg 24(3). As to the appropriate office in relation to Wales see reg 2(5).

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### **1218. Visits by registered provider.**

Where the registered provider<sup>1</sup> is an individual, but is not in day to day charge of the residential family centre, he must visit the residential family centre in accordance with the following provisions<sup>2</sup>.

Where the registered provider is an organisation or a partnership, the residential family centre must be visited by:

- 3117 (1) the responsible individual or one of the partners, as the case may be<sup>3</sup>;
- 3118 (2) another of the directors or other persons responsible for the management of the organisation or partnership<sup>4</sup>; or
- 3119 (3) an employee of the organisation or partnership who is not directly concerned with the conduct of the residential family centre<sup>5</sup>.

Visits under head (1) or head (2) above must take place at least once a month and may be unannounced<sup>6</sup>.

The person carrying out the visit must:

- 3120 (a) interview, with their consent and in private, such of the residents and persons working at the residential family centre as appears necessary in order to form an opinion of the standard of care provided in the residential family centre<sup>7</sup>;
- 3121 (b) inspect the premises of the residential family centre, its daily log of events and records of any complaints<sup>8</sup>; and
- 3122 (c) prepare a written report on the conduct of the residential family centre<sup>9</sup>.

1 For the meaning of 'registered provider' see para 1205 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(1).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(2)(a).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(2)(b).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(2)(c).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(3).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(4)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(4)(a).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(4)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(4)(b).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(4)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(4)(c). The registered provider must supply a copy of the report

to: (1) Her Majesty's Chief Inspector of Education, Children's Services and Skills or, as the case may be, the appropriate office in relation to Wales; (2) the registered manager; and (3) in the case of a visit under heads (1)-(3) in the text: (a) where the registered provider is an organisation, to each of the directors or other persons responsible for the management of the organisation; and (b) in relation to England, where the registered provider is a partnership, to each of the partners: Residential Family Centres Regulations 2002, SI 2002/3213, reg 25(5); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 25(5). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the appropriate office in relation to Wales see reg 2(5).

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### **1219. Notifiable events in England.**

The registered person<sup>1</sup> must give notice to the appropriate persons or body<sup>2</sup> without delay of the occurrence of:

- 3123 (1) the death of a resident accommodated in the centre<sup>3</sup>;
- 3124 (2) referral to the Secretary of State pursuant to the Protection of Children Act 1999<sup>4</sup> of an individual working at the centre<sup>5</sup>;
- 3125 (3) any serious accident, serious injury or serious illness sustained by a resident<sup>6</sup>;
- 3126 (4) the outbreak in the residential family centre of any infectious disease which in the opinion of any registered medical practitioner attending residents of the residential family centre is sufficiently serious to be so notified<sup>7</sup>;
- 3127 (5) allegation that a resident accommodated in the centre has committed a serious offence<sup>8</sup>;
- 3128 (6) involvement or suspected involvement in prostitution of a child or a parent who is under the age of 18, accommodated at the centre<sup>9</sup>;
- 3129 (7) any serious incident necessitating the calling of police to the residential family centre<sup>10</sup>;
- 3130 (8) absconding by a resident accommodated in the centre<sup>11</sup>;
- 3131 (9) any serious complaint about the centre or persons working there<sup>12</sup>;
- 3132 (10) instigation and outcome of any child protection enquiry involving a child or a parent who is under the age of 18, accommodated in the centre<sup>13</sup>.

The registered person must without delay notify the parent accommodated in the residential family centre with a child of any significant incident affecting the child's welfare unless to do so is not reasonably practicable or would place the child's welfare at risk<sup>14</sup>. Any notification which is given orally must be confirmed in writing<sup>15</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 See notes 3-13 infra.

3 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills, the placing authority, the Secretary of State, the local authority and the primary care trust. As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION. As to the Secretary of State see para 155 ante.

4 Ie pursuant to the Protection of Children Act 1999 s 2(1)(a) (see para 651 ante).

5 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills and the placing authority.

6 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills and the placing authority.

7 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills, the placing authority and the primary care trust. As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.

- 8 Notification must be made to the placing authority and the police.
- 9 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills, the placing authority, the local authority and the police.
- 10 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills and the placing authority.
- 11 Notification must be made to the placing authority.
- 12 Notification must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills and the placing authority.
- 13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 26(1), Sch 5. Notification under head (10) in the text must be made to Her Majesty's Chief Inspector of Education, Children's Services and Skills and the placing authority.
- 14 Ibid s 26(2).
- 15 Ibid s 26(3).

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## **1220. Notifiable events in Wales.**

The registered person<sup>1</sup> must give notice to the appropriate office in relation to Wales<sup>2</sup> without delay of the occurrence of:

- 3133 (1) the death of any resident, including the circumstances of his death<sup>3</sup>;
- 3134 (2) the outbreak in the residential family centre of any infectious disease which in the opinion of any registered medical practitioner attending residents of the residential family centre is sufficiently serious to be so notified<sup>4</sup>;
- 3135 (3) any serious accident, serious injury or serious illness sustained by a resident<sup>5</sup>;
- 3136 (4) any serious incident in the residential family centre necessitating the calling of police to the residential family centre<sup>6</sup>;
- 3137 (5) any child protection enquiry involving any resident, which relates to any concern arising during the period in which a person is accommodated in a residential family centre<sup>7</sup>;
- 3138 (6) any allegation of misconduct by the registered person or by any person who works at the residential family centre<sup>8</sup>.

Any notification made in accordance with the above provisions which is given orally must be confirmed in writing<sup>9</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).

3 Ibid reg 26(1)(a).

4 Ibid reg 26(1)(b). As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 3, 99 et seq.

5 Ibid reg 26(1)(c).

6 Ibid reg 26(1)(d).

7 Ibid reg 26(1)(e).

8 Ibid reg 26(1)(f).

9 Ibid reg 26(2).

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### **1221. Notice of absence.**

Where the registered provider<sup>1</sup>, if he is the person in day to day charge of the residential family centre, or the registered manager<sup>2</sup> proposes to be absent from the residential family centre for a continuous period of 28 days or more, the registered person<sup>3</sup> must give notice in writing to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>4</sup> or, as the case may be, the appropriate office in relation to Wales<sup>5</sup> of the proposed absence<sup>6</sup>.

Except in the case of an emergency, the notice must be given at least 28 days before the proposed absence is to start, or within such shorter period as may be agreed with the Chief Inspector or, as the case may be, the appropriate office in relation to Wales; and the notice must specify:

- 3139 (1) the length or expected length of the proposed absence<sup>7</sup>;
- 3140 (2) the reason for the proposed absence<sup>8</sup>;
- 3141 (3) the arrangements which have been made for the running of the residential family centre during that absence<sup>9</sup>;
- 3142 (4) the name, address and qualifications of the person who will be responsible for the residential family centre during the absence<sup>10</sup>; and
- 3143 (5) in the case of the absence of the registered manager, the arrangements that have been, or are proposed to be, made for appointing another person to manage the residential family centre during that absence, including the proposed date by which the appointment is to be made<sup>11</sup>.

Where the absence arises as a result of an emergency, the registered person must give notice of the absence within one week of its occurrence specifying the matters in heads (1) to (5) above<sup>12</sup>.

Where the registered provider, if he is the person in day to day charge of the residential family centre, or the registered manager has been absent from the residential family centre for a continuous period of 28 days or more, and the Chief Inspector or, as the case may be, the appropriate office in relation to Wales has not been given notice of the absence, the registered person must without delay give notice in writing to the Chief Inspector or, as the case may be, the appropriate office in relation to Wales specifying the matters mentioned heads (1) to (5) above<sup>13</sup>.

The registered person must inform the Chief Inspector or, as the case may be, the appropriate office in relation to Wales of the return to work of the registered provider or (as the case may be) the registered manager not later than seven days after the date of his return<sup>14</sup>.

1 For the meaning of 'registered provider' see para 1205 note 1 ante.

2 For the meaning of 'registered manager' see para 1203 note 1 ante.

3 For the meaning of 'registered person' see para 1203 note 1 ante.

4 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

- 5 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).
- 6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(1) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(1).
- 7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(2)(a).
- 8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(2)(b).
- 9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(2)(c).
- 10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(2)(d); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(2)(d).
- 11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(2)(e); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(2)(e).
- 12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(3); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(3).
- 13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(4) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(4).
- 14 Residential Family Centres Regulations 2002, SI 2002/3213, reg 27(5) (SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 27(5).



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## **1222. Notice of changes.**

The registered person<sup>1</sup> must give notice in writing to Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> or, as the case may be, the appropriate office in relation to Wales<sup>3</sup> as soon as it is practicable to do so if any of the following events takes place or is proposed to take place<sup>4</sup>:

- 3144 (1) a person other than the registered person carries on or manages the residential family centre<sup>5</sup>;
  - 3145 (2) a person ceases to carry on or manage the residential family centre<sup>6</sup>;
  - 3146 (3) where the registered person is an individual, he changes his name<sup>7</sup>;
  - 3147 (4) where the registered provider is an organisation:
- .101**
- 177. (a) the name or address of the organisation is changed<sup>8</sup>;
  - 178. (b) there is any change of director, manager, secretary or other similar officer of the organisation<sup>9</sup>;
  - 179. (c) there is to be any change of responsible individual<sup>10</sup>;
- .102**
- 3148 (5) where the registered provider is an individual, a trustee in bankruptcy is appointed<sup>11</sup>;
  - 3149 (6) where the registered provider is a company (or, in England, a company or a partnership), a receiver, manager, liquidator or provisional liquidator is appointed in respect of the registered provider<sup>12</sup>;
  - 3150 (7) the premises of the residential family centre are to be significantly altered or extended, or additional premises are acquired<sup>13</sup>;
  - 3151 (8) in relation to Wales, where the registered provider is in a partnership whose business includes carrying on a residential family centre, a receiver or manager is, or is likely to be, appointed for the partnership<sup>14</sup>; or
  - 3152 (9) in relation to England, where the registered provider is a partnership, there is any change in the membership of the partnership<sup>15</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(1) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(1).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(a).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(b).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(c).

- 8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(e)(i); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(d)(i).
- 9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(e)(ii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(d)(ii).
- 10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(e)(iii); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(d)(iii).
- 11 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(f); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(e).
- 12 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(g); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(f).
- 13 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(h); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 28(h).
- 14 Ibid reg 28(g).
- 15 Residential Family Centres Regulations 2002, SI 2002/3213, reg 28(d).

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### **1223. Appointment of liquidators etc.**

Any person appointed as:

- 3153 (1) the receiver or manager of the property of a company which is a registered provider<sup>1</sup> of a residential family centre<sup>2</sup>;
- 3154 (2) a liquidator or provisional liquidator of a company which is the registered provider of a residential family centre<sup>3</sup>;
- 3155 (3) the trustee in bankruptcy of a registered provider of a residential family centre<sup>4</sup>; or
- 3156 (4) in relation to Wales, the receiver or manager of the property of a partnership whose business includes carrying on a residential family centre<sup>5</sup>,

must:

- 3157 (a) forthwith notify Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>6</sup> or, as the case may be, the appropriate office in relation to Wales<sup>7</sup> of his appointment indicating the reasons for it<sup>8</sup>;
- 3158 (b) appoint a manager to take full time day to day charge of the residential family centre in any case where there is no registered manager<sup>9</sup>; and
- 3159 (c) within 28 days of his appointment, notify the Chief Inspector or, as the case may be, the appropriate office in relation to Wales of his intentions regarding the future operation of the residential family centre<sup>10</sup>.

1 For the meaning of 'registered provider' see para 1205 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(2)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(2)(a).

3 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(2)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(2)(b).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(2)(c); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(2)(d).

5 Ibid reg 29(2)(c).

6 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

7 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 2(5).

8 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(1)(a) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(1)(a).

9 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(1)(b); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(1)(b).

10 Residential Family Centres Regulations 2002, SI 2002/3213, reg 29(1)(c) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 29(1)(c).



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#### **1224. Death of registered person.**

If more than one person is registered in respect of a residential family centre, and a registered person<sup>1</sup> dies, the other registered person must without delay notify Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>2</sup> or, as the case may be, the appropriate office in relation to Wales<sup>3</sup> of the death in writing<sup>4</sup>.

If only one person is registered in respect of a residential family centre, and that person dies, his personal representatives must notify the Chief Inspector or, as the case may be, the appropriate office in relation to Wales in writing without delay of the death and within 28 days of their intentions regarding the future operation of the residential family centre<sup>5</sup>.

The personal representatives of a deceased registered provider may carry on the residential family centre without being registered in respect of it for a period not exceeding 28 days<sup>6</sup>. However, the Chief Inspector or, as the case may be, the appropriate office in relation to Wales may extend this period by such further period, not exceeding one year, as the Chief Inspector or the appropriate office in relation to Wales determines and must notify any such determination to the personal representatives in writing<sup>7</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

3 As to the appropriate office in relation to Wales see the Residential Family Centres (Wales) Regulations, SI 2003/781, reg 2(5).

4 Residential Family Centres Regulations 2002, SI 2002/3213, reg 30(1) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 30(1).

5 Residential Family Centres Regulations 2002, SI 2002/3213, reg 30(2) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 30(2).

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 30(3)(a); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 30(3)(a). The personal representatives must appoint a person to take full time day to day charge of the residential family centre during any period in which in they carry on the residential family centre without being registered in respect of it: Residential Family Centres Regulations 2002, SI 2002/3213, reg 30(5); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 30(5).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 30(3)(b), (4) (amended by SI 2007/603); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 30(3)(b), (4).

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## **1225. Offences.**

A contravention or failure to comply with certain provisions of the Residential Family Centres Regulations 2002<sup>1</sup> and the Residential Family Centres (Wales) Regulations 2003<sup>2</sup> is an offence<sup>3</sup>.

<sup>1</sup> The Residential Family Centres Regulations 2002, SI 2002/3213, regs 4, 9-28.

<sup>2</sup> The Residential Family Centres (Wales) Regulations 2003, SI 2003/781, regs 4-28.

<sup>3</sup> Residential Family Centres Regulations 2002, SI 2002/3213, reg 31(1); Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 31(1). Proceedings may be brought against a person who was once, but no longer is, a registered person in respect of a failure to comply with the Residential Family Centres Regulations 2002, SI 2002/3213, reg 19 or, as the case may be, the Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 19 (see para 1212 ante).

In relation to England, Her Majesty's Chief Inspector of Education, Children's Services and Skills must not bring proceedings against a person in respect of any contravention or failure to comply with the Residential Family Centres Regulations 2002, SI 2002/3213, regs 4, 9-28 unless: (1) he is a registered person; (2) notice has been given to him in accordance with heads (a)-(d) infra; (3) the period specified in the notice, within which the registered person may make representations to the Chief Inspector, has expired; and (4) in a case where, in accordance with head (b) below, the notice specifies any action that is to be taken within a specified period, the period has expired and the action has not been taken within that period: reg 31(2). Where the Chief Inspector considers that the registered person has contravened or failed to comply with any of regs 4, 9-28, he may serve a notice on the registered person specifying: (a) in what respect in his opinion the registered person has contravened or is contravening any of the regulations, or has failed or is failing to comply with the requirements of any of the regulations; (b) where it is practicable for the registered person to take action for the purpose of complying with any of those regulations, the action which, in the opinion of the Chief Inspector, the registered person should take for that purpose; (c) the period, not exceeding three months, within which the registered person should take any action specified in accordance with head (b) above; (d) the period, not exceeding one month, within which the registered person may make representations to the Chief Inspector about the notice: reg 31(3). As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

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### **1226. Complaints procedure in England.**

The registered person<sup>1</sup> must establish a procedure ('the complaints procedure') for considering complaints made to the registered person by a resident or a person acting on behalf of a resident<sup>2</sup>. The registered person must ensure that any complaint made under the complaints procedure is fully investigated<sup>3</sup>. The registered person must provide a written copy of the complaints procedure on request to any resident and any person acting on behalf of a resident<sup>4</sup>. The written copy of the complaints procedure must include the name and address of Her Majesty's Chief Inspector of Education, Children's Services and Skills<sup>5</sup> and the procedure (if any) that has been notified by the Chief Inspector to the registered person for the making of complaints to the Chief Inspector relating to residential family centres<sup>6</sup>.

The registered person must, within 28 days after the date on which the complaint is made, or such shorter period as may be reasonable in the circumstances, inform the person who made the complaint of the action (if any) that is to be taken<sup>7</sup>.

The registered person must ensure that a written record is made of any complaint or representation, the action taken in response, and the outcome of the investigation<sup>8</sup>. The registered person must supply to the Chief Inspector at his request a statement containing a summary of the complaints made during the preceding 12 months, and the action that was taken<sup>9</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres Regulations 2002, SI 2002/3213, reg 20(1).

3 Ibid reg 20(2).

4 Ibid reg 20(3).

5 As to Her Majesty's Chief Inspector of Education, Children's Services and Skills see para 196 ante; and EDUCATION.

6 Residential Family Centres Regulations 2002, SI 2002/3213, reg 20(4) (amended by SI 2007/603).

7 Residential Family Centres Regulations 2002, SI 2002/3213, reg 20(5).

8 Ibid reg 20(6).

9 Ibid reg 20(7) (amended by SI 2007/603).

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### **1227. Complaints procedure in Wales.**

The registered person<sup>1</sup> must prepare and follow a written procedure ('the complaints procedure') for considering complaints made to the registered person by a resident or person acting on the resident's behalf<sup>2</sup>. The complaints procedure must be appropriate to the needs of residents<sup>3</sup> and must include provision for the consideration of complaints made about the registered person<sup>4</sup>.

The registered person must ensure that the residents, representatives of residents and any authority which has arranged for the accommodation of a resident at the residential family centre are aware of the existence of the complaints procedure, and must take all reasonable steps to give them a copy of the complaints procedure in an appropriate format or such format as may be requested<sup>5</sup>. The registered person must also ensure that the staff employed at the residential family centre are informed about, given a copy of, and appropriately trained in the operation of, the complaints procedure<sup>6</sup>.

The complaints procedure must include the name, address and telephone number of the appropriate office in relation to Wales<sup>7</sup> and the procedure, if any, that has been notified to the registered person for the making of complaints<sup>8</sup>. The complaints procedure must also include provision for the local resolution of complaints at an early stage where appropriate<sup>9</sup>. Where the complaints procedure includes provision for a formal consideration, this provision must be approved<sup>10</sup>.

The complaints procedure must be operated in accordance with the principle that the welfare of the resident is safeguarded and promoted and account must be taken of the ascertainable wishes and feelings of the resident<sup>11</sup>. When a complaint is made, the registered person must advise the complainant of his right to complain at any time to the authority which has arranged for the accommodation of the resident at the residential family centre and the registered person must inform the complainant of the availability of any advocacy services which the registered person believes may be of assistance to the complainant<sup>12</sup>. Where relevant and the complainant is a child, the registered person must advise the complainant that a local authority receiving a complaint must provide information and assistance for complainants, and must in particular offer help in obtaining an advocate<sup>13</sup>. The registered person can in any case where it is appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the complaint<sup>14</sup>.

The registered person must keep a written record of any complaint, the outcome of the investigation, and any action taken in response; and the registered person must supply to the appropriate office in relation to Wales at its request a statement containing a summary of the complaints made during the preceding 12 months, and the action taken in response to each complaint<sup>15</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20(1) (reg 20 substituted by SI 2006/3251).

3 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20(2) (as substituted: see note 2 supra).



- 4 Ibid reg 20(3) (as substituted: see note 2 supra).
- 5 Ibid reg 20(4) (as substituted: see note 2 supra).
- 6 Ibid reg 20(5) (as substituted: see note 2 supra).
- 7 As to the appropriate office in relation to Wales see *ibid* reg 2(5).
- 8 Ibid reg 20(6) (as substituted: see note 2 supra).
- 9 Ibid reg 20(7) (as substituted: see note 2 supra). As the local resolution of complaints see para 1228 post.
- 10 Ibid reg 20(8) (as substituted: see note 2 supra). The approval of the National Assembly for Wales will only be given where the complaints procedure includes provision for the formal consideration to be undertaken by a person who is independent of the management of the residential family centre: reg 20(9) (as so substituted). As to the procedure for the formal consideration of complaints see para 1229 post.
- 11 Ibid reg 20A(1) (reg 20A added by SI 2006/3251).
- 12 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20A(2), (3) (as added: see note 11 supra).
- 13 Ibid reg 20A(3) (as added: see note 11 supra).
- 14 Ibid reg 20A(4) (as added: see note 11 supra).
- 15 Ibid reg 20A(5), (6) (as added: see note 11 supra).

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### **1228. Local resolution of complaints in Wales.**

Complaints that are dealt with locally must be resolved by the registered person<sup>1</sup> as soon as reasonably practicable and in any event within 14 days<sup>2</sup>. Where the complaint is accordingly resolved, the registered person must confirm in writing to the complainant the agreed resolution<sup>3</sup>. The registered person must confirm the local resolution of a complaint<sup>4</sup>.

1 For the meaning of 'registered person' see para 1203 note 1 ante.

2 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20B(1) (reg 20B added by SI 2006/3251). This time limit may be extended for up to a further 14 days with the agreement of the complainant: Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20B(4) (as so added).

3 Ibid reg 20B(2) (as added: see note 2 supra).

4 See ibid reg 20B(3) (as added: see note 2 supra).

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### **1229. Formal consideration of complaints in Wales.**

Complaints that are dealt with by way of formal consideration must be resolved as soon as reasonably practicable and in any event within 35 days of the request for formal consideration<sup>1</sup>. The outcome of a formal consideration must be confirmed in writing by the registered person<sup>2</sup> to the complainant and must summarise the nature and substance of the complaint, the investigation undertaken, the conclusions and the action to be taken as a result<sup>3</sup>.

The registered person must send a copy of the written response to a complaint to the appropriate office in relation to Wales, and to any authority which has arranged for the accommodation of a resident at the residential family centre<sup>4</sup>.

If the complaint has not been resolved within 35 days of the request for formal consideration, the registered person must notify the appropriate office in relation to Wales of the complaint and the reasons for the delay in resolution<sup>5</sup>.

If the complainant is a child the registered person must appoint an independent person who must take part in any consideration of the representations by the registered person<sup>6</sup>.

1 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20C(1) (reg 20C added by SI 2006/3251). This time limit may be extended with the agreement of the complainant: Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20C(4) (as so added).

2 For the meaning of 'registered person' see para 1203 note 1 ante.

3 Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20C(2) (as added: see note 1 supra).

4 Ibid reg 20C(3) (as added: see note 1 supra). As to the appropriate office in relation to Wales see reg 2(5).

5 Ibid reg 20C(5) (as added: see note 1 supra).

6 Ibid reg 20C(6) (as added: see note 1 supra).

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### **1230. Complaints subject to concurrent consideration of complaints in Wales.**

Where a complaint which is subject to concurrent consideration, that is, a complaint which relates to any matter:

- 3160 (1) about which the complainant has stated in writing that he intends to take proceedings in any court or tribunal<sup>1</sup>; or
- 3161 (2) about which the registered person<sup>2</sup> is taking or is proposing to take disciplinary proceedings<sup>3</sup>; or
- 3162 (3) about which the registered person has been notified that an investigation is being conducted by any person or body in contemplation of criminal proceedings<sup>4</sup>; or
- 3163 (4) about which a meeting involving other bodies including the police has been convened to discuss issues relating to the protection of children or vulnerable adults<sup>5</sup>; or
- 3164 (5) about which the registered person has been notified that there are current investigations in contemplation of proceedings under the Care Standards Act 2000<sup>6</sup>,

the registered person must consider, in consultation with the complainant and any other appropriate person or body, how the complaint should be handled<sup>7</sup>.

The consideration of complaints subject to concurrent consideration may be discontinued if at any time it appears to the registered person that to continue would compromise or prejudice the other consideration<sup>8</sup>. However, the consideration can be resumed at any time and must be resumed where the concurrent consideration is discontinued or completed and the complainant requests that the complaint be considered under these provisions<sup>9</sup>. Where the registered person decides to discontinue the consideration of a complaint, the registered person must give notice of that decision to the complainant<sup>10</sup>. Where the consideration of a complaint has been discontinued, the registered person must ascertain the progress of the concurrent consideration and notify the complainant when it has been concluded<sup>11</sup>.

<sup>1</sup> Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20D(1)(a) (reg 20D added by SI 2006/3251).

<sup>2</sup> For the meaning of 'registered person' see para 1203 note 1 ante.

<sup>3</sup> Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20D(1)(b) (as added: see note 1 supra).

<sup>4</sup> Ibid reg 20D(1)(c) (as added: see note 1 supra).

<sup>5</sup> Ibid reg 20D(1)(d) (as added: see note 1 supra).

<sup>6</sup> Ie proceedings under the Care Standards Act 2000 s 59 (see SOCIAL SERVICES AND COMMUNITY CARE).

<sup>7</sup> Residential Family Centres (Wales) Regulations 2003, SI 2003/781, reg 20D(1)(e) (as added: see note 1 supra).

<sup>8</sup> Ibid reg 20D(2) (as added: see note 1 supra).

- 9 Ibid reg 20D(4), (6) (as added: see note 1 supra).
- 10 Ibid reg 20D(3) (as added: see note 1 supra).
- 11 Ibid reg 20D(5) (as added: see note 1 supra).

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## **(15) ARRANGEMENTS FOR THE IMPROVEMENT OF WELL-BEING AND PROMOTION OF WELFARE OF CHILDREN**

### **1231. Arrangements for the improvement of well-being and promotion of welfare of children.**

A children's services authority must make arrangements to promote co-operation between itself, each of its relevant partners, and such other persons or bodies as it considers appropriate, with a view to improving the well-being of children in the authority's area<sup>1</sup>. It may, in addition, be required to establish and operate databases containing information in respect of persons to whom such arrangements relate<sup>2</sup>.

Each children's services authority must also establish a local safeguarding children board for its area, the objective of which is to co-ordinate what is done by each person or body represented on the board for the purposes of safeguarding and promoting the welfare of children in the area of the authority by which it is established, and to ensure the effectiveness of what is done by each such person or body for those purposes<sup>3</sup>.

A children's services authority may from time to time be required to prepare and publish a plan setting out the authority's strategy for discharging its functions in relation to children and relevant young persons<sup>4</sup>.

A children's services authority may, and from a day to be appointed must, appoint relevant responsible officers<sup>5</sup>.

All arrangements under these provisions are subject to inspection<sup>6</sup>.

1 See, in relation to England, the Children Act 2004 ss 10, 11 (both as amended); and para 187 ante. In relation to Wales, see ss 25, 28 (both as amended); and para 192 ante.

2 See, in relation to England, *ibid* s 12 (as amended); and para 188 ante. In relation to Wales, see s 29 (as amended); and para 193 ante.

3 See, in relation to England, *ibid* ss 13-16; and para 189 ante. In relation to Wales, see ss 31-34 (s 31 as amended); and para 194 ante.

4 See, in relation to England, *ibid* s 17; and para 190 ante. In relation to Wales, see s 26; and para 192 ante.

5 See, in relation to England, *ibid* ss 18, 19 (s 18 as amended); and para 190 ante. In relation to Wales, see s 27; and para 192 ante.

6 See, in relation to England, *ibid* ss 20-22 (s 20 as amended); and para 191 ante. In relation to Wales, see s 30; and para 195 ante.

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## 12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN

### (1) OFFENDERS UNDER THE AGE OF EIGHTEEN

#### (i) Preliminary Procedures

##### 1232. General principles.

Every court, in dealing with a child or young person<sup>1</sup> who is brought before it, either as an offender or otherwise, must have regard to the welfare of the child or young person, and, in a proper case, must take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training<sup>2</sup>.

The principal aim of the youth justice system is to prevent offending by children and young persons, and all persons and bodies carrying out functions in relation to that system are under a duty to have regard to that aim<sup>3</sup>.

It is conclusively presumed that no child under the age of 10 years can be guilty of any criminal offence<sup>4</sup>. There was formerly a rebuttable presumption of criminal law that a child between the ages of 10 and 14 years was incapable of committing an offence, but this presumption has now been abolished<sup>5</sup>.

<sup>1</sup> For the purposes of the Children and Young Persons Act 1933, a 'child' is a person under age of 14; and a 'young person' is anyone between the age of 14 and 18: see s 107(1).

<sup>2</sup> Ibid s 44(1) (amended by the Children and Young Persons Act 1969 s 72(4), Sch 6). Cf the welfare principle applied by the court in family proceedings: see para 300 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10.

Until a day to be appointed the Secretary of State may direct that:

3165 (1) a person who is under the age of 18 years and is undergoing detention in a young offender institution (Children and Young Persons Act 1933 s 58(a) (amended by the Criminal Justice Act 1988 s 123(6), Sch 8 para 3(2)); or

3166 (2) a child or young person sentenced to be detained under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78) with respect to whom he is authorised to give directions under s 92 (Children and Young Persons Act 1933 s 58(b) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 3(1), (2)); or

3167 (3) a young person who has been ordered to be imprisoned and has been pardoned by Her Majesty on condition of his agreeing to undergo training in a school (Children and Young Persons Act 1933 s 58(c)),

must be transferred or sent to and detained in an approved school specified in the order; and any such order must be an authority for his detention in that approved school or in such other approved school as the Secretary of State may from time to time determine until such date as may be specified in the order: s 58. This is subject to the proviso that the date to be so specified must be not later than that on which he will in the opinion of the Secretary of State attain the age of 19 years nor later:

3168 (a) in the case of a person who was sentenced to detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91, than the date on which his detention would have expired (Children and Young Persons Act 1933 s 58 proviso (a) (amended by the Criminal Justice Act 1948 ss 79, 83, Schs 9, 10; and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 3(1), (3));

3169 (b) in the case of a young person who has been sentenced to imprisonment and pardoned as aforesaid, than three years from the date as from which his sentence began to run (Children and Young Persons Act 1933 s 58 proviso (b));

- 3170 (c) in the case of a person who was undergoing detention in a young offender institution, than the end of the period for which he would have been liable to be detained therein (s 58 proviso (c) (added by the Criminal Justice Act 1948 s 79, Sch 9; and amended by the Criminal Justice Act 1988 s 123(6), Sch 8 Pt I para 3(2)).

As from a day to be appointed, the Children and Young Persons Act 1933 s 58 (as amended) is prospectively repealed by the Children and Young Persons Act 1969 s 72(4), Sch 6. At the date at which this volume states the law, no such day had been appointed.

3 Crime and Disorder Act 1998 s 37(1), (2). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10. The purposes of sentencing adult offenders as set out in Criminal Justice Act 2003 s 142 are specifically disapplied to offenders aged under 18 at the time of conviction: see s 142(2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 615.

4 Children and Young Persons Act 1933 s 50 (amended by the Children and Young Persons Act 1963 s 16(1)). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1375. The courts' powers with regards to a child under 10 are limited to the making of a child safety order under the Crime and Disorder Act 1998 s 11: see para 625 ante. As to the criminal capacity of children under 14 years see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 37.

5 Crime and Disorder Act 1998 s 34. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1376. See *R v Secretary of State for the Home Department, ex p Venables*, *R v Secretary of State for the Home Department, ex p Thompson* (1996) 140 Sol Jo LB 127, (1996) Times, 7 May, DC; affd [1997] 1 All ER 327, [1997] 2 WLR 67, CA; affd [1998] AC 407, [1997] 3 All ER 97, HL (two boys aged 10 years found guilty of murdering a child aged two years). As to the criminal liability of children see further para 29 ante.



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### **1233. Local authority duties in relation to young offenders.**

Each local authority<sup>1</sup> has a duty:

- 906 (1) to ensure that youth justice services<sup>2</sup> are available as appropriate in its area<sup>3</sup>;
- 907 (2) to establish for its area one or more youth offending teams<sup>4</sup>; and
- 908 (3) to formulate and implement for each year a youth justice plan<sup>5</sup>.

1 'Local authority', in relation to England, means a county council, a district council whose district does not form part of an area that has a county council, a London borough council or the Common Council of the City of London; and, in relation to Wales, means a county council or a county borough council: Crime and Disorder Act 1998 s 46(1). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; and as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55.

2 'Youth justice services' means any of the following:

- 3171 (1) the provision of persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers (ibid s 38(4)(a));
- 3172 (2) the assessment of children and young persons, and the provision for them of rehabilitation programmes, for the purposes of s 66(2) (see para 1236 post) (s 38(4)(b));
- 3173 (3) the provision of support for children and young persons remanded or committed on bail while awaiting trial or sentence (s 38(4)(c));
- 3174 (4) the placement in local authority accommodation of children and young persons remanded or committed to such accommodation under the Children and Young Persons Act 1969 s 23 (as substituted and amended) (see para 1246 post) (s 38(4)(d));
- 3175 (5) the provision of reports or other information required by courts in criminal proceedings against children and young persons (s 38(4)(e));
- 3176 (6) the performance by youth offending teams and members of youth offending teams of functions under the Anti-social Behaviour Act 2003 ss 25-27 (Crime and Disorder Act 1998 s 38(4)(ee) (added by the Anti-social Behaviour Act 2003 s 29(2)));
- 3177 (7) the provision of persons to act as responsible officers in relation to individual support orders (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 309), parenting orders (see paras 1319-1322 post), child safety orders (see para 625 ante), reparation orders (see para 1308 post) and action plan orders (see para 1365 post) (Crime and Disorder Act 1998 s 38(4)(f) (amended by the Criminal Justice Act 2003 s 323(1), (5)));
- 3178 (8) the supervision of young persons sentenced to a community order under the Criminal Justice Act 2003 s 177 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 168 et seq) (Crime and Disorder Act 1998 s 38(4)(g) (amended by the Criminal Justice Act 2003, s 304, Sch 32, Pt 1, paras 87, 89(1), (2)));
- 3179 (9) the supervision of children and young persons sentenced to a detention and training order (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89 et seq) (including an order under the Armed Forces Act 2006 s 211 (see ARMED FORCES) or a supervision order (see para 1340 et seq) (Crime and Disorder Act 1998 s 38(4)(h)));

3180 (10) the post-release supervision of children and young persons under the Crime (Sentences) Act 1997 s 31 (see PRISONS vol 36(2) (Reissue) para 627) or by virtue of conditions imposed under the Criminal Justice Act 2003 s 250 (see PRISONS) (Crime and Disorder Act 1998 s 38(4)(i) (amended by the Criminal Justice Act 2003 s 332, Sch 32 paras 87, 89(1), (3)));

3181 (11) the performance of functions under the Powers of Criminal Courts (Sentencing) Act 2000 s 102(1) (period of detention and training under detention and training orders) by such persons as may be authorised by the Secretary of State under that provision (Crime and Disorder Act 1998 s 38(4)(j) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 197(a)));

3182 (12) the implementation of referral orders within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000 (see para 1290 et seq post) (Crime and Disorder Act 1998 s 38(4) (k) (added by the Youth Justice and Criminal Evidence Act 1999 s 67, Sch 4 paras 25, 28; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 197(b))).

Youth Justice Services are monitored by the Youth Justice Board: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1705. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1702.

3 See the Crime and Disorder Act 1998 s 38(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1702.

4 See ibid s 39(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. It is the duty of the youth offending team or teams to co-ordinate the provision of youth justice services: see s 39(7); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703.

5 See ibid s 40(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1704.

## UPDATE

### 1233 Local authority duties in relation to young offenders

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--1998 Act s 38(4) further amended: Armed Forces Act 2006 Sch 16 para 153; Criminal Justice and Immigration Act 2008 Sch 4 para 49, Sch 26 para 34 (Sch 26 para 34 partly in force: SI 2009/2780).

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### **1234. Detention by the police.**

There are particular provisions applicable to the treatment of juveniles whilst under police arrest<sup>1</sup>. Where a child<sup>2</sup> or young person<sup>3</sup> is in police detention, such steps as are practicable must be taken to ascertain the identity of a person responsible for his welfare<sup>4</sup>. If it is practicable to ascertain the identity of a person responsible for the welfare of the child or young person<sup>5</sup>, that person must be informed, unless it is not practicable to do so:

- 909 (1) that the child or young person has been arrested<sup>6</sup>;
- 910 (2) why he has been arrested<sup>7</sup>; and
- 911 (3) where he is being detained<sup>8</sup>.

The custody officer must, as soon as practicable, inform the appropriate adult<sup>9</sup> of the grounds for the juvenile's detention and ask the adult to attend at the police station to see the juvenile<sup>10</sup>. The appropriate adult must be allowed to consult the custody record<sup>11</sup> as soon as practicable after arrival at the police station, and to receive a copy on request when the juvenile leaves police detention or is taken before a court<sup>12</sup>. The appropriate adult must witness the procedure<sup>13</sup> by which the juvenile is notified by the custody officer of his rights to notify someone of his arrest, to consult the Codes of Practice, and to legal advice<sup>14</sup>.

If the juvenile is cautioned<sup>15</sup> in the absence of the appropriate adult, the caution must be repeated in the adult's presence<sup>16</sup>. A juvenile must not be interviewed or asked to provide or sign a written statement in the absence of an appropriate adult<sup>17</sup>. Where the appropriate adult is present at an interview, he must be informed that he is not expected simply to act as an observer, and also that the purposes of his presence are: (a) to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly and; (b) to facilitate communication with the person being interviewed<sup>18</sup>.

A juvenile must not be placed in a police cell unless no other secure accommodation is available and the custody officer considers that it is not practicable to supervise him if he is not placed in a cell, or the custody officer considers that a cell provides more comfortable accommodation than other secure accommodation in the police station<sup>19</sup>. The juvenile must not be placed in a cell with an adult<sup>20</sup>.

1    le anyone who appears to be under the age of 17: see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (July 2006) para 1.5; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 949. As to provisions that relate to all persons in police detention see the Police and Criminal Evidence Act 1984 Part IV (ss 34-52); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 938 et seq.

2    For the meaning of 'child' see para 613 note 1 ante.

3    For the purposes of the Children and Young Persons Act 1933 s 31 (as amended) (see para 1242 post) and s 34 (as amended), 'young person' means a person who has attained the age of 14 and is under the age of 17 years: s 31(2) (added by the Criminal Justice Act 1991 s 101(1), Sch 8 para 1, Sch 12 para 22).

4    Children and Young Persons Act 1933 s 34(2) (s 34(2) substituted, and s 34(3)-(11) added, by the Police and Criminal Evidence Act 1984 s 57). For these purposes, the reference to a child or young person who is in police detention includes a reference to a child or young person who has been detained under the terrorism provisions: Children and Young Persons Act 1933 s 34(10) (as so added). For the meaning of 'terrorism

provisions' see the Police and Criminal Evidence Act 1984 s 65 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 952 (definition applied by the Children and Young Persons Act 1933 s 34(11) (as so added)). Those detained under the Terrorism Act 2000 are subject to Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000 (July 2006) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 420 et seq) and not Code C: see Code H, para 1.1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 421.

The rights conferred on a child or young person by the Children and Young Persons Act 1933 s 34(2)-(8) (s 34(2) as substituted, s 34(3)-(8) as added) are in addition to his rights under the Police and Criminal Evidence Act 1984 s 56 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 952, 955): Children and Young Persons Act 1933 s 34(9) (as so added).

5 For these purposes, the persons who may be responsible for the welfare of a child or young person are his parent or guardian, or any other person who has for the time being assumed responsibility for his welfare: *ibid* s 34(5) (added by the Police and Criminal Evidence Act 1984 s 57). For the meaning of 'guardian' see para 747 note 13 ante. The reference to a parent or guardian in the Children and Young Persons Act 1933 s 34(5) (as added) is, in the case of a child or young person in the care of a local authority, a reference to that authority: s 34(8) (added by the Police and Criminal Evidence Act 1984 s 57; and amended by the Children Act 1989 s 108(7), Sch 15). The local authorities for the purposes of the Children and Young Persons Act 1933 Pts III, IV are the councils of counties (other than metropolitan counties) of metropolitan districts and of London boroughs and the Common Council of the City of London but, in relation to Wales, are the councils of counties and county boroughs: s 96(1A) (added by the Child Care Act 1980 s 89, Sch 5 para 1; and amended by the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 1(2)). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; and as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55. A person responsible for the welfare of a juvenile may also be a person who has assumed responsibility for the time being: Code C para 3.13. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 950. If it appears that at the time of his arrest a supervision order, as defined in the Powers of Criminal Courts (Sentencing) Act 2000 s 163 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250 et seq) or the Children Act 1989 Pt IV (ss 31-42) (as amended), is in force in respect of him, the person responsible for his supervision must also be informed as described in the Children and Young Persons Act 1933 s 34(3) (as added) (see the text and notes 6-8 *infra*) as soon as it is reasonably practicable to do so: s 34(7) (added by the Police and Criminal Evidence Act 1984 s 57; and amended by the Children Act 1989 s 108(5), Sch 13 para 6; and the Powers of Criminal Courts (Sentencing) Act 2000 s 168(1)). If it appears that at the time of his arrest the child or young person is being provided with accommodation by or on behalf of a local authority under the Children Act 1989 s 20 (see para 863 ante), the local authority must also be informed as described in the Children and Young Persons Act 1933 s 34(3) (as added) as soon as it is reasonably practicable to do so: s 34(7A) (added by the Children Act 1989 Sch 13 para 6). As to supervision orders see further para 1340 post.

6 Children and Young Persons Act 1933 s 34(3)(a) (added by the Police and Criminal Evidence Act 1984 s 57). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 950. For these purposes, 'arrest' includes detention under the terrorism provisions: Children and Young Persons Act 1933 s 34(10) (as added: see note 4 *supra*). Where information falls to be given under s 34(3) (as added), it must be given as soon as it is practicable to do so: s 34(4) (as so added). See also Code C para 3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 950.

If it is practicable to give a person responsible for the welfare of the child or young person the information required by the Children and Young Persons Act 1933 s 34(3) (as added), that person must be given it as soon as it is practicable to do so: s 34(6) (added by the Police and Criminal Evidence Act 1984 s 57).

7 Children and Young Persons Act 1933 s 34(3)(b) (added by the Police and Criminal Evidence Act 1984 s 57). See note 6 *supra*.

8 Children and Young Persons Act 1933 s 34(3)(c) (added by the Police and Criminal Evidence Act 1984 s 57). See note 6 *supra*.

9 For these purposes, 'the appropriate adult' means:

3183 (1) a juvenile's parent or guardian or, if the juvenile is in local authority or voluntary organisation care, or is otherwise being looked after by under the Children Act 1989, the a person representing that authority or organisation (Code C para 1.7(a)(i));

3184 (2) a social worker (Code C para 1.7(a)(ii)); or

- 3185 (3) failing either of the adults described in head (1) or head (2) supra, another responsible adult aged 18 or over who is not a police officer or employed by the police (Code C: para 1.7(a) (iii)).

See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 940.

The police should take all reasonable steps to secure the attendance of the parent or carer before requesting an appropriate adult: Youth Justice Board, National Standards for Youth Justice Service (2004) (B16) para 2.7.

10 Code C para 3.15. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 949. A person will not be an appropriate adult if he is suspected of involvement in the offence, nor should an estranged parent act as the appropriate adult where the juvenile objects to his presence: Code C: Guidance Note paras 1B, 1C. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 940.

11 A record must be maintained in respect of every person detained at a police station: Code C paras 2.3, 2.5. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 940.

12 Code C paras 2.5, 2.6. This entitlement lasts for 12 months after the juvenile's release: Code C para 2.4A. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 940.

13 If the appropriate adult is not present when the provisions of Code C paras 3.1-3.5 are complied with, then these provisions must be complied with again in the presence of the appropriate adult once that person arrives: Code C para 3.17. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 949.

14 Code C paras 3.1-3.5, 3.17. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 722-723.

15 As to cautions see Code C paras 10.1-10.4; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 959.

16 Code C para 10.12. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 959.

17 Code C para 11.15. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 962. For exceptions to this rule see Code C paras 11.1, 11.18, 11.20 and Annex C; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 963, 1042.

18 Code C para 11.17. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) 962.

19 Code C para 8.8. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 957.

20 Code C para 8.8. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 957.

## **UPDATE**

### **1234 Detention by the police**

NOTE 5--Children and Young Persons Act 1933 s 34(7) further amended, s 34(7B) added: Criminal Justice and Immigration Act 2008 Sch 4 para 2, Sch 28 Pt 1.

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### **1235. Reprimands and warnings.**

Where:

- 912 (1) a constable has evidence that a child<sup>1</sup> or young person<sup>2</sup> ('the offender') has committed an offence<sup>3</sup>;
- 913 (2) the constable considers that the evidence is such that, if the offender were prosecuted for the offence, there would be a realistic prospect of his being convicted<sup>4</sup>;
- 914 (3) the offender admits to the constable that he committed the offence<sup>5</sup>;
- 915 (4) the offender has not previously been convicted of an offence<sup>6</sup>; and
- 916 (5) the constable is satisfied that it would not be in the public interest for the offender to be prosecuted<sup>7</sup>,

the constable may reprimand<sup>8</sup> the offender if the offender has not previously been reprimanded or warned<sup>9</sup>.

The constable may warn the offender if:

- 917 (a) the offender has not previously been warned<sup>10</sup>; or
- 918 (b) where the offender has previously been warned, the offence was committed more than two years after the date of the previous warning, and the constable considers the offence to be not so serious as to require a charge to be brought<sup>11</sup>.

However, no person may be warned under head (b) above more than once<sup>12</sup>.

Where the offender has not been previously reprimanded, the constable must warn rather than reprimand the offender if he considers the offence to be so serious as to require a warning<sup>13</sup>.

The constable must:

- 919 (i) where the offender is under the age of 17, give any reprimand or warning in the presence of an appropriate adult<sup>14</sup>; and
- 920 (ii) explain to the offender and, where he is under that age, the appropriate adult in ordinary language, the implications of a reprimand and a warning<sup>15</sup>.

The Secretary of State<sup>16</sup> must publish in such manner as he considers appropriate, guidance as to:

- 921 (A) the circumstances in which it is appropriate to give reprimands or warnings, including criteria for determining<sup>17</sup> whether an offence is not so serious as to require a charge to be brought, and for determining<sup>18</sup> whether an offence is so serious as to require a warning<sup>19</sup>;
- 922 (B) the places where reprimands and warnings may be given<sup>20</sup>;
- 923 (C) the category of constable by whom reprimands and warnings may be given<sup>21</sup>; and

924 (D) the form which reprimands and warnings are to take and the manner in which they are to be given and recorded<sup>22</sup>.

1 For the meaning of 'child' see para 627 note 5 ante.

2 For the meaning of 'young person' see para 627 note 6 ante.

3 Crime and Disorder Act 1998 s 65(1)(a).

4 Ibid s 65(1)(b).

5 Ibid s 65(1)(c).

6 Ibid s 65(1)(d).

7 Ibid s 65(1)(e). Warnings should not be administered to an offender in circumstances where there can be no reasonable expectation that this will curb his offending: see Home Office Circular 14/2006, para. 11.

8 As to the effects of reprimands and warnings see para 1236 post.

9 Crime and Disorder Act 1998 s 65(2). This is subject to s 65(4): see the text to note 13 infra. No caution may be given to a child or young person after the commencement of s 65: s 65(8). As to the commencement of s 65 see s 121(2); the Crime and Disorder Act 1998 (Commencement No 2 and Transitional Provisions) Order 1998, SI 1998/2327; and the Crime and Disorder Act 1998 (Commencement No 7) Order 2000, SI 2000/924. The decision whether to reprimand, warn or charge will depend on the seriousness of the offence as measured by reference to the ACPO Gravity Factor System which scores offences between 1 (always the minimum response applicable) and 4 (always charge) and taking account of public interest considerations and the victim's views: see Home Office Circular 14/2006, paras 4.1-4.3, 9, Annex D.

10 Crime and Disorder Act 1998 s 65(3)(a).

11 Ibid s 65(3)(b).

12 Ibid s 65(3).

13 Ibid s 65(4).

14 Ibid s 65(5)(a) (substituted by the Criminal Justice and Court Services Act 2000 s 56(1)(a)). For these purposes, 'appropriate adult', in relation to a child or young person, means:

3186 (1) his parent or guardian or, if he is in the care of a local authority or voluntary organisation, a person representing that authority or organisation (Crime and Disorder Act 1998 s 65(7)(a));

3187 (2) a social worker of a local authority(s 65(7)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4));

3188 (3) if no person falling within head (1) or head (2) supra is available, any responsible person aged 18 or over who is not a police officer or a person employed by the police (Crime and Disorder Act 1998 s 65(7)(c)).

15 Ibid s 65(5)(b). Certain implications relating to reprimands and warnings must be explained by a constable to an offender and the appropriate adult under s 65(5) (as amended): see para 1236 post. In addition, the effect of any guidance issued under s 66(3) must also be explained: see para 1236 post.

16 See the Home Office and the Youth Justice Board publications *Final Warning Scheme--Guidance for the Police* (April 2000); *Final Warning Scheme--Further Guidance for the Police and Youth Offending Teams* (January 2001); *The Final Warning Scheme* (November 2002); Home Office Circular 14/2006 *The Final Warning Scheme* (May 2006). As to the Secretary of State see para 155 ante.

17 Ie for the purposes of the Crime and Disorder Act 1998 s 65(3)(b): see head (b) in the text.

18 Ie for the purposes of ibid s 65(4): see the text and note 13 supra.

19 Ibid s 65(6)(a).

- 20 Ibid s 65(6)(aa) (added by the Criminal Justice and Court Services Act 2000 s 56(1)(b)).
- 21 Crime and Disorder Act 1998 s 65(6)(b).
- 22 Ibid s 65(6)(c).

## **UPDATE**

### **1235 Reprimands and warnings**

TEXT AND NOTES--Crime and Disorder Act 1998 s 65 further amended: Criminal Justice and Immigration Act 2008 Sch 9 para 2 (in force in relation to specified police areas: see SI 2009/2780). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 18 (in force in relation to specified police areas: see SI 2009/2780).

As to provision for the giving of youth conditional cautions to children and young persons see PARA 1236A.



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### **1236. Effects of reprimands and warnings on young offenders.**

Once a child or young person has been reprimanded, no criminal charge can endure in respect of that offence<sup>1</sup>. However, any reprimand of a child or young person<sup>2</sup>, any warning of a child or young person<sup>3</sup>, and any report on a failure by a child or young person to participate in a rehabilitation programme<sup>4</sup> arranged for him<sup>5</sup> may be cited in criminal proceedings in the same circumstances as a conviction of the person may be cited<sup>6</sup>.

Where a constable warns a child or young person<sup>7</sup>, he must as soon as practicable refer that child or young person to a youth offending team<sup>8</sup>. A youth offending team must assess any child or young person so referred to it, and unless it considers it inappropriate to do so, must arrange for him to participate in a rehabilitation programme<sup>9</sup>. The Secretary of State<sup>10</sup> must publish, in such manner as he considers appropriate, guidance as to what should be included in such a rehabilitation programme arranged for a child or young person, the manner in which any failure by a child or young person to participate in such a programme is to be recorded, and the persons to whom any such failure is to be notified<sup>11</sup>. Where a child or young person who has been warned<sup>12</sup> is convicted of an offence committed within two years of the warning, the court by or before which he is so convicted<sup>13</sup>:

- 925 (1) must not make a conditional discharge order<sup>14</sup> in respect of the offence unless it is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its doing so<sup>15</sup>; and
- 926 (2) where it does so, must state in open court that it is of that opinion and why it is<sup>16</sup>.

1 *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369, [2005] 1 WLR 1184. Where the offence is under the Sexual Offences Act 2003 Sch 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 560), the notification requirements of the sex offenders register will be triggered by a reprimand or warning: see Home Office Circular 14/2006, para 4. As to the compliance of the procedure with human rights see *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369, [2005] 1 WLR 1184.

2 Ie under the Crime and Disorder Act 1998 s 65 (as amended): see para 1235 ante. For the meaning of 'child' see para 627 note 5 ante. For the meaning of 'young person' see para 627 note 6 ante.

3 See note 2 supra.

4 For these purposes, 'rehabilitation programme' means a programme the purpose of which is to rehabilitate participants and to prevent them from re-offending: Crime and Disorder Act 1998 s 66(6).

5 Ie under *ibid* s 65(2): see para 1235 note 9 ante.

6 *Ibid* ss 65(9), 66(5).

7 See note 2 supra.

8 Crime and Disorder Act 1998 ss 65(9), 66(1).

9 *Ibid* s 66(2).

10 See the Home Office and the Youth Justice Board publications *Final Warning Scheme--Guidance for Youth Offending Teams* (April 2000); *Final Warning Scheme--Further Guidance for the Police and Youth Offending*

*Teams* (January 2001); *The Final Warning Scheme* (November 2002); and Home Office Circular 14/2006 *The Final Warning Scheme* (May 2006). As to the Secretary of State see para 155 ante.

11 Crime and Disorder Act 1998 ss 65(9), 66(3).

12 See note 2 supra.

13 Crime and Disorder Act 1998 ss 65(9), 66(4).

14 le under the Powers of Criminal Courts (Sentencing) Act 2000 s 12(1)(b): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

15 Crime and Disorder Act 1998 ss 66(4)(a) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 198).

16 Crime and Disorder Act 1998 s 66(4)(b).

## **UPDATE**

### **1236 Effects of reprimands and warnings on young offenders**

TEXT AND NOTES--As to provision for the giving of youth conditional cautions to children and young persons see PARA 1236A.

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### **1236A. Young offenders: youth conditional cautions.**

The following provisions are partly in force: SI 2009/140, SI 2009/860, SI 2009/2780. For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 18 (partly in force: see SI 2009/2780).

An authorised person may give a youth conditional caution to a child or young person ('the offender') if (1) the offender has not previously been convicted of an offence, and (2) each of the five requirements in the Crime and Disorder Act 1998 s 66B is satisfied: Crime and Disorder Act 1998 s 66A(1) (ss 66A-66H added by Criminal Justice and Immigration Act 2008 Sch 9 para 3). In the Crime and Disorder Act 1998 s 66A, 'authorised person' means a constable, an investigating officer, or a person authorised by a relevant prosecutor for the purposes of s 66A: s 66A(7). For the meaning of 'investigating officer' and 'relevant prosecutor' see Crime and Disorder Act 1998 s 66H. 'Youth conditional caution' means a caution which is given in respect of an offence committed by the offender and which has conditions attached to it with which the offender must comply: s 66A(2). The conditions which may be attached to such a caution are those which have one or more of the following objects (a) facilitating the rehabilitation of the offender; (b) ensuring that the offender makes reparation for the offence; (c) punishing the offender: s 66A(3). The conditions that may be attached to a youth conditional caution include (i) (subject to s 66C) a condition that the offender pay a financial penalty; (ii) a condition that the offender attend at a specified place at specified times: s 66A(4). 'Specified' means specified by a relevant prosecutor: s 66A(4). Conditions attached by virtue of head (ii) may not require the offender to attend for more than 20 hours in total, not including any attendance required by conditions attached for the purpose of facilitating the offender's rehabilitation: s 66A(5). The Secretary of State may by order amend s 66A(5) by substituting a different figure: s 66A(6).

The first requirement is that the authorised person has evidence that the offender has committed an offence: Crime and Disorder Act 1998 s 66B(1). The second requirement is that a relevant prosecutor decides that there is sufficient evidence to charge the offender with the offence, and that a youth conditional caution should be given to the offender in respect of the offence: s 66B(2). The third requirement is that the offender admits to the authorised person that he committed the offence: s 66B(3). The fourth requirement is that the authorised person explains the effect of the youth conditional caution to the offender and warns him that failure to comply with any of the conditions attached to the caution may result in his being prosecuted for the offence: s 66B(4). If the offender is aged 16 or under, the explanation and warning mentioned in s 66B(4) must be given in the presence of an appropriate adult (see PARA 1235): s 66B(5). The fifth requirement is that the offender signs a document which contains (A) details of the offence, (B) an admission by him that he committed the offence, (C) his consent to being given the youth conditional caution, and (D) the conditions attached to the caution: s 66B(6).

Provision is made for the attachment of a condition that the offender pay a financial penalty (a 'financial penalty condition') to a youth conditional caution given in respect of a prescribed offence: see Crime and Disorder Act 1998 s 66C. For the offences so prescribed, see Crime and Disorder Act 1998 (Youth Conditional Cautions: Financial Penalties) Order 2009, SI 2009/2781.

A relevant prosecutor may, with the consent of the offender, vary the conditions attached to a youth conditional caution by modifying or omitting any of the conditions; or adding a condition: see Crime and Disorder Act 1998 s 66D.

If the offender fails, without reasonable excuse, to comply with any of the conditions attached to the youth conditional caution, criminal proceedings may be instituted against the person for the offence in question: see Crime and Disorder Act 1998 s 66E.

Where a person who has been given a youth conditional caution is convicted of an offence committed within two years of the giving of the caution, the court by or before which the person is so convicted (aa) may not make an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 12(1)(b) (conditional discharge) in respect of the offence unless it is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its doing so; and (bb) where it does make such an order, must state in open court that it is of that opinion and why it is: Crime and Disorder Act 1998 s 66F.

The Secretary of State must prepare a code of practice in relation to youth conditional cautions: see Crime and Disorder Act 1998 s 66G, and the Crime and Disorder Act 1998 (Youth Conditional Cautions: Code of Practice) Order 2010, SI 2010/127.

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### **1237. Anti-social behaviour orders.**

Anti-social behaviour orders may be made in respect of any child aged ten or over by a relevant authority<sup>1</sup> if the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself and the order is necessary to protect those persons from further anti-social acts<sup>2</sup>.

Proceedings for an anti-social behaviour order are civil proceedings, and require no need to prove mens rea; but the criminal standard of proof must be satisfied<sup>3</sup>.

The application is by way of complaint to a magistrates court<sup>4</sup>, who must make an order for a minimum length of two years<sup>5</sup>. Where an anti-social behaviour order is made in relation to a young person aged 16 or younger, the court must make a parenting order in respect of his parents if the court considers it would be desirable in the interests of preventing further anti-social behaviour<sup>6</sup>. In respect of a young person aged 16 or younger, the court, having obtained any information which it considers necessary, must consider making an individual support order for a period not exceeding six months<sup>7</sup>.

The breach of a condition of an anti-social behaviour order without reasonable excuse is a criminal offence<sup>8</sup>. Where a child is guilty of such a breach, the court may not conditionally discharge the offender<sup>9</sup>. Breach of an individual support order is a criminal offence punishable by fine<sup>10</sup>.

An anti-social behaviour order may also be made where a child is convicted of a relevant offence<sup>11</sup>, and the court considers that the offender has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself, and that an order is necessary to protect persons in any place in England and Wales from further anti-social acts by him<sup>12</sup>.

1 For the meaning of 'relevant authority' see the Crime and Disorder Act 1998 s 1(1A) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 307.

2 See *ibid* s 1; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 496 et seq.

3 *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593.

4 See the Crime and Disorder Act 1998 s 1(3) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 496.

5 See *ibid* s 1(7); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 496.

6 See *ibid* s 8(1)(b), (6), and see para 1320 post.

7 See *ibid* s 1AA (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 309-310.

8 See *ibid* s 1AA(10) (as added and amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 311.

9 See *ibid* s 1(11) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 311.

10 See *ibid* s 1AB(3) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 310.

11 For the meaning of 'relevant offence' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

12 See the Crime and Disorder Act 1998 s 1C(2) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1238. Detention after charge.

### **1238. Detention after charge.**

Where a juvenile arrested<sup>1</sup> for an offence other than under a warrant indorsed for bail<sup>2</sup> is then charged with an offence, the custody officer<sup>3</sup> must order his release from detention either on bail or free of bail unless<sup>4</sup>:

- 927 (1) the arrested person's name and address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address<sup>5</sup>;
- 928 (2) the custody officer has reasonable grounds for believing that the arrested person will fail to appear in court to answer bail<sup>6</sup>;
- 929 (3) in the case of a person arrested for an imprisonable offence<sup>7</sup>, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence<sup>8</sup>;
- 930 (4) in a case where a drug sample may be taken to test for the presence of a Class A drug<sup>9</sup> and the arrested person has attained the minimum age<sup>10</sup>, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable the sample to be taken<sup>11</sup>;
- 931 (5) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property<sup>12</sup>;
- 932 (6) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence<sup>13</sup>;
- 933 (7) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection<sup>14</sup>; or
- 934 (8) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests<sup>15</sup>.

If the release of a person arrested is not required by reason of any one or more matters mentioned in heads (1) to (8) above, the custody officer may authorise him to be kept in police detention but may not authorise him to be kept in police detention by virtue of head (4) above after the period of six hours beginning when he was charged with the offence<sup>16</sup>. Where a custody officer authorises a person who has been charged to be kept in police detention, he must, as soon as practicable, make a written record of the grounds for the detention<sup>17</sup>. A written notice of the charge must be given to the appropriate adult<sup>18</sup>.

Where a custody officer authorises an arrested juvenile to be kept in police detention<sup>19</sup>, the custody officer must, unless he certifies that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so, or in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation<sup>20</sup> is available and that keeping him in other local authority accommodation<sup>21</sup> would not be adequate to protect the public from serious harm from him<sup>22</sup>, secure that the arrested juvenile is moved to local authority accommodation<sup>23</sup>. Where an arrested juvenile is moved to local authority accommodation<sup>24</sup>, it is lawful for any person acting on behalf of the authority to detain him<sup>25</sup>.

A child<sup>26</sup> or young person<sup>27</sup> arrested in pursuance of a warrant must not be released unless his parent<sup>28</sup> or guardian (with or without sureties) enters into a recognisance for such amount as the custody officer at the police station where he is detained considers will secure his attendance at the hearing of the charge<sup>29</sup>. Such a recognisance may, if the custody officer thinks fit, be conditioned for the attendance of the parent or guardian at the hearing in addition to the child or young person<sup>30</sup>.

1 'Arrested juvenile' means a person arrested with or without a warrant who appears to be under the age of 17: Police and Criminal Evidence Act 1984 s 37(15) (definition amended by the Children Act 1989 s 108(7), Sch 15).

2 As to a warrant indorsed for bail see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 941.

3 As to custody officers see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 944.

4 Police and Criminal Evidence Act 1984 s 38(1) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 54). The custody officer, in taking the decisions required by the Police and Criminal Evidence Act 1984 s 38(1)(a) (as amended) and s 38(1)(b) (see the text to notes 5-15 infra) (except s 38(1)(a)(i), (vi) (as added) and s 38(1)(b)(ii)), must have regard to the same considerations as those to which a court is required to have regard in taking the corresponding decisions under the Bail Act 1976 s 4 (as amended), Sch 1 Pt I para 2 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1170): Police and Criminal Evidence Act 1984 s 38(2A) (added by the Criminal Justice and Public Order Act 1994 Sch 10 para 54).

5 Police and Criminal Evidence Act 1984 s 38(1)(a)(i), (b)(i).

6 Ibid s 38(1)(a)(ii), (b)(i) (s 38(1)(a)(ii) substituted by the Criminal Justice and Public Order Act 1994 s 28(2)).

7 For these purposes, 'imprisonable offence' has the same meaning as in the Bail Act 1976 Sch 1 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1170): Police and Criminal Evidence Act 1984 s 38(7A) (added by the Criminal Justice and Public Order Act 1994 s 28(3), (4)).

8 Police and Criminal Evidence Act 1984 s 38(1)(a)(iii), (b)(i) (substituted by the Criminal Justice and Public Order Act 1994 s 28(2)).

9 Ie under the Police and Criminal Evidence Act 1984 s 63B (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) 1031.

10 'Minimum age' means the age specified in ibid s 63B(3)(b) (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) 1031): s 38(6A) (added by the Children Act 1989 s 108(5), Sch 13 para 53(2); substituted by the Criminal Justice Act 1991 s 59; and amended by the Criminal Justice Act 2003 s 304, Sch 32 para 44).

11 Police and Criminal Evidence Act 1984 s 38(1)(a)(iiia), (b)(i) (s 38(1)(a)(iiia) added by the Criminal Justice and Court Services Act 2000 s 57(1), (3)(a); and substituted by the Drugs Act 2005 s 23(1), Sch 1 paras 1, 3(a); and the Police and Criminal Evidence Act 1984 s 38(1)(b) amended by the Criminal Justice Act 2003 s 5(1), (2)(a)(ii)).

12 Police and Criminal Evidence Act 1984 s 38(1)(a)(iv).

13 Ibid s 38(1)(a)(v), (b)(i).

14 Ibid s 38(1)(a)(vi), (b)(i).

15 Ibid s 38(1)(b)(ii).

16 Ibid s 38(2) (amended by the Criminal Justice and Court Services Act 2000 s 57(1), (3)(b)).

17 Police and Criminal Evidence Act 1984 s 38(3). The written record must be made in the presence of the person charged who must at that time be informed by the custody officer of the grounds for his detention: s 38(4). However, s 38(4) does not apply where the person charged is, at the time when the written record is made:

3189 (1) incapable of understanding what is said to him (s 38(5)(a));



3190 (2) violent or likely to become violent (s 38(5)(b)); or

3191 (3) in urgent need of medical attention (s 38(5)(c)).

18 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (July 2006) para 16.3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 1042. This is subject to Code C para 2.6A: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 940.

19 Ie under the Police and Criminal Evidence Act 1984 s 38(1) (as amended): see the text and notes 4-15 *supra*.

20 'Secure accommodation' means accommodation provided for the purpose of restricting liberty: *ibid* s 38(6A) (added by the Children Act 1989 s 108(5), Sch 13 para 53; and substituted by the Criminal Justice Act 1991 s 59).

21 'Local authority accommodation' means accommodation provided by or on behalf of a local authority (within the meaning of the Children Act 1989): Police and Criminal Evidence Act 1984 s 38(6A) (as added and substituted: see note 10 *supra*). For the meaning of 'local authority' see para 1240 note 1 post; definition applied by s 38(8) (amended by the Children Act 1989 Sch 13 para 53(3)).

22 Any reference, in relation to an arrested juvenile charged with a violent or sexual offence, to protecting the public from serious harm from him must be construed as a reference to protecting members of the public from death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him: Police and Criminal Evidence Act 1984 s 38(6A) (as added and substituted: see note 10 *supra*). For these purposes, 'violent offence' and 'sexual offence' have the same meanings as in the Criminal Justice Act 2003 Sch 15 Pt 1 (violent offences) and Sch 15 Pt 2 (sexual offences) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 70-71): Police and Criminal Evidence Act 1984 s 38(6A) (as so added and substituted).

23 *Ibid* s 38(6) (substituted by the Criminal Justice Act 1991 s 59; and amended by the Criminal Justice and Public Order Act 1994 s 24). A certificate made under the Police and Criminal Evidence Act 1984 s 38(6) (as substituted and amended) in respect of an arrested juvenile must be produced to the court before which he is first brought thereafter: s 38(7). The police have a wide discretion in deciding which authority to approach: *R (on the application of M) v Gateshead Council* [2006] EWCA Civ 221, [2006] QB 650, [2007] 1 All ER 1262.

24 Ie under the Police and Criminal Evidence Act 1984 s 38(6) (as substituted and amended).

25 *Ibid* s 38(6B) (added by the Children Act 1989 Sch 13 para 53).

26 For these purposes, 'child' means a person under the age of 14: see the Children and Young Persons Act 1969 s 70(1); and para 3 *ante*.

27 For these purposes, 'young person' means a person who has attained the age of 14 and is under the age of 17 years: *ibid* s 29(2) (added by the Criminal Justice Act 1991 s 68, Sch 8 para 4(1)).

28 In the case of a child or young person:

3192 (1) whose father and mother were not married to each other at the time of his birth (Children and Young Persons Act 1969 s 70(1A)(a) (s 70(1A) added by the Family Law Reform Act 1987 ss 8(1), 33(1), Sch 2 para 26; and substituted by the Crime and Disorder Act 1998 s 106, Sch 7 para 10)); and

3193 (2) with respect to whom a residence order is in force in favour of the father (Children and Young Persons Act 1969 s 70(1A)(b) (as so added and substituted)),

any reference in the Children and Young Persons Act 1969 to the parent of the child or young person includes, unless the contrary intention appears, a reference to the father (s 70(1A) (as so added and substituted)).

Such a reference to a child or young person whose father and mother were not married to each other at the time of his birth is to be construed in accordance with the Family Law Reform Act 1987 s 1 (see para 125 *ante*): Children and Young Persons Act 1969 s 70(1B) (added by the Family Law Reform Act 1987 ss 8(1), 33(1), Sch 2 para 26; and substituted by the Crime and Disorder Act 1998 Sch 7 para 10). For the meaning of 'residence order' see para 262 *ante*; definition applied by the Children and Young Persons Act 1969 s 70(1B) (as so added and substituted).

29 Ibid s 29(1) (substituted by the Police and Criminal Evidence Act 1984 s 119(1), Sch 6 para 19(b); amended by the Criminal Justice Act 1988 s 170, Sch 15 para 36, Sch 16; and renumbered by the Criminal Justice Act 1991 Sch 8 para 4(1)).

30 Children and Young Persons Act 1969 s 29(1) (as substituted, amended and renumbered: see note 29 *supra*).

## **UPDATE**

### **1238 Detention after charge**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1239. Restrictions on proceedings against young persons.

### **1239. Restrictions on proceedings against young persons.**

It is the duty of a person who decides to lay an information<sup>1</sup> in respect of an offence in a case where he has reason to believe that the alleged offender is a young person<sup>2</sup> to give notice of the decision to the appropriate local authority<sup>3</sup> unless he is himself that authority<sup>4</sup>.

1 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) para 912. See also CrimPR Glossary.

2 For the purposes of the Children and Young Persons Act 1969 ss 5(8), 7(7), (8), 9(1), 23(1), 29(1), 'young person' is to be construed as including a child who has attained the age of ten years: Children and Young Persons Act 1969 (Transitional Modifications of Part I) Order 1970, SI 1970/1882, art 4. For the meaning of 'child' see para 1238 note 26 ante.

3 For these purposes, 'the appropriate local authority', in relation to a young person, means the local authority for the area in which it appears to the informant in question that the young person resides or, if the young person appears to the informant not to reside in the area of a local authority, the local authority in whose area it is alleged that the relevant offence or one of the relevant offences was committed: Children and Young Persons Act 1969 s 5(9).

4 Ibid s 5(8). In the case of a person under 18 but over the age of 13 an officer of the local probation board must also be notified: see s 34(2) (amended by the Children Act 1989 s 108(7), Sch 15; and the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt I para 4(1)(a), (2)); and the Children and Young Persons Act 1969 (Transitional Modifications of Part I) Order 1970, SI 1970/1882, art 5 (amended by SI 1973/1083). Where notice is to be given to a local authority under the Children and Young Persons Act 1969 s 5(8) it does not have to be given before the defendant first appears at court, but as soon as reasonably practicable after the decision to prosecute has been made: *DPP v Cottier* [1996] 3 All ER 126, [1996] 1 WLR 826, DC. These provisions are directory rather mandatory and a failure to notify does not render those proceedings or any subsequent conviction and sentence a nullity: *R v Marsh (Dwayne)* [1997] 1 WLR 649, (1996) 140 Sol Jo LB 116, CA.

### **UPDATE**

### **1239 Restrictions on proceedings against young persons**

NOTE 1--CrimPR Glossary now Criminal Procedure Rules 2010, SI 2010/60, Glossary.

NOTE 4--1969 Act s 34(2) further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1240. Investigations by local authorities.

### **1240. Investigations by local authorities.**

Where a local authority<sup>1</sup> or local education authority<sup>2</sup> brings proceedings for an offence alleged to have been committed by a young person<sup>3</sup>, or is notified that any such proceedings are to be brought, it is the authority's duty to make such investigations and provide the court before which the proceedings are heard with such information relating to the home surroundings, school record, health and character of the person in respect of whom the proceedings are brought as appear to the authority likely to assist the court<sup>4</sup>. The local authority or local education authority is relieved of this duty if it is of the opinion that such action is unnecessary<sup>5</sup>, but if the court requests it to make investigations or provide information, or make further investigations and provide further information, relating to these matters, then it is the authority's duty to comply with the request<sup>6</sup>.

1 'Local authority', except in relation to proceedings under the Children and Young Persons Act 1969 s 1 (repealed) instituted by a local education authority (see note 2 infra), means the council of a non-metropolitan county or of a county borough, metropolitan district or London borough or the Common Council of the City of London: Children and Young Persons Act 1969 s 70(1) (definition amended by the Local Government Act 1972 s 195(6), Sch 23 para 16; and the Local Government (Wales) Act 1994 s 22(4), Sch 10 para 6). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; and as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55.

2 As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

3 For the meaning of 'young person' see para 1239 note 2 ante.

4 Children and Young Persons Act 1969 s 9(1) (amended by the Children Act 1989 s 108(7), Sch 15). The Secretary of State may by order provide that any reference to a young person in the Children and Young Persons Act 1969 s 9(1) (as amended) is to be construed as including a child who has attained such age as may be so specified: s 34(1). As to the Secretary of State see para 155 ante.

5 Ibid s 9(1) (as amended: see note 4 supra).

6 Ibid s 9(2).

### **UPDATE**

### **1240 Investigations by local authorities**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1241. Attendance of parent or guardian at court.

### **1241. Attendance of parent or guardian at court.**

Where a child or young person<sup>1</sup> is charged with an offence or is for any other reason brought before a court, the court may, and in the case of a child or young person under the age of 16 must, require his parent<sup>2</sup> or guardian<sup>3</sup> to attend at the court during all the stages of the proceedings, unless and to the extent that the court is satisfied that it would be unreasonable to require such attendance, having regard to the circumstances of the case<sup>4</sup>.

Where a child or young person is arrested, such steps must be taken by the person who arrested him as may be practicable to inform at least one person whose attendance may be required<sup>5</sup>.

1 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

2 'Parent' includes adoptive parent: see the Adoption Act 1976 s 39 (as amended); and para 100 ante.

3 In relation to a child or young person for whom a local authority has parental responsibility (see para 134 ante) and who is in its care (see para 270 et seq ante) or who is provided with accommodation by it (see para 863 et seq ante) in the exercise of any functions (in particular those under the Children Act 1989) which stand referred to its social services committee under the Local Authority Social Services Act 1970, the reference to a person who is a parent or guardian of his must be construed as a reference to that authority or, where he is allowed to live with such a person, as including such a reference: Children and Young Persons Act 1933 s 34A(2) (s 34A added by the Criminal Justice Act 1991 s 56; and the Children and Young Persons Act 1933 s 34A(2) amended by the Local Government Act 2000 s 107, Sch 5 para 1). For the meaning of 'local authority' see para 1240 note 1 ante; definition applied by the Children and Young Persons Act 1933 s 34A(2) (as so added and amended). For the meaning of 'parental responsibility' see para 134 ante; definition applied by s 34A(2) (as so added and amended). For guidelines as to when a local authority may not be considered a guardian see *Somerset County Council v Brice* [1973] 3 All ER 438, [1973] 1 WLR 1169; *Lincoln Corp'n v Parker* [1974] 2 All ER 949, [1974] 1 WLR 713; *Leicestershire County Council v Cross* [1976] 2 All ER 491. As to social services committees see the Local Authority Social Services Act 1970 s 2 (as amended), s 3A (as added); and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1006.

4 Children and Young Persons Act 1933 s 34A(1) (as added: see note 3 supra).

5 See *ibid* s 34 (as substituted and amended); and para 1234 ante. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 950. For the meaning of 'young person' see para 1234 note 3 ante. Where a child or young person is charged with an offence, or is for any other reason brought before a court, a summons or warrant may be issued by a court to enforce the attendance of a parent or guardian under the Children and Young Persons Act 1933 s 34A (as added and amended), in the same manner as if an information were laid upon which a summons or warrant could be issued against a defendant under the Magistrates' Courts Act 1980; and a summons to the child or young person may include a summons to the parent or guardian to enforce his attendance for the said purpose: CrimPR 7.8.

## **UPDATE**

### **1241 Attendance of parent or guardian at court**

NOTE 5--CrimPR 7.8 now Criminal Procedure Rules 2010, SI 2010/60, rr 7.1-7.4.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1242. Separation from other offenders.

**1242. Separation from other offenders.**

Arrangements must be made for preventing a child or young person<sup>1</sup> while detained in a police station, or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged<sup>2</sup>. Arrangements must also be made for ensuring that a girl (being a child or young person), while so detained, being conveyed, or waiting, is under the care of a woman<sup>3</sup>.

<sup>1</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

<sup>2</sup> Children and Young Persons Act 1933 s 31(1) (renumbered by the Criminal Justice Act 1991 ss 68, 101(1), Sch 8 para 1, Sch 12 para 22).

<sup>3</sup> Children and Young Persons Act 1933 s 31(1) (as renumbered: see note 2 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1243. Presumption and determination of age.

### **1243. Presumption and determination of age.**

Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child or young person<sup>1</sup>, the court must make due inquiry as to the age of that person, and for that purpose must take such evidence as may be forthcoming at the hearing of the case<sup>2</sup>. However, an order or judgment of the court is not invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it must, for the purposes of the Children and Young Persons Act 1933, be deemed to be the true age of that person, and, where it appears to the court that the person so brought before it has attained the age of 18 years, that person must for the purposes of that Act be deemed not to be a child or young person<sup>3</sup>.

Where, in any charge or indictment for any of certain offences<sup>4</sup>, it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or had attained any specified age, and he appears to the court to have been at the date of the commission of the alleged offence a child or young person, or to have been under or to have attained the specified age, as the case may be, he must for the purposes of the Children and Young Persons Act 1933 be presumed at that date to have been a child or young person or to have been under or to have attained that age, as the case may be, unless the contrary is proved<sup>5</sup>.

Where, in any charge or indictment for certain offences<sup>6</sup>, it is alleged that the person in respect of whom the offence was committed was a child or was a young person, it is not a defence to prove that the person alleged to have been a child was a young person or the person alleged to have been a young person was a child in any case where the acts constituting the alleged offence would equally have been an offence if committed in respect of a young person or child respectively<sup>7</sup>.

Where a person is charged with an offence under the Children and Young Persons Act 1933 in respect of a person apparently under a specified age it is a defence to prove that the person was actually of or over that age<sup>8</sup>.

<sup>1</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

<sup>2</sup> Children and Young Persons Act 1933 s 99(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 1(2)).

<sup>3</sup> Children and Young Persons Act 1933 s 99(1) (as amended: see note 2 supra). See also note 2 supra.

<sup>4</sup> I.e. any offence under the Children and Young Persons Act 1933 or any of the offences mentioned in Sch 1 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1164) except as provided in s 14 (as amended), ss 41, 42 (as amended), ss 43, 99 (as amended), Sch 1: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1164.

<sup>5</sup> Ibid s 99(2) (amended by the Sexual Offences Act 1956 s 48, Sch 3).

<sup>6</sup> I.e. any offence under the Children and Young Persons Act 1933 or any of the offences mentioned in Sch 1 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1164).

7 See *ibid* s 99(3).

8 *Ibid* s 99(4).



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1244. Young person reaching 18 during proceedings.

**1244. Young person reaching 18 during proceedings.**

Where proceedings in respect of a young person<sup>1</sup> are begun for an offence and he attains the age of 18 before the conclusion of the proceedings, the court may continue to deal with the case and make any order which it could have made if he had not attained that age<sup>2</sup>.

<sup>1</sup> For the meaning of 'young person' see para 619 note 2 ante.

<sup>2</sup> Children and Young Persons Act 1963 s 29(1) (amended by the Children and Young Persons Act 1969 s 72(3), (4), Sch 5 para 49, Sch 6; the Children Act 1989 s 108(7), Sch 15; and the Criminal Justice Act 1991 s 68, Sch 8 para 3).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(i) Preliminary Procedures/1245. Time limits for persons under the age of 18.

**1245. Time limits for persons under the age of 18.**

The Secretary of State<sup>1</sup> may by regulations make provision, with respect to a person under the age of 18 at the time of his arrest in connection with an offence, as to the maximum period to be allowed for the completion of the stage beginning with his arrest and ending with the date fixed for his first appearance in court<sup>2</sup>. Regulations may also provide for the period within which the stage between conviction and sentence should be completed<sup>3</sup>.

<sup>1</sup> As to the Secretary of State see para 155 ante.

<sup>2</sup> See the Prosecution of Offences Act 1985 s 22A(1)(a) (as added); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1157. At the date at which this volume states the law no such regulations were in force.

<sup>3</sup> See *ibid* s 22A(1)(b) (as added); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1157. At the date at which this volume states the law no such regulations were in force.

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## (ii) Summary Proceedings

### 1246. Bail to local authority custody: general.

A person charged with or convicted of a criminal offence has a general right to bail, to which conditions may be attached<sup>1</sup>.

If the parent or guardian of a child or young person<sup>2</sup> consents to be a surety for him<sup>3</sup>, then he may be required to secure that the child or young person complies with any requirement imposed on him<sup>4</sup>. However, he will not be required to secure compliance with any requirement to which his consent does not extend and must not, in respect of those requirements to which his consent does extend, be bound in a sum greater than a specified amount<sup>5</sup>.

A child or young person may be required to comply with requirements imposed for the purpose of securing the electronic monitoring of his compliance (an 'electronic monitoring requirement') with any other requirements imposed by way of a condition of bail<sup>6</sup>, provided the following conditions are met<sup>7</sup>:

- 935 (1) the child or young person is aged 12 or over<sup>8</sup>; and
- 936 (2) that:
- 18
- 1. (a) he is charged with or has been convicted of a violent or sexual offence, or an offence punishable in the case of an adult with imprisonment for a term of 14 years or more<sup>9</sup>; or
- 2. (b) he is charged with or has been convicted of one or more imprisonable offences which, together with any other imprisonable offences of which he has been convicted in any proceedings amount to a recent history of repeatedly committing imprisonable offences while remanded on bail or to local authority accommodation<sup>10</sup>;
- 19
- 937 (3) the court has been notified by the Secretary of State that electronic monitoring arrangements are available in each local justice area that is a relevant area<sup>11</sup> and is satisfied that the necessary provision can be made under those arrangements<sup>12</sup>; and
- 938 (4) a youth offending team<sup>13</sup> has informed the court that in its opinion the imposition of such a requirement will be suitable in the case of the child or young person<sup>14</sup>.

Where a court imposes an electronic monitoring requirement, the requirement must include provision for making a person responsible for the monitoring; and a person who is made so responsible must be of a description specified<sup>15</sup> in an order made by the Secretary of State<sup>16</sup>. The Secretary of State may make rules for regulating the electronic monitoring of compliance with requirements imposed on a child or young person as a condition of bail and the functions of persons made responsible for securing the electronic monitoring of compliance with such requirements<sup>17</sup>.

- 1 As to bail generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1165 et seq. There are certain statutory exceptions to the general right to bail: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1170-1171.
- 2 'Child' means a person under the age of 14: Bail Act 1976 s 2(2). 'Young person' means a person who has attained the age of 14 and is under the age of 17: s 2(2).
- 3 le for the purposes of ibid s 3(7)(a) (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 4 le imposed by ibid s 3(6) (as amended) or s 3(6A) (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167. However, no requirement is to be imposed on the parent or guardian of a young person where it appears that the young person will attain the age of 17 before the time appointed for him to surrender to custody: s 3(7)(a).
- 5 Ibid s 3(7)(b). The sum by which the parent or guardian of a child or young person may be bound must not exceed £50: s 3(7)(b).
- 6 Ibid s 3(6ZAA) (added by the Criminal Justice and Police Act 2001 s 131(1)). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 7 See the Bail Act 1976 s 3AA(1) (s 3AA added by the Criminal Justice and Police Act 2001 s 131(2)). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 8 Bail Act 1976 s 3AA(2) (as added: see note 7 supra). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 9 Ibid s 3AA(3)(a) (as added: see note 7 supra). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 10 Ibid s 3AA(3)(b) (as added: see note 7 supra). For the meaning of 'local authority accommodation' see the Children and Young Persons Act 1969; and note 4 infra (definition applied by the Bail Act 1976 s 3AA(11) (as so added)).
- 11 A local justice area is a relevant area in relation to a proposed electronic monitoring condition if the court considers that it will not be practicable to secure the electronic monitoring in question unless electronic monitoring arrangements are available in that area: ibid s 3AA(12) (as added (see note 7 supra); and amended by the Courts Act 2003 s 109(1), Sch 8 para 181).
- 12 Bail Act 1976 s 3AA(4) (as added (see note 7 supra); and amended by the Courts Act 2003 Sch 8 para 181). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 13 As to the functions of youth offending teams see para 1306 post.
- 14 Bail Act 1976 s 3AA(5) (as added: see note 7 supra). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.
- 15 The description of the person responsible for the monitoring of an electronic monitoring requirement for the purposes of ibid s 3AA(6) (as added) is: (1) in relation to such a requirement imposed on an offender residing in a police area specified in the Bail (Electronic Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/844, Sch 1, one employed by Premier Monitoring Services, PO Box 45, Norwich, NR3 1BF to monitor offenders (art 3 (amended by SI 2005/984)); and (2) in relation to such a requirement imposed on an offender residing in a police area specified in the Electronic Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/844, Sch 2, one employed by Securicor Justice Services Limited, Sutton Park, 15 Carshalton Road, Sutton, Surrey, SM1 4LD to monitor offenders (art 4 (amended by SI 2005/984)).

Where:

- 3194 (a) an electronic monitoring requirement is imposed for the purpose of securing compliance with more than one requirement (Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, art 6(1)(a));
- 3195 (b) the requirements relate to different places or areas (art 6(1)(b));
- 3196 (c) the places or areas are in different police areas (art 6(1)(c)); and
- 3197 (d) the police areas are specified in different Schedules to the Electronic Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/845 (as amended) (art 6(1)(d)),

the following apply:

- 3198 (i) if one of the requirements is a curfew requirement, then heads (a) and (b) supra have effect as if the electronic monitoring requirement was imposed solely for the purpose of securing compliance with the curfew requirement (art 6(2) (amended by SI 2005/984));
- 3199 (ii) in any other case, the court must choose whichever of the police areas referred to in head (c) supra as it thinks fit, and the responsible officer must be of the description which would be specified in heads (1) and (2) supra if the electronic monitoring requirement were imposed for the purpose of securing compliance with requirements which related solely to places or areas within that police area (Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, art 6(3)).

Any power of the Secretary of State to make an order or rules under the Bail Act 1976 s 3AA (as added and amended) is exercisable by statutory instrument: s 3AA(9) (s 3AA as added: see note 7 supra). A statutory instrument containing rules is subject to annulment in pursuance of a resolution of either House of Parliament: s 3AA(10) (as so added). Rules made under s 3AA (as added and amended) may make different provisions for different cases: s 3AA(8) (as so added). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.

16 Ibid s 3AA(6) (s 3AA as added: see note 7 supra). See the Bail (Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/844 (amended by SI 2005/984).

17 Ibid s 3AA(7) (s 3AA as added: see note 7 supra). At the date at which this volume states the law no such rules had been made. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.

## UPDATE

### 1246 Bail to local authority custody: general

TEXT AND NOTES 6-17--Bail Act 1976 ss 3(6ZAA), 3AA(1), (4) substituted, s 3AA(5) amended, s 3AA(6)-(10), (12) omitted: Criminal Justice and Immigration Act 2008 Sch 11 paras 2, 3, Sch 28 Pt 4. See Bail Act 1976 s 3AB (conditions for the imposition of electronic monitoring requirements: other persons), s 3AC (electronic monitoring: general provisions) (ss 3AB, 3AC added by Criminal Justice and Immigration Act 2008 Sch 11 para 4).

NOTES 15, 16--SI 2002/844 replaced: Bail (Electronic Monitoring of Requirements) (Responsible Officer) Order 2008, SI 2008/2713. The description of the person responsible for the monitoring of an electronic monitoring requirement is now (1) in relation to such a requirement imposed on an offender residing in a police area specified in SI 2008/2713, Sch 1, one employed by Serco Ltd, Serco House, 16 Bartley Wood Business Park, Bartley Way, Hook, Hampshire, RG27 9UY to monitor offenders (art 2(1)); and (2) in relation to such a requirement imposed on an offender residing in a police area specified in SI 2008/2713, Sch 2, one employed by G4S Justice Services Ltd, Sutton Park House, 15 Carshalton Road, Sutton, Surrey, SM1 4LD to monitor offenders (art 2(2)).

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### **1247. Remand to local authority custody: general.**

Where a court<sup>1</sup> remands a child or young person<sup>2</sup> charged with or convicted of one or more offences, or commits him for trial or sentence, and he is not released on bail, the remand or committal must be to local authority accommodation<sup>3</sup>. Where a court remands a child or young person in connection with extradition proceedings<sup>4</sup> and he is not released on bail the remand must be to local authority accommodation<sup>5</sup>.

A court remanding a person to local authority accommodation must designate the local authority which is to receive him; and that authority must be:

- 939 (1) in the case of a person who is being looked after by a local authority<sup>6</sup>, that authority;<sup>7</sup> and
- 940 (2) in any other case, the local authority in whose area it appears to the court that he resides or the offence or one of the offences was committed<sup>8</sup>.

A child or young person may be required to comply with conditions imposed for the purpose of securing the electronic monitoring of his compliance (an 'electronic monitoring condition') with any other requirements imposed by way of a condition of remand<sup>9</sup>, provided the following requirements are met<sup>10</sup>, namely:

- 941 (a) that the child or young person is aged 12 or over<sup>11</sup>;
- 942 (b) that:
- 20 3. (i) he is charged with or has been convicted of a violent or sexual offence, or an offence punishable in the case of an adult with imprisonment for a term of 14 years or more<sup>12</sup>; or
- 4. (ii) he is charged with or has been convicted of one or more imprisonable offences which, together with any other imprisonable offences of which he has been convicted in any proceedings amount to a recent history of repeatedly committing imprisonable offences while remanded on bail or to local authority accommodation<sup>13</sup>;
- 21 943 (c) that the court has been notified by the Secretary of State that electronic monitoring arrangements are available in each local justice area that is a relevant area<sup>14</sup> and is satisfied that the necessary provision can be made under those arrangements<sup>15</sup>; and
- 944 (d) that a youth offending team<sup>16</sup> has informed the court that in its opinion the imposition of such a requirement will be suitable in the case of the child or young person<sup>17</sup>.

Where a court imposes an electronic monitoring condition, the condition must include provision for making a person responsible for the monitoring; and a person who is made so responsible must be of a description specified<sup>18</sup> in an order made by the Secretary of State<sup>19</sup>. The Secretary of State may make rules for regulating the electronic monitoring of compliance with conditions imposed under the above provisions and the functions of persons made responsible for securing the electronic monitoring of compliance with such conditions<sup>20</sup>.

Where a court remands a person aged 10 or 11 on bail and either the person is charged with or has been convicted of a serious offence, or in the opinion of the court the person is a persistent offender, the court may order a local authority to make an oral or written report specifying where the person is likely to be placed or maintained if he is further remanded to local authority accommodation<sup>21</sup>.

1 'Court' includes a justice: Children and Young Persons Act 1969 s 23(12) (s 23 substituted by the Criminal Justice Act 1991 s 60(1)).

2 For the meaning of 'child' see para 613 note 1 ante. 'Young person' means a person who has attained the age of 14 years and is under the age of 17 years: Children and Young Persons Act 1969 s 23(12) (as substituted: see note 1 supra).

3 Ibid s 23(1) (as substituted: see note 1 supra). As from a day to be appointed, this provision is amended by the Violent Crime Reduction Act 2006 s 61 so as to refer also to sending for trial. At the date at which this volume states the law no such day had been appointed. As to the modification of this provision in relation to boys aged 15 and 16 see para 1253 post. An order under the Children and Young Persons Act 1969 s 23 (as substituted and amended) remanding a young person to local authority care does not confer parental responsibility on the local authority: *North Yorkshire County Council v Selby Youth Court Justices* [1994] 1 All ER 991, [1995] 1 WLR 1, DC. As to parental responsibility see para 134 et seq ante. 'Local authority accommodation' means accommodation provided by or on behalf of a local authority within the meaning of the Children Act 1989: Children and Young Persons Act 1969 s 70(1) (definition added by the Children Act 1989 s 108(4), Sch 12 para 29). However, for the purposes of the definition of 'secure accommodation' (see para 1248 post), 'local authority accommodation' includes any accommodation falling within the Criminal Justice Act 1991 s 61(2) (as substituted and amended): Children and Young Persons Act 1969 s 23(12) (as substituted (see note 1 supra); and amended by the Criminal Justice and Public Order Act 1994 s 19(1)).

A magistrates' court having power to remand a person in custody may, if the remand is for a period not exceeding 24 hours, commit him to detention at a police station: Children and Young Persons Act 1969 s 23(14) (as so substituted; and amended by the Crime and Disorder Act 1998 ss 119, 120(2), Sch 8 para 22, Sch 10); Magistrates' Courts Act 1980 s 128(7) (amended by the Police and Criminal Evidence Act 1984 s 48).

4 'Extradition proceedings' means proceedings under the Extradition Act 2003 (see EXTRADITION): Children and Young Persons Act 1969 s 23(12) (definition added by the Extradition Act 2003 s 201(1), (9)).

5 Children and Young Persons Act 1969 s 23(1A) (s 23 as substituted (see note 1 supra); s 23(1A) added by the Extradition Act 2003 s 20(1), (3)).

6 Any reference to a person who is being looked after by a local authority must be construed in accordance with the Children Act 1989 s 22 (as amended): Children and Young Persons Act 1969 s 23(13)(a) (as substituted: see note 1 supra).

7 Ibid s 23(2)(a) (as substituted: see note 1 supra). As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. Where a person is remanded to local authority accommodation it is lawful for any person acting on behalf of the designated authority to detain him: s 23(3) (as so substituted).

8 Ibid s 23(2)(b) (as substituted: see note 1 supra).

9 Ibid s 23(7)(b) (substituted by the Criminal Justice and Police Act 2001 s 132(1)(b)).

10 Children and Young Persons Act 1969 s 23AA(1) (s 23AA added by the Criminal Justice and Police Act 2001 s 132(2)).

11 Children and Young Persons Act 1969 s 23AA(2) (as added: see note 10 supra).

12 Ibid s 23AA(3)(a) (as added: see note 10 supra).

13 Ibid s 23AA(3)(b) (as added: see note 10 supra). For the meaning of 'local authority accommodation' see the Children and Young Persons Act 1969; and note 6 supra (definition applied by the Bail Act 1976 s 3AA(11) (as so added)).

14 A local justice area is a relevant area in relation to a proposed electronic monitoring condition if the court considers that it will not be practicable to secure the electronic monitoring in question unless electronic monitoring arrangements are available in that area: ibid s 23AA(9) (s 23AA as added (see note 10 supra); s 23AA(9) amended by the Courts Act 2003 s 109(1), Sch 8 para 135). As to the Secretary of State see para 155 ante.

15 Children and Young Persons Act 1969 s 23AA(4) (s 23AA as added (see note 10 supra); s 23AA(4) amended by the Courts Act 2003 Sch 8 para 135).

16 As to the functions of youth offending teams see para 1306 post.

17 Children and Young Persons Act 1969 s 23AA(5) (s 23AA as added: see note 10 supra).

18 The description of the person responsible for the monitoring of an electronic monitoring condition for the purposes of *ibid* s 23AA(6) (as added) is: (1) in relation to such a requirement imposed on an offender residing in a police area specified in the Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, Sch 1, one employed by Premier Monitoring Services, PO Box 45, Norwich, NR3 1BF to monitor offenders (art 3 (amended by SI 2005/984)); and (2) in relation to such a requirement imposed on an offender residing in a police area specified in Sch 2, one employed by Securicor Justice Services Limited, Sutton Park, 15 Carshalton Road, Sutton, Surrey, SM1 4LD to monitor offenders (Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, art 4 (amended by SI 2005/984)).

Where:

3200 (a) an electronic monitoring requirement is imposed for the purpose of securing compliance with more than one requirement (Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, art 6(1)(a));

3201 (b) the requirements relate to different places or areas (art 6(1)(b));

3202 (c) the places or areas are in different police areas (art 6(1)(c)); and

3203 (d) the police areas are specified in different Schedules to the Electronic Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/845 (as amended) (art 6(1)(d)),

the following apply:

3204 (i) if one of the requirements is a curfew requirement, then heads (a) and (b) *supra* have effect as if the electronic monitoring requirement was imposed solely for the purpose of securing compliance with the curfew requirement (art 6(2) (amended by SI 2005/984));

3205 (ii) in any other case, the court must choose whichever of the police areas referred to in head (c) *supra* as it thinks fit, and the responsible officer must be of the description which would be specified in heads (1) and (2) *supra* if the electronic monitoring requirement were imposed for the purpose of securing compliance with requirements which related solely to places or areas within that police area (Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845, art 6(3)).

The Bail Act 1976 s 3AA(8)-(10) (as added) (see para 1246 *ante*) apply in relation to the Children and Young Persons Act 1969 s 23AA (as added) as they apply in relation to the Bail Act 1976 s 3AA (as added): Children and Young Persons Act 1969 s 23AA(8) (as added: see note 10 *supra*).

19 *Ibid* s 23AA(6) (as added: see note 10 *supra*). See the Local Authority Remands (Electronic Monitoring of Conditions) (Responsible Officer) Order 2002, SI 2002/845 (amended by SI 2005/984).

20 Children and Young Persons Act 1969 s 23AA(7) (as added: see note 10 *supra*). At the date at which this volume states the law no such rules had been made.

21 *Ibid* s 23B (added by the Anti-social Behaviour Act 2003 s 90). Such an order must designate the local authority which is to make the report, and that authority must be the local authority which the court would have designated under the Children and Young Persons Act 1969 s 23(2) (as substituted) (see the text and notes 7-8 *supra*) if the person had been remanded to local authority accommodation: s 23B(3) (as so added). Such an order must specify the period within which the local authority must comply with the order: s 23B(4) (as so added). The maximum period that may be so specified is seven working days: s 23B(5) (as so added). If the Secretary of State by order so provides, s 23(2) (as substituted) also applies where:

3206 (1) a court remands on bail any person who has attained the age of 12 and is under the age of 17 (s 23B(6)(a) (as so added));

3207 (2) the requirement in s 23AA(3) (as added) is fulfilled (s 23B(6)(b) (as so added)); and



3208 (3) in a case where he is remanded after conviction, the court is satisfied that the behaviour which constituted the offence was due, to a significant extent, to the circumstances in which the offender was living (s 23B(6)(c) (as so added)).

'Serious offence' means an offence punishable in the case of an adult with imprisonment for a term of two years or more: s 23B(7) (as so added). 'Working day' means any day other than a Saturday or a Sunday, Christmas Day or Good Friday, or a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321): s 23B(7) (as so added).

## **UPDATE**

### **1247 Remand to local authority custody: general**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 15, 18--Children and Young Persons Act 1969 s 23AA(4) further amended, s 23AA(8) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 5, Sch 28 Pt 4.

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### **1248. Security requirement: general.**

A court remanding to local authority accommodation<sup>1</sup> a child or young person<sup>2</sup> charged with or convicted of one or more offences may, after consultation<sup>3</sup> with the designated authority, require that authority to comply with a security requirement, that is to say, a requirement that the person in question be placed and kept in secure accommodation<sup>4</sup>.

Where a court imposes a security requirement in respect of a person, it is its duty:

- 945 (1) to state in open court that it is of the opinion, after considering all the options for the remand of the person, that only remanding him to local authority accommodation with a security requirement would be adequate to protect the public from serious harm from him, or to prevent the commission by him of imprisonable offences<sup>5</sup>; and
- 946 (2) to explain to him in open court and in ordinary language why it is of that opinion<sup>6</sup>.

Where a person is remanded to local authority accommodation and a security requirement is imposed in respect of him, the designated local authority may, with the consent of the Secretary of State, arrange for the person to be detained, for the whole or any part of the period of the remand or committal, in a secure training centre; and his detention there pursuant to the arrangements is lawful<sup>7</sup>.

It is the duty of every local authority to secure that it is in a position to comply with any security requirement which may be imposed on it<sup>8</sup>. A local authority may discharge this duty either by providing secure accommodation itself or by making arrangements with other local authorities for the provision by it of such accommodation or by making arrangements with persons carrying on an appropriate children's home for the provision or use by it of such accommodation<sup>9</sup>.

There are other powers by which a child or young person may be placed in secure accommodation<sup>10</sup>.

If a person aged 17 years is remanded in custody, he may be remanded to a prison<sup>11</sup>.

The custody time limit provisions apply to proceedings in the youth court<sup>12</sup>.

<sup>1</sup> ie a person remanded in accordance with the Children and Young Persons Act 1969 s 23(1) (as substituted) (see para 1247 ante). For the meaning of 'local authority accommodation' see para 1247 note 4 ante.

<sup>2</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 1247 note 2 ante.

<sup>3</sup> Any reference to consultation must be construed as a reference to such consultation, if any, as is reasonably practicable in all the circumstances of the case: Children and Young Persons Act 1969 s 23(13)(b) (s 23 substituted by the Criminal Justice Act 1991 s 60).

<sup>4</sup> Children and Young Persons Act 1969 s 23(4) (as substituted (see note 3 supra); and amended by the Crime and Disorder Act 1998 s 97(1)). As to the modification of this provision in relation to boys aged 15 and 16 see para 1253 post. 'Secure accommodation' means accommodation which is provided in a children's home in respect of which a person is registered under the Care Standards Act 2000 Pt II (ss 11-42) (as amended) for the

purpose of restricting liberty, and is approved for that purpose by the Secretary of State or the Welsh Ministers: Children and Young Persons Act 1969 s 23(12) (s 23 as so substituted; definition amended by the Care Standards Act 2000 s 116, Sch 4 para 3(b)). For the meaning of 'children's home' see para 983; definition applied by the Children and Young Persons Act 1969 s 23(12) (as substituted (see note 3 supra); and amended by the Care Standards Act 2000 Sch 4 para 3(a)). As to the Secretary of State and the Welsh Ministers see para 155 ante.

Where a male aged 15 or 16 years is remanded or committed under the Children and Young Persons Act 1969 s 23(4) (as substituted and amended) to local authority accommodation with a requirement that he be placed and kept in secure accommodation, a remand centre or a prison, the court must record in the warrant of commitment a statement of any declaration that is required in connection with that remand or committal: CrimPR 18.8.

5 Children and Young Persons Act 1969 s 23(5AA), (6)(a) (s 23 as substituted (see note 3 supra); s 23(5AA) (added by the Criminal Justice and Police Act 2001 s 130(1), (3); and amended by the Extradition Act 2003 s 201(1), (7)).

6 Children and Young Persons Act 1969 s 23(6)(b) (s 23 as substituted: see note 3 supra). A magistrates' court must cause a reason stated by it under head (2) in the text to be specified in the warrant of commitment and to be entered in the register: s 23(6)(b) (as so substituted). 'Magistrates' court' includes a justice: s 23(12) (as so substituted).

7 Ibid s 23(7A) (s 23(7A), (7B) added by the Criminal Justice and Police Act 2001 s 133(1)). Such arrangements may include provision for payments to be made by the authority to the Secretary of State: Children and Young Persons Act 1969 s 23(7B) (as so added).

8 Criminal Justice Act 1991 s 61(1) (amended by the Crime and Disorder Act 1998 s 120(2), Sch 10). Such a security requirement may be imposed under the Children and Young Persons Act 1969 s 23(4) (as substituted and amended): see note 4 supra.

As from a day to be appointed, in relation to any costs incurred by a local authority in discharging its duty under the Criminal Justice Act 1991 s 61(1) (as amended), the Secretary of State may: (1) defray such costs to such extent as he considers appropriate in any particular case (s 61A(1)(a) (s 61 added by the Criminal Justice and Public Order Act 1994 s 21)); (2) defray a proportion to be determined by him from time to time of such costs (Criminal Justice Act 1991 s 61A(1)(b) (as so added)); and (3) defray or contribute to such costs in accordance with a tariff to be determined by him from time to time (s 61A(1)(c) (as so added)). Such payments are to be made out of money provided by Parliament: s 61A(3) (as so added). The Secretary of State may require any person providing secure accommodation to transmit to him, at such times and in such form as he may direct, such particulars as he may require with respect to any such costs: s 61A(2) (as so added). At the date at which this volume states the law no such day had been appointed.

9 Ibid s 61(2) (amended by the Criminal Justice and Public Order Act 1994 s 19(3); and the Care Standards Act 2000 Sch 4 para 17).

The Secretary of State may by regulations make provision as to the co-operation required of local authorities in the provision of secure accommodation: Criminal Justice Act 1991 s 61(3). Such regulations must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 61(4). At the date at which this volume states the law no such regulations had been made.

10 See the Children Act 1989 s 25 (as amended); and para 1037 et seq ante. See also the Children Secure Accommodation Regulations 1991, SI 1991/1505 (amended by SI 1992/2117; SI 1995/1398; SI 1996/692; SI 2000/694; SI 2001/2237; SI 2002/546; SI 2002/808; SI 2002/2935; SI 2004/696); and para 1038 et seq ante.

11 See the Criminal Justice Act 1948 s 27 (substituted by the Children and Young Persons Act 1969 Sch 5; amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 7; the Criminal Justice Act 2003 s 41, Sch 3 para 35; and prospectively amended by the Criminal Justice and Court Services Act 2000 s 75, Sch 8).

12 See the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1153. See also *R v Stratford Youth Court, ex p S* [1998] 1 WLR 1758 [1999] Crim LR 146, DC; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1153.

## UPDATE

### 1248 Security requirement: general

NOTE 4--CrimPR 18.8 now Criminal Procedure Rules 2010, SI 2010/60, r 18.8.



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### **1249. Security requirement where remanded.**

A court remanding to local authority accommodation<sup>1</sup> a child or young person<sup>2</sup> charged with or convicted of one or more offences or committed or sent for trial<sup>3</sup> must not impose a security requirement except in respect of a child who has attained the age of 12, or a young person, who (in either case) is of a prescribed description<sup>4</sup>, and then only if<sup>5</sup>:

- 947 (1) he is charged with or has been convicted of a violent or sexual offence<sup>6</sup>, or an offence punishable in the case of an adult with imprisonment for a term of 14 years or more<sup>7</sup>; or
- 948 (2) he is charged with or has been convicted of one or more imprisonable offences which, together with any other imprisonable offences of which he has been convicted in any proceedings amount, or would, if he were convicted of the offences with which he is charged, amount, to a recent history of repeatedly committing imprisonable offences while remanded on bail or to local authority accommodation<sup>8</sup>,

and (in either case) the following condition must be satisfied<sup>9</sup>. The condition is that the court is of the opinion, after considering all the options for the remand of the person, that only remanding him to local authority accommodation with a security requirement would be adequate to protect the public from serious harm from him, or to prevent the commission by him of imprisonable offences<sup>10</sup>.

1 For the meaning of 'local authority accommodation' see para 1247 note 3 ante.

2 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 1247 note 2 ante.

3 I.e a person remanded in accordance with the Children and Young Persons Act 1969 s 23(1) (as substituted) (see para 1247 ante).

4 'Prescribed description' means a description prescribed by reference to age or sex or both by an order of the Secretary of State: Children and Young Persons Act 1969 s 23(12) (s 23 substituted by the Criminal Justice Act 1991 s 60); and definition added by the Crime and Disorder Act 1998 s 97(4)). As to the Secretary of State see para 155 ante.

5 Children and Young Persons Act 1969 s 23(5) (as substituted (see note 4 supra); and amended by the Crime and Disorder Act 1998 s 97(2)). As to the modification of this provision in relation to boys aged 15 and 16 see para 1253 post. For the purposes of the Children and Young Persons Act 1969 s 23(5) (as substituted and amended), the following descriptions of children and young persons are prescribed:

3209 (1) any child who is of the age of 12 or 13 (Secure Remands and Committals (Prescribed Description of Children and Young Persons) Order 1999, SI 1999/1265, art 2(a));

3210 (2) any person who is of the age of 14 (art 2(b));

3211 (3) any female person who is of the age of 15 or 16 (art 2(c)).

Any reference, in relation to a person charged with or convicted of a violent or sexual offence, to protecting the public from serious harm from him must be construed as a reference to protecting members of the public from

death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him: Children and Young Persons Act 1969 s 23(13)(c) (as substituted: see note 4 supra).

6 For these purposes, a 'sexual offence' means an offence specified in the Criminal Justice Act 2003 Sch 15 Pt 2 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 71) and a 'violent offence' means an offence specified in Sch 15 Pt 1 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 70): Children and Young Persons Act 1969 s 23(12) (s 23 as substituted (see note 4 supra); definition substituted by the Criminal Justice Act 2003 s 304, Sch 32 para 15).

7 Children and Young Persons Act 1969 s 23(5)(a) (as substituted: see note 4 supra).

8 Ibid s 23(5)(b) (as substituted (see note 4 supra); and s 23(5)(b) substituted by the Criminal Justice and Police Act 2001 s 130(2)).

9 Children and Young Persons Act 1969 s 23(5) (as substituted (see note 4 supra); and amended by the Criminal Justice and Police Act 2001 s 130(2)).

10 Children and Young Persons Act 1969 s 23(5AA) (added by the Criminal Justice and Police Act 2001 s 130(1), (3); and amended by the Extradition Act 2003 s 201(1), (7)). As to the modification of this provision in relation to boys aged 15 and 16 see para 1253 post.

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### **1250. Security requirement where remanded in connection with extradition proceedings.**

A court must not impose a security requirement in relation to a person remanded to local authority accommodation<sup>1</sup> in connection with extradition proceedings<sup>2</sup> unless:

- 949 (1) he has attained the age of 12 and is of a prescribed description<sup>3</sup>;
- 950 (2) one or both of the following conditions are satisfied<sup>4</sup>:
- 22
  - 5. (a) the conduct constituting the offence to which the extradition proceedings relate would if committed in the United Kingdom constitute an offence punishable in the case of an adult with imprisonment for a term of 14 years or more<sup>5</sup>;
  - 6. (b) the person has previously absconded from the extradition proceedings<sup>6</sup> or from proceedings in the United Kingdom or the requesting territory<sup>7</sup> which relate to the conduct constituting the offence to which the extradition proceedings relate<sup>8</sup>; and
- 23
  - 951 (3) the court is of the opinion, after considering all the options for the remand of the person, that only remanding him to local authority accommodation with a security requirement<sup>9</sup> would be adequate to protect the public from serious harm from him, or to prevent the commission by him of imprisonable offences<sup>10</sup>.

1 For the meaning of 'local authority accommodation' see para 1247 note 3 ante.

2 I.e. a person remanded in accordance with the Children and Young Persons Act 1969 s 23(1A) (as added) (see para 1247 ante).

3 Ibid s 23(5ZA)(a) (s 23 substituted by the Criminal Justice Act 1991 s 60; and the Children and Young Persons Act 1969 s 23(5ZA)-(5ZC) added by the Extradition Act 2003 s 201(1), (6)). 'Prescribed description' means a description prescribed by reference to age or sex or both by an order of the Secretary of State: Children and Young Persons Act 1969 s 23(12) (definition added by the Crime and Disorder Act 1998 s 97(4)). See the Secure Remands and Committals (Prescribed Description of Children and Young Persons) Order 1999, SI 1999/1265. As to the Secretary of State see para 155 ante.

4 Children and Young Persons Act 1969 s 23(5ZA)(b) (as added: see note 3 supra).

5 Ibid s 23(5ZB)(a) (as added: see note 3 supra).

6 For the meaning of 'extradition proceedings' see para 1247 note 4 ante.

7 For the purposes of the Children and Young Persons Act 1969 s 23(5ZB) (as added) a person has absconded from proceedings if in relation to those proceedings he has been released subject to a requirement to surrender to custody at a particular time and he has failed to surrender to custody at that time, or he has surrendered into the custody of a court and he has at any time absented himself from the court without its leave: s 23(5ZC) (as added: see note 3 supra).

8 'Requesting territory' means the territory to which a person's extradition is sought in extradition proceedings: s 23(12) (as substituted (see note 3 supra); and amended by the Extradition Act 2003 s 201(9)).

9 Children and Young Persons Act 1969 s 23(5ZB)(b) (as added: see note 3 supra).

10 Ibid s 23(5ZA)(c) (as added: see note 3 supra); s 23(5AA) (added by the Criminal Justice and Police Act 2001 s 130(1), (3); and amended by the Extradition Act 2003 s 201(1)).



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### **1251. Security requirement where child not legally represented.**

A court must not impose a security requirement in respect of a child or young person<sup>1</sup> who is not legally represented in the court unless:

- 952 (1) he was granted a right to representation funded by the Legal Services Commission<sup>2</sup> as part of the Criminal Defence Service<sup>3</sup> but the right was withdrawn because of his conduct, or because it appeared that his financial resources were such that he was not eligible to be granted such a right<sup>4</sup>;
- 953 (2) he applied for such representation and the application was refused because it appeared that his financial resources were such that he was not eligible to be granted a right to it<sup>5</sup>; or
- 954 (3) having been informed of his right to apply for such representation and had the opportunity to do so, he refused or failed to apply<sup>6</sup>.

<sup>1</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 1247 note 2 ante.

<sup>2</sup> As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq.

<sup>3</sup> As to the Criminal Defence Service see LEGAL AID vol 65 (2008) PARA 120 et seq.

<sup>4</sup> Children and Young Persons Act 1969 s 23(5A)(a) (s 23 substituted by the Criminal Justice Act 1991 s 60; the Children and Young Persons Act 1969 s 23(5A) added by the Crime and Disorder Act 1998 s 97(3); and the Children and Young Persons Act 1969 s 23(5A)(a) substituted by the Access to Justice Act 1999 s 24, Sch 4 paras 4, 6(a); and amended by the Criminal Defence Service Act 2006 s 4(2)(a), (3)(a)). As to the modification of this provision in relation to boys aged 15 and 16 see para 1253 post.

<sup>5</sup> Criminal and Young Persons Act 1969 s 23(5A)(aa) (s 23(5A) as added (see note 4 supra); and s 23(5A)(aa) added by the Criminal Defence Service Act 2006 s 4(2)(a), (3)(b)).

<sup>6</sup> Criminal and Young Persons Act 1969 s 23(5A)(b) (as added (see note 4 supra); and s 23(5A)(b) amended by the Access to Justice Act 1999 s 24, Sch 4 paras 4, 6).

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### **1252. Remand without security requirement.**

A court remanding a person to local authority accommodation<sup>1</sup> without imposing a security requirement may, after consultation with the designated authority, require that person to comply with:

- 955 (1) any such conditions as could be imposed under the Bail Act 1976<sup>2</sup> if he were then being granted bail<sup>3</sup>; and
- 956 (2) any conditions imposed for the purpose of securing the electronic monitoring of his compliance with any other condition imposed<sup>4</sup>.

Where a court imposes on a person any such conditions<sup>5</sup>, it is its duty to explain to him in open court and in ordinary language why it is imposing those conditions<sup>6</sup>.

A court remanding a person to local authority accommodation without imposing a security requirement may, after consultation with the designated authority, impose on that authority requirements for securing compliance with any conditions imposed on that person<sup>7</sup>, or requirements stipulating that he must not be placed with a named person<sup>8</sup>. Where a person is remanded to local authority accommodation, a relevant court<sup>9</sup> may, on the application of the designated authority, impose on that person any such conditions as could be imposed on that person<sup>10</sup> if the court were then remanding him to such accommodation, and where it does so, may impose on that authority any requirements for securing compliance with the conditions so imposed<sup>11</sup>. Where a person is remanded to local authority accommodation, a relevant court may, on the application of the designated authority or that person, vary or revoke any conditions or requirements imposed<sup>12</sup>.

1 For the meaning of 'local authority accommodation' see para 1247 note 3 ante.

2 *Ie* under the Bail Act 1976 s 3(6) (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.

3 Children and Young Persons Act 1969 s 23(7)(a) (s 23 substituted by the Criminal Justice Act 1991 s 60; and the Children and Young Persons Act 1969 s 23(7)(a), (b) substituted by the Criminal Justice and Police Act 2001 s 132(1)(b)). As to the modification of the Children and Young Persons Act 1969 s 23 in relation to boys aged 15 and 16 see para 1253 post.

4 *Ibid* s 23(7)(b) (as substituted: see note 3 supra). The conditions imposed referred to in the text are conditions imposed under s 23 (as substituted and amended). Section 23(7) (as substituted) is subject to s 23AA (as added) (see para 1247 ante).

5 *Ie* any such conditions as are mentioned in *ibid* s 23(7) (as substituted) (see the text and notes 1-4 supra).

6 *Ibid* s 23(8) (as substituted: see note 3 supra). A magistrates' court must cause a reason stated by it under s 23(8) (as substituted) to be specified in the warrant of commitment and to be entered in the register: s 23(8) (as so substituted).

7 *Ie* under *ibid* s 23(7) (as substituted) (see the text and notes 1-4 supra).

8 *Ibid* s 23(9) (as substituted: see note 3 supra).

9 'Relevant court' means:

3212 (1) in relation to a person remanded to local authority accommodation under *ibid* s 23(1) (see para 1247 ante), the court by which he was so remanded, or any magistrates' court having jurisdiction in the place where he is for the time being (s 23(12) (s 23 as substituted (see note 3 supra); and definition substituted by the Extradition Act 2003 s 201(1), (8)); and

3213 (2) in relation to a person remanded to local authority accommodation under the Children and Young Persons Act 1969 s 23(1A) (as added) (see para 1247 ante), the court by which he was so remanded (as so substituted).

10 See note 5 supra.

11 Children and Young Persons Act 1969 s 23(10) (as substituted: see note 3 supra).

12 *Ibid* s 23(11) (as substituted: see note 3 supra). The conditions or requirements are those that may be imposed under s 23(7) (as substituted) (see the text and notes 1-4 supra), s 27(9) (as substituted) (see the text and notes 7-8 supra) or s 27(10) (as substituted) (see the text and notes 9-11 supra).

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**1253. Bail and remand to local authority custody: alternative arrangements for boys aged 15 and 16 charged with specific offences.**

In relation to remand or committal of any male person who is of the age of 15 or 16<sup>1</sup>, who is not of a prescribed description<sup>2</sup> and is not remanded in connection with proceedings under the Extradition Act 2003<sup>3</sup>, the following arrangements apply.

Where a court<sup>4</sup> remands a child or young person<sup>5</sup> charged with or convicted of one or more offences, or commits him for trial or sentence, and he is not released on bail, then, unless he is remanded to a remand centre or a prison<sup>6</sup>, the remand or committal must be to local authority accommodation<sup>7</sup>.

A court remanding a person to local authority accommodation must designate the local authority which is to receive him; and that authority must be:

- 957 (1) in the case of a person who is being looked after by a local authority<sup>8</sup>, that authority<sup>9</sup>; and
- 958 (2) in any other case, the local authority in whose area it appears to the court that he resides or the offence or one of the offences was committed<sup>10</sup>.

Where a court, after consultation<sup>11</sup> with an officer of a local probation board, a social worker of a local authority or a member of a youth offending team, declares a person to be of a description set out below<sup>12</sup>:

- 959 (a) it must remand him to local authority accommodation and require him to be placed and kept in secure accommodation<sup>13</sup>, if:
- 24 7. (i) it also, after such consultation, declares him to be a person who in its opinion, it would be undesirable to be remanded to a prison, by reason of his physical or emotional immaturity or a propensity of his to harm himself<sup>14</sup>; and
- 8. (ii) it has been notified that secure accommodation is available for him<sup>15</sup>; or
- 25 960 (b) it must remand him to a remand centre, if head (a) above does not apply and it has been notified that such a centre is available for the reception from the court of persons to whom the description set out below applies<sup>16</sup>; and
- 961 (c) it must remand him to a prison, if neither head (a) nor head (b) above applies<sup>17</sup>.

A person falls within the description referred to above if:

- 962 (A) he is charged with or has been convicted of a violent or sexual offence<sup>18</sup>, or an offence punishable in the case of an adult with imprisonment for a term of 14 years or more<sup>19</sup>; or
- 963 (B) he has a recent history of absconding while remanded to local authority accommodation, and is charged with or has been convicted of an imprisonable offence<sup>20</sup> alleged or found to have been committed while he was so remanded<sup>21</sup>,

and (in either case) the court is of opinion that only remanding him to a remand centre or prison, or to local authority accommodation with a requirement that he be placed and kept in secure accommodation, would be adequate to protect the public from serious harm from him or to prevent the commission by him of imprisonable offences<sup>22</sup>.

A court may not make a declaration that a person falls within this description in respect of a person who is not legally represented in the court unless he was granted a right to representation funded by the Legal Services Commission<sup>23</sup> as part of the Criminal Defence Service<sup>24</sup> but the right was withdrawn because of his conduct or because it appeared that his financial resources were such that he was not eligible to be granted such a right<sup>25</sup>; he applied for such representation and the application was refused because it appeared that his financial resources were such that he was not eligible to be granted a right to it<sup>26</sup>; or having been informed of his right to apply for such representation and had the opportunity to do so, he refused or failed to apply<sup>27</sup>.

Where a court declares a person to fall within this description, it is its duty to state in open court that it is of the opinion that he so falls, and to explain to him in open court and in ordinary language why it is of that opinion<sup>28</sup>.

A court remanding a person to local authority accommodation without imposing a security requirement<sup>29</sup> may, after consultation with the designated authority, require that person to comply with any such conditions as could be imposed under the Bail Act 1976<sup>30</sup> if he were then being granted bail<sup>31</sup> and any conditions imposed for the purpose of securing the electronic monitoring of his compliance with any other condition so imposed<sup>32</sup>. Where a court imposes on a person any such conditions<sup>33</sup>, it is its duty to explain to him in open court and in ordinary language why it is imposing those conditions<sup>34</sup>.

A court remanding a person to local authority accommodation without imposing a security requirement may, after consultation with the designated authority, impose on that authority requirements for securing compliance with any conditions imposed on that person<sup>35</sup>, or requirements stipulating that he must not be placed with a named person<sup>36</sup>.

Where a person is remanded to local authority accommodation without the imposition of a security requirement, a relevant court<sup>37</sup> may, on the application of the designated authority, declare him to be a person falling within the description set out above, and on doing so its duty to remand<sup>38</sup> applies<sup>39</sup>.

Where a person is remanded to local authority accommodation, a relevant court may, on the application of the designated authority, impose on that person any such conditions as could be imposed on that person if the court were then remanding him to such accommodation, and where it does so, it may impose on that authority any requirements for securing compliance with the conditions so imposed<sup>40</sup>. Where a person is remanded to local authority accommodation, a relevant court may, on the application of the designated authority or that person, vary or revoke any conditions or requirements imposed<sup>41</sup>.

It is the duty of every local authority to secure that it is in a position to comply with requirements imposed under the provisions described above<sup>42</sup>.

1 Crime and Disorder Act 1998 s 98(1)(a).

2 Ibid s 98(1)(b). The text refers to a prescribed description for the purposes of the Children and Young Persons Act 1969 s 23(5) (as substituted and amended, and as it has effect without modification) (see para 1246 text and notes 19-21 ante). At the date at which this volume states the law, the descriptions so prescribed exclude male persons aged 15 and 16: see para 1249 notes 4, 5 ante. The differential treatment of boys and girls aged 15 and 16 is justified and not contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 14 because the greater number of boys than girls in custody has led to the development of a more comprehensive network of specialist

juvenile youth offender institutions for boys: *R (on the application of SR) v Nottingham Magistrates' Court* [2001] EWHC 802 (Admin), (2001) 166 JP 132, DC.

The text and notes to this paragraph set out the provisions of the Children and Young Persons Act 1969 s 23, as substituted by the Criminal Justice Act 1991 s 60(1) and variously modified by the Crime and Disorder Act 1998 s 98 in relation to male persons aged 15 and 16.

3 Ibid s 98(1)(c). As to where a court remands a child or young person in connection with extradition proceedings and he is not released on bail see the Children and Young Persons Act 1969 s 23(1A) (as added); and para 1247 ante.

4 For the meaning of 'court' see para 1247 note 1 ante.

5 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 1246 note 2 ante.

6 Ie in pursuance of the Children and Young Persons Act 1969 s 23(4)(b) or (c) (as substituted and amended) (see the text and notes 16-17 infra).

7 Ibid s 23(1) (s 23 substituted by the Criminal Justice Act 1991 s 60(1); and modified by the Crime and Disorder Act 1998 s 98(2)). As from a day to be appointed, this provision is amended by the Violent Crime Reduction Act 2006 s 61 so as also to refer to sending for trial. At the date at which this volume states the law no such day had been appointed.

8 See para 1247 note 3 ante.

9 Children and Young Persons Act 1969 s 23(2)(a) (as substituted: see note 7 supra). As to the meaning of 'look after' where a local authority looks after a child see para 867 ante. Where a person is remanded to local authority accommodation, it is lawful for any person acting on behalf of the designated authority to detain him: s 23(3) (as so substituted).

10 Ibid s 23(2)(b) (as substituted: see note 7 supra).

11 Any reference to consultation is to be construed as a reference to such consultation (if any) as is reasonably practicable in all the circumstances of the case: ibid s 23(13)(b) (as substituted: see note 7 supra).

12 Ie a person to whom ibid s 23(5) (as substituted) applies (see the text and notes 18-22 infra): s 23(5) (as substituted (see note 7 supra); and further substituted, by way of modification, by the Crime and Disorder Act 1998 s 98(3)).

13 Children and Young Persons Act 1969 s 23(4)(a) (as substituted: see note 12 supra). For the meaning of 'secure accommodation', and as to the content of the warrant of in such a case, see para 1248 note 4 ante.

14 Ibid s 23(4)(a)(i), (5A) (as substituted: see note 12 supra). As from a day to be appointed, this provision is further amended so as to include a person remanded to a remand centre: see s 23(5A) (as so substituted; and amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 38, 39(a), Sch 8). At the date at which this volume states the law no such day had been appointed.

15 Children and Young Persons Act 1969 s 23(4)(a)(ii) (as substituted: see note 12 supra).

16 Ibid s 23(4)(b) (as substituted: see note 12 supra). This provision is repealed as from day to be appointed by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 Pt II paras 38, 39(b)(ii), Sch 8. See the Children and Young Persons Act 1969 s 23(5) (as so substituted); and the text and notes 18-23 infra. At the date at which this volume states the law no such day had been appointed.

17 Ibid s 28(4)(c) (as substituted: see note 12 supra). As from a day to be appointed, this provision is substituted by the Criminal Justice and Court Services Act 2000 Sch 7 paras 38, 39(b)(iii) so as to provide instead that if head (a) in the text does not apply, the court must remand him to a prison. At the date at which this volume states the law no such day had been appointed.

18 For the meaning of 'violent or sexual offence' see para 1249 note 6 ante.

19 Children and Young Persons Act 1969 s 23(5)(a) (as substituted: see note 12 supra).

20 For these purposes, 'imprisonable offence' means an offence punishable in the case of an adult with imprisonment: ibid s 23(12).

21 Ibid s 23(5)(b) (as substituted: see note 12 supra).

22 Ibid s 23(5), (5AA) (s 23(5) as substituted (see note 12 supra); s 23(5AA) substituted by the Criminal Justice and Police Act 2001 s 130(6)). As from a day to be appointed, the Children and Young Persons Act 1969 s 23(5) (as substituted) is amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 38, 39(c), Sch 8. See also *R (on the application of M) v Crown Court at Inner London* [2006] EWHC 2497 (Admin), [2006] 1 WLR 3406.

23 As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq.

24 As to the Criminal Defence Service see LEGAL AID vol 65 (2008) PARA 120 et seq.

25 Children and Young Persons Act 1969 s 23(5A)(a) (as substituted (see note 12 supra); and further substituted by the Access to Justice Act 1999 s 24, Sch 4 para 7).

26 Children and Young Persons Act 1969 s 23(5A)(aa) (s 23(5A) as substituted (see note 12 supra); and further substituted by the Criminal Defence Service Act 2006 s 4(2)(b), (3)(b)).

27 Children and Young Persons Act 1969 s 23(5)(b) (as substituted (see note 12 supra)).

28 Ibid s 23(6)(a), (b) (as substituted (see note 7 supra); modified by the Crime and Disorder Act 1998 s 98(4); and amended by the Criminal Justice and Police Act 2001 s 130(7)). A magistrate's court must cause a reason stated by it under the Children and Young Persons Act 1969 s 23(6)(b) (as substituted) to be specified in the warrant of commitment and to be entered in the register: s 23(6) (as so substituted). 'Magistrates' court' includes a justice: s 23(12) (as so substituted).

29 Ie a requirement imposed under *ibid* s 23(4)(a) (as substituted) (see the text and notes 14, 15 supra) that the person be placed and kept in secure accommodation.

30 Ie under the Bail Act 1976 s 3(6) (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1167.

31 Children and Young Persons Act 1969 s 23(7)(a) (as substituted: see note 7 supra); modified by the Crime and Disorder Act 1998 s 98(5)). The Children and Young Persons Act 1969 s 23(7) (as substituted) is subject to s 23AA (as added) (see para 1247 ante).

32 Children and Young Persons Act 1969 s 23(7)(b) (as substituted (see note 7 supra); modified by the Crime and Disorder Act 1998 s 98(5)).

33 Ie any such conditions as are mentioned in *ibid* s 23(7) (as substituted: see note 7 supra).

34 Ibid s 23(8) (as substituted: see note 7 supra). A magistrates' court must cause a reason stated by it under s 23(8) (as substituted) to be specified in the warrant of commitment and to be entered in the register: s 23(8) (as so substituted).

35 Ie under *ibid* s 23(7) (as substituted: see note 7 supra).

36 Ibid s 23(9) (as substituted: see note 7 supra).

37 For the meaning of 'relevant court' see para 1252 note 9 ante.

38 Ie its duty under the Children and Young Persons Act 1969 s 23(4) (as substituted).

39 Ibid s 23(9A) (added for this purpose by the Crime and Disorder Act 1998 s 98(6)).

40 Children and Young Persons Act 1969 s 23(10) (as substituted: see note 7 supra).

41 Ibid s 23(11) (as substituted: see note 7 supra). The conditions or requirements are those that may be imposed under s 23(7), (9) or (10) (as substituted).

42 See paras 1246-1247 ante.

## UPDATE

### **1253 Bail and remand to local authority custody: alternative arrangements for boys aged 15 and 16 charged with specific offences**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 12--1998 Act s 98(3) amended: SI 2008/912.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(ii) Summary Proceedings/1254. Liability to arrest for breaking conditions of remand.

### **1254. Liability to arrest for breaking conditions of remand.**

A child or young person<sup>1</sup> who has been remanded or committed to local authority accommodation and in respect of whom conditions have been imposed<sup>2</sup> may be arrested without warrant<sup>3</sup> by a constable if the constable has reasonable grounds for suspecting that the child or young person has broken any of those conditions<sup>4</sup>. A child or young person so arrested<sup>5</sup> must, except where he was arrested within 24 hours of the time appointed for him to appear before the court in pursuance of the remand or committal, be brought as soon as practicable and in any event within 24 hours<sup>6</sup> after his arrest before a justice of the peace, and in that excepted case must be brought before the court before which he was to have appeared<sup>7</sup>.

A justice of the peace before whom a child or young person is brought<sup>8</sup> if of the opinion that the child or young person has broken any condition imposed on him<sup>9</sup> must remand him<sup>10</sup>, but, if not of that opinion, it must remand him to the place to which he had been remanded or committed at the time of his arrest subject to the same conditions as those which had been imposed on him at that time<sup>11</sup>.

1 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

2 I.e. under the Children and Young Persons Act 1969 s 23(7) or (10): see para 1247 ante. For the meaning of 'local authority accommodation' see para 1247 note 3 ante.

3 As to arrest without warrant see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 924 et seq.

4 Children and Young Persons Act 1969 s 23A(1) (s 23A added by the Criminal Justice and Public Order Act 1994 s 23).

5 I.e. under the Children and Young Persons Act 1969 s 23A(1) (as added): see the text and note 4 supra.

6 In reckoning any period of 24 hours for the purposes of ibid s 23A(2) (as added) (see the text and note 7 infra), no account is to be taken of Christmas Day, Good Friday or any Sunday: s 23A(2) (as added: see note 4 supra). As to the reckoning of time generally see TIME.

7 Ibid s 23A(2) (as added (see note 4 supra); and amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 136, Sch 10).

8 I.e. under the Children and Young Persons Act 1969 s 23A(2) (as added): see the text and note 7 supra).

9 See note 2 supra.

10 Children and Young Persons Act 1969 s 23A(3)(a) (as added: see note 4 supra). Section 23(7) or (10) (see para 1247 ante) then applies as if the person was then charged with or convicted of the offence for which he had been remanded or committed: s 23A(3)(a) (as so added).

11 Ibid s 23A(3)(b) (as added: see note 4 supra).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(ii) Summary Proceedings/1255. Summary trial of young person.

### **1255. Summary trial of young person.**

Until a day to be appointed<sup>1</sup>, where a person under the age of 18 appears or is brought before a magistrates' court<sup>2</sup> on an information<sup>3</sup> charging him with an indictable offence<sup>4</sup>, he must be tried summarily unless<sup>5</sup>:

- 964 (1) he is charged with an offence of homicide<sup>6</sup>;
- 965 (2) each of the requirements in the Firearms Act 1968 relating to mandatory minimum sentence for certain offences under that Act<sup>7</sup> would be satisfied with respect to the offence and the person charged with it, if he were convicted of that offence<sup>8</sup>;
- 966 (3) the offence is one under which young persons convicted on indictment of certain grave offences may be sentenced to be detained for long periods<sup>9</sup> and the court considers that if he is found guilty of the offence it ought to be possible to sentence him under certain sentencing provisions<sup>10</sup>; or
- 967 (4) he is charged jointly with a person who has attained the age of 18 and the court considers it necessary in the interests of justice to commit or send them both for trial<sup>11</sup>.

In a case falling within head (3) or head (4) above the accused must be committed for trial if the court is of the opinion that there is sufficient evidence to put him on trial or if it has power<sup>12</sup> to commit him without consideration of the evidence<sup>13</sup>. Where a magistrates' court commits a person under the age of 18 for trial for an offence of homicide, or for an offence within head (3) above, it may also commit him for trial for any other indictable offence with which he is charged at the same time if the charges could be joined in the same indictment<sup>14</sup>.

If on trying a person summarily<sup>15</sup> the court finds him guilty, it may impose a fine not exceeding a stated amount<sup>16</sup> or may exercise the same powers as it could have exercised if he had been found guilty of an offence for which, but for the restriction on imposing imprisonment on young offenders<sup>17</sup>, he could have been sentenced to imprisonment for a term not exceeding the maximum term of imprisonment for the offence on conviction on indictment, or six months, whichever is the less<sup>18</sup>.

A youth court<sup>19</sup> is not required to adjourn any proceedings for any offence at any stage by reason only of the fact that the court commits the accused for trial for another offence, or that the accused is charged with another offence<sup>20</sup>.

1 As from a day to be appointed, the Magistrates' Courts Act 1980 s 24 is amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 1 paras 1, 9, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1105; MAGISTRATES vol 29(2) (Reissue) para 663.

2 For the meaning of 'magistrates' court' see MAGISTRATES vol 29(2) (Reissue) para 583.

3 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) para 912.

4 As to indictable offences see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1102 et seq.

5 Magistrates' Courts Act 1980 s 24(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6). The Magistrates' Courts Act 1980 s 24(1) (as amended) is substituted by the Criminal Justice Act 2003 Sch 3 Pt I paras 1, 9(1), (2) as from a day to be appointed under s 336(3) to provide that where a person under the age of 18 years appears or is brought before a magistrates' court on an information charging him with an indictable offence he must, subject to the Crime and Disorder Act 1998 ss 51, 51A (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1132) and the Magistrates' Courts Act 1980 ss 24A, 24B (both as added) (see paras 1256-1257 post), be tried summarily. At the date at which this volume states the law no such day had been appointed. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1116; MAGISTRATES vol 29(2) (Reissue) para 663. As to the situation until this substitution comes into force see further *R (on the application of the DPP) v South East Surrey Youth Court (Ghanbari, interested party)* [2005] EWHC 2929 (Admin), [2006] 2 All ER 444; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1105.

The Magistrates' Courts Act 1980 s 24 (as amended) is directed only at the procedure of the magistrates' court, and cannot operate so as to deprive the Crown Court of jurisdiction to consider the joinder of counts: *R v Stephenson* (1998) 162 JP 495, CA. A trial of a child should not be transferred to the Crown Court unless the prosecution could conclude that a magistrates' court would be likely to find that the case fell within the Magistrates' Courts Act 1980 s 24 (as amended), and a statement to that effect should be included in the transfer notice: *R v T, R v K* [2001] 1 Cr App Rep 446, (2001) Times, 11 January, CA. An important consideration when deciding whether to transfer to the Crown Court is whether the young offender will be able to have a fair trial within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6: Application 24724/94 *T v United Kingdom* [2000] 2 All ER 1024, [2000] Crim LR 187, ECtHR. The date on which the court decides mode of trial is the crucial date for determining whether the defendant has the right to elect trial if he is aged 18 and over: *R v West London Justices, ex p Siley-Winditt* [2000] Crim LR 926, DC. See also *R (on the application of H) v Southampton Youth Court* [2004] EWHC 2912 (Admin), 169 JP 37, [2005] Crim LR 395; *R (on the application of Crown Prosecution Service) v Redbridge Youth Court* [2005] EWHC 1390 (Admin) at [11], 169 JP 393 at [11] per Brooke LJ.

6 Magistrates' Courts Act 1980 s 24(1B)(a) (s 24(1B) added by the Criminal Justice Act 2003 s 42(1),(2)(c)). As to homicide see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 84 et seq. An offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 107) is an offence of homicide for these purposes: s 6(1), (5).

7 The requirements under the Firearms Act 1968 s 51A(1) (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 662, 664.

8 See the Magistrates' Courts Act 1980 s 24(1B)(b) (as added: see note 6 supra).

This includes situations where the Violent Crime Reduction Act 2006 s 29(3) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE) would apply if he were convicted of the offence: see the Magistrates' Courts Act 1980 s 24(1B)(c) (added by the Violent Crime Reduction Act 2006 s 49, Sch 1 para 1).

9 The offence is one mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1), (2) (s 91(1) amended; s 91(2) repealed) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78). See also *R (on the application of the Crown Prosecution Service) v Redbridge Youth Court* [2005] EWHC 1390 (Admin), 169 JP 393; *R (on the application of the DPP) v South East Surrey Youth Court (Ghanbari, interested party)* [2005] EWHC 2929 (Admin) at [13], [2006] 2 All ER 444 at [13] per Rose LJ.

10 See the Magistrates' Courts Act 1980 s 24(1)(a) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), (3), Sch 10 para 40, Sch 11; the Crime and Disorder Act 1998 s 119, Sch 8 para 40(1); and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 64(1), (2)). As to the prospective substitution of this provision see note 5 supra. The sentencing provisions mentioned in the text are those under the Powers of Criminal Courts (Sentencing) Act 2000 s 91(3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78). See further MAGISTRATES vol 29(2) (Reissue) para 663.

11 Magistrates' Courts Act 1980 s 24(1)(b) (amended by the Criminal Justice Act 1991 Sch 8 para 6). As to the prospective substitution of this provision see note 5 supra. Where in such a case a magistrates' court commits a person under the age of 18 for trial for an offence with which he is charged jointly with a person who has attained that age, the court may also commit him for trial for any other indictable offence with which he is charged at the same time (whether jointly with the person who has attained that age or not), if the charges for both could be joined on the same indictment: Magistrates' Courts Act 1980 s 24(2) (amended by the Criminal Justice Act 1991 Sch 8 para 6; and the Crime and Disorder Act 1998 Sch 8 para 40(2)). As to committal for trial see MAGISTRATES vol 29(2) (Reissue) para 676. As to the effects of the Crime and Disorder Act 1998 s 51(5) upon committal proceedings see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1132. As to relevant and competing factors relevant to issue see *R (on the application of the DPP) v South East Surrey Youth Court (Ghanbari, interested party)* [2005] EWHC 2929 (Admin), [2006] 2 All ER 444. Where a magistrates' court conducts committal proceedings against both a young person and an adult and concludes that there is sufficient evidence to commit the young person but not the adult, it must discharge the adult and then consider whether the young person's case falls within the Magistrates' Courts Act 1980 s 24(1)(a) (as amended) in order

to determine the mode of trial; it has no power to remit the case to a youth court for the mode of trial to be decided: *R v Tottenham Youth Court, ex p Fawzy* [1998] 1 All ER 365, [1999] 1 WLR 1350. See further MAGISTRATES vol 29(2) (Reissue) para 663.

12 le under the Magistrates' Courts Act 1980 s 6(2): see MAGISTRATES vol 29(2) (Reissue) para 676.

13 Ibid s 24(1). As to the prospective substitution of this provision see note 5 supra.

14 Ibid s 24(1A) (added by the Crime and Disorder Act 1998 s 47(6); and amended by the Criminal Justice Act 2003 s 42(1), (2)(b)). As from a day to be appointed, this provision is repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 1 paras 1, 9(1), (3), Sch 37 Pt 4). At the date at which this volume states the law, no such day had been appointed. See further MAGISTRATES vol 29(2) (Reissue) para 663.

15 le in pursuance of the Magistrates' Courts Act 1980 s 24(1) (as amended): see the text and notes 1-13 supra.

16 le £1000. However, in relation to a person under the age of 14, *ibid* s 24(3) (as amended) has effect as if for '£1,000' there were substituted '£250': s 24(4) (amended by the Criminal Justice Act 1991 ss 17(2)(a), (b), 101(2), Sch 13).

17 le the Powers of Criminal Courts (Sentencing) Act 2000 s 89(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 11.

18 Magistrates' Courts Act 1980 s 24(3) (amended by the Criminal Justice Act 1982 s 77, Sch 14 para 47; the Criminal Justice Act 1991 s 17(2); and the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 64(1), (3)). See further MAGISTRATES vol 29(2) (Reissue) para 663.

19 As to youth courts see para 1263 et seq post.

20 Magistrates' Courts Act 1980 s 10(3A) (added by the Crime and Disorder Act 1998 s 47(5)). See further MAGISTRATES vol 29(2) (Reissue) para 663.

## UPDATE

### 1255 Summary trial of young person

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **1256. Indicating intention as to plea in certain cases.**

As from a day to be appointed<sup>1</sup> where:

- 968 (1) a person under the age of 18 years<sup>2</sup> appears or is brought before a  
magistrates' court on an information<sup>3</sup> charging him with certain<sup>4</sup> offences<sup>5</sup>; and  
969 (2) but for the application of the following provisions<sup>6</sup>, the court would be  
required at that stage<sup>7</sup> to determine, in relation to the offence, whether to send the  
person to the Crown Court for trial, or to determine any matter, the effect of which  
would be to determine whether he is sent to the Crown Court for trial<sup>8</sup>,

the court must, before proceeding to make any such determination (the 'relevant determination'), follow the following procedure<sup>9</sup>.

The court must cause the charge to be written down, if this has not already been done, and to be read to the defendant<sup>10</sup>. The court must explain to the defendant in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty:

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9. (a) the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and, having been asked, he had pleaded guilty<sup>11</sup>;  
10. (b) in cases where the offence is mentioned in the provisions<sup>12</sup> relating to a sentence of detention for a specified period, he may be sent to the Crown Court for sentencing<sup>13</sup> if the court is of a specified<sup>14</sup> opinion<sup>15</sup>.

26

The court must then ask the defendant whether, if the offence were to proceed to trial, he would plead guilty or not guilty<sup>16</sup>. If the defendant indicates that he would plead guilty, the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and as if, having been asked, the defendant had pleaded guilty, and, accordingly, the court must not, and may not be required to, proceed to make the relevant determination or to proceed further under the relevant provision<sup>17</sup> relating to sending for trial in relation to the offence<sup>18</sup>.

If the defendant indicates that he would plead not guilty, the court must proceed to make the relevant determination and the above provisions<sup>19</sup> cease to apply<sup>20</sup>. If the defendant in fact fails to indicate a plea he is to be taken<sup>21</sup> to indicate that he would plead not guilty<sup>22</sup>.

1 The Magistrates' Courts Act 1980 ss 24A, 24C, 24D are added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 10 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to legislation having effect before the appointed day concerning offences triable on indictment or summarily see para 1255 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1105.

2 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1116.

3 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) para 912.

4 Ie an offence under the Crime and Disorder Act 1998 s 51A(12) (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133).

5 Magistrates' Courts Act 1980 s 24A(1)(a) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

6 Ie the provisions of *ibid* s 24A(2)-(10) (as added) (see the text and notes 9-22 *infra*).

7 Ie by virtue of the Crime and Disorder Act 1998 s 51(7), (8) (as substituted) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1132), s 51A(3)(b), (4), (5) (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133).

8 Magistrates' Courts Act 1980 s 24A(1)(b) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

9 *Ibid* s 24A(2) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

10 *Ibid* s 24A(4) (as added: see note 1 supra). Everything that the court is required to do under s 24A (as added) must be done with the defendant present in court: s 24A(3) (as so added).

The functions of a magistrates' court under ss 24A, 24B (as added) (see para 1257 post) and 24C (as added) (see note 22 *infra*) may be discharged by a single justice: s 24D(1) (as added: see note 1 supra). Section 24D(1) (as added) is not to be taken as authorising the summary trial of an information (other than a summary trial by virtue of s 24A(7) (as added) (see the text and note 18 *infra*) or s 24B(2)(c) (as added) (see para 1257 post), or the imposition of a sentence, by a magistrates' court composed of fewer than two justices: s 24D(2) (as so added). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

11 See *ibid* s 24A(5)(a) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

12 Ie the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (as amended; prospectively amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

13 Ie under *ibid* s 3B (prospectively added) or (if applicable) s 3C (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1125-1126.

14 Ie such opinion as is mentioned in *ibid* s 3B(2) (prospectively added) or s 3C(2) (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1125-1126.

15 Magistrates' Courts Act 1980 s 24A(5)(b) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

16 *Ibid* s 24A(6) (as added: see note 1 supra). Subject to s 24A(7) (as added) (see the text and note 17 *infra*), the following are not for any purpose to be taken to constitute the taking of a plea:

3214 (1) asking the defendant under s 24A (as added) whether, if the offence were to proceed to trial, he would plead guilty or not guilty (s 24A(10)(a) (as so added));

3215 (2) an indication by the defendant under s 24A (as added) of how he would plead (s 24A(10)(b) (as so added)).

See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

17 Ie under either the Crime and Disorder Act 1998 s 51 or s 51A (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1131-1133).

18 Magistrates' Courts Act 1980 s 24A(7) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

19 Ie *ibid* s 24A (as added).

20 *Ibid* s 24A(8) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

21 Ie for the purposes of *ibid* s 24A (as added).

22 Ibid s 24A(9) (as added: see note 1 supra). A magistrates' court proceeding under s 24A (as added) or s 24B (as added) (see para 1257 post) may adjourn the proceedings at any time, and on doing so on any occasion when the defendant is present may remand the defendant: s 24C(1) (as added: see note 1 supra). Where the court remands the defendant, the time fixed for the resumption of proceedings is to be that at which he is required to appear or be brought before the court in pursuance of the remand or would be required to be brought before the court but for s 128(3A) (as added and amended; prospectively amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1144): s 24C(2) (as so added). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117.

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### **1257. Intention as to plea where defendant absent.**

As from a day to be appointed<sup>1</sup> where:

- 970 (1) a person under the age of 18 years<sup>2</sup> appears or is brought before a  
magistrates' court on an information<sup>3</sup> charging him with certain<sup>4</sup> offences<sup>5</sup>;
- 971 (2) but for the application of the following provisions<sup>6</sup>, the court would be  
required at that stage<sup>7</sup> to determine in relation to the offence, whether to send the  
person to the Crown Court for trial, or to determine any matter, the effect of which  
would be to determine whether he is sent to the Crown Court for trial ('the relevant  
determination')<sup>8</sup>;
- 972 (3) the defendant is represented by a legal representative<sup>9</sup>;
- 973 (4) the court considers that by reason of the defendant's disorderly conduct  
before the court it is not practicable for the relevant proceedings<sup>10</sup> to be conducted  
in his presence<sup>11</sup>; and
- 974 (5) the court considers that it should proceed in the absence of the defendant<sup>12</sup>,  
975 then, in such a case:
- 27 11. (a) the court must cause the charge to be written down, if this has not already  
been done, and to be read to the representative<sup>13</sup>;
- 12. (b) the court must ask the representative whether, if the offence were to  
proceed to trial, the defendant would plead guilty or not guilty<sup>14</sup>;
- 13. (c) if the representative indicates that the defendant would plead guilty, the  
court must proceed as if the proceedings constituted from the beginning the  
summary trial of the information and as if, having been asked, the defendant  
pleaded guilty under it<sup>15</sup>;
- 14. (d) if the representative indicates that the defendant would plead not guilty,  
the court must proceed to make the relevant determination<sup>16</sup>.
- 28

If the representative in fact fails to indicate how the defendant would plead, he is to be taken to indicate that the defendant would plead not guilty<sup>17</sup>.

1 The Magistrates' Courts Act 1980 s 24B is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 10 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed.

2 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1116.

3 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 912.

4 Ie an offence under the Crime and Disorder Act 1998 s 51A(12) (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1117).

5 Magistrates' Courts Act 1980 s 24B(1)(a) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

6 Ie provisions of *ibid* s 24B (as added).



7 le by virtue of the Crime and Disorder Act 1998 s 51(7), (8) (as substituted) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1132), s 51A(3)(b), (4), (5) (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133).

8 Magistrates' Courts Act 1980 s 24B(1)(b) (as added: see note 1 supra).

9 Ibid s 24B(1)(c) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

10 le under s 24A (as added): see para 1256 ante.

11 Ibid s 24B(1)(d) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

12 Ibid s 24B(1)(e) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

13 Ibid s 24B(2)(a) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

14 Ibid s 24B(2)(b) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

15 Ibid s 24B(2)(c) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1118.

16 Ibid s 24B(2)(d) (as added: see note 1 supra). See s 24D(1), (2) (as added); and para 1256 ante. If the representative indicates that the defendant would plead not guilty, s 24B (as added) ceases to apply: s 24B(2) (as so added). Subject to s 24B(2)(c) (as added) (see head (c) in the text), the following do not for any purpose constitute the taking of a plea:

3216 (1) asking the representative under s 24B (as added) whether (if the offence were to proceed to trial) the defendant would plead guilty or not guilty (s 24B(4)(a) (as so added));

3217 (2) an indication by the representative under s 24B (as added) of how the defendant would plead (s 24B(4)(b) (as so added)).

17 Ibid s 24B(3) (as added: see note 1 supra). See also para 1117 note 22 ante.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(ii) Summary Proceedings/1258. Power to change from summary trial to committal proceedings and vice versa.

### **1258. Power to change from summary trial to committal proceedings and vice versa.**

Until a day to be appointed<sup>1</sup>, where a person under the age of 18 appears or is brought before a magistrates' court on an information<sup>2</sup> charging him with an indictable offence<sup>3</sup> other than certain offences<sup>4</sup>, and the court<sup>5</sup>:

976 (1) has begun to try the information summarily, on the footing that the case does not fall into specified categories of cases<sup>6</sup>, and must therefore be tried summarily<sup>7</sup>; or

977 (2) has begun to inquire into the case as examining justices on the footing that the case does so fall<sup>8</sup>:

29

15. (a) if, in a case falling within head (1) above, it appears to the court at any time before the conclusion of the evidence for the prosecution that the case is after all one which ought not to be tried summarily<sup>9</sup>, the court may discontinue the summary trial and proceed to inquire into the information as examining justices and, on doing so, must adjourn the hearing<sup>10</sup>; or

16. (b) if, in a case falling within head (2) above, it appears to the court at any time during the inquiry that the case is after all one which ought to be tried summarily<sup>11</sup>, the court may proceed to try the information summarily<sup>12</sup>.

30

1 The Magistrates' Courts Act 1980 s 25 is amended by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 1 paras 1, 11, Sch 37 Pt 4 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed.

2 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (Reissue) para 912.

3 As to indictable offences see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1102 et seq.

4 I.e. offences falling within the Magistrates' Courts Act 1980 s 24(1B) (as added): see para 1257 ante.

5 I.e. within ibid s 24(1)(a) (as amended) or s 24(1)(b) (as amended): see para 1255 ante.

6 Ibid s 25(5) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6; and the Prosecution of Offences Act 1985 s 31(5), (6), Sch 1 Pt 1, Sch 2). As from a day to be appointed, the provisions of the Magistrates' Courts Act 1980 s 25(3)-(8) (as amended) are prospectively repealed by the Criminal Justice Act 2003 ss 41, 32, Sch 3 Pt 1 paras 1, 11, Sch 37 Pt 4. At the date at which this volume states the law, no such day had been appointed.

7 Magistrates' Courts Act 1980 s 25(5)(a). As to the prospective repeal of this provision see note 6 supra.

8 Ibid s 25(5)(b). As to the prospective repeal of this provision see note 6 supra.

9 I.e. under ibid s 24(1) (as amended): see para 1255 ante.

10 Ibid s 25(6) (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 5(2)). As to the prospective repeal of this provision see note 6 supra. Where the Magistrates' Courts Act 1980 s 25(6) (as amended) applies, and the court adjourns the hearing without remanding the accused, the justice or any of the

justices of which the court is composed may issue a summons directed to the accused requiring his presence before the court: see s 26(1); and MAGISTRATES vol 29(3) (Reissue) para 665. If the accused is not present at the time and place appointed for the resumption of the hearing, the court may issue a warrant for his arrest: see s 26(2); and MAGISTRATES vol 29(3) (Reissue) para 665. See *R v West London Justices, ex p S-W* (2000) 165 JP 112. See also *R (on the application of K) v Leeds Youth Court* [2001] EWHC 177 (Admin), 165 JP 694, DC.

11 See note 7 *supra*.

12 Magistrates' Courts Act 1980 s 25(7). As to the prospective repeal of this provision see note 6 *supra*.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(iii) Remission to Youth Court or Magistrates' Court/1259. Cases to be remitted to youth court: remittal for sentence.

### **(iii) Remission to Youth Court or Magistrates' Court**

#### **1259. Cases to be remitted to youth court: remittal for sentence.**

Where child or young person (that is to say, any person aged under 18)<sup>1</sup>, is convicted by or before any court of an offence other than homicide<sup>2</sup>, the court may and, if it is not a youth court<sup>3</sup>, must unless satisfied that it would be undesirable to do so, remit the case<sup>4</sup>:

- 978 (1) if the offender was sent to the Crown Court for trial<sup>5</sup> to a youth court acting for the place where he was committed for trial or sent to the Crown Court for trial<sup>6</sup>; or
- 979 (2) in any other case, to a youth court acting either for the same place as the remitting court or for the place where the offender habitually resides<sup>7</sup>.

Where a case is so remitted, the offender must be brought before a youth court accordingly, and that court may deal with him in any way in which it might have dealt with him if he had been tried and convicted by that court<sup>8</sup>.

A court by which an order remitting a case to a youth court is made<sup>9</sup>:

- 980 (a) may<sup>10</sup> give such directions as appear to be necessary with respect to the custody of the offender or for his release on bail<sup>11</sup> until he can be brought before the youth court<sup>12</sup>; and
- 981 (b) must cause to be transmitted to the designated officer for the youth court a certificate setting out the nature of the offence and stating that the offender has been convicted of the offence, and that the case has been remitted for the purpose of being dealt with under specific provisions of the Power of Criminal Courts (Sentencing) Act 2000<sup>13</sup>.

Where a case is so remitted, the offender has no right of appeal against the order of remission, but has the same right of appeal against any order of the court to which the case is remitted as if he had been convicted by that court<sup>14</sup>.

If the court would be required<sup>15</sup>, were it not to remit the case<sup>16</sup>, to refer the offender to a youth offender panel<sup>17</sup>, the court may, but need not, so remit the case<sup>18</sup>. However, if the court is not required to refer the offender to a youth offender panel<sup>19</sup>, the case may be dealt with by means of:

- 982 (i) an order discharging the offender absolutely or conditionally<sup>20</sup>;
- 983 (ii) an order for the payment of a fine<sup>21</sup>; or
- 984 (iii) an order<sup>22</sup> requiring the offender's parent or guardian to enter into a recognisance to take proper care<sup>23</sup> of him and exercise proper control<sup>24</sup> over him<sup>25</sup>,

with or without any other order that the court has power to make when absolutely or conditionally discharging an offender, if the court is of the opinion that the case is one which can properly be dealt with by such means<sup>26</sup>.

Before finally disposing of the case or before remitting the case to another court in pursuance of the Power of Criminal Courts (Sentencing) Act 2000<sup>27</sup>, the court must inform the relevant minor and his parent or guardian, if present, or any person assisting him in his case, of the manner in which it proposes to deal with the case and allow any of those persons so informed to make representations, but the relevant minor must not be so informed if the court considers it undesirable so to do<sup>28</sup>. On making any order, the court must explain to the relevant minor the general nature and effect of the order unless, in the case of an order requiring his parent or guardian to enter into a recognisance, it appears to it undesirable so to do<sup>29</sup>.

1 For these purposes, 'child' means a person under the age of 14; and 'young person' means a person aged at least 14 but under 18: Powers of Criminal Courts (Sentencing) Act 2000 s 163.

2 Ibid s 8(1). As to homicide see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 84 et seq.

3 As to youth courts see para 1263 et seq post.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 8(2). In relation to a magistrates' court other than a youth court, s 8(2) has effect subject to s 8(6): see s 8(2). Without prejudice to the power to remit any case to a youth court which is conferred on a magistrates' court other than a youth court by s 8(1), (2), where such a magistrates' court convicts a child or young person of an offence it must exercise that power unless the case falls within s 8(7) (see note 18 infra) or s 8(8) (see note 26 infra): s 8(6). A document purporting to be a copy of an order made by a court under s 8 is, if it purports to be certified as a true copy by the justices' chief executive for the court, evidence of the order: s 8(10).

5 Ie under the Crime and Disorder Act 1998 s 51 or s 51A (as added) (see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 662, 664).

6 Powers of Criminal Courts (Sentencing) Act 2000 s 8(2)(a) (substituted by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 74(1), (2)).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 8(2)(b).

8 Ibid s 8(3).

9 Ie under ibid s 8(2): see the text to notes 1-7 supra.

10 Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (restrictions on granting bail): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1170.

11 As to bail generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1165 et seq.

12 Power of Criminal Courts (Sentencing) Act 2000 s 8(4)(a).

13 Ibid s 8(4)(b) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 62). The case may be remitted under the Power of Criminal Courts (Sentencing) Act 2000 s 8(4)(b) for the purpose of being dealt with by s 8(1)-(3): see the text to notes 1-8 supra.

14 Ibid s 8(5).

15 Ie by ibid s 16(2): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344.

16 Ie under ibid s 8(2): see the text and notes 3-7 supra.

17 As to youth offender panels see para 1295 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

18 Power of Criminal Courts (Sentencing) Act 2000 s 8(7).

19 Ie the case does not fall within ibid s 8(7): see the text to note 18 supra.

20 Ibid s 8(8)(a). As to absolute and conditional discharge see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

21 Ibid s 8(8)(b).

- 22    le an order under ibid s 150: see para 1288 post.
- 23    'Care' is to be construed in accordance with ibid s 150(11) (see para 1288 post): s 8(9).
- 24    'Control' is to be construed in accordance with ibid s 150(11) (see para 1288 post): s 8(9).
- 25    Ibid s 8(8)(c).
- 26    Ibid s 8(8).
- 27    le in pursuance of ibid s 8: see the text and notes 20-26 supra.
- 28    CrimPR 44.2(1).
- 29    CrimPR 44.2(2).

## **UPDATE**

### **1259 Cases to be remitted to youth court: remittal for sentence**

TEXT AND NOTES 27-29--CrimPR Pt 44 now Criminal Procedure Rules 2010, SI 2010/60, Pt 37.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(iii) Remission to Youth Court or Magistrates' Court/1260. Young person charged jointly with older person.

### **1260. Young person charged jointly with older person.**

Where:

- 985 (1) a person under the age of 18 ('the juvenile') appears or is brought before a magistrates' court other than a youth court<sup>1</sup> on an information<sup>2</sup> jointly charging him and one or more other persons with an offence<sup>3</sup>; and
- 986 (2) that other person, or any of those other persons, has attained that age<sup>4</sup>,

head (a) and head (b) below have effect notwithstanding the provision<sup>5</sup> which would otherwise require the charge against the juvenile to be heard by a magistrates' court other than a youth court<sup>6</sup>.

If:

- 987 (a) the court proceeds to the summary trial<sup>7</sup> of the information in the case of both or all of the accused, and the older accused<sup>8</sup> or each of the older accused pleads guilty<sup>9</sup>; or
- 988 (b) the court, in the case of the older accused, or each of the older accused, sends him to the Crown Court for trial under certain provisions<sup>10</sup> and, in the case of the juvenile, proceeds to the summary trial of the information<sup>11</sup>,

then, if in either situation the juvenile pleads not guilty, the court may before any evidence is called in his case remit him for trial to a youth court acting for the same place as the remitting court or for the place where he habitually resides<sup>12</sup>.

A person so remitted to a youth court must be brought before and tried by a youth court accordingly<sup>13</sup>. A person so remitted has no right of appeal against the order of remission<sup>14</sup>, and the remitting court may<sup>15</sup> give such directions as appear to be necessary with respect to his custody or for his release on bail until he can be brought before the youth court<sup>16</sup>.

1 As to youth courts see para 1263 et seq post.

2 As to the laying of an information see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 912.

3 Magistrates' Courts Act 1980 s 29(1)(a) (amended by the Criminal Justice Act 1991 ss 68, 70, 100, Sch 8 para 6(1)(a), Sch 11 para 40). See also MAGISTRATES vol 29(3) (Reissue) para 747.

4 Magistrates' Courts Act 1980 s 29(1)(b). Section 29 (as amended) applies in relation to a corporation as if it were an individual who had attained the age of 18 years: s 29(5) (amended by the Criminal Justice Act 1991 Sch 8 para 6, Sch 11 para 40). See also MAGISTRATES vol 29(3) (Reissue) para 747.

5 I.e. the Children and Young Persons Act 1933 s 46(1) proviso (a) (as amended): see para 1266 post.

6 Magistrates' Courts Act 1980 s 29(1) (amended by the Criminal Justice Act 1991 Sch 8 para 6(1)(a), Sch 11 para 40). See also MAGISTRATES vol 29(3) (Reissue) para 747.

7 As to summary trials see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 805.

8 The 'older accused' means such one or more of the accused as have attained the age of 18 years: Magistrates' Courts Act 1980 s 29(1) (as amended: see note 6 supra).

9 Ibid s 29(2)(a). See also MAGISTRATES vol 29(3) (Reissue) para 747.

10 Ibid s 29(2)(b)(i) (amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 51(1), (5)). The provisions mentioned in the text are those of the Crime and Disorder Act 1998 s 51 or s 51A (as added): see para 1262 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 662, 664. See also MAGISTRATES vol 29(3) (Reissue) para 747.

11 Magistrates' Courts Act 1980 s 29(2)(b)(ii). See also para 1255 ante; and MAGISTRATES vol 29(3) (Reissue) para 747.

12 Ibid s 29(2) (amended by the Criminal Justice Act 1991 Sch 8 para 6, Sch 11 para 40).

13 Magistrates' Courts Act 1980 s 29(3) (amended by the Criminal Justice Act 1991 Sch 8 para 6, Sch 11 para 40). See also MAGISTRATES vol 29(3) (Reissue) para 747.

14 Magistrates' Courts Act 1980 s 29(4)(a).

15 Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1170.

16 Magistrates' Courts Act 1980 s 29(4)(b) (amended by the Criminal Justice Act 1991 Sch 8 para 6, Sch 11 para 40; and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 41). See also MAGISTRATES vol 29(3) (Reissue) para 747.

## **UPDATE**

### **1260 Young person charged jointly with older person**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(iii) Remission to Youth Court or Magistrates' Court/1261. Remission to magistrates' court.

**1261. Remission to magistrates' court.**

Where a young person<sup>1</sup> who appears or is brought before a youth court<sup>2</sup> charged with an offence subsequently attains the age of 18, specific provisions allow for the remission of that person for trial or sentence, as appropriate, to the magistrates' court acting for the same local justice area as the youth court<sup>3</sup>.

1 For the meaning of 'young person' see para 627 note 6 ante.

2 As to youth courts see para 1263 et seq post.

3 See the Crime and Disorder Act 1998 s 47 (as amended); the Powers of Criminal Courts (Sentencing) Act 2000 s 9; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1098.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(1) OFFENDERS UNDER THE AGE OF EIGHTEEN/(iii) Remission to Youth Court or Magistrates' Court/1262. Sending cases to the Crown Court.

## **1262. Sending cases to the Crown Court.**

Where a child or young person appears or is brought before a magistrates' court charged with an offence and the following condition is satisfied<sup>1</sup>, the court must send him forthwith to the Crown Court for trial for the offence<sup>2</sup>. The condition is that the offence is a specified offence<sup>3</sup> and it appears to the court that if he is found guilty of that offence the criteria for the imposition of a sentence<sup>4</sup> would be met<sup>5</sup>.

Where the court sends a child or young person for trial as mentioned above<sup>6</sup>, it may at the same time send him to the Crown Court for trial for any indictable or summary offence with which he is charged and which:

- 989 (1) if it is an indictable offence, appears to the court to be related to the offence mentioned above<sup>7</sup>;
- 990 (2) if it is a summary offence, appears to the court to be related to the offence mentioned above<sup>8</sup> or to the indictable offence, and which is punishable with imprisonment or involves obligatory or discretionary disqualification from driving<sup>9</sup>.

Where a child or young person who has been sent for trial as mentioned above subsequently appears or is brought before a magistrates' court charged with an indictable or summary offence which appears to the court to be related to the offence and in the case of a summary offence fulfils the requisite condition, the court may send him forthwith to the Crown Court for trial for the indictable or summary offence<sup>10</sup>.

Where a child or young person appears or is brought before a magistrates court on the same or a subsequent occasion charged jointly with an adult with an indictable offence for which the adult is sent for trial, the court must, if it considers it necessary in the interests of justice to do so, send the child or young person forthwith to the Crown Court for trial for the indictable offence<sup>11</sup>. The court may at the same time send the child or young person to the Crown Court for trial for any indictable or summary offence with which he is charged which fulfils the requisite conditions<sup>12</sup>.

Otherwise, until a day to be appointed, where a child a child or young person appears or is brought before a magistrates court on the same or a subsequent occasion charged jointly with an adult with an indictable offence for which the adult is sent for trial, the court must, if it considers it necessary in the interests of justice to do so, send the child or young person forthwith to the Crown Court for trial for the indictable offence<sup>13</sup>. The court may at the same time send the child or young person to the Crown Court for trial for any indictable or summary offence with which he is charged which fulfils the requisite conditions<sup>14</sup>.

1 le the condition specified in the Crime and Disorder Act 1998 s 51A(3)(d) (as added). Section 51 is substituted, and s 51A is added, by the Criminal Justice Act 2003 s 41, Sch 3 Pt 1 paras 15, 18. At the date at which this volume states the law the Crime and Disorder Act 1998 ss 51, 51A (as added) have effect only for cases sent for trial under s 51A(3)(d) (as added): see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2, Sch 1 para 29; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133. At the date at which this volume states the law no orders had been made bringing the Crime and Disorder Act 1998 s 51A(3)(a)-(c) (as added) into force (see note 5 *infra*). Section 51A (as added) is subject to the Magistrates' Courts Act 1980 ss 24A, 24B (both as added) (see para

1256 ante): Crime and Disorder Act 1998 s 51A(1) (as so added). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133.

2 Ibid s 51A(2) (as added: see note 1 supra). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133.

3 le a specified offence within the meaning of the Criminal Justice Act 2003 s 224 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 70-71, 80). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1133.

4 le the criteria for the imposition of a sentence under ibid s 226(3) or s 228(2) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 83-84).

5 Crime and Disorder Act 1998 s 51A(3)(d) (as added: see note 1 supra).

As from a day to be appointed, the following conditions also apply, namely:

3218 (1) the offence is:

180.(a) an offence of homicide (s 51A(3)(a), (12)(a) (as so added));

181. (b) each of the requirements of the Firearms Act 1968 would be satisfied with respect to the offence and the person charged with it, if he were convicted of the offence (Crime and Disorder Act 1998 s 51A(3)(a), (12)(b) (as so added)); or

182. (c) the Violent Crime Reduction Act 2006 s 29(3) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE) would apply if he were convicted of the offence (Crime and Disorder Act 1998 s 51A(3)(a), (12)(c) (s 51A as so added; s 51A(12)(c) added by the Violent Crime Reduction Act 2006 s 49, Sch 1 para 5));

3219 (2) the offence is such as is mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (other than one in head (1) supra) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of s 91(3) (Crime and Disorder Act 1998 s 51A(3)(b) (as so added));

3220 (3) notice is given to the court under s 51B (as added) or s 51C (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1134-1135) in respect of the offence (s 51A(3)(c) (as so added)).

In the case of a child or young person charged with an offence:

3221 (i) if the offence satisfies the conditions in s 51A(3)(d) (as added), the offence must be dealt with as mentioned in s 51A(2) (as added) and not under any other provision of s 51A (as added) or s 51 (s 51A(10)(a) (as so added));

3222 (ii) subject to head (i) above, if the offence is one in respect of which the requirements of s 51(7) for sending the child or young person to the Crown Court are satisfied, the offence must be dealt with under s 51(7) and not under any other provision of s 51A (as added) or s 51 (s 51A(10)(b) (as so added)).

As from a day to be appointed the above also applies to s 51A(3)(a)-(c) (as added). At the date at which this volume states the law no such day had been appointed.

6 le as mentioned in ibid s 51A(2) (as added): see the text and note 2 supra.

7 Ibid s 51A(4)(a) (as added: see note 1 supra). See note 6 supra.

8 See note 6 supra.

9 Crime and Disorder Act 1998 s 51A(4)(b), (12) (as added: see note 1 supra).

10 Ibid s 51A(5) (as added: see note 1 supra).

11 See ibid s 51(7) (as substituted: see note 1 supra). See note 1 supra.

12 Ibid s 51(8) (as substituted: see note 11 supra).

13 Ibid s 51(5) (as substituted: see note 11 supra).

14 Ibid s 51(6) (as substituted: see note 11 supra).

## **UPDATE**

### **1262 Sending cases to the Crown Court**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(2) YOUTH COURTS/(i) Constitution and Jurisdiction/1263. Meaning of 'youth court'.

## **(2) YOUTH COURTS**

### **(i) Constitution and Jurisdiction**

#### **1263. Meaning of 'youth court'.**

Magistrates' courts constituted in accordance with the relevant statutory provisions<sup>1</sup> and sitting for the purpose of hearing any charge against a child or young person<sup>2</sup> or for the purpose of exercising any other jurisdiction conferred on youth courts<sup>3</sup> by or under any Act<sup>4</sup>, are known as youth courts<sup>5</sup>. Juvenile courts were renamed 'youth courts' by the Criminal Justice Act 1991<sup>6</sup>.

1 Children and Young Persons Act 1933 s 45(1)(a) (s 45 substituted by the Courts Act 2003 s 50(1)). The relevant statutory provisions referred to in the text are the Children and Young Persons Act 1933 s 45 (as substituted) (see para 1264 et seq post) or the Courts Act 2003 s 66 (see MAGISTRATES).

2 Children and Young Persons Act 1933 s 45(1)(b)(i) (as substituted: see note 1 supra). For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

3 As to youth courts see para 1264 et seq post.

4 Children and Young Persons Act 1933 s 45(1)(b)(ii) (as substituted: see note 1 supra).

5 Ibid s 45(1)(b) (as substituted: see note 1 supra).

6 See the Criminal Justice Act 1991 s 70(1). The consequential amendment of enactments is also provided for: see ss 70(2), 100, Sch 11 paras 40, 41.

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### **1264. Constitution of youth courts.**

A justice of the peace is not qualified to sit as a member of a youth court for the purpose of dealing with any proceedings unless<sup>1</sup> he has been authorised by the Lord Chief Justice<sup>2</sup> to sit as a member of a youth court to deal with: (1) proceedings of that description<sup>3</sup>; or (2) all proceedings dealt with by youth courts<sup>4</sup>.

Every holder of a judicial office listed below is qualified to sit as a member of a youth court:

- 991 (a) judge of the High Court<sup>5</sup>;
- 992 (b) deputy judge of the High Court<sup>6</sup>;
- 993 (c) circuit judge<sup>7</sup>;
- 994 (d) deputy circuit judge<sup>8</sup>;
- 995 (e) recorder<sup>9</sup>.

A youth court must consist of either: (i) a District Judge sitting alone<sup>10</sup>; or (ii) not more than three justices who must include a man and a woman<sup>11</sup>.

A youth court, other than one consisting of a District Judge (Magistrates' Courts) sitting alone, must sit under the chairmanship of a District Judge (Magistrates' Courts) if he is sitting as a member of the court or a youth justice who is on the list of approved youth court chairmen<sup>12</sup>. The youth justices present may appoint one of their number to preside in a youth court to deal with any case in the absence of a justice entitled to preside<sup>13</sup> if:

- 996 (A) before making such appointment the youth justices present are satisfied as to the suitability for this purpose of the justice proposed<sup>14</sup>; and
- 997 (B) except as mentioned below, the justice proposed has completed or is undergoing a chairman training course<sup>15</sup>.

The condition in head (B) above does not apply if by reason of illness, circumstances unforeseen when the youth justices to sit were chosen, or other emergency, no justice who complies with that condition is present<sup>16</sup>.

1 Children and Young Persons Act 1933 s 45(2) (s 45 substituted by the Courts Act 2003 s 50(1)).

2 This power is exercised concurrently with the Lord Chancellor. As to the protected functions of the Lord Chancellor see the Constitutional Reform Act 2005 s 19, Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4): see COURTS) to exercise his functions under the Children and Young Persons Act 1933 s 45(3) (as substituted) or s 45(4) (as substituted) or his powers under rules under s 45(4) (as substituted): s 45(9) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 para 20(1), (5)).

3 Children and Young Persons Act 1933 s 45(2), (3)(a) (s 45 as substituted (see note 1 supra); and s 45(3) amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 20(1), (2)).

4 Children and Young Persons Act 1933 s 45(2), (3)(b) (as substituted (see note 1 supra); and amended (see note 3 supra)).

The Lord Chief Justice may, with the concurrence of the Lord Chancellor, by rules make provision about:

- 3223 (1) the grant and revocation of authorisations (s 45(4)(a) (as so substituted));
- 3224 (2) the appointment of chairmen of youth courts (s 45(4)(b) (as so substituted)); and
- 3225 (3) the composition of youth courts (s 45(4)(c) (as so substituted)).

Rules under s 45(4) (as substituted):

- 3226 (a) may confer powers on the Lord Chancellor or Lord Chief Justice with respect to any of the matters specified in the rules (s 45(6) (as so substituted));
- 3227 (b) may be made only after consultation with the Criminal Procedure Rule Committee (s 45(7) (as so substituted));
- 3228 (c) are to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament (s 45(8), (9) (as so substituted)).

The Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611 (see para 1265 post) have been made under the Children and Young Persons Act 1933 s 45(4). See also note 2 supra.

5 See the Courts Act 2003 s 66(2)(a), (3).

6 Ibid s 66(2)(b), (3).

7 Ibid s 66(2)(c), (3).

8 Ibid s 66(2)(d), (3).

9 Ibid s 66(2)(e), (3).

10 Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 10(1)(a).

11 Ibid r 10(1)(b). If at any sitting of a youth court other than one constituted in accordance with head (ii) in the text, no man or no woman is available owing to circumstances unforeseen when the justices to sit were chosen, or if the only man or woman present cannot properly sit as a member of the court, and in any such case the other members of the panel present think it inexpedient in the interests of justice for there to be an adjournment, the court may be constituted without a man or, as the case may be, without a woman: r 10(2). Nothing in r 10 is to be construed as requiring a youth court to include both a man and a woman in any case in which a single justice has by law jurisdiction to act: r 10(4).

12 Ibid r 11(1). For these purposes, 'a list of approved chairmen' means a list kept by the Inner London Youth Training and Development Committee or the Bench Training and Development Committee, both established in accordance with the Justices of the Peace (Training Development and Committee) Rules 2007, SI 2007/1609: Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 11(3). A youth justice may preside before he has been included on a list of approved youth court chairmen only if he is under the supervision of a youth justice who is on a list of approved youth court chairmen and he has completed the training courses prescribed by the Justices of the Peace (Training Development and Committee) Rules 2007, SI 2007/1609, r 31: Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 11(2).

13 Ie under ibid r 11.

14 Ibid r 12(1)(a).

15 Ibid r 12(1)(b). A chairman training course is a training course in accordance with the Justices of the Peace (Training Development and Committee) Rules 2007, SI 2007/1609, r 31(f).

16 Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 12(2).

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### **1265. Constitution of a youth panel.**

A youth panel is a committee for each local justice area consisting of the youth justices<sup>1</sup> for the local justice area to which the youth panel relates<sup>2</sup>. The youth panel makes recommendations to the Bench Training and Development Committee<sup>3</sup> for its local justice area or, in the case of the Inner London area, the Inner London Youth Training and Development Committee<sup>4</sup> in relation to the number of new justices required to sit and preside in youth courts and liaise with other bodies in order to share information and represent the views of youth justices<sup>5</sup>.

A youth panel must meet as often as necessary but not less than twice a year<sup>6</sup>.

Where two or more outgoing panels had formed a combined panel<sup>7</sup>, there must be a combined youth panel for the local justice areas covered by the combined outgoing panel<sup>8</sup>. There must be a combined youth panel for the Inner London area<sup>9</sup>. The Lord Chief Justice may, on the application of the youth panels concerned and after consultation with the area director, give approval for the formation of a combined youth panel in respect of two or more local justice areas or dissolution of a combined youth panel<sup>10</sup>.

The members of each youth panel must elect, by secret ballot, a chairman and one or more deputy chairmen, to hold office for a term of one year from 1 January following the date of appointment<sup>11</sup>. However, person who, immediately before 13 July 2007, held office as a chairman of an outgoing panel or a combined outgoing panel held office as chairman of the youth panel for the corresponding local justice area or areas for a term beginning on 13 July 2007 and ending on 31 December 2007<sup>12</sup>. At the youth election meeting in 2007 the members of the youth panel must elect the chairman and one or more deputy chairmen to hold office from 1 January 2008<sup>13</sup>. At the youth election meeting in 2007 and each subsequent youth election meeting the members of the youth panel must decide whether the election in the following year is to take place at the youth election meeting or by postal ballot to be conducted prior to the youth election meeting and, if appropriate, the method of conducting a postal ballot<sup>14</sup>. Nominations for the chairman and one or more deputy chairmen may be made by the members of the youth panel to the justices' clerk<sup>15</sup>. If a vacancy occurs in the chairmanship or deputy chairmanship, the members of the youth panel must, as soon as practicable, elect by secret ballot a chairman or, as the case may be, deputy chairman, to hold office for the remainder of the period for which the person replaced would have served<sup>16</sup>.

A previous chairman<sup>17</sup> is not eligible for re-election as chairman if, on 1 January after the election, he will have held such office for periods totalling more than two years unless at least six years have elapsed since he last held office<sup>18</sup>. In any event a previous chairman is not eligible for re-election as chairman if, on 1 January after the election, he will have held office for periods totalling more than five years<sup>19</sup>. A youth justice who has held office as deputy chairman of a youth panel is not eligible for re-election as deputy chairman if on 1 January after the election he will have held such office for periods totalling more than five years<sup>20</sup>.

1 'Youth justice' means a justice authorised to sit as a member of a youth court: Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 2.

2 Ibid r 3.

3 Ie the committee established in accordance with the Justice of the Peace (Training Development and Committee) Rules 2007, SI 2007/1609.



4 le the committee established in accordance with the Justice of the Peace (Training Development and Committee) Rules 2007, SI 2007/1609.

5 Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 9.

6 Ibid r 4(1). One of the meetings of the youth panel, to be known as the youth election meeting, must take place between 1 September and 30 November each year: r 4(2).

7 le a combined panel formed before 13 July 2007.

8 Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 5(1).

9 Ibid r 5(2).

10 Ibid r 5(3).

11 Ibid r 6(2). Where there is an equality of votes between any candidates in a ballot and the addition of a vote would entitle one of them to be elected, the justices' clerk must decide between the candidates by lot: r 8(1). Where a ballot paper is returned unmarked or marked in such a manner that there is a doubt as to the identity of the justice or justices for whom the vote is cast the ballot paper or the vote, as the case may be, must be rejected when the votes are counted: r 8(2).

12 Ibid r 6(1).

13 Ibid r 6(3).

14 Ibid r 6(4).

15 Ibid r 6(5).

16 Ibid r 6(6).

17 For these purposes, 'previous chairman' means a youth justice who has held office as chairman of a youth panel established under the Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611: r 7(1) (amended by SI 2007/2622). For the purposes of the Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 7 no periods of office held as chairman or deputy chairman, as the case may be, of an outgoing panel or combined outgoing panel may be taken into account in determining eligibility for re-election as chairman or deputy chairman: r 7(5) (added by SI 2007/2622).

18 Youth Courts (Constitution of Committees and Right to Preside) Rules 2007, SI 2007/1611, r 7(2).

19 Ibid r 7(3).

20 Ibid r 7(4) (amended by SI 2007/2622).

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### **1266. Jurisdiction of youth courts.**

No charge against a child or young person, and no application the hearing of which is assigned to youth courts, may be heard by a magistrates' court which is not a youth court<sup>1</sup>, except that:

- 998 (1) a charge made jointly against a child or young person and a person who has attained the age of 18 years is to be heard by a magistrates' court other than a youth court<sup>2</sup>;
- 999 (2) where a child or young person is charged with an offence, the charge may be heard by a magistrates' court which is not a youth court if a person who has attained the age of 17 years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting that offence<sup>3</sup>; and
- 1000 (3) where, in the course of any proceedings before any magistrates' court other than a youth court, it appears that the person to whom the proceedings relate is a child or young person, nothing in this provision<sup>4</sup> is to be construed as preventing the court, if it thinks fit so to do, from proceeding with the hearing and determination of those proceedings<sup>5</sup>.

A magistrates' court which is not a youth court may hear an information against a child or young person if he is charged with<sup>6</sup>:

- 1001 (a) aiding, abetting, causing, procuring, allowing or permitting an offence with which a person who has attained the age of 18 is charged at the same time<sup>7</sup>; or
- 1002 (b) an offence arising out of circumstances which are the same as or connected with those giving rise to an offence with which a person who has attained the age of 18 is charged at the same time<sup>8</sup>.

If a notification that the defendant desires to plead guilty without appearing before the court is received by the designated officer for a court<sup>9</sup> and the court has no reason to believe that the accused is a child or young person, then, if he is a child or young person he is deemed<sup>10</sup> to have attained the age of 18 in its application to the proceedings in question<sup>11</sup>. Conversely, a youth court sitting for the purpose of hearing a charge against a person who is believed to be a child or young person may, if it thinks fit to do so, proceed with the hearing and determination of the charge notwithstanding that it is discovered that the person in question is not a child or young person<sup>12</sup>. The attainment of the age of 18 years by a person in whose case an order for conditional discharge has been made does not deprive a youth court of jurisdiction to enforce his attendance and deal with him in respect of the commission of a further offence<sup>13</sup>.

1 Children and Young Persons Act 1933 s 46(1) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40; and the Courts Act 2003 s 109(1), Sch 8 para 74). No direction, whether contained in the Children and Young Persons Act 1933 or any other Act, that a charge is to be brought before a youth court is to be construed as restricting the powers of any justice or justices to entertain an application for bail or for a remand, and to hear such evidence as may be necessary for that purpose: s 46(2) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40). See *R v Uxbridge Youth Court, ex p Howard* (1998) 162 JP 327, sub nom *R v Uxbridge Youth Court, ex p H* (1998) Times, 7 April; *R v B (child: mode of trial for indecency)* [2001] 06 LS Gaz R 45, (2001) Times, 27 February, CA. The preferred way to challenge the jurisdiction of a youth court rather than committing a young person to the Crown Court pursuant to the Magistrates' Courts Act 1980 s 24(1) (see para

1255 ante) is through judicial review proceedings: *R (on the application of DPP) v Camberwell Youth Court, R (on the application of H) v Camberwell Youth Court* [2004] EWHC 1805 (Admin), [2004] 4 All ER 699, [2005] 1 WLR 810. See further MAGISTRATES vol 29(2) (Reissue) para 746.

2 Children and Young Persons Act 1933 s 46(1) proviso (a) (amended by the Criminal Justice Act 1991 ss 68, 100, Sch 8 para 1, Sch 11 para 40; and the Courts Act 2003 s 109(1), Sch 8 para 74). In certain circumstances, however, a person under 18 charged jointly with an older person or persons may be remitted to a youth court: see para 1260 ante. See further MAGISTRATES vol 29(2) (Reissue) para 746.

3 Children and Young Persons Act 1933 s 46(1) proviso (b) (amended by the Criminal Justice Act 1991 Sch 11 para 40; and the Courts Act 2003 Sch 8 para 74). See further MAGISTRATES vol 29(2) (Reissue) para 746.

4 *Ie* the Children and Young Persons Act 1933 s 46(1) proviso (c) (as amended): see the text and note 5 *infra*.

5 *Ibid* s 46(1) proviso (c) (amended by the Criminal Justice Act 1991 Sch 11 para 40; and the Courts Act 2003 Sch 8 para 74). See further MAGISTRATES vol 29(2) (Reissue) para 746.

6 Children and Young Persons Act 1963 s 18 (amended by the Criminal Justice Act 1991 Sch 11 para 40). See further MAGISTRATES vol 29(2) (Reissue) para 746.

7 Children and Young Persons Act 1963 s 18(a) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 5). See further MAGISTRATES vol 29(2) (Reissue) para 746.

8 Children and Young Persons Act 1963 s 18(b) (amended by the Criminal Justice and Public Order Act 1994 Sch 9 para 5). See further MAGISTRATES vol 29(2) (Reissue) para 746.

9 *Ie* in pursuance of the Magistrates' Courts Act 1980 s 12 (as amended): see MAGISTRATES vol 29(2) (Reissue) paras 705-706.

10 *Ie* for the purposes of the Children and Young Persons Act 1933 s 46(1) (as amended): see the text and note 2 *supra*.

11 *Ibid* s 46(1A) (added by the Children and Young Persons Act 1969 s 72(3), Sch 5 para 4; and amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 6; the Criminal Justice Act 1991 Sch 8 para 1(2), Sch 11 para 40; the Access to Justice Act 1999 s 90(1), Sch 13 paras 8, 11(a); and the Courts Act 2003 s 109(1), Sch 8 para 74). See further MAGISTRATES vol 29(2) (Reissue) para 746.

12 Children and Young Persons Act 1933 s 48(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 12, Sch 5; and the Criminal Justice Act 1991 Sch 11 para 40). However, see also *R v Chelsea Justices, ex p DPP* [1963] 3 All ER 657, [1963] 1 WLR 1138 (no jurisdiction if court knew the young person was 17 when the charge was preferred). See further MAGISTRATES vol 29(2) (Reissue) para 746.

13 Children and Young Persons Act 1933 s 48(2) (substituted by the Criminal Justice Act 1948 s 79, Sch 9; and amended by the Children and Young Persons Act 1969 s 72(4), Sch 6; and the Criminal Justice Act 1991 Sch 8 para 1(2), Sch 11 para 40). See further MAGISTRATES vol 29(2) (Reissue) para 746.

## UPDATE

### 1266 Jurisdiction of youth courts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## (ii) Procedure

### 1267. Sitings.

Youth courts must sit as often may be necessary for the purpose of exercising any jurisdiction conferred on them by or under the Children and Young Persons Act 1933 or any other Act<sup>1</sup>, and may sit on any day to hear and determine a charge against a child or young person<sup>2</sup> in respect of an indictable offence<sup>3</sup>.

No person may be present at any sitting of a youth court<sup>4</sup> except members and officers of the court<sup>5</sup>, parties to the case before the court, their solicitors and counsel, witnesses and other persons directly concerned in the case<sup>6</sup>, bona fide representatives of newspapers or news agencies<sup>7</sup>, and such other persons as the court may specially authorise to be present<sup>8</sup>.

1 Children and Young Persons Act 1933 s 47(1) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40).

2 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

3 Children and Young Persons Act 1933 s 48(4) (amended by the Magistrates' Courts Act 1952 s 132(1), Sch 6; and the Criminal Justice Act 1991 Sch 11 para 40). See also MAGISTRATES vol 29(2) (Reissue) para 748. As to indictable offences see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1102 et seq.

4 Children and Young Persons Act 1933 s 47(2) (amended by the Criminal Justice Act 1991 Sch 11 para 40; and the Crime and Disorder Act 1998 ss 47(7), 120(2), Sch 10).

5 Children and Young Persons Act 1933 s 47(2)(a).

6 Ibid s 47(2)(b). See *R v Southwark Juvenile Court, ex p NJ* [1973] 3 All ER 383, sub nom *R v Southwark Juvenile Court, ex p J* [1973] 1 WLR 1300, DC (welfare officer excluded; certiorari granted as the welfare officer had the right to attend the sitting of the court as a person directly concerned in the case, and her exclusion meant that justice had not been seen to have been done; however, the statute is directory and not mandatory); followed in *R v Willesden Justices, ex p Brent London Borough Council* [1989] FCR 2, [1988] 2 FLR 95.

7 Children and Young Persons Act 1933 s 47(2)(c). As to restrictions on newspaper reports see para 1272 post. As from a day to be appointed, s 47(2)(c) is amended so as to refer to 'news gathering or reporting organisations' instead of 'newspapers or news agencies': see s 47(2)(c) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 2). At the date at which this volume states the law no such day had been appointed.

8 Children and Young Persons Act 1933 s 47(2)(d).

## UPDATE

### 1267 Sitings

TEXT AND NOTE 6--Reference to counsel or solicitor is now to legal representative, which means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) PARA 512): Children and Young Persons Act 1933 ss 47(2)(b), 107 (s 47(2)(b) amended, definition in s 107 added, by Legal Services Act 2007 Sch 21 paras 18, 20).



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### **1268. Conduct of proceedings; evidence.**

The following apply<sup>1</sup> where a child or young person ('the relevant minor') is charged with an offence and proceedings are brought in a magistrates' court<sup>2</sup> in relation to the breach, revocation and amendment of:

- 1003 (1) supervision orders<sup>3</sup>;
- 1004 (2) certain community orders<sup>4</sup>;
- 1005 (3) attendance centre orders<sup>5</sup>;
- 1006 (4) action plan orders and reparation orders<sup>6</sup>.

The nature of the proceedings and the substance of the charge must be explained to the relevant minor in simple language suitable to his age and understanding<sup>7</sup>. He must then be asked whether he pleads guilty or not guilty to the charge<sup>8</sup>. Where the child or young person does not plead guilty or the proceedings are of a kind mentioned in head (1), (2) or (3) above, the court must hear the witnesses in support of the charge, or as the case may be, the application<sup>9</sup>. Except where the proceedings are of a kind mentioned in head (1), (2) or (3) above and the relevant minor is the applicant, each witness may at the close of the evidence in chief be cross-examined by or on behalf of the relevant minor<sup>10</sup>.

Except where a child or young person is legally represented, the court must allow his parent or guardian to assist him in his defence<sup>11</sup>. If in any case where the relevant minor is not legally represented or assisted<sup>12</sup>, the relevant minor, instead of asking questions by way of cross-examination, makes assertions, the court must then put to the witness such questions as it thinks necessary on behalf of the relevant minor and may for this purpose question the relevant minor in order to bring out or clear up any point arising out of any such assertions<sup>13</sup>. If it appears to the court after hearing the evidence in support of the charge or application that a *prima facie* case is made out, the relevant minor must, if he is not the applicant and is not legally represented, be told that he may give evidence or address the court, and the evidence of any witnesses must be heard<sup>14</sup>.

1 Youth court proceedings are governed by the Criminal Procedure Rules see the Courts Act 2003 s 69; and COURTS.

2 CrimPR 38.1(1).

3 I.e. proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 paras 1, 2, 5, 6 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 262-263); see CrimPR 38.1(2)(a).

4 I.e. proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 Pt II, III, IV (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq); see CrimPR 38.1(2)(b).

5 I.e. proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 paras 4-7 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 268-269); see CrimPR 38.1(2)(c).

6 I.e. proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 247-248, 385-386); see CrimPR 38.1(2)(d).

7 CrimPR 38.3.

8 CrimPR 38.4.

9 CrimPR 38.5(1).

10 CrimPR 38.5(2).

11 CrimPR 38.2(1). Where the parent or guardian cannot be found or cannot in the opinion of the court be reasonably required to attend, the court may allow any relative or other responsible person to take the place of the parent or guardian for the purposes of CrimPR Pt 38: CrimPR 38.2(2).

12 le as provided by CrimPR 38.2 (see the text and note 11 supra).

13 CrimPR 38.5(3).

14 CrimPR 38.6.

## **UPDATE**

### **1268 Conduct of proceedings; evidence**

TEXT AND NOTES--CrimPR Pt 38 now Criminal Procedure Rules 2010, SI 2010/60, Pt 37.

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### **1269. Procedure after finding.**

The following applies where:

- 1007 (1) a relevant minor<sup>1</sup> before a youth court is found guilty of an offence, whether after a plea of guilty or otherwise<sup>2</sup>; or
- 1008 (2) in proceedings relating to the breach, revocation and amendment of supervision orders, certain community orders or attendance centre orders<sup>3</sup> the court is satisfied that the case for the applicant if the relevant minor is not the applicant, has been made out, or, if he is the applicant, has not been made out<sup>4</sup>.

The relevant minor and his parent or guardian, if present, must be given an opportunity to make a statement<sup>5</sup>. The court must take into consideration all available information<sup>6</sup> as to the general conduct, home surroundings, school record and medical history of the child or young person and, in particular, must take into consideration information provided in pursuance of investigations by local authorities<sup>7</sup>. Any written report<sup>8</sup> of a probation officer, local authority, local education authority, education establishment or registered medical practitioner<sup>9</sup> may be received and considered by the court without being read aloud<sup>10</sup>. If the court considers it necessary in the interests of the child or young person, it may require him or his parent or guardian, if present, to withdraw from the court<sup>11</sup>.

Before finally disposing of the case, or before remitting the case to another court<sup>12</sup> the court must inform the child or young person and his parents or guardian, if present, or any person assisting him in the case, of the manner in which it proposes to deal with the case and allow any of those persons so informed to make representations<sup>13</sup>. However, the relevant minor is not so informed if the court considers it undesirable so to do<sup>14</sup>. On making any order, the court must explain to the child or young person the general nature and effect of the order unless, in the case of an order requiring his parent or guardian to enter into a recognisance, it appears to the court undesirable to do so<sup>15</sup>.

1 For the meaning of 'relevant minor' see para 1268 ante.

2 CrimPR 44.1(1)(a).

3 I.e. proceedings of a kind mentioned in CrimPR 38.1(2)(a), (b) or (c) (see para 1268 text and notes 1-5 supra).

4 CrimPR 44.1(1)(b).

5 CrimPR 44.1(2)(a).

6 If information is not fully available the court must consider the desirability of adjourning the proceedings for such inquiry as may be necessary: CrimPR 44.1(2)(c). See also note 10 infra.

7 CrimPR 44.1(2)(b). Such information provided by local authorities is provided in pursuance of the Children and Young Persons Act 1969 s 9 (as amended) (see para 1240 ante). As to the power to remand the child or young person for the necessary inquiries to be made see para 1270 post.

8 The court must arrange for copies of any written report before the court to be made available to:

3229 (1) the legal representative, if any, of the relevant minor (CrimPR 44.1(3)(a));



3230 (2) any parent or guardian of the relevant minor who is present at the hearing (CrimPR 44.1(3)(b)); and

3231 (3) the relevant minor, except where the court otherwise directs on the ground that it appears to it impracticable to disclose the report having regard to his age and understanding or undesirable to do so having regard to potential serious harm which might thereby be suffered by him (CrimPR 44.1(3)(c)).

9 In any proceedings, other than proceedings for an offence, before a youth court, and on any appeal from a decision of a youth court in any such proceedings, any document purporting to be a certificate of a fully registered medical practitioner as to any person's physical or mental condition is admissible as evidence of that condition: Children and Young Persons Act 1963 s 26 (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40). As from a day to be appointed this provision is amended so as to refer to a fully registered medical practitioner who hold a licence to practice: see the Children and Young Persons Act 1963 s 26 (as so amended; and further amended by the Medical Act 1983 (Amendment) Order 2002, SI 2002/3135, art 16(1), Sch 1 para 4). At the date at which this volume states the law no such day had been appointed. As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 4.

10 CrimPR 44.1(2)(d). In any case in which the relevant minor is not legally represented and where a report which has not been made available to him in accordance with a direction under CrimPR 44.1(3)(c) (see note 8 head (3) *supra*) has been considered without being read aloud in pursuance of CrimPR 44.1(2)(d) or where he or his parent or guardian has been required to withdraw from the court in pursuance of CrimPR 44.1(2)(e) (see the text and note 11 *infra*), then:

3232 (1) the relevant minor must be told the substance of any part of the information given to the court bearing on his character or conduct which the court considers to be material to the manner in which the case should be dealt with unless it appears to it impracticable so to do having regard to his age and understanding (CrimPR 44.1(4)(a)); and

3233 (2) his parent or guardian, if present, must be told the substance of any part of such information which the court considers to be material as aforesaid and which has reference to his character or conduct or to the character, conduct, home surroundings or health of the relevant minors, and if such a person, having been told the substance of any part of such information, desires to produce further evidence with reference thereto, the court, if it thinks the further evidence would be material, must adjourn the proceedings for the production of that evidence and must, if necessary in the case of a report, require the attendance at the adjourned hearing of the person who made the report (CrimPR 44.1(4)(b)).

11 CrimPR 44.1(2)(e).

12 In pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 s 8 (see para 1259 *et seq ante*).

13 CrimPR 44.2(1).

14 CrimPR 44.2(1).

15 CrimPR 44.2(2).

## UPDATE

### 1269 Procedure after finding

TEXT AND NOTES--CrimPR Pt 44 now Criminal Procedure Rules 2010, SI 2010/60, Pt 37.

NOTE 9--Appointed day is 16 November 2009: London Gazette, 21 August 2009.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(2) YOUTH COURTS/(ii) Procedure/1270. Remand for further inquiries.

### **1270. Remand for further inquiries.**

When a youth court has remanded a child or young person<sup>1</sup> for information to be obtained with respect to him<sup>2</sup>, any youth court acting for the same local justice area may in his absence extend the period for which he is remanded, so, however, that he appears before a court or a justice of the peace at least once in every 21 days, and when the required information has been obtained, may deal with him finally<sup>3</sup>.

Where a child or young person has been remanded, and the period of remand is extended in his absence, notice must be given to him and his sureties, if any, of the date at which he will be required to appear before the court<sup>4</sup>.

<sup>1</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

<sup>2</sup> As to the power of a court to adjoin proceedings to obtain such information see the CrimPR 44.1(2)(c); para 1269 note 8 ante.

<sup>3</sup> Children and Young Persons Act 1933 s 48(3) (amended by the Children and Young Persons Act 1969 ss 79, 83(3), Sch 9, Sch 10 Pt I; the Criminal Justice Act 1991 s 100, Sch 11 para 40; the Access to Justice Act 1999 s 76(2), Sch 10 paras 14, 15; and the Courts Act 2003 s 109(1), Sch 8 para 75). See further MAGISTRATES vol 29(2) (Reissue) para 751.

<sup>4</sup> CrimPR 19.9.

### **UPDATE**

### **1270 Remand for further inquiries**

TEXT AND NOTE 4--CrimPR 19.9 now Criminal Procedure Rules 2010, SI 2010/60, r 19.9.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(2) YOUTH COURTS/ (iii) Restrictions on Reporting/1271. General restriction on reporting.

### **(iii) Restrictions on Reporting**

#### **1271. General restriction on reporting.**

In relation to any proceedings in any court<sup>1</sup> the court may direct that:

- 1009 (1) no newspaper report of the proceedings may reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person<sup>2</sup> concerned in the proceedings<sup>3</sup>, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness in those proceedings<sup>4</sup>; and
- 1010 (2) no picture may be published in any newspaper as being or including a picture of any child or young person so concerned in those proceedings<sup>5</sup>,

except in so far (if at all) as may be permitted by the direction of the court<sup>6</sup>.

Any person who publishes any matter in contravention of any such direction is guilty of an offence<sup>7</sup>. The onus is on the applicant to show cause to restrict publicity<sup>8</sup>.

The power as to the court's directions on reporting restrictions<sup>9</sup> is not part of the jurisdiction of the Crown Court in matters relating to a trial on indictment<sup>10</sup> within the meaning of the Supreme Court Act 1981, and is therefore subject to judicial review<sup>11</sup>. When considering whether to lift reporting restrictions the court must consider whether there are good reasons to name the defendants<sup>12</sup>, and must balance the appropriate interests and considerations<sup>13</sup>. However, the decision to lift reporting restrictions<sup>14</sup> is a matter relating to trial on indictment and is therefore not susceptible to judicial review<sup>15</sup>. A judge has complete discretion to allow representations to be made to him by those whom he considers to have a legitimate interest in the making of, or the opposition to the making of, an order under the Children and Young Persons Act 1933<sup>16</sup>, as there is no statutory limitation on the persons who may do so<sup>17</sup>.

1 This refers to any proceedings in the court which is considering making the order; thus a court cannot make an order in respect of proceedings before another court: *R v Lee* [1993] 2 All ER 170, [1993] 1 WLR 103, CA. As to the mandatory restrictions on the reporting of youth court proceedings see para 1272 post.

2 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante. The words 'any particulars calculated to lead to the identification of any child or young person' include revealing the identity of the defendants if such identification would inevitably breach the order by leading to the identification of the child or young person concerned in the proceedings: see *Ex p Godwin* [1992] QB 190, sub nom *R v Crown Court at Southwark, ex p Godwin* [1991] 3 All ER 818, CA. For an example of a case where an order was refused see *R v Lee* [1993] 2 All ER 170, [1993] 1 WLR 103, CA. As to the limitation on the power to restrict the reporting of proceedings see *R (on the application of Gazette Media Co Ltd) v Crown Court at Teesside* [2005] EWCA Crim 1983, [2005] EMLR 832 (the Children and Young Persons Act 1933 s 39 (as amended) did not enable the express restriction of the naming of the defendant in a conspiracy to rape proceedings in which the complainant was the defendant's 11-year-old daughter).

3 As from a day to be appointed, 'proceedings' for these purposes means proceedings other than criminal proceedings: Children and Young Persons Act 1933 s 39(3) (added by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 1, 2, except in relation to criminal proceedings instituted (within the meaning of s 67, Sch 7 para 1(2)) before the day on which Sch 2 para 2(1) comes into force). At the date at which this volume states the law no such day had been appointed.

4 Children and Young Persons Act 1933 s 39(1)(a) (amended by the Children and Young Persons Act 1963 ss 57(1), 64(3), Sch 5). The Children and Young Persons Act 1933 s 39 (as amended) applies, with the necessary modifications, in relation to sound and television broadcasts as it applies in relation to newspapers: Children and Young Persons Act 1963 s 57(4). As from a day to be appointed, this provision is repealed by the Youth Justice and Criminal Evidence Act 1999 s 67(3), Sch 6. At the date at which this volume states the law no such day had been appointed.

5 Children and Young Persons Act 1933 s 39(1)(b).

6 Ibid s 39(1). In most cases, it is inappropriate for the court to restrain press identification of a child who is the subject of an anti-social behaviour order: *Medway Council v BBC* [2002] 1 FLR 104, [2001] Fam Law 883. The court must attach proper weight to the interim nature of an interim anti-social behaviour order when considering whether to impose reporting restrictions: *R (on the application of K) v Knowsley Metropolitan Borough Council* [2004] EWHC 1933 (Admin), (2004) 168 JP 461.

7 Children and Young Persons Act 1933 s 39(2). On summary conviction such a person is liable in respect of each offence to a fine not exceeding level 5 on the standard scale: s 39(2) (amended by virtue of the Criminal Justice Act 1982 ss 37, 39(2), 46, Sch 3). As to the standard scale see para 132 note 2 ante.

8 *R v Central Criminal Court, ex p W, B and C* [2001] 1 Cr App Rep 7, DC.

9 Ie under the Children and Young Persons Act 1933 s 39 (as amended; prospectively further amended): see the text and notes 1-7 supra. In all proceedings to which the power under s 39 (as amended and prospectively further amended) applies, the clerk to the justices must remind the court of its power at the commencement of the proceedings: Home Office Circular 18/56, para 2. When forwarding the depositions in this type of case, he must as a matter of course enclose a statement showing that the attention of the examining justices had been called to the power and that they did or did not give a direction prohibiting publication: para 4. On an appeal to the Crown Court, the police should inform the court whether a direction under the power was given in the magistrates' court: para 4. See also Home Office Circular 17/64, para 6.

10 Ie within the meaning of the Supreme Court Act 1981 s 29(3): see CRIMINAL LAW, EVIDENCE AND PROCEDURE VOL 11(3) (2006 Reissue) para 1232.

11 See *R v Crown Court at Leicester, ex p S (a minor)* [1992] 2 All ER 659, [1993] 1 WLR 111n, DC.

12 *R v Central Criminal Court, ex p S* [1999] 1 FLR 480, [1999] Crim LR 159, [1999] Fam Law 93. See also *Re R (a minor) (wardship: restrictions on publication)* [1994] Fam 254, [1994] 3 All ER 658, CA (protection of ward in relation to publicity arising out of criminal proceedings is a matter for the criminal courts).

13 *R v Central Criminal Court, ex p W, B and C* [2001] 1 Cr App Rep 7, DC.

14 Ie under the Children and Young Persons Act 1933 s 39 (as amended; prospectively further amended): see the text and notes 1-7 supra.

15 *R v Crown Court at Winchester, ex p B (a minor)* [1999] 4 All ER 53, [1999] 1 WLR 788; not followed in *R v Crown Court at Manchester, ex p H and D* [2000] 2 All ER 166, [2000] 1 WLR 760, DC (decision taken after trial to lift reporting restrictions was collateral to trial and not precluded from judicial review). See also JUDICIAL REVIEW.

16 Ie under the Children and Young Persons Act 1933 s 39 (as amended; prospectively further amended). See also *President's Direction (applications for reporting restriction orders)* [2005] Fam Law 397; *Practice Note (applications for reporting restriction orders)* [2005] Fam Law 398.

17 *Ex p Crook* [1995] 1 All ER 537, [1995] 1 WLR 139, CA. Any order so made must set out clearly the terms on which it is based: *Briffett v DPP, Bradshaw v DPP* [2001] EWHC 841 (Admin), (2001) Times, 26 November, [2002] EMLR 203, DC.

## UPDATE

### 1271 General restriction on reporting

NOTE 3--See *C v Crown Prosecution Service* [2008] EWHC 854 (Admin), (2008) 172 JP 273, DC (prohibition of publication of criminal proceedings removed where no particular harm to children). The reporting of the names and addresses of vulnerable

children and any information on their involvement in care proceedings must be kept confidential: *Re X (children)* [2007] EWHC 1719 (Fam), [2008] 1 FLR 589.

NOTE 10--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1.

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## **1272. General restrictions on the reporting of youth court proceedings.**

Until a day to be appointed, the law on the restrictions on the reporting of youth court proceedings under the Children and Young Persons Act 1933 is as follows<sup>1</sup>. In relation to:

- 1011 (1) proceedings in a youth court<sup>2</sup>;
- 1012 (2) proceedings on appeal from a youth court (including proceedings by way of case stated)<sup>3</sup>;
- 1013 (3) proceedings for varying or revoking supervision orders<sup>4</sup>; and
- 1014 (4) proceedings on appeal from a magistrates' court<sup>5</sup> (including proceedings by way of case stated)<sup>6</sup>,

the following prohibitions apply<sup>7</sup>, that is to say:

- 1015 (a) no report<sup>8</sup> may be published which reveals the name, address or school of any child or young person<sup>9</sup> concerned in the proceedings<sup>10</sup> or which includes any particulars likely to lead to the identification of any child or young person concerned in the proceedings<sup>11</sup>; and
- 1016 (b) no picture may be published or included in a programme service<sup>12</sup> as being or including a picture of any child or young person concerned in the proceedings<sup>13</sup>.

If a report or picture is published or included in a programme service in contravention of these provisions, the following persons, that is to say<sup>14</sup>:

- 1017 (i) in the case of publication of a written report or a picture as part of a newspaper, any proprietor, editor or publisher of the newspaper<sup>15</sup>; and
- 1018 (ii) in the case of the inclusion of a report or picture in a programme service, any body corporate which provides the service and any person having functions in relation to the programme corresponding to those of an editor of a newspaper, is liable on summary conviction to a fine not exceeding a stated amount<sup>16</sup>.

In any proceedings for varying or revoking supervision orders<sup>17</sup> before a magistrates' court other than a youth court, or on appeal from such a court, it is the duty of the magistrates' court or the appellate court to announce in the course of the proceedings that the provisions relating to restrictions on reports of proceedings in which children or young persons are concerned<sup>18</sup> apply to the proceedings, and if the court fails to do so those provisions do not apply to the proceedings<sup>19</sup>.

1 As from a day to be appointed the Children and Young Persons Act 1933 s 49 (as substituted and amended) (see the text and notes 2-19 *infra*) is further amended by the Youth Justice and Criminal Evidence Act 1999. At the date at which this volume states the law no such day had been appointed. As to the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively amended) see para 1274 *post*.

2 *Ibid* s 49(2)(a) (s 49 substituted by the Criminal Justice and Public Order Act 1994 s 49). See further MAGISTRATES vol 29(2) (Reissue) para 753.

- 3 Children and Young Persons Act 1933 s 49(2)(b) (as substituted: see note 2 supra). As to proceedings by way of case stated see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 2005 et seq. See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 4 Ibid s 49(2)(c) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 2(1), (2)(a)). Proceedings for varying or revoking supervision orders are made under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 (as amended): see paras 1352-1353 post. As to supervision orders see para 270 et seq ante. See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 5 le arising out of proceedings under ibid Sch 7 (as amended): see paras 1352-1353 post.
- 6 Children and Young Persons Act 1933 s 49(2)(d) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (2)(b)). See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 7 le subject to the Children and Young Persons Act 1933 s 49(5) (as substituted): see para 1273 note 14 post.
- 8 The reports to which ibid s 49 (as substituted and amended) applies are reports in a newspaper and reports included in a programme service, and similarly as respects pictures: s 49(3) (as substituted: see note 2 supra). See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 9 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 1234 note 3 ante.
- 10 For the purposes of the Children and Young Persons Act 1933 s 49 (as substituted and amended), a child or young person is 'concerned' in any proceedings whether as being the person against or in respect of whom the proceedings are taken or as being a witness in the proceedings: s 49(4) (as substituted: see note 2 supra).
- 11 Ibid s 49(1)(a) (as substituted: see note 2 supra). A defendant in proceedings before a youth court ceases to benefit from the reporting restrictions as soon as he attains the age of 18: *T v DPP, North East Press Ltd* [2003] EWHC 240 (Admin), 168 JP 194, [2005] Crim LR 739. See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 12 For these purposes, 'programme' has the same meaning as in the Broadcasting Act 1990 s 202(1) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 328): Children and Young Persons Act 1933 s 49(11) (as substituted: see note 2 supra). For these purposes, 'programme service' has the same meaning as in the Broadcasting Act 1990 s 201(1) (as amended) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 328): Children and Young Persons Act 1933 s 49(11) (as so substituted).
- 13 Ibid s 49(1)(b) (as substituted: see note 2 supra). See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 14 Ibid s 49(9) (as substituted: see note 2 supra). See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 15 Ibid s 49(9)(a) (as substituted: see note 2 supra). See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 16 Ibid s 49(9)(b) (as substituted: see note 2 supra). The fine may not exceed level 5 on the standard scale: s 49(9)(b) (as so substituted). As to the standard scale see para 132 note 2 ante. See further MAGISTRATES vol 29(2) (Reissue) para 753.
- 17 See note 4 supra.
- 18 le the provisions of the Children and Young Persons Act 1933 s 49 (as substituted and amended).
- 19 Ibid s 49(10) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (4)). See further MAGISTRATES vol 29(2) (Reissue) para 753.

## UPDATE

### 1272 General restrictions on the reporting of youth court proceedings

TEXT AND NOTES 4, 6, 19--Children and Young Persons Act 1933 s 49(2)(c), (d) substituted, s 49(10) further amended, Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2 partly repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 3(2), (4), Sch 28 Pt 1.





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### **1273. Power to dispense with restrictions on the reporting of youth court proceedings.**

Until a day to be appointed, the law on the power to dispense with restrictions on the reporting of youth court proceedings under the Children and Young Persons Act 1933 is as follows<sup>1</sup>. If a court is satisfied that it is in the public interest to do so, it may, in relation to a child or young person who has been convicted of an offence, by order dispense to any specified extent with the specified restrictions imposed on reports of proceedings in which children and young persons are concerned<sup>2</sup> in relation to any proceedings before it<sup>3</sup>, being proceedings relating to<sup>4</sup>:

- 1019 (1) the prosecution or conviction of the offender for the offence<sup>5</sup>;
- 1020 (2) the manner in which he, or his parent or guardian<sup>6</sup>, must be dealt with in respect of the offence<sup>7</sup>;
- 1021 (3) the enforcement, amendment, variation, revocation or discharge of any order made in respect of the offence<sup>8</sup>;
- 1022 (4) where an attendance centre order<sup>9</sup> is made in respect of the offence, the enforcement of any relevant rules<sup>10</sup>; or
- 1023 (5) where a detention and training order<sup>11</sup> is made, the enforcement of any relevant requirements imposed<sup>12</sup>.

A court may<sup>13</sup> by order dispense to any specified extent with these requirements in relation to a child or young person who is concerned in the proceedings if it is satisfied<sup>14</sup>:

- 1024 (a) that it is appropriate to do so for the purpose of avoiding injustice to the child or young person<sup>15</sup>; or
- 1025 (b) that, as respects such a child or young person<sup>16</sup> who is unlawfully at large<sup>17</sup>, it is necessary to dispense with those requirements for the purpose of apprehending him and bringing him before a court or returning him to the place in which he was in custody<sup>18</sup>.

1 As from a day to be appointed the Children and Young Persons Act 1933 s 49 (as substituted and amended) (see the text and notes 2-18 *infra*) is further amended by the Youth Justice and Criminal Evidence Act 1999. At the date at which this volume states the law no such day had been appointed. As to the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively amended) see para 1274 *post*.

2 I.e. the requirements of *ibid* s 49 (as substituted and amended). For these purposes, 'specified' means specified in an order under s 49 (as substituted and amended): s 49(11) (s 49 substituted by the Criminal Justice and Public Order Act 1994 s 49).

3 I.e. to which the Children and Young Persons Act 1933 s 49 (as substituted and amended) applies by virtue of s 49(2)(a) or (b) (as substituted): see para `1272 *ante*.

4 *Ibid* s 49(4A) (added by the Crime (Sentences) Act 1997 s 45). A court must not exercise its power under the Children and Young Persons Act 1933 s 49(4A) (as added) without affording the parties to the proceedings an opportunity to make representations, and taking into account any representations which are duly made: s 49(4B) (added by the Crime (Sentences) Act 1997 s 45).

The power to dispense with anonymity, as permitted in certain circumstances by the Children and Young Persons Act 1933 s 49(4A) (as added), has to be exercised with great care, caution and circumspection: *McKerry v Teesdale and Wear Valley Justices* (2000) 164 JP 355, [2000] COD 199, DC.

- 5 Children and Young Persons Act 1933 s 49(4A)(a) (as added: see note 4 supra).
  - 6 For the meaning of 'guardian' see para 1234 note 5 ante.
  - 7 Children and Young Persons Act 1933 s 49(4A)(b) (as added: see note 4 supra).
  - 8 Ibid s 49(4A)(c) (as added: see note 4 supra).
  - 9 As to attendance centre orders see para 1358 post.
  - 10 Children and Young Persons Act 1933 s 49(4A)(d) (as added (see note 4 supra); and amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 para 2(1), (2)). The relevant rules are any made under the Criminal Justice Act 2003 s 222(1)(d) or (e) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 285).
  - 11 As to detention and training orders see para 1398 post.
  - 12 Children and Young Persons Act 1933 s 49(4A)(e) (as added (see note 4 supra); and substituted by the Crime and Disorder Act 1998 s 119, Sch 8 para 1; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (3)(b)). The relevant requirements are any imposed under the Powers of Criminal Courts (Sentencing) Act 2000 s 103(6)(b): see para 1401 post.
  - 13 Ie in relation to proceedings before it to which the Children and Young Persons Act 1933 s 49 (as substituted and amended) applies.
  - 14 Ibid s 49(5) (as substituted: see note 2 supra). The court's power under s 49(5) (as substituted) may be exercised by a single justice: s 49(8) (as so substituted).
  - 15 Ibid s 49(5)(a) (as substituted: see note 2 supra).
  - 16 Ie a child or young person to whom ibid s 49(5) (as substituted) (see the text and note 14 supra) applies.
  - 17 A person who, having been granted bail, is liable to arrest (whether with or without a warrant) is treated as unlawfully at large: ibid s 49(11) (as substituted: see note 2 supra). As to bail see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1165-1201; and as to arrest see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 910-935.
  - 18 Ibid s 49(5)(b) (as substituted: see note 2 supra). The provisions of s 49(5)(b) (as substituted) apply to any child or young person who is charged with or has been convicted of a violent offence, a sexual offence, or an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more: s 49(6) (as so substituted). For these purposes, 'violent offence' means an offence listed in the Criminal Justice Act 2003 Sch 15 Pt 1 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 70): Children and Young Persons Act 1933 s 49(11) (as so substituted; and amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 para 2(1), (3)). For these purposes, 'sexual offence' means an offence listed in the Criminal Justice Act 2003 Sch 15 Pt 2 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 71): Children and Young Persons Act 1933 s 49(11) (as so substituted; and amended by the Criminal Justice Act 2003 Sch 32 Pt 1 para 2(1), (3)).
- The court must not exercise its power under the Children and Young Persons Act 1933 s 49(5)(b) (as substituted) except in pursuance of an application by or on behalf of the Director of Public Prosecutions, and unless notice of the application has been given by the Director of Public Prosecutions to any legal representative of the child or young person: s 49(7) (as so substituted). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066 et seq. For these purposes, 'legal representative' means an authorised advocate or authorised litigator, as defined by the Courts and Legal Services Act 1990 s 119(1) (see LEGAL PROFESSIONS vol 65 (2008) PARAS 497-498): Children and Young Persons Act 1933 s 49(11) (as so substituted).

## UPDATE

### **1273 Power to dispense with restrictions on the reporting of youth court proceedings**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 10--Children and Young Persons Act 1933 s 49(4A)(d) repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 3(3), Sch 28 Pt 1 (not yet in force).

NOTE 18--Definition of 'legal representative' omitted: Legal Services Act 2007 Sch 21 para 19, Sch 23.

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**1274. Restrictions under the Youth Justice and Criminal Evidence Act 1999 on reporting of youth court proceedings.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. In relation to<sup>2</sup>:

- 1026 (1) proceedings in a youth court<sup>3</sup>;
- 1027 (2) proceedings on appeal from a youth court (including proceedings by way of case stated)<sup>4</sup>;
- 1028 (3) proceedings for varying or revoking supervision orders<sup>5</sup>; and
- 1029 (4) proceedings on appeal from a magistrates' court<sup>6</sup> (including proceedings by way of case stated)<sup>7</sup>,

no matter relating to any child or young person<sup>8</sup> concerned in proceedings<sup>9</sup> to which these provisions apply may while he is under the age of 18 be included in any publication<sup>10</sup> if it is likely to lead members of the public to identify him as someone concerned in the proceedings<sup>11</sup>. If a publication includes any such matter, the following persons are guilty of an offence and liable on summary conviction to a fine not exceeding a prescribed level<sup>12</sup>:

- 1030 (a) where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical<sup>13</sup>;
- 1031 (b) where the publication is a relevant programme any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>14</sup>; and
- 1032 (c) in the case of any other publication, any person publishing it<sup>15</sup>.

If a court is satisfied that it is in the public interest to do so, it may, in relation to a child or young person who has been convicted of an offence, by order dispense to any specified<sup>16</sup> extent with the restrictions imposed<sup>17</sup> on reports of proceedings in which children and young are concerned in relation to any proceedings before it<sup>18</sup>, being proceedings relating to<sup>19</sup>:

- 1033 (i) the prosecution or conviction of the offender for the offence<sup>20</sup>;
- 1034 (ii) the manner in which he, or his parent or guardian<sup>21</sup>, must be dealt with in respect of the offence<sup>22</sup>;
- 1035 (iii) the enforcement, amendment, variation, revocation or discharge of any order made in respect of the offence<sup>23</sup>;
- 1036 (iv) where an attendance centre order<sup>24</sup> is made in respect of the offence, the enforcement of any relevant rules<sup>25</sup>; or
- 1037 (v) where a detention and training order<sup>26</sup> is made, the enforcement of any relevant requirements imposed<sup>27</sup>.

A court may<sup>28</sup> by order dispense to any specified extent with these requirements in relation to a child or young person who is concerned in the proceedings if it is satisfied<sup>29</sup>:

- 1038 (A) that it is appropriate to do so for the purpose of avoiding injustice to the child or young person<sup>30</sup>; or
- 1039 (B) that, as respects a child or young person<sup>31</sup> who is unlawfully at large<sup>32</sup>, it is necessary to dispense with those requirements for the purpose of apprehending him and bringing him before a court or returning him to the place in which he was in custody<sup>33</sup>.

In any proceedings for varying or revoking supervision orders<sup>34</sup> before a magistrates' court other than a youth court, or on appeal from such a court, it is the duty of the magistrates' court or the appellate court to announce in the course of the proceedings that the provisions relating to restrictions on reports of proceedings in which children or young persons are concerned<sup>35</sup> apply to the proceedings, and if the court fails to do so those provisions do not apply to the proceedings<sup>36</sup>.

These provisions extend to England and Wales, Scotland and Northern Ireland, but no reference in these provisions to any court includes a court in Scotland<sup>37</sup>.

1 The provisions of the Children and Young Persons Act 1933 s 49 (as substituted and amended) are prospectively amended by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 1, 3 as from a day to be appointed under s 68(3). At the date at which this volume states the law no such day had been appointed. As to the restrictions on reporting of youth court proceedings at the date at which this volume states the law see paras 1272-1273 ante.

The prospective amendments effected by the Youth Justice and Criminal Evidence Act 1999 Sch 2 paras 1, 3 widen the scope of the restriction on the reporting of court proceedings involving young persons. The principal change is that where the Children and Young Persons Act 1933 s 49 (as substituted and amended) (see paras 1272-1273 ante) prohibits the publication of reports, and the inclusion of pictures in a programme service, s 49 (as substituted and amended; prospectively further amended) prohibits the inclusion of information or pictures in 'publications', which is defined as including any speech, writing, programme or other communication in whatever form (thereby including within its scope electronic media and the internet) addressed to the public at large or any section of the public. A different emphasis is also placed on the wording of the prohibition itself: where s 49 (as substituted and amended) prohibits the revelation of a child's name, address or school or other particulars likely to lead to the identification of the child, s 49 (as substituted and amended; prospectively further amended) absolutely prohibits the inclusion in any publication of any matter likely to lead to the identification of the child, with the prohibitions on revealing names, addresses or schools included only as particular examples of prohibited matters. Additionally, whereas s 49 (as substituted and amended) extends only to England and Wales, s 49 (as substituted and amended; prospectively further amended) is stated to extend to England, Wales, Scotland and Northern Ireland.

2 Children and Young Persons Act 1933 s 49(2) (s 49 substituted by the Criminal Justice and Public Order Act 1994 s 49).

3 Children and Young Persons Act 1933 s 49(2)(a) (as substituted: see note 2 supra).

4 Ibid s 49(2)(b) (as substituted: see note 2 supra). As to proceedings by way of case stated see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 2005 et seq.

5 Ibid s 49(2)(c) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 2(1), (2)(a)). Proceedings for varying or revoking supervision orders are made under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 (as amended): see paras 1352-1353 post. As to supervision orders see para 270 et seq ante.

In its application to Northern Ireland, the Children and Young Persons Act 1933 s 49(2) (as substituted) has effect as if s 49(2)(c), (d) were omitted: see s 49(13)(b) (as added: see note 1 supra).

6 Ie arising out of proceedings under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 (as amended): see paras 1352-1353 post.

7 Children and Young Persons Act 1933 s 49(2)(d) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (2)(b)). See note 5 supra.

8 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

9 For these purposes, a child or young person is 'concerned' in any proceedings if he is a person against or in respect of whom the proceedings are taken, or a person called, or proposed to be called, to give evidence in the proceedings: Children and Young Persons Act 1933 s 49(4) (as substituted (see note 2 supra); and amended (see note 1 supra)).

In its application to Northern Ireland, s 49 (as substituted and amended; prospectively further amended) has effect as if to provide that references in s 49 (as substituted and amended; prospectively further amended) to a young person concerned in proceedings are, where the proceedings are in a court in Northern Ireland, to a person who has attained the age of 14 but is under the age of 17: s 49(14) (as added: see note 1 supra).

10 'Publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme must be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings: *ibid* s 49(3) (as substituted: see note 1 supra). The matters relating to a person in relation to which the restrictions imposed by s 49(1) (as substituted) apply (if their inclusion in any publication is likely to have the result mentioned in s 49(1) (as substituted)) include in particular:

3234 (1) his name (s 49(3A)(a) (as added: see note 1 supra));

3235 (2) his address (s 49(3A)(b) (as so added));

3236 (3) the identity of any school or other educational establishment attended by him (s 49(3A)(c) (as so added));

3237 (4) the identity of any place of work (s 49(3A)(d) (as so added)); and

3238 (5) any still or moving picture of him (s 49(3A)(e) (as so added)).

'Relevant programme' means a programme included in a programme service, within the meaning of the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 328): Children and Young Persons Act 1933 s 49(11) (definition as so added). 'Picture' includes a likeness however produced: s 49(11) (definition as so added).

11 *Ibid* s 49(1) (as substituted: see note 1 supra).

In the application of s 49 (as substituted and amended; prospectively further amended) to Northern Ireland, no matter relating to any child or young person concerned in proceedings to which s 49 (as substituted and amended; prospectively further amended) applies may while he is under the age of 17 be included in any publication if it is likely to lead members of the public to identify him as someone concerned in the proceedings: s 49(1) (as so substituted; and modified by s 49(13)(a)).

12 *Ibid* s 49(9) (as substituted: see note 1 supra). The fine may not exceed level 5 on the standard scale: s 49(9) (as so substituted). As to the standard scale see para 132 note 2 ante. Where a person is charged with an offence under s 49(9) (as substituted) it is a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication included the matter in question: s 49(9A) (s 49(9A-9E) as added: see note 1 supra). If an offence under s 49(9) (as substituted) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 49(9B) (as so added). For these purposes, 'officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: s 49(9C) (as so added). If the affairs of a body corporate are managed by its members, 'director' in s 49(9C) (as added) means a member of that body: s 49(9D) (as so added). Where an offence under s 49(9) (as substituted) is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership is guilty of the offence and is liable to be proceeded against and punished accordingly: s 49(9E) (as so added).

13 *Ibid* s 49(9)(a) (as substituted: see note 1 supra).

14 *Ibid* s 49(9)(b) (as substituted: see note 1 supra).

15 *Ibid* s 49(9)(c) (as substituted: see note 1 supra).

16 'Specified' means specified in an order under *ibid* s 49 (as substituted and amended; prospectively further amended): s 49(11).

17 *Ie* the restrictions imposed by *ibid* s 49(1) (as substituted): see the text and note 11 supra.

18 le to which *ibid* s 49 (as substituted and amended; prospectively further amended) applies by virtue of s 49(2)(a) (as substituted) or s 49(2)(b) (as substituted): see the text and notes 2-4 *supra*.

19 *Ibid* s 49(4A) (added by the Crime (Sentences) Act 1997 s 45; and amended (see note 1 *supra*)).

In its application to Northern Ireland, the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively further amended) has effect to provide that if a court is satisfied that it is in the public interest to do so, it may, in relation to a child or young person who has been convicted of an offence, by order dispense to any specified extent with the restrictions imposed by s 49(1) (as substituted) (see the text to notes 8-11 *supra*) in relation to any proceedings before it to which s 49 (as substituted and amended; prospectively further amended) applies by virtue of s 49(2)(a) or (b) (as substituted), being proceedings relating to:

3239 (1) the prosecution or conviction of the offender for the offence (s 49(4A)(a) (as so added and amended));

3240 (2) the manner in which he, or his parent or guardian, must be dealt with in respect of the offence (s 49(4A)(b) (as so added and amended));

3241 (3) the enforcement, amendment, variation, revocation or discharge of any order made in respect of the offence (s 49(4A)(c) (as so added and amended));

3242 (4) where an attendance centre order is made in respect of the offence, the enforcement of any rules made under the Criminal Justice (Children) (Northern Ireland) Order 1998, SI 1998/1504 (Children and Young Persons Act 1933 s 49(4A)(d) (as so added and amended; and modified by s 49(13)(c)(i)); or

3243 (5) where a juvenile justice centre order is made, the enforcement of any requirements imposed under the Criminal Justice (Children) (Northern Ireland) Order 1998, SI 1998/1504, art 40(2) (Children and Young Persons Act 1933 s 49(4A)(e) (as so added and amended; and modified by s 49(13)(c)(ii)).

A court must not exercise its power under s 49(4A) (as added and amended) without affording the parties to the proceedings an opportunity to make representations, and taking into account any representations which are duly made: s 49(4B) (added by the Crime (Sentences) Act 1997 s 45).

As from a day to be appointed, the court's power under the Children and Young Persons Act 1933 s 49(4A) (as added and amended) may be exercised by a single justice: s 49(8) (as substituted (see note 2 *supra*); and amended (see note 1 *supra*)).

In its application to Northern Ireland, s 49 (as substituted and amended; prospectively further amended) has effect as if s 49(8) (as substituted and amended) were omitted: see s 49(13)(f) (as added: see note 1 *supra*). The power to dispense with anonymity, as permitted in certain circumstances by s 49(4A) (as added and amended), has to be exercised with great care, caution and circumspection: *McKerry v Teesdale and Wear Valley Justices* (2000) 164 JP 355, [2000] COD 199, DC.

20 Children and Young Persons Act 1933 s 49(4A)(a) (as added: see note 19 *supra*).

21 For the meaning of 'guardian' see para 747 note 13 *ante*.

22 Children and Young Persons Act 1933 s 49(4A)(b) (as added: see note 19 *supra*).

23 *Ibid* s 49(4A)(c) (as added: see note 19 *supra*).

24 As to attendance centre orders see para 1358 *post*.

25 Children and Young Persons Act 1933 s 49(4A)(d) (as added (see note 19 *supra*); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (3)(a)). The relevant rules are any made under the Criminal Justice Act 2003 s 222(1)(d) or (e): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 285.

26 As to detention and training orders see para 1398 *post*.

27 Children and Young Persons Act 1933 s 49(4A)(e) (as added (see note 19 *supra*); and amended by the Crime and Disorder Act 1998 s 119, Sch 8 para 1; and the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (3)(b)). The relevant requirements are any imposed under the Powers of Criminal Courts (Sentencing) Act 2000 s 103(6)(b): see para 1401 *post*.

28 le in relation to proceedings before it to which the Children and Young Persons Act 1933 s 49 (as substituted and amended) applies.

29 Ibid s 49(5) (as substituted: see note 2 supra). The court's power under s 49(5) (as substituted) may be exercised by a single justice: s 49(8) (as so substituted).

In its application to Northern Ireland, s 49 (as substituted and amended; prospectively further amended) has effect to provide that, subject to s 49(7) (as substituted), a court or the Secretary of State may, in relation to proceedings before it to which s 49 (as substituted and amended; prospectively further amended) applies, by order dispense to any specified extent with the requirements of s 49 (as substituted and amended; prospectively further amended) in relation to a child or young person who is concerned in the proceedings if it is satisfied: (1) that it is appropriate to do so for the purpose of avoiding injustice to the child or young person; or (2) that, as respects a child or young person to whom s 49(5) (as substituted) applies who is unlawfully at large, it is necessary to dispense with those requirements for the purpose of apprehending him and bringing him before a court or the Secretary of State, or returning him to the place in which he was in custody: s 49(5) (as so substituted; and modified by s 49(13)(d)).

30 Ibid s 49(5)(a) (as substituted: see note 2 supra).

31 Ie a child or young person to whom ibid s 49(5) (as substituted) applies.

32 A person who, having been granted bail, is liable to arrest (whether with or without a warrant) is treated as unlawfully at large: ibid s 49(11) (as substituted: see note 2 supra). As to bail see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1165-1201; and as to arrest see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 910-935.

33 Ibid s 49(5)(b) (as substituted: see note 2 supra). The provisions of s 49(5)(b) (as substituted) apply to any child or young person who is charged with or has been convicted of a violent offence, a sexual offence, or an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more: s 49(6) (as so substituted). As from a day to be appointed the reference to the age of 21 is changed so as to refer to the age of 18: see s 49(6) (as so substituted; and amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II para 5). At the date at which this volume states the law no such day had been appointed.

The court must not exercise its power under the Children and Young Persons Act 1933 s 49(5)(b) (as substituted) except in pursuance of an application by or on behalf of the Director of Public Prosecutions, and unless notice of the application has been given by the Director of Public Prosecutions to any legal representative of the child or young person: s 49(7) (as so substituted). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1066 et seq.

In its application to Northern Ireland, s 49 (as substituted and amended; prospectively further amended) has effect to provide that the court must not exercise its power under s 49(5)(b) (as substituted) except in pursuance of an application by or on behalf of the Director of Public Prosecutions for Northern Ireland, and unless notice of the application has been given by the Director of Public Prosecutions for Northern Ireland to any legal representative of the child or young person: s 49(7) (as so substituted; and modified by s 49(13)(e)). In its application to Northern Ireland, s 49 (as substituted and amended; prospectively further amended) has effect as if 'violent offence' has the same meaning for these purposes as in the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160, art 2(2): Children and Young Persons Act 1933 s 49(11) (as so substituted; definition amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (5); and modified by the Children and Young Persons Act 1933 s 49(13)(g)(ii)). In its application to Northern Ireland, the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively further amended) has effect as if for these purposes, 'sexual offence' has the same meaning as in the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160, art 2(2): Children and Young Persons Act 1933 s 49(11) (as so substituted; definition amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (5); and modified by the Children and Young Persons Act 1933 s 49(13)(g)(ii)).

34 See note 5 supra.

35 Ie the provisions of the Children and Young Persons Act 1933 s 49 (as substituted and amended).

36 Ibid s 49(10) (as substituted (see note 2 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2(1), (4)).

In its application to Northern Ireland, the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively further amended) has effect as if s 49(10) (as substituted and amended) were omitted: see s 49(13)(f) (as added: see note 1 supra).

37 Ibid s 49(12) (as added: see note 1 supra).

## UPDATE



**1274 Restrictions under the Youth Justice and Criminal Evidence Act 1999 on reporting of youth court proceedings**

TEXT AND NOTES 5, 7, 36--Children and Young Persons Act 1933 s 49(2)(c), (d) substituted, s 49(10) further amended, Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 2 partly repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 3(2), (4), Sch 28 Pt 1.

TEXT AND NOTES 19, 25--Children and Young Persons Act 1933 s 49(4A)(d) repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 3(3), Sch 28 Pt 1 (not yet in force).

NOTE 33--Children and Young Persons Act 1933 s 49(13)(g)(ii) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 100.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(2) YOUTH COURTS/ (iii) Restrictions on Reporting/1275. Restrictions on reporting criminal investigations involving persons under 18 years.

### **1275. Restrictions on reporting criminal investigations involving persons under 18 years.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Those provisions apply<sup>2</sup> where a criminal investigation<sup>3</sup> has begun in respect of:

- 1040 (1) an alleged offence against the law of England and Wales, or Northern Ireland<sup>4</sup>; or
- 1041 (2) an alleged civil offence<sup>5</sup> (other than an offence falling within head (1) above) committed (whether or not in the United Kingdom) by a person subject to service law<sup>6</sup>.

No matter relating to any person involved in the offence<sup>7</sup> may, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person involved in the offence<sup>8</sup>. However, these restrictions<sup>9</sup> cease to apply once there are proceedings in a court (whether a court in England and Wales, a service court or a court in Northern Ireland) in respect of the offence<sup>10</sup>. In addition, any appropriate criminal court<sup>11</sup> may by order dispense, to any extent specified in the order, with the imposed restrictions<sup>12</sup> in relation to a person if it is satisfied that it is necessary in the interests of justice to do so<sup>13</sup>. However, when deciding whether to make such an order dispensing (to any extent) with those restrictions in relation to a person, the court must have regard to the welfare of that person<sup>14</sup>.

The matters relating to a person in relation to which those restrictions<sup>15</sup> apply (if their inclusion in any publication is likely to have the result mentioned) include in particular<sup>16</sup>:

- 1042 (a) his name<sup>17</sup>;
- 1043 (b) his address<sup>18</sup>;
- 1044 (c) the identity of any school or other educational establishment attended by him<sup>19</sup>;
- 1045 (d) the identity of any place of work<sup>20</sup>; and
- 1046 (e) any still or moving picture of him<sup>21</sup>.

1 The Youth Justice and Criminal Evidence Act 1999 s 44 is to be brought into force on a day to be appointed by an order made by the Secretary of State under s 68(3). At the date at which this volume states the law no such order had been made. Sections 49-52 have been brought into force for the purposes of s 46 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1430) and s 47 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1302) (see the Youth Justice and Criminal Evidence Act 1999 (Commencement No 10) (England and Wales) Order 2004, SI 2004/2428), although they are not yet in force for the purposes of this paragraph. As to the Secretary of State see para 155 ante.

2 Ie subject to the Youth Justice and Criminal Evidence Act 1999 s 44(3): see the text and note 1 supra.

3 For the purposes of ibid s 44, any reference to a criminal investigation, in relation to an alleged offence, is to an investigation conducted by police officers, or other persons charged with the duty of investigating offences, with a view to it being ascertained whether a person should be charged with the offence: s 44(13)(b).

4 Ibid s 44(1)(a).

5 For these purposes, 'civil offence' means an act or omission which, if committed in England and Wales, would be an offence against the law of England and Wales: ibid s 44(13)(a).

6 Ibid s 44(1)(b). Until a day to be appointed, for the purposes of s 44 any reference to a person subject to service law is to:

- 3244 (1) a person subject to military law, air force law or the Naval Discipline Act 1957 (Youth Justice and Criminal Evidence Act 1999 s 44(13)(c)(i)); or
- 3245 (2) any other person to whom provisions of the Army Act 1955 Pt II (ss 24-143) (repealed), the Air Force Act 1955 Pt II (ss 24-143) (repealed), or of the Naval Discipline Act 1957 Pt I (ss 1-44) (repealed) and Pt II (ss 45-92) (repealed) apply (whether with or without any modifications) (Youth Justice and Criminal Evidence Act 1999 s 44(13)(c)(ii)).

Section 44(13)(c)(i), (ii) is substituted by the Armed Forces Act 2006 s 378(1), Sch 16 para 158 as from a day to be appointed under s 383(2) so that for the purposes of the Youth Justice and Criminal Evidence Act 1999 s 44 any reference to a person subject to service law is to:

- 3246 (a) a person subject to service law within the meaning of the Armed Forces Act 2006 (Youth Justice and Criminal Evidence Act 1999 s 44(13)(c)(i) (as so substituted));
- 3247 (b) a civilian subject to service discipline within the meaning of the Armed Forces Act 2006 (Youth Justice and Criminal Evidence Act 1999 s 44(13)(c)(ii) (as so substituted)).

At the date at which this volume states the law no such day had been appointed. See also ARMED FORCES.

7 For the purposes of ibid s 44(2) any reference to a person involved in the offence is to:

- 3248 (1) a person by whom the offence is alleged to have been committed (s 44(4)(a)); or
- 3249 (2) if s 44(4)(b) applies to the publication in question by virtue of s 44(5):

183.(a) a person against or in respect of whom the offence is alleged to have been committed (s 44(4)(b)(i)); or

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184.(b) a person who is alleged to have been a witness to the commission of the offence (s 44(4)(b)(ii)).

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However, head (2)(b) supra does not include a person in relation to whom the Sexual Offences (Amendment) Act 1992 s 1 (prospectively amended) (anonymity of victims of certain sexual offences) applies in connection with the offence: Youth Justice and Criminal Evidence Act 1999 s 44(4). Head (2) supra applies to a publication if where it is a relevant programme, it is transmitted, or in the case of any other publication, it is published, on or after such date as may be specified in an order made by the Secretary of State: s 44(5).

Any power of the Secretary of State to make any order under the Youth Justice and Criminal Evidence Act 1999 is exercised by statutory instrument: s 64(1) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(4), Sch 12 Pt 1).

A statutory instrument containing any order under the Youth Justice and Criminal Evidence Act 1999 s 61(1) or (2) is subject to annulment in pursuance of a resolution of either House of Parliament: s 64(2) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 12 Pt 1).

No order may be made under the Youth Justice and Criminal Evidence Act 1999 s 18(5) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1416), s 42(2) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1446) or s 44(5), unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament: s 64(3) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 12 Pt 1).

Any order made by the Secretary of State under the Youth Justice and Criminal Evidence Act 1999 may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit: s 64(4) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 12 Pt 1).

8 Youth Justice and Criminal Evidence Act 1999 s 44(2). If a publication includes any matter in contravention of s 44(2), the provisions in s 49 relating to offences apply: s 49(1)(a). Where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical is guilty of an offence: s 49(2). Where the publication is a relevant programme:

- 3250 (1) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included (s 49(3)(a)); and

- 3251 (2) any person having functions in relation to the programme corresponding to those of an editor of a newspaper, is guilty of an offence (s 49(3)(b)).

In the case of any other publication, any person publishing it is guilty of an offence: s 49(4). A person guilty of an offence under s 49 is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 49(5). As to the standard scale see para 132 note 2 ante.

Where a person is charged with an offence under s 49 it is a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication included the matter or report in question: s 50(1). Where:

- 3252 (a) a person is charged with an offence under s 49 (s 50(2)(a)); and

- 3253 (b) the offence relates to the inclusion of any matter in a publication in contravention of s 44(2) (s 50(2)(b)),

it is a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the criminal investigation in question had begun (s 50(2)). Where:

- 3254 (i) heads (a) and (b) supra apply (s 50(3)(a)); and

- 3255 (ii) the contravention of s 44(2) does not relate to:

185. (A) the person by whom the offence mentioned in that provision is alleged to have been committed (s 50(3)(b)(i)); or

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186. (B) where that offence is one in relation to which the Sexual Offences (Amendment) Act 1992 s 1 (prospectively amended) applies, a person who is alleged to be a witness to the commission of the offence (Youth Justice and Criminal Evidence Act 1999 s 50(3)(b)(ii)),

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it is a defence to show to the satisfaction of the court that the inclusion in the publication of the matter in question was in the public interest on the ground that, to the extent that they operated to prevent that matter from being so included, the effect of the restrictions imposed by s 44(2) was to impose a substantial and unreasonable restriction on the reporting of matters connected with that offence (s 50(3)). Where heads (a) and (b) supra apply, and the contravention of s 44(2) relates to a person ('the protected person') who is neither the person mentioned in head (ii)(A) supra nor a person within head (ii)(B) supra who is under the age of 16, in such a case it is a defence, subject to s 50(6), to prove that written consent to the inclusion of the matter in question in the publication had been given by an appropriate person, if at the time when the consent was given the protected person was under the age of 16, or by the protected person, if that person was aged 16 or 17 at that time, and (where the consent was given by an appropriate person) that written notice had been previously given to that person drawing to his attention the need to consider the welfare of the protected person when deciding whether to give consent: s 50(5). The defence provided by s 50(5) is not available if (where the consent was given by an appropriate person) it is proved that written or other notice withdrawing the consent was given to the appropriate recipient by any other appropriate person or by the protected person, and was so given in sufficient time to enable the inclusion in the publication of the matter in question to be prevented: s 50(6).

For the purposes of s 50, 'an appropriate person' means (subject to s 50(10), (11)) in England and Wales or Northern Ireland, a person who is a parent or guardian of the protected person: s 50(9). Where the protected person is, within the meaning of the Children Act 1989, a child who is looked after by a local authority, 'an appropriate person' means a person who is a representative of that authority, or a parent or guardian of the protected person with whom the protected person is allowed to live: Youth Justice and Criminal Evidence Act 1999 s 50(10). Where the protected person is, within the meaning of the Children (Northern Ireland) Order 1995, SI 1995/755 (as amended), a child who is looked after by an authority, 'an appropriate person' means a person who is an officer of that authority, or a parent or guardian of the protected person with whom the protected person is allowed to live: Youth Justice and Criminal Evidence Act 1999 s 50(11). However, no person by whom the offence mentioned in s 44(2) is alleged to have been committed is, by virtue of s 50(9), (10), (11), an appropriate person for the purposes of s 50: s 50(13). For the purposes of s 50, 'the appropriate recipient', in relation to a notice under s 50(6)(a), means:

- 3256 (aa) the person to whom the notice giving consent was given (s 50(14)(a));

- 3257 (bb) (if different) the person by whom the matter in question was published (s 50(14)(b));  
or

- 3258 (cc) any other person exercising, on behalf of the person mentioned in head (bb) supra, any responsibility in relation to the publication of that matter (s 50(14)(c)).

For the purposes of s 50(14), 'person' includes a body of persons and a partnership: s 50(14). For the purposes of s 50, 'guardian', in relation to the protected person, means any person who is not a parent of the protected person but who has parental responsibility for the protected person within the meaning of, in England and Wales, the Children Act 1989, or in Northern Ireland, the Children (Northern Ireland) Order 1995, SI 1995/755 (as amended): Youth Justice and Criminal Evidence Act 1999 s 50(9).

If an offence committed by a body corporate under s 49 is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 51(1). 'Officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: s 51(2). If the affairs of a body corporate are managed by its members, 'director' means a member of that body: s 51(3).

9 le the restrictions imposed by *ibid* s 44(2): see note 7 supra.

10 *Ibid* s 44(3).

11 For the purposes of *ibid* s 44(7), 'appropriate criminal court' means:

- 3259 (1) in a case where s 44 applies by virtue of s 44(1)(a)(i) or (ii), any court in England and Wales or (as the case may be) in Northern Ireland which has any jurisdiction in, or in relation to, any criminal proceedings (but not a service court unless the offence is alleged to have been committed by a person subject to service law) (s 44(9)(a)); and

- 3260 (2) in a case where s 44 applies by virtue of s 44(1)(b), any court falling within head (1) supra or a service court (s 44(9)(b)).

12 See note 7 supra.

13 Youth Justice and Criminal Evidence Act 2000 s 44(7). The power under s 44(7) of a magistrates' court in England and Wales may be exercised by a single justice: s 44(10). In the case of a decision of a magistrates' court in England and Wales, or a court of summary jurisdiction in Northern Ireland, to make or refuse to make an order under s 44(7), the following persons, namely:

- 3261 (1) any person who was a party to the proceedings on the application for the order (s 44(11)(a)); and

- 3262 (2) with the leave of the Crown Court (or, in Northern Ireland, a county court), any other person (s 44(11)(b)),

may, in accordance with the Criminal Procedure Rules in England and Wales, or rules of court in Northern Ireland, appeal to the Crown Court (or, in Northern Ireland, a county court) against that decision or appear or be represented at the hearing of such an appeal: s 44(11) (amended by the Courts Act 2003 s 109(1), Sch 8 para 386).

On such an appeal the Crown Court (or, in Northern Ireland, a county court) may make such order as is necessary to give effect to its determination of the appeal, and may also make such incidental or consequential orders as appear to it to be just: s 44(12) (amended by the Courts Act 2003 s 109(1), Sch 8 para 386).

14 Youth Justice and Criminal Evidence Act 1999 s 44(8).

15 See note 9 supra.

16 Youth Justice and Criminal Evidence Act 1999 s 44(6).

17 *Ibid* s 44(6)(a).

18 *Ibid* s 44(6)(b).

19 *Ibid* s 44(6)(c).

20 *Ibid* s 44(6)(d).

21 *Ibid* s 44(6)(e).

**UPDATE**

**1275 Restrictions on reporting criminal investigations involving persons under 18 years**

NOTE 6--Appointed day for the commencement of the Armed Forces Act 2006 Sch 16 para 158 is 31 October 2009: SI 2009/1167.

NOTE 7--See also Criminal Justice and Immigration Act 2008 Sch 26 para 39.

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### **1276. Power to restrict reporting of criminal proceedings involving persons under 18.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. These provisions, which restrict the reporting of criminal proceedings involving persons under 18, apply in relation to any criminal proceedings in any court (other than a service court) in England and Wales or Northern Ireland, and any proceedings (whether in the United Kingdom<sup>2</sup> or elsewhere) in any service court<sup>3</sup>.

The court may direct that no matter relating to any person concerned in the proceedings may while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings<sup>4</sup>. Such matters relating to a person in relation to which the restrictions imposed by such a direction<sup>5</sup> apply<sup>6</sup> include in particular<sup>7</sup>:

- 1047 (1) his name<sup>8</sup>;
- 1048 (2) his address<sup>9</sup>;
- 1049 (3) the identity of any school or other educational establishment attended by him<sup>10</sup>;
- 1050 (4) the identity of any place of work<sup>11</sup>; and
- 1051 (5) any still or moving picture of him<sup>12</sup>.

However, the court or an appellate court<sup>13</sup> may by direction ('an excepting direction') dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction<sup>14</sup> if it is satisfied that it is necessary in the interests of justice to do so<sup>15</sup>. The court or an appellate court may also by direction ('an excepting direction') dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction<sup>16</sup> if it is satisfied that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and that it is in the public interest to remove or relax that restriction<sup>17</sup>.

1 The Youth Justice and Criminal Evidence Act 1999 s 45 is to be brought into force as from a day to be appointed by an order made by the Secretary of State under s 68(3). At the date at which this volume states the law no such order had been made. As to the Secretary of State see para 155 ante.

2 For the meaning of 'United Kingdom' see para 102 note 7 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 45(1). However, s 45(1) does not apply in relation to any proceedings to which the Children and Young Persons Act 1933 s 49 (as substituted and amended; prospectively further amended) (see para 1272 ante) applies: Youth Justice and Criminal Evidence Act 1999 s 45(2).

4 Ibid s 45(3). When deciding whether to make a direction under s 45(3) in relation to a person, or an excepting direction under s 45(4) (see note 15 infra) or s 45(5) (see note 17 infra) by virtue of which the restrictions imposed by a direction under s 45(3) would be dispensed with (to any extent) in relation to a person, the court or (as the case may be) the appellate court must have regard to the welfare of that person: s 45(6). For the purposes of s 45(3), any reference to a person concerned in the proceedings is to a person against or in respect of whom the proceedings are taken, or who is a witness in the proceedings: s 45(7).

5 I.e. a direction under ibid s 45(3). A direction under s 45(3) may be revoked by the court or an appellate court: s 45(9).

6     le if their inclusion in any publication is likely to have the result mentioned in *ibid* s 45(3): see the text and note 4 *supra*.

7     *Ibid* s 45(8).

8     *Ibid* s 45(8)(a).

9     *Ibid* s 45(8)(b).

10    *Ibid* s 45(8)(c).

11    *Ibid* s 45(8)(d).

12    *Ibid* s 45(8)(e).

13    For these purposes, 'appellate court', in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal: *ibid* s 45(11).

14    See note 5 *supra*.

15    Youth Justice and Criminal Evidence Act 1999 s 45(4). See also note 4 *supra*. An excepting direction may be given at the time the direction under s 45(3) (see the text and note 4 *supra*) is given or subsequently, and may be varied or revoked by the court or an appellate court: s 45(10).

16    See note 5 *supra*.

17    Youth Justice and Criminal Evidence Act 1999 s 45(5). However, no excepting direction may be given under s 45(5) by reason only of the fact that the proceedings have been determined in any way or have been abandoned: s 45(5). See also note 4 *supra*.



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### **(3) EVIDENCE OF CHILDREN IN CRIMINAL PROCEEDINGS**

#### **1277. Competence and capacity to give evidence.**

At every stage in criminal proceedings any person is, whatever his age, competent to give evidence<sup>1</sup> unless it appears to the court that he is not a person who is able to:

- 1052 (1) understand questions put to him as a witness<sup>2</sup>; and
- 1053 (2) give answers to them which can be understood<sup>3</sup>.

A child who is a witness in criminal proceedings may not be sworn for the purpose of giving evidence on oath unless:

- 1054 (a) he has attained the age of 14<sup>4</sup>; and
- 1055 (b) he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath<sup>5</sup>.

A deposition of a child's unsworn evidence<sup>6</sup> may be taken for the purposes of criminal proceedings as if that evidence had been given on oath<sup>7</sup>.

Any requirement whereby at a trial on indictment<sup>8</sup> it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated<sup>9</sup>. Unsworn evidence admitted by virtue of the Youth Justice and Criminal Evidence Act 1999<sup>10</sup> may corroborate evidence (sworn or unsworn) given by any other person<sup>11</sup>.

Where a justice of the peace is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person<sup>12</sup> in respect of whom any of certain offences<sup>13</sup> is alleged to have been committed would involve serious danger to his life or health, the justice may take in writing the deposition of the child or young person on oath, and must subscribe the deposition and add to it a statement of his reason for taking it and of the day when and place where it was taken, and of the names of the persons (if any) present at the taking of it<sup>14</sup>.

Special provisions exist for a witness in criminal proceedings, other than the accused, who is under 17 at the time of the hearing<sup>15</sup>. Until a day to be appointed, special provisions also apply in relation to the evidence of persons under 14 in committal proceedings for assault or sexual offences<sup>16</sup>.

1 Youth Justice and Criminal Evidence Act 1999 s 53(1). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1401.

2 Ibid s 53(2), (3)(a). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1401.

3 Ibid s 53(2), (3)(b). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1401.

4 Ibid s 55(2)(a). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1403. See *R v Sharman* (1998) 162 JP 110, [1998] 1 FLR 785, CA (case decided under the Criminal Justice Act 1989 s 32A (repealed)); *R v MacPherson* [2005] EWCA Crim 3605, [2006] 1 Cr App Rep 459, [2007] Crim LR 504. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1403.

5 Youth Justice and Criminal Evidence Act 1999 s 55(2)(b). The witness, if he is able to give intelligible testimony, is presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party): s 55(3). If any such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the court that, on a balance of probabilities, the witness has attained the age of 14 and has a sufficient appreciation of the matters mentioned in s 55(2)(b): s 55(4). For the purposes of s 55, a person is able to give intelligible testimony if he is able to: (1) understand questions put to him as a witness (s 55(8)(a)); and (2) give answers to them which can be understood (s 55(8)(b)). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1403.

6 I.e. a child who is competent to give evidence in criminal proceedings, but by virtue of *ibid* s 55(2) is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings: see s 56(1), (2). A court in criminal proceedings must accordingly receive in evidence any evidence given unsworn in pursuance of s 56(2): s 56(4). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1404.

7 *Ibid* s 56(3). A court in criminal proceedings must accordingly receive in evidence any evidence given unsworn in pursuance of s 56(3): s 56(4). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1404.

8 As to trials on indictment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1102 et seq.

9 Criminal Justice Act 1988 s 34(2) (amended by the Criminal Justice and Public Order Act 1994 ss 32(2), (4), 168(3), Sch 11). As to the need for corroboration of certain evidence in criminal cases see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1449 et seq. When a complaint of indecent assault has been elicited from a young child by a mother's questioning, the jury must be warned as to the significance of the mother's evidence: *R v NK* [1999] Crim LR 980, sub nom *R v K* (1999) Times, 16 July, CA. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1404.

10 I.e. by virtue of the Youth Justice and Criminal Evidence Act 1999 s 56: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1404.

11 Criminal Justice Act 1988 s 34(3) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 15, 17).

12 For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

13 I.e. any of the offences mentioned in the Children and Young Persons Act 1933 Sch 1 (amended by the Sexual Offences Act 1956 s 51, Sch 4; the Criminal Justice Act 1988 s 170, Sch 15 para 8, Sch 16; the Sexual Offences Act 2003 s 139, Sch 6 para 7; and the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 2). See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1164. Where a person is charged with committing any of the offences mentioned in the Children and Young Persons Act 1933 Sch 1 (as amended) in respect of two or more children or young persons, the same information or summons may charge the offence in respect of all or any of them, but the person charged is not, if he is summarily convicted, liable to a separate penalty in respect of each child or young person except upon separate information: s 14(1). The same information or summons may charge him with the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, and may charge him with committing all or any of those offences in a manner likely to cause unnecessary suffering or injury to health, alternatively or together, but when those offences are charged together the person charged is not, if he is summarily convicted, liable to a separate penalty for each: s 14(2) (amended by the Children Act 1989 s 108(7), Sch 15). When any offence mentioned in the Children and Young Persons Act 1933 Sch 1 (as amended) charged against any person is a continuous offence, it is not necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence: s 14(4).

Where, in any proceedings with relation to any of the offences mentioned in Sch 1 (as amended), the court is satisfied that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child or young person: s 41.

14 *Ibid* s 42(1). The justice taking any such deposition must transmit it with his statement:

3263 (1) if the deposition relates to an offence for which any accused person is already sent or committed for trial, to the proper officer of the court for trial at which the accused person has been sent or committed (s 42(2)(a) (amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 33)); and

3264 (2) in any other case, to the proper officer of the court before which proceedings are pending in respect of the offence (Children and Young Persons Act 1933 s 42(2)(b) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 8, 9)).

In the Children and Young Persons Act 1933 s 42(2)(a), the word 'sent' is substituted for the word 'committed' by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 33 as from a day to be appointed. At the date at which this volume states the law this amendment is in force only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1132) or s 51A(3)(d) (as added) (see para 1262 ante): see the Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), (2)(a), Schedule Pt 1 para 1(1)(a).

Where, in any proceedings in respect of any of the offences mentioned in the Children and Young Persons Act 1933 Sch 1 (as amended), the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to his life or health, any deposition of the child or young person taken under Pt III (ss 31-76) (as amended; prospectively further amended) is admissible in evidence either for or against the accused person without further proof if it purports to be signed by the justice by or before whom it purports to be taken: s 43. However, the deposition is not admissible in evidence against the accused person unless it is proved that reasonable notice of the intention to take the deposition has been served upon him and that he or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition: s 43 proviso. See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1534.

15 See the Youth Justice and Criminal Evidence Act 1999 ss 16-33; para 1278 et seq post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1417 et seq. When a handicapped child has recorded his evidence on video, the child may not be able to give evidence without including irrelevant matters: *R (on the application of the Crown Prosecution Service) v Brentford Youth Court* [2003] EWHC 2409 (Admin), 167 JP 614. See also *R (on the application of the DPP) v Redbridge Youth Court*, *R (on the application of L) v Bicester Youth Court* [2001] EWHC 209 (Admin), [2001] 4 All ER 411, [2001] 1 WLR 2403 (case decided under the Criminal Justice Act 1988 ss 32, 32A (repealed)).

16 See the Magistrates' Courts Act 1980 s 103(2) (as substituted and amended); and MAGISTRATES vol 29(2) (Reissue) para 669. As from a date to be appointed, the Magistrates' Courts Act 1980 s 103 is repealed by Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 51(1), (6)(b), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 1277 Competence and capacity to give evidence

NOTE 14--Reference to counsel or solicitor is now to legal representative (see PARA 1267); Children and Young Persons Act 1933 s 43 (amended by Legal Services Act 2007 Sch 21 para 17).

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### **1278. Child witness eligible for assistance.**

A witness<sup>1</sup> in criminal proceedings, excluding the accused<sup>2</sup>, is eligible for assistance where he is under the age of 17 at the time of hearing<sup>3</sup>.

The following special measures may be available to such a witness<sup>4</sup>:

- 1056 (1) screens so that the witness cannot see the accused<sup>5</sup>;
- 1057 (2) evidence being given by a live television link<sup>6</sup>;
- 1058 (3) evidence being given in private<sup>7</sup>;
- 1059 (4) the removal of wigs and gowns<sup>8</sup>;
- 1060 (5) evidence in chief being recorded<sup>9</sup>;
- 1061 (6) the examination of the witness through an intermediary<sup>10</sup>;
- 1062 (7) the provision of aids to communication<sup>11</sup>.

As from a day to be appointed, the cross-examination and re-examination of the witness may be adduced by video recording<sup>12</sup>.

1 A 'witness' in relation to any criminal proceedings, means any person called, or proposed to be called, to give evidence in the proceedings: Youth Justice and Criminal Evidence Act 1999 s 63(1).

2 'Accused', in relation to criminal proceedings, means any person charged with an offence to which the proceedings relate (whether or not he has been convicted): *ibid* s 63(1).

3 *Ibid* s 16(1)(a). For these purposes, 'the time of the hearing' in relation to a witness means the time when it falls to the court to make a determination for the purposes of s 19(2) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1419) in relation to the witness: s 16(3). A witness in criminal proceedings, other than the accused, is also eligible for assistance if:

3265 (1) the witness is suffering from mental disorder within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 402) or otherwise has a significant impairment of intelligence and social functioning, or the witness has a physical disability or is suffering from a physical disorder (Youth Justice and Criminal Evidence Act 1999 s 16(2));

3266 (2) the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings (s 17(1)).

In determining whether a witness falls within head (2) above, the court must consider:

3267 (a) the nature and alleged circumstances of the offence (s 17(2)(a));

3268 (b) the age of the witness (s 17(2)(b));

3269 (c) such of the following as may be relevant:

15 187.(i) the social and cultural background and ethnic origin of the witness (s 17(2)(c)(i));

16 188.(ii) the domestic and employment circumstances of the witness (s 17(2)(c)(ii)); and

17 189.(iii) any religious beliefs or political opinions of the witness (s 17(2)(c)(iii));

3270 (d) any behaviour towards the witness on the part of:

18 190.(i) the accused (s 17(2)(d)(i));

19 191.(ii) members of the family or associates of the accused (s 17(2)(d)(ii)); or

20 192.(iii) any other person who is likely to be an accused or witness in the proceedings (s 17(2)(d)(iii)).

Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings unless the witness has informed the court of his wish not to be so eligible: see s 17(4). The court must in addition consider any views expressed by the witness: *ibid* s 17(3).

See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1417-1418.

4 See *ibid* s 18(1)(a); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1417. An application for special measure directions must be made in accordance with CrimPR Pt 29 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1419).

5 See the Youth Justice and Criminal Evidence Act 1999 s 23; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1421.

6 See *ibid* s 24; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1422.

7 See *ibid* s 25; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1423. This only applies where the charge relates to a sexual offence (s 25(4)(a)) or there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings (s 25(4)(b)).

8 See *ibid* s 26; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1424.

9 See *ibid* s 27; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1425.

10 See *ibid* s 29; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1427.

11 See *ibid* s 30; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1428.

12 See *ibid* s 28; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1426. At the date at which this volume states this provision is in force for the purpose only of the exercise of any power to make rules of court.

## UPDATE

### 1278 Child witness eligible for assistance

NOTES 2, 3--However, a court has an inherent power to appoint an intermediary to enable a minor who is the accused to participate effectively in a trial: *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), [2010] 1 All ER 735.

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### **1279. Special measures directions in relation to a child witness.**

Where in any criminal proceedings:

- 1063 (1) a party to the proceedings makes an application for the court to give a direction in relation to a witness<sup>1</sup> in the proceedings other than the accused<sup>2</sup>; or
- 1064 (2) the court of its own motion raises the issue whether such a direction should be given<sup>3</sup>,

and the court determines that a child witness is eligible for assistance<sup>4</sup>, the court must then:

- 1065 (a) determine whether any of the special measures available in relation to the witness, or any combination of them, would, in its opinion, be likely to improve the quality of evidence given by the witness<sup>5</sup>; and
- 1066 (b) if so:
  - 31 17. (i) determine which of those measures, or combination of them, would, in its opinion, be likely to maximise so far as practicable the quality of such evidence<sup>6</sup>; and
  - 18. (ii) give a direction providing for the measure or measures so determined to apply to evidence given by the witness<sup>7</sup>.
- 32

A special measures direction<sup>8</sup> must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence<sup>9</sup>.

Where a court, in making a determination for the purposes of head (b) above determines that a witness in criminal proceedings is a child witness, the court must first have regard to the following and then have regard to head (b) above<sup>10</sup>. The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements:

- 1067 (A) it must provide for any relevant recording to be admitted<sup>11</sup>; and
- 1068 (B) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording, whether in chief or otherwise, to be given by means of a live link<sup>12</sup>.

1 For the meaning of 'witness' see para 1278 note 1 ante.

2 Youth Justice and Criminal Evidence Act 1999 s 19(1)(a). For the meaning of 'accused' see para 1278 note 2 ante.

3 Ibid s 19(1)(b).

4 le by virtue of ibid ss 16, 17 (see para 1278 ante).

5 Ibid s 19(2)(a). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1420.

6 Ibid s 19(2)(b)(i). In determining whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular: (1) any views expressed by the witness (s 19(3)(a)); and (2) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings (s 19(3)(b)). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1420.

7 Ibid s 19(2)(b)(ii). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1420.

8 A special measures direction has binding effect from the time it is made until the proceedings for the purposes of which it is made are either determined (by acquittal, conviction or otherwise), or abandoned, in relation to the accused or (if there is more than one) in relation to each of the accused: see ibid s 20(1). The court may discharge or vary (or further vary) a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or of its own motion: s 20(2). For these purposes, 'the relevant time' means the time when the direction was given, or if a previous application has been made under s 20(2), the time when the application (or last application) was made: s 20(3). The court must state in open court its reasons for giving or varying, or refusing an application for, or for the variation or discharge of, or discharging, a special measures direction and, if it is a magistrates' court, must cause them to be entered in the register of its proceedings: s 20(4).

9 Ibid s 19(4). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1420.

10 Ibid s 21(2). For the purposes of s 19(2) (see the text and notes 5-7 supra), as it then applies to the witness, any special measures required to be applied in relation to him by virtue of s 21 are to be treated as if they were measures determined by the court, pursuant to s 19(2)(a) (see head (a) in the text) and s 19(2)(b)(i) (see head (b)(i) in the text), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his evidence: s 21(2).

11 Ibid s 21(3)(a). A relevant recording is one admitted under s 27 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1425).

The primary rule is subject to the following limitations:

3271 (1) the requirement contained in s 21(3)(a) or (b) has effect subject to the availability (within the meaning of s 18(2)) of the special measure in question in relation to the witness (s 21(4)(a));

3272 (2) the requirement contained in s 21(3)(a) also has effect subject to s 27(2) (s 21(4)(b));  
and

3273 (3) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason) (s 21(4)(c)).

Section 21(4)(c) does not apply in relation to a child witness in need of special protection: s 21(5). See *R (on the application of D) v Camberwell Green Youth Court*, *R (on the application of the DPP) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 All ER 999, [2005] 1 WLR 393.

12 Youth Justice and Criminal Evidence Act 1999 s 21(3)(b). See note 11 supra. A live link is one given in accordance with s 24 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1422).

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### **1280. Special protection of a child witness.**

A child witness<sup>1</sup> is in need of special protection if the offence to which the proceedings relate is an offence falling within particular provisions<sup>2</sup>.

Where a child witness is in need of special protection by virtue of a sexual offence<sup>3</sup>, any special measures direction<sup>4</sup> given by the court must in addition provide for the special measure available in relation to video recorded cross-examination or re-examination<sup>5</sup> to apply in relation to:

- 1069 (1) any cross-examination of the witness otherwise than by the accused in person<sup>6</sup>; and
- 1070 (2) any subsequent re-examination<sup>7</sup>.

No person charged with an offence falling within particular provisions<sup>8</sup> may in any criminal proceedings cross-examine in person a protected witness<sup>9</sup> either in connection with that offence or in connection with any other offence of whatever nature with which that person is charged in the proceedings<sup>10</sup>.

1 A witness in criminal proceedings is a 'child witness' if he is an eligible witness by reason of the Youth Justice and Criminal Evidence Act 1999 s 16(1)(a) (see para 1278 ante): s 21(1)(a). Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of s 16(1)(a) then, subject to s 21(9) and except where the witness has already begun to give evidence in the proceedings the direction ceases to have effect at the time when the witness attains the age of 17: s 21(8). Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of s 16(1)(a) and:

3274 (1) the direction provides:

193.(a) for any relevant recording to be admitted under s 27 as evidence in chief of the witness (s 21(9)(a)(i)); or

21

194.(b) for the special measure available under s 28 to apply in relation to the witness (s 21(9)(a)(ii)); and

22

3275 (2) if it provides for that special measure to so apply, the witness is still under the age of 17 when the video recording is made for the purposes of s 28 (s 21(9)(b)),

then, so far as it provides as mentioned in head (1)(a) or head (1)(b) above, the direction continues to have effect in accordance with s 20(1) even though the witness subsequently attains that age (s 21(9)).

2 Ibid s 21(1)(b). The particular provisions referred to in the text are:

3276 (1) the Protection of Children Act 1978 or the Sexual Offences Act 2003 Pt 1 (Youth Justice and Criminal Evidence Act 1999 s 35(3)(a) (amended by the Sexual Offences Act 2003 ss 139, 140, Sch 6 para 41, Sch 7));

3277 (2) kidnapping, false imprisonment or an offence under the Child Abduction Act 1984 ss 1, 2 (Youth Justice and Criminal Evidence Act 1999 s 35(3)(b));



3278 (3) any offence under the Children and Young Persons Act 1933 s 1 (Youth Justice and Criminal Evidence Act 1999 s 35(3)(c));

3279 (4) any offence (not within any of heads (1)-(3) supra) which involves an assault on, or injury or a threat of injury to, any person (s 35(3)(d)).

As to kidnapping see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 136; and as to false imprisonment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 135. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 165 et seq.

3 le by virtue of ibid s 35(3)(a) (as amended) (see note 2 supra).

4 As to special measures directions see para 1279 ante.

5 le the special measure available under the Youth Justice and Criminal Evidence Act 1999 s 28 (not yet in force) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1426).

6 Ibid s 21(6)(a). The requirement contained in s 21(6) has effect subject to the following limitations:

3280 (1) it has effect subject to the availability (within the meaning of s 18(2)) of that special measure in relation to the witness (s 21(7)(a)); and

3281 (2) it does not apply if the witness has informed the court that he does not want that special measure to apply in relation to him (s 21(7)(b)).

7 Ibid s 21(6)(b).

8 le an offence to which ibid s 35 (as amended) applies (see note 2 supra).

9 For these purposes, a 'protected witness' is a witness who:

3282 (1) either is the complainant or is alleged to have been a witness to the commission of the offence to which this section applies (ibid s 35(2)(a)); and

3283 (2) either is a child or falls to be cross-examined after giving evidence in chief (whether wholly or in part) by means of a video recording made (for the purposes of s 27) at a time when the witness was a child, or in any other way at any such time (s 35(2)(a)).

For the purposes of s 35, 'child' means: (a) where the offence falls within s 35(3)(a) (as amended) (see note 2 supra), a person under the age of 17 (s 35(4)(a)); or (b) where the offence falls within s 35(3)(b), (c) or (d) (see note 2 supra), a person under the age of 14 (s 35(4)(b)). For the purposes of s 35, 'witness' includes a witness who is charged with an offence in the proceedings: s 35(5).

10 Ibid s 35(1).

## UPDATE

### 1280 Special protection of a child witness

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--1999 Act s 35(3)(a) amended, s 35(3A) added: Criminal Justice and Immigration Act 2008 Sch 26 para 36. The amendment made by Sch 26 para 36 is deemed to have had effect as from 1 May 2004: Sch 26 para 38. When determining whether a child should give oral evidence, great weight had to be given to the child's interests: *Re W (children) (care proceedings: evidence)* [2010] UKSC 12, [2010] 2 All ER 418.

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### **1281. Clearing the court.**

Where, in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the court's opinion, is a child or young person<sup>1</sup> is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned with the case, be excluded from the court during the taking of the evidence of that witness<sup>2</sup>. However, this does not authorise the exclusion of bona fide representatives of a newspaper or news agency<sup>3</sup>.

No child (other than an infant in arms) is permitted to be present in court during the trial of any other person charged with an offence, or during any proceedings preliminary to a trial, except during such time as his presence is required as a witness or otherwise for the purposes of justice or while the court consents to his presence, and any child present in court when he is not to be permitted to be so must be ordered to be removed<sup>4</sup>.

<sup>1</sup> For the meaning of 'child' see para 613 note 1 ante. For the meaning of 'young person' see para 619 note 2 ante.

<sup>2</sup> Children and Young Persons Act 1933 s 37(1). These powers are in addition and without prejudice to any other of the court's powers to hear proceedings in camera: s 37(2).

<sup>3</sup> Ibid s 37(1) proviso. As from a day to be appointed, this provision is amended so as to refer to bona fide representatives of a news gathering or reporting organisation: s 37(1) proviso (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 2(1), (2)). At the date at which this volume states the law no such day had been appointed. As to evidence given by children in criminal proceedings generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE.

<sup>4</sup> Children and Young Persons Act 1933 s 36 (amended by the Access to Justice Act 1999 ss 73(1), 106, Sch 15 Pt III).

### **UPDATE**

#### **1281 Clearing the court**

TEXT AND NOTE 2--Reference to counsel or solicitors is now to legal representative (see PARA 1267): Children and Young Persons Act 1933 s 37(1) (amended by Legal Services Act 2007 Sch 21 para 16).

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## **(4) SENTENCING CHILDREN AND YOUNG PERSONS**

### **(i) Introduction**

#### **1282. The sentencing powers of the courts.**

The principal aim of the youth justice system is to prevent offending by children and young persons<sup>1</sup>. The courts have available to them a broad range of measures by which to sentence children and young persons, and certain limited means to make orders affecting their parent or guardian. The common law powers to bind over apply to children and young persons as they do to adults, but there is also a statutory power to bind over a parent or guardian<sup>2</sup>. The power to impose an absolute or conditional discharge applies largely as it does to adults<sup>3</sup>, but with certain statutory limitations since the replacement of police cautions for those under 18 years with a scheme of reprimands and warnings<sup>4</sup>. Referral to a youth offender panel<sup>5</sup> of offenders without previous convictions provides a programme of meetings and a contract between the offender and the panel, by which the offender is required to participate in a variety of schemes aimed at the prevention of further offending<sup>6</sup>. Reparation orders require the offender to make reparation to his victim or the community by unpaid work for no more than 24 hours<sup>7</sup>. Parenting orders are designed to prevent further offending or the repetition of the behaviour which gave rise to the proceedings, and impose requirements on a parent or guardian of a child who has been convicted of an offence or been made subject to certain orders<sup>8</sup>. The court may also impose an anti-social behaviour order after conviction for an offence<sup>9</sup>. Financial penalties are also available but with a statutory ceiling for fines<sup>10</sup>. There are powers to make a parent or guardian liable to pay fines, compensation and costs<sup>11</sup>.

There are only three forms of custodial sentence now available for offenders under 18<sup>12</sup>:

- 1071 (1) a detention and training order<sup>13</sup>;
- 1072 (2) detention for serious offences<sup>14</sup>; and
- 1073 (3) detention at Her Majesty's pleasure for murder<sup>15</sup>.

<sup>1</sup> See the Crime and Disorder Act 1998 s 37(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10.

<sup>2</sup> As to binding over see para 1288 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 152.

<sup>3</sup> See the Powers of Criminal Courts (Sentencing) Act 2000 ss 12-15; and para 1289 post.

<sup>4</sup> As to reprimands and warnings see paras 1235-1236 ante.

<sup>5</sup> As to youth offender panels see para 1295 et seq.

<sup>6</sup> See the Powers of Criminal Courts (Sentencing) Act 2000 ss 16-32; and para 1295 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

<sup>7</sup> See *ibid* ss 73-75 (ss 73, 74 as amended); and para 1308 post.

<sup>8</sup> See the Crime and Disorder Act 1998 ss 8, 9, 10 (all as amended); and paras 1319-1322 post.

<sup>9</sup> See *ibid* s 1C (as added and amended); and para 1237 ante.

10 See the Powers of Criminal Courts (Sentencing) Act 2000 s 135; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.

11 See *ibid* s 137 (as amended; prospectively amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.

12 As to custodial sentences see para 1397 et seq post. As to custodial sentences available in respect of young offenders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 11, 78 et seq. The restrictions on the imposition of custodial sentences relate to the seriousness of the offences and the age of the offender and certain other specified issues: see *ibid* ss 76-108 (as amended; prospectively amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 29 et seq, 67 et seq.

13 See *ibid* ss 100-107 (s 103 as amended; ss 100, 101, 105, 106 prospectively amended); and para 1398 et seq post.

14 See *ibid* s 91 (prospectively amended); and para 1404 post.

15 See *ibid* s 90 (as amended); and para 1405 post.

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### **1283. Youth community orders.**

A 'youth community order' means:

- 1074 (1) a supervision order<sup>1</sup>, which entails a supervisor acting to advise, assist and befriend the subject for a period of up to three years<sup>2</sup>;
- 1075 (2) an attendance centre order<sup>3</sup>, which is a form of community penalty; provision is made for the aggregate number of hours for which an attendance centre order may require a person to attend at an attendance centre<sup>4</sup>;
- 1076 (3) a curfew order<sup>5</sup>, which is available for an offender of any age, and operates to restrict his liberty in the community for a period of between two and twelve hours each day, for no more than three months if the offender is less than 16 at conviction, but otherwise up to six months<sup>6</sup>;
- 1077 (4) an exclusion order<sup>7</sup>, which prohibits the offender from entering a specified place for a specified period<sup>8</sup>;
- 1078 (5) an action plan order<sup>9</sup>, which involves a scheme of requirements and restrictions, lasting for three months<sup>10</sup>.

1    Ie an order as defined by the Powers of Criminal Courts (Sentencing) Act 2000 s 63(1). As to supervision orders see ss 63-67 (ss 63, 64, 66 as amended); para 1340 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250 et seq. As to community orders see further para 1339 et seq post.

2    Criminal Justice Act 2003 s 147(2)(d); Powers of Criminal Courts (Sentencing) Act 2000 s 33(1)(a) (s 33 substituted by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 95). However, the substitution of this provision is of no effect in relation to an offence committed before 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 para 42(1), (34), Sch 2 para 5. As to the position before 4 April 2005 see para 1285 post. See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

3    Ie an order as defined by the Powers of Criminal Courts (Sentencing) Act 2000 s 163. As to attendance centre orders see ss 60-62 (s 60 as amended; prospectively amended); para 1358 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 267-269.

4    Criminal Justice Act 2003 s 147(2)(c); Powers of Criminal Courts (Sentencing) Act 2000 s 33(1)(c) (as substituted: see note 2 supra). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

5    Ie an order as defined by ibid s 163. As to curfew orders see s 37 (prospectively amended), s 38 (repealed), ss 39, 40 (prospectively amended); para 1363 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231.

6    Criminal Justice Act 2003 s 147(2)(a); Powers of Criminal Courts (Sentencing) Act 2000 s 33(1)(a) (as substituted: see note 2 supra). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

7    Ie an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 40A (as added). See para 1364 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 232.

8    Criminal Justice Act 2003 s 147(2)(b); Powers of Criminal Courts (Sentencing) Act 2000 s 33(1)(b) (as substituted: see note 2 supra). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

9    Ie an order under ibid s 69(1). As to action plan orders see ss 69-72 (s 69 as amended); para 1365 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 242 et seq.

10 Criminal Justice Act 2003 s 147(2)(e); Powers of Criminal Courts (Sentencing) Act 2000 s 33(1)(e) (as substituted: see note 2 supra). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

## **UPDATE**

### **1283 Youth community orders**

TEXT AND NOTES--Criminal Justice Act 2003 s 147(2) repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 72(3), Sch 28 Pt 1. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

TEXT AND NOTE 5--Definition of 'curfew order' in Powers of Criminal Courts (Sentencing) Act 2000 s 163 repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 61, Sch 28 Pt 1.

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### **1284. Community orders.**

Where a person aged 18 or over (or, as from 4 April 2009, aged 16 or over)<sup>1</sup> is convicted of an offence, the court by or before which he is convicted may make an order (a 'community order') imposing on him one or more of the following requirements:

- 1079 (1) an unpaid work requirement<sup>2</sup>;
- 1080 (2) an activity requirement<sup>3</sup>;
- 1081 (3) a programme requirement<sup>4</sup>;
- 1082 (4) a prohibited activity requirement<sup>5</sup>;
- 1083 (5) a curfew requirement<sup>6</sup>;
- 1084 (6) an exclusion requirement<sup>7</sup>;
- 1085 (7) a residence requirement<sup>8</sup>;
- 1086 (8) a mental health treatment requirement<sup>9</sup>;
- 1087 (9) a drug rehabilitation requirement<sup>10</sup>;
- 1088 (10) an alcohol treatment requirement<sup>11</sup>;
- 1089 (11) a supervision requirement<sup>12</sup>;
- 1090 (12) an attendance centre requirement<sup>13</sup>.

1 The Criminal Justice Act 2003 Pt 12 Ch 2 (ss 177-180) was brought into force on 4 April 2005 by the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 para 7. However, in so far the Criminal Justice Act 2003 ss 177-180 and Schs 8, 9 apply, where a person aged 16 or 17 is convicted of an offence, those provisions come into force on 4 April 2009: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 2005/950, art 2(2) (amended by SI 2007/391).

2 Criminal Justice Act 2003 s 177(1)(a). An unpaid work requirement referred to in the text is one defined by s 199 (see para 1380 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 270-271). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

3 Ibid s 177(1)(b). An activity requirement referred to in the text is one defined by s 201 (see para 1381 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

4 Ibid s 177(1)(c). A programme requirement referred to in the text is one defined by s 202 (see para 1382 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

5 Ibid s 177(1)(d). A prohibited activity requirement referred to in the text is one defined by s 203 (see para 1383 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 274). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

6 Ibid s 177(1)(e). A curfew requirement referred to in the text is one defined by s 204 (see para 1384 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

7 Ibid s 177(1)(f). An exclusion requirement referred to in the text is one defined by s 205 (see para 1385 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

8 Ibid s 177(1)(g). A residence requirement referred to in the text is one defined by s 206 (see para 1386 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 277). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

9 Ibid s 177(1)(h). A mental health treatment requirement referred to in the text is one defined by s 207 (see para 1387 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

10 Ibid s 177(1)(i). A drug rehabilitation requirement referred to in the text is one defined by s 209 (see para 1388 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

11 Ibid s 177(1)(j). An alcohol treatment requirement referred to in the text is one defined by s 212 (see para 1389 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

12 Ibid s 177(1)(k). A supervision requirement referred to in the text is one defined by s 213 (see para 1390 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 282). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

13 Ibid s 177(1)(l). An attendance centre requirement referred to in the text is one defined by s 214 (see para 1391 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 283). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

## **UPDATE**

### **1284 Community orders**

TEXT AND NOTE 1--Now aged 18 or over: Criminal Justice and Immigration Act 2008 Sch 4 para 82.

NOTE 1--Reference to 4 April 2009 now to 4 April 2010: SI 2005/950 art 2(2) (amended by SI 2009/616).



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### **1285. Community orders where offence committed before 4 April 2005.**

Where an offence was committed before 4 April 2005<sup>1</sup> and the offender is aged 16 or over, in addition to the youth community orders<sup>2</sup>, the court may impose any of the following orders:

- 1091 (1) a community rehabilitation order<sup>3</sup>, which places the offender under probation for up to three years<sup>4</sup>;
- 1092 (2) a community punishment order<sup>5</sup>, which requires the offender to perform unpaid work<sup>6</sup>;
- 1093 (3) a community punishment and rehabilitation order<sup>7</sup>, which is a combination of the orders in heads (1) and (2) above<sup>8</sup>;
- 1094 (4) a drug treatment and testing order<sup>9</sup> designed for repeat offenders whose offending is driven by drug dependence<sup>10</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 s 33 was substituted by the Criminal Justice Act 2003 s 304 Sch 32 paras 90, 95 as from 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 para 42(1), (34); and para 1283 ante. However, this substitution is of no effect in relation to an offence committed before 4 April 2005: see Sch 2 para 5.

2 See para 1283 ante.

3 As to community rehabilitation orders see the Powers of Criminal Courts (Sentencing) Act 2000 ss 41-45, Sch 2-4 (repealed with savings); and para 1370 post.

4 Ibid s 33(1)(b) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 1(1)(a), (2)).

5 As to community punishment orders see the Powers of Criminal Courts (Sentencing) Act 2000 ss 46-50, 59, Sch 3, 4 (repealed with savings) and para 1371 post.

6 Ibid s 33(1)(c) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

7 As to community punishment and rehabilitation orders see the Powers of Criminal Courts (Sentencing) Act 2000 s 51, Schs 2-4 (repealed with savings); and para 1373 post.

8 Ibid s 33(1)(d) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 3(1)(a), (2)).

9 As to drug treatment and testing orders see the Powers of Criminal Courts (Sentencing) Act 2000 ss 52-58, Sch 3 (ss 52-58 repealed with savings); and para 1374 post.

10 Ibid s 33(1)(e).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(ii) Pre-sentencing Reports/1286. Disclosure of pre-sentence reports.

## **(ii) Pre-sentencing Reports**

### **1286. Disclosure of pre-sentence reports.**

A pre-sentence report is a report which is submitted with a view to assisting the court in determining the most suitable method of dealing with an offender, is made or submitted by an appropriate officer, and contains information on such matters as may be prescribed by the Secretary of State<sup>1</sup>. Where the offender is aged under 18, it will be prepared by an officer of a local probation board, a social worker of a local authority or a member of a youth offending scheme<sup>2</sup>.

The court must give a copy of the report:

- 1095 (1) to the offender or his counsel or solicitor<sup>3</sup>;
- 1096 (2) if the offender is aged under 18, to any parent or guardian of his who is present in court<sup>4</sup>; and
- 1097 (3) to the prosecutor, that is to say, the person having the conduct of the proceedings in respect of the offence<sup>5</sup>.

If it appears to the court that disclosure to the young offender or to any parent or guardian would be likely to create a risk of significant harm to the offender, a complete copy need not be given<sup>6</sup>. Where a report by an officer of a local probation board or a member of a youth offending team is made to any court (other than a youth court) with a view to assisting the court in determining the most suitable method of dealing with any person in respect of an offence, and the report is not a pre-sentence report<sup>7</sup>, the court must give a copy of the report to the offender or his counsel or solicitor and if the offender is aged under 18, to any parent or guardian<sup>8</sup> of his who is present in court<sup>9</sup>.

<sup>1</sup> Criminal Justice Act 2003 s 158(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626.

<sup>2</sup> Ibid s 158(2)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626.

<sup>3</sup> Criminal Justice Act 2003 s 159(2)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

<sup>4</sup> Ibid s 159(2)(b). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

<sup>5</sup> Ibid s 159(2)(c). No information obtained by virtue of head (3) in the text is to be used or disclosed otherwise than for the purpose of:

3284 (1) determining whether representations as to matters contained in the report need to be made to the court (s 159(5)(a)); or

3285 (2) making such representations to the court (s 159(5)(b)).

If the prosecutor is not of a description prescribed by order made by the Secretary of State, a copy of the report need not be given to the prosecutor if the court considers that it would be inappropriate for him to be given it: s

159(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628. As to the Secretary of State see para 155 ante.

6 See *ibid* s 159(3). See also CrimPR 44.1(3)(c); and para 1269 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

7 Criminal Justice Act 2003 s 160(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

8 In relation to an offender aged under 18 for whom a local authority has parental responsibility and who is in their care, or is provided with accommodation by it in the exercise of any social services functions, references in *ibid* s 160 to his parent or guardian are to be read as references to that authority: s 160(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

9 *Ibid* s 160(2). If it appears to the court that disclosure to the young offender or to any parent or guardian would be likely to create a risk of significant harm to the offender, a complete copy need not be given: s 160(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 628.

## **UPDATE**

### **1286 Disclosure of pre-sentence reports**

TEXT AND NOTE 1--See also Criminal Justice Act 2003 s 158(1A), (1B) (added by Criminal Justice and Immigration Act 2008 s 12) which requires that, in any case where a court is considering passing a custodial sentence in respect of a person under 18, the pre-sentence report must be in writing.

TEXT AND NOTES 2, 7--Criminal Justice Act 2003 s 158(2)(b) further amended, s 160(1) amended: SI 2008/912.

TEXT AND NOTE 3--Reference to counsel or solicitor now to legal representative: Criminal Justice Act 2003 s 159(2)(a) (amended by Legal Services Act 2007 Sch 21 para 147).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(ii) Pre-sentencing Reports/1287. Pre-sentence reports.

### **1287. Pre-sentence reports.**

In the case of a custodial sentence, the court must obtain and consider a pre-sentence report<sup>1</sup> before:

- 1098 (1) forming the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence<sup>2</sup>;
- 1099 (2) determining the appropriate length of a custodial sentence<sup>3</sup>;
- 1100 (3) concluding that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences<sup>4</sup>.

In the case of a community sentence, the court must obtain and consider a pre-sentence report before:

- 1101 (a) forming the opinion that the offence, or the combination of the offence and one or more offences associated with it was serious enough to warrant a community sentence<sup>5</sup>;
- 1102 (b) determining what restrictions on liberty are commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it<sup>6</sup>;
- 1103 (c) forming any opinion as to the suitability for the offender of the particular requirement or requirements to be imposed by a community order<sup>7</sup>.

A new pre-sentence report need not be ordered if, in the circumstances of the case, the court is of the opinion that it is unnecessary<sup>8</sup> provided, in the case of an offender aged under 18, that:

- 1104 (i) there exists a previous pre-sentence report obtained in respect of the offender<sup>9</sup>; and
- 1105 (ii) the court has had regard to the information contained in that report, or, if there is more than one such report, the most recent report<sup>10</sup>.

No custodial sentence may be invalidated by the failure of a court to obtain and consider a pre-sentence report before forming an opinion referred to above<sup>11</sup> but any court on an appeal against such a sentence<sup>12</sup> must:

- 1106 (A) obtain a pre-sentence report if none was obtained by the court below<sup>13</sup>; and
- 1107 (B) consider any such report obtained by it or by that court<sup>14</sup>.

The provisions relating to disclosure of pre-sentence reports<sup>15</sup> to the offender apply to any pre-sentence report obtained in pursuance of the above provisions<sup>16</sup>.

1 For the meaning of 'pre-sentence report' see para 1286 ante.

2 Criminal Justice Act 2003 ss 152, 156(3)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626.

3 Ibid ss 153(2), 156(3)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626.

4 Ibid ss 156(3)(a), 226(1)(b), 228(1)(b)(i). As to the specified offences see Sch 15; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 70-71. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626.

5 Ibid ss 148(1), 156(3)(b).

6 Ibid ss 148(2)(b), (3)(b), 156(3)(b).

7 Ibid s 156(3)(b).

8 See ibid s 156(4).

9 Ibid s 156(5)(a).

10 Ibid s 156(5)(b).

11 Ie an opinion referred to in ibid s 156(3).

12 As to appeal against sentence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 44 et seq.

13 Criminal Justice Act 2003 s 156(6)(a). Section 156(6)(a) does not apply if the court is of the opinion:

3286 (1) that the court below was justified in forming an opinion that it was unnecessary to obtain a pre-sentence report (s 156(7)(a)); or

3287 (2) that, although the court below was not justified in forming that opinion, in the circumstances of the case at the time it is before the court, it is unnecessary to obtain a pre-sentence report (s 156(7)(b)).

In a case where the offender is aged under 18 and the offence is not triable only on indictment and there is no other offence associated with it that is triable only on indictment, the court must not form such an opinion as is mentioned in s 81(6) unless:

3288 (a) there exists a previous pre-sentence report obtained in respect of the offender (s 156(8)(a)); and

3289 (b) the court has had regard to the information contained in that report, or, if there is more than one such report, the most recent report (s 156(8)(b)).

14 Ibid s 156(6)(b).

15 Ie ibid s 159: see para 1286 ante.

16 See ibid s 159(1).

## UPDATE

### 1287 Pre-sentence reports

TEXT AND NOTES 5-7--Criminal Justice Act 2003 s 156(3)(b) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 77(4).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iii) Binding Over and Absolute and Conditional Discharges/1288. Binding over of parent or guardian.

### **(iii) Binding Over and Absolute and Conditional Discharges**

#### **1288. Binding over of parent or guardian.**

Where a child or young person (that is to say, any person aged under 18) is convicted of an offence, the following powers<sup>1</sup> are exercisable by the court by which he is sentenced for that offence, and where the offender is aged under 16 when sentenced it is the duty of that court<sup>2</sup>:

- 1108 (1) to exercise those powers if it is satisfied, having regard to the circumstances of the case, that their exercise would be desirable in the interests of preventing the commission by him of further offences<sup>3</sup>; and
- 1109 (2) if it does not exercise them, to state in open court that it is not satisfied as is mentioned in head (1) above and why it is not so satisfied<sup>4</sup>.

The powers conferred<sup>5</sup> are as follows:

- 1110 (a) with the consent of the offender's parent or guardian, to order the parent or guardian to enter into a recognisance to take proper care<sup>6</sup> of him and exercise proper control<sup>7</sup> over him<sup>8</sup>; and
- 1111 (b) if the parent or guardian refuses consent and the court considers the refusal unreasonable, to order the parent or guardian to pay a fine not exceeding a stated amount<sup>9</sup>.

Where the court has passed a community sentence<sup>10</sup> on the offender, it may include in the recognisance a provision that the offender's parent or guardian ensure that the offender complies with the requirements of that sentence<sup>11</sup>.

Such an order<sup>12</sup> must not require the parent or guardian to enter into a recognisance for a period exceeding three years, or where the offender will attain the age of 18 in a period shorter than three years, for a period exceeding that shorter period<sup>13</sup>. The provisions relating to forfeiture of recognisances<sup>14</sup> apply in relation to a recognisance entered into in pursuance of such an order as it applies in relation to a recognisance to keep the peace<sup>15</sup>.

A parent or guardian may appeal to the Crown Court against such an order made by a magistrates' court<sup>16</sup>. A parent or guardian may appeal to the Court of Appeal against such an order made by the Crown Court, as if he had been convicted on indictment and the order were a sentence passed on his conviction<sup>17</sup>.

A court may vary or revoke such an order made by it if, on the application of the parent or guardian, it appears to the court, having regard to any change in the circumstances since the order was made, to be in the interests of justice to do so<sup>18</sup>.

<sup>1</sup> I.e. the powers conferred by the Powers of Criminal Courts (Sentencing) Act 2000 s 150: see the text and notes 5-9 *infra*.

<sup>2</sup> *Ibid* s 150(1). However, s 150(1) has effect subject to s 19(5) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 347) and s 28, Sch 1 Pt II para 13(5) (cases where referral orders are made or extended) (see para 1304 *post*): see s 150(1).

3 Ibid s 150(1)(a).

4 Ibid s 150(1)(b).

5 See note 1 supra.

6 For these purposes, taking 'care' of a person includes giving him protection and guidance: Powers of Criminal Courts (Sentencing) Act 2000 s 150(11).

7 For these purposes, 'control' includes discipline: ibid s 150(1).

8 Ibid s 150(2)(a). An order under s 150 must not require the parent or guardian to enter into a recognisance for an amount exceeding £1,000: s 150(3). However, in fixing the amount of a recognisance under s 150, the court must take into account among other things the means of the parent or guardian so far as they appear or are known to the court; and this applies whether taking into account the means of the parent or guardian has the effect of increasing or reducing the amount of the recognisance: s 150(7). As to recognisances generally see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151 et seq.

9 Ibid s 150(2)(b). The fine must not exceed £1000: s 150(2)(b). A fine imposed under s 150(2)(b) is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction: s 150(6).

10 As to community sentences see paras 1339 et seq post.

11 Powers of Criminal Courts (Sentencing) Act 2000 s 150(2).

12 Ie under ibid s 150.

13 Ibid s 150(4).

14 Ie the Magistrates' Courts Act 1980 s 120 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 157.

15 Powers of Criminal Courts (Sentencing) Act 2000 s 150(5).

16 Ibid s 150(8).

17 Ibid s 150(9).

18 Ibid s 150(10).

## **UPDATE**

### **1288 Binding over of parent or guardian**

TEXT AND NOTE 11--Powers of Criminal Courts (Sentencing) Act 2000 s 150(2) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 58.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iii) Binding Over and Absolute and Conditional Discharges/1289. Absolute and conditional discharges.

### **1289. Absolute and conditional discharges.**

Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law or is subject to a mandatory minimum sentence<sup>1</sup>) is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order discharging him absolutely, or may discharge him subject to the condition that he commits no offence during such period as may be specified, not exceeding three years<sup>2</sup>. A court must not order a discharge where a person has, within two years of the offence, been warned unless it is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its doing so<sup>3</sup>.

Where an offender is convicted of a further offence which occurred during the period of conditional discharge, the offender is liable to be sentenced for the original offence as if he had just been convicted of that offence<sup>4</sup>.

Where the offender is under 18, a conviction for an offence for which an order is made<sup>5</sup> discharging the offender absolutely or conditionally is deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender<sup>6</sup>. However, a discharge does count as a previous conviction such as would prohibit the making of a referral order<sup>7</sup> and triggers the requirement to register as a sex offender<sup>8</sup>. The court may, in addition to a conditional discharge, make an anti-social behaviour order<sup>9</sup>.

1    Ie under the Firearms Act 1968 s 51A(2) (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 662, 664), the Criminal Justice Act 2003 s 226 or s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-84) or the Violent Crime Reduction Act 2006 s 29(4) or s 29(6) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE): Powers of Criminal Courts (Sentencing) Act 2000 s 12(1) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 93(a); and the Violent Crime Reduction Act 2006 s 49, Sch 1 para 6(a)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

2    Powers of Criminal Courts (Sentencing) Act 2000 s 12. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

3    Ibid s 12(2); Crime and Disorder Act 1998 s 66(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

4    See the Powers of Criminal Courts (Sentencing) Act 2000 s 13(6), (8); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 43.

5    Ie under ibid s 12: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

6    Ibid s 14(1). However, s 14(1) does not apply to an offender who was aged 18 or over at the time of his conviction of the offence in question and who is subsequently sentenced under s 13 for that offence: see s 14(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 41. As to the other effects of absolute and conditional discharges see ss 14, 15; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 40-41, 43.

7    See ibid s 17(5); and the Sexual Offences Act 2003 s 134(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 344 et seq, 363.

8    Ie provided the offence took place after 1 May 2004: see the Sexual Offences Act 2003 s 134(2). For offences prior to that date, a discharge does not count as a conviction: *R v Longworth* [2006] UKHL 1, [2006] 1 All ER 887, [2006] 1 WLR 313. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 363, 559.



9 See the Crime and Disorder Act 1988 s 1C(4) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

## **UPDATE**

### **1289 Absolute and conditional discharges**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--Powers of Criminal Courts (Sentencing) Act 2000 s 12(1) further amended: Criminal Justice and Immigration Act 2008 Sch 26 para 41.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1295. Establishment of youth offender panels.

## **(iv) Referral Orders**

### **A. REFERRAL TO YOUTH OFFENDER PANELS**

#### **UPDATE**

#### **1290-1294 Duty and power to refer to youth offender panels ... Attendance of parents at the making of referral orders**

Material relating to these paragraphs have been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 344-348.

#### **1295. Establishment of youth offender panels.**

Where a referral order has been made<sup>1</sup> in respect of an offender (or two or more associated<sup>2</sup> referral orders have been so made), it is the duty of the youth offending team specified in the order (or orders):

- 1112 (1) to establish a youth offender panel for the offender<sup>3</sup>;
- 1113 (2) to arrange for the first meeting of the panel to be held<sup>4</sup>; and
- 1114 (3) subsequently to arrange for the holding of any further meetings of the panel required<sup>5</sup>.

A youth offender panel must be constituted, conduct its proceedings, and discharge its functions<sup>6</sup> in accordance with guidance given from time to time by the Secretary of State<sup>7</sup>. At each of its meetings a panel must, however, consist of at least one member appointed by the youth offending team from among its members, and two members so appointed who are not members of the team<sup>8</sup>. The Secretary of State may by regulations make provision requiring persons appointed as members of a youth offender panel to have such qualifications, or satisfy such other criteria, as are specified in the regulations<sup>9</sup>.

Where it appears to the court which made a referral order that, by reason of either a change or a prospective change in the offender's place or intended place of residence, the youth offending team for the time being specified in the order ('the current team') either does not or will not have the function of implementing referral orders in the area in which the offender resides or will reside, the court may amend the order so that it instead specifies the team which has the function of implementing such orders in that area ('the new team')<sup>10</sup>. Where a court so amends a referral order:

- 1115 (a) the new youth offending team must establish a youth offender panel for the offender<sup>11</sup>;
- 1116 (b) the new youth offending team must arrange for the first meeting of the panel to be held if no youth offenders contract has taken effect<sup>12</sup> between the offender and a youth offender panel established by the current team<sup>13</sup>; and

1117 (c) if such a contract has so taken effect<sup>14</sup>, it must (after the amendment) be treated as if it were a contract which had taken effect<sup>15</sup> between the offender and the panel being established for the offender by the new team<sup>16</sup>.

1 As to the making of referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

2 For the meaning of 'associated' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346; definition applied by the Powers of Criminal Courts (Sentencing) Act 2000 s 32.

3 Ibid s 21(1)(a).

4 Ibid s 21(1)(b). The first meeting of the panel has as its aim to reach agreement with the offender on a programme of behaviour the aim (or principal aim) of which is the prevention of re-offending by the offender: see s 23; and para 1297 post. References in Pt III (ss 16-32) to the meetings of a youth offender panel (or any such meeting) are to the following meetings of the panel (or any of them):

3290 (1) the first meeting held in pursuance of s 21(1)(b) (s 21(7)(a));

3291 (2) any further meetings held in pursuance of s 25 (see para 1299 post) (s 21(7)(b));

3292 (3) any progress meeting held under s 26 (see para 1300 post) (s 21(7)(c)); and

3293 (4) the final meeting held under s 27 (see para 1301 post) (s 21(7)(d)).

As to meetings in relation to youth offender panels see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

5 Ibid s 21(1)(c). Such further meetings of the panel may be required by virtue of s 25, in addition to those required by virtue of any other provisions of Pt III: see para 1299 post.

6 Its functions under ibid Pt III. Particular attention must be given to those functions arising under s 23: see para 1297 post.

7 Ibid s 21(2). As to the Secretary of State see para 155 ante.

8 Ibid s 21(3).

9 Ibid s 21(4). At the date at which this volume states the law no such regulations had been made.

10 Ibid s 21(5).

11 Ibid s 21(6)(a); and see s 21(1)(a).

12 Or has been treated as having taken effect: ibid s 21(6)(b).

13 Ibid s 21(6)(b); and see s 21(1)(b).

14 Or has previously under ibid s 21(6) been treated as having so taken effect: s 21(6)(c).

15 See note 10 supra.

16 Powers of Criminal Courts (Sentencing) Act 2000 s 21(6)(c).

## UPDATE

### 1290-1303 Referral to Youth Offender Panels

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1296. Attendance at youth offender panel meetings.

### **1296. Attendance at youth offender panel meetings.**

The specified youth offending team must, in the case of each meeting of the youth offender panel established for the offender<sup>1</sup>, notify the offender, and any person who is required by order to attend the meeting of the youth offender panel<sup>2</sup>, of the time and place at which he is required to attend that meeting<sup>3</sup>. If the offender fails to attend any part of such a meeting the panel may adjourn the meeting<sup>4</sup> to such time and place as it may specify, or end the meeting and refer the offender back to the appropriate court<sup>5</sup>. If a parent or guardian of the offender fails to comply with an order requiring attendance at meetings and the offender is aged under 18 at the time of the failure, the panel may refer that guardian to a youth court acting in the local justice area<sup>6</sup>. One person aged 18 or over chosen by the offender, with the agreement of the panel, is entitled to accompany the offender to any meeting of the panel (and it need not be the same person who accompanies him to every meeting)<sup>7</sup>.

The panel may allow to attend any such meeting:

- 1118 (1) any person who appears to the panel to be a victim of, or otherwise affected by, the offence, or any of the offences, in respect of which the offender was referred to the panel<sup>8</sup>; and
- 1119 (2) any person who appears to the panel to be someone capable of having a good influence on the offender<sup>9</sup>.

Where the panel allows any such person as is mentioned in head (1) above ('the victim') to attend a meeting of the panel, the panel may allow the victim to be accompanied to the meeting by one person chosen by the victim with the agreement of the panel<sup>10</sup>.

1 See para 1295 ante. As to meetings in relation to youth offender panels see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

2 I.e. the appropriate person or persons to whom an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 20 applies: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 348.

3 Ibid s 22(1).

4 Ibid s 22(1) applies in relation to any such adjourned meeting: s 22(2).

5 Ibid s 22(2). For the meaning of 'appropriate court' see para 1302 note 2 post; definition applied by s 32. Nothing in s 22(2) prevents the panel from making the decision mentioned in s 27(3) (where the panel decides that the offender's compliance with the terms of the youth offender contract has been such as to justify the conclusion that, by the time the compliance period expires, the young offender will have satisfactorily completed that contract, that decision has the effect of discharging the referral order (or orders) as from the end of the compliance period) (see para 1301 post) in the offender's absence if it appears to the panel to be appropriate to do that instead of exercising either of its powers under s 22(2): s 27(5). See also the Home Office, Lord Chancellor's Department and Youth Justice Board publication *Referral Orders and Youth Offender Panels--Guidance for Courts, Youth Offending Teams and Youth Offender Panels* (February 2002) para 8.13.

6 Powers of Criminal Courts (Sentencing) Act 2000 s 22(2A) (added by the Criminal Justice Act 2003 s 324, Sch 34 para 4). As to what happens on a such a referral see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A (as added); and para 1303 post.

- 7 Ibid s 22(3).
- 8 Ibid s 22(4)(a).
- 9 Ibid s 22(4)(b).
- 10 Ibid s 22(5).

## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1297. Agreement of youth offender contract with offender.

### **1297. Agreement of youth offender contract with offender.**

At the first meeting of the youth offender panel established for an offender<sup>1</sup>, the panel must seek to reach agreement with the offender on a programme of behaviour the aim (or principal aim) of which is the prevention of re-offending by the offender<sup>2</sup>. The terms of the programme may, in particular, include provision for<sup>3</sup>:

- 1120 (1) the offender to make financial or other reparation to any person who appears to the panel to be a victim of, or otherwise affected by, the offence, or any of the offences, for which the offender was referred to the panel<sup>4</sup>;
- 1121 (2) the offender to attend mediation sessions with any such victim or other person<sup>5</sup>;
- 1122 (3) the offender to carry out unpaid work or service in or for the community<sup>6</sup>;
- 1123 (4) the offender to be at home at times specified in or determined under the programme<sup>7</sup>;
- 1124 (5) attendance by the offender at a school or other educational establishment or at a place of work<sup>8</sup>;
- 1125 (6) the offender to participate in specified activities (such as those designed to address offending behaviour, those offering education or training or those assisting with the rehabilitation of persons dependent on, or having a propensity to misuse, alcohol or drugs)<sup>9</sup>;
- 1126 (7) the offender to present himself to specified persons at times and places specified in or determined under the programme<sup>10</sup>;
- 1127 (8) the offender to stay away from specified places or persons (or both)<sup>11</sup>;
- 1128 (9) enabling the offender's compliance with the programme to be supervised and recorded<sup>12</sup>.

The programme may not, however, provide for the electronic monitoring of the offender's whereabouts, or for the offender to have imposed on him any physical restriction on his movements<sup>13</sup>. Where a programme is agreed between the offender and the panel, the panel must cause a written record of the programme to be produced immediately in language capable of being readily understood by, or explained to, the offender, and for signature by him<sup>14</sup>. Once the record has been signed by the offender, and by a member of the panel on behalf of the panel, the terms of the programme, as set out in the record, take effect as the terms of a 'youth offender contract' between the offender and the panel; and the panel must cause a copy of the record to be given or sent to the offender<sup>15</sup>.

1 As to the establishment of youth offender panels see para 1295 ante. As to meetings in relation to youth offender panels see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 23(1).

3 Ibid s 23(2).

4 Ibid s 23(2)(a). No term which provides for anything to be done to or with any such victim or other affected person as is mentioned in s 23(2)(a) may be included in the programme without the consent of that person: s 23(4).

5 Ibid s 23(2)(b).

6 Ibid s 23(2)(c).

7 Ibid s 23(2)(d).

8 Ibid s 23(2)(e).

9 Ibid s 23(2)(f).

10 Ibid s 23(2)(g).

11 Ibid s 23(2)(h).

12 Ibid s 23(2)(i).

13 Ibid s 23(3).

14 Ibid s 23(5).

15 Ibid s 23(6). A copy should be given to the parent or guardian as well as anyone else who will be assisting the offender: see the Home Office, Lord Chancellor's Department and Youth Justice Board publication *Referral Orders and Youth Offender Panels--Guidance for Courts, Youth Offending Teams and Youth Offender Panels* (February 2002) para 8.44.

## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1298. Duration of youth offender contracts.

### **1298. Duration of youth offender contracts.**

The following provisions<sup>1</sup> apply where a youth offender contract has taken effect<sup>2</sup> between an offender and a youth offender panel<sup>3</sup>. The day on which the youth offender contract so takes effect is the first day of the period for which it has effect<sup>4</sup>.

Where the panel was established in pursuance of a single referral order, the length of the period for which the contract has effect is that of the period specified<sup>5</sup> in the referral order<sup>6</sup>. Where the panel was established in pursuance of two or more associated<sup>7</sup> referral orders, the length of the period for which the contract has effect is that resulting from the court's directions<sup>8</sup>.

If the referral order, or each of the associated referral orders, is revoked<sup>9</sup>, the period for which the contract has effect expires at the time when the order or orders is or are revoked unless it has already expired<sup>10</sup>.

1    Ie the Powers of Criminal Courts (Sentencing) Act 2000 s 24.

2    Ie under *ibid* s 23: see para 1297 ante.

3    *Ibid* s 24(1).

4    *Ibid* s 24(2).

5    Ie the period specified under *ibid* s 18(1)(c): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

6    *Ibid* s 24(3). However, s 24(3) has effect subject to: (1) any order under s 28, Sch 1 Pt II para 11 or 12 extending the length of the period for which the contract has effect (s 24(5)(a)); and (2) s 24(6) (see the text and notes 9-10 *infra*) (s 24(5)(b)). As to the making of referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

7    As to the meaning of 'associated' in relation to referral orders see para SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

8    Powers of Criminal Courts (Sentencing) Act 2000 s 24(4). The text refers to the court's directions under s 18(6): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346. However, s 24(4) has effect subject to: (1) any order under s 28, Sch 1 Pt II para 11 or 12 extending the length of the period for which the contract has effect (s 24(5)(a)); and (2) s 24(6) (see the text and notes 9-10 *infra*) (s 24(5)(b)).

9    Ie whether under *ibid* Sch 1 Pt I para 5(2) or by virtue of Sch 1 Pt II para 14(2): see para 1305 post.

10   *Ibid* s 24(6).

## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the

interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

### **1298 Duration of youth offender contracts**

NOTES 6, 8--Powers of Criminal Courts (Sentencing) Act 2000 s 24(5)(a) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 42.

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### **1299. Failure to agree a youth offender contract.**

Where it appears to a youth offender panel to be appropriate to do so, the panel may:

- 1129 (1) end the first meeting<sup>1</sup> (or any further meeting held in pursuance of head (2) below) without having reached agreement with the offender on a programme of behaviour<sup>2</sup>; and
- 1130 (2) resume consideration of the offender's case at a further meeting of the panel<sup>3</sup>.

If, however, it appears to the panel at the first meeting or any such further meeting that there is no prospect of agreement being reached with the offender within a reasonable period after the making of the referral order (or orders), head (2) above does apply and instead the panel must refer the offender back to the appropriate court<sup>4</sup>.

If, at a meeting of the panel, agreement is reached with the offender but he does not sign the record produced<sup>5</sup>, and his failure to do so appears to the panel to be unreasonable, the panel must end the meeting and refer the offender back to the appropriate court<sup>6</sup>.

<sup>1</sup> As to meetings in relation to youth offender panels see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

<sup>2</sup> Ie a programme of behaviour of the kind mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 23(1): see para 1297 ante.

<sup>3</sup> Ibid s 25(1).

<sup>4</sup> Ibid s 25(2). As to the appropriate court see para 1302 note 2 post.

<sup>5</sup> Ie in pursuance of ibid s 23(5): see para 1297 ante.

<sup>6</sup> Ibid s 25(3).

## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1300. Progress meetings.

### **1300. Progress meetings.**

At any time after a youth offender contract has taken effect<sup>1</sup>, but before the end of the period for which the contract has effect<sup>2</sup>, the specified youth offending team<sup>3</sup> must, if so requested by the panel, arrange for the holding of a meeting of the panel ('a progress meeting')<sup>4</sup>. Such meetings should take place at least every three months<sup>5</sup>. The panel may make such a request if it appears to it to be expedient to review the offender's progress in implementing the programme of behaviour contained in the contract, or any other matter arising in connection with the contract<sup>6</sup>. However, the panel must make such a request if:

1131 (1) the offender has notified the panel that:

33

19. (a) he wishes to seek the panel's agreement to a variation in the terms of the contract<sup>7</sup>; or

20. (b) he wishes the panel to refer him back to the appropriate court with a view to the referral order (or orders)<sup>8</sup> being revoked on account of a significant change in his circumstances (such as his being taken to live abroad) making compliance with any youth offender contract impractical<sup>9</sup>; or

34

1132 (2) it appears to the panel that the offender is in breach of any of the terms of the contract<sup>10</sup>.

At a progress meeting the panel must do such one or more of the following things as it considers appropriate in the circumstances, namely<sup>11</sup>:

1133 (i) review the offender's progress or any such other matter as is mentioned in heads (1) and (2) above<sup>12</sup>;

1134 (ii) discuss with the offender any breach of the terms of the contract which it appears to the panel that he has committed<sup>13</sup>;

1135 (iii) consider any variation in the terms of the contract sought by the offender or which it appears to the panel to be expedient to make in the light of any such review or discussion<sup>14</sup>; and

1136 (iv) consider whether to accede to any request by the offender that he be referred back to the appropriate court<sup>15</sup>.

Where the panel has discussed with the offender such a breach as is mentioned in head (ii) above:

1137 (A) the panel and the offender may agree that the offender is to continue to be required to comply with the contract (either in its original form or with any agreed variation in its terms) without being referred back to the appropriate court<sup>16</sup>; or

1138 (B) the panel may decide to end the meeting and refer the offender back to that court<sup>17</sup>.

Where a variation in the terms of the contract is agreed between the offender and the panel, the panel must cause a written record of the variation to be produced immediately in language capable of being readily understood by, or explained to, the offender, and for signature by him<sup>18</sup>. Any such variation takes effect once the record has been signed by the offender, and by a member of the panel on behalf of the panel<sup>19</sup>. The panel must cause a copy of the record to be given or sent to the offender<sup>20</sup>. If at a progress meeting any such variation is agreed but the offender does not sign the record produced<sup>21</sup>, and his failure to do so appears to the panel to be unreasonable, the panel may end the meeting and refer the offender back to the appropriate court<sup>22</sup>.

Certain of the provisions relating to the agreement of the youth offender contract with the offender<sup>23</sup> apply in connection with what may be provided for by the terms of the contract as varied<sup>24</sup> as they apply in connection with what may be provided for by the terms of a programme of behaviour<sup>25</sup>.

1     Ile under the Powers of Criminal Courts (Sentencing) Act 2000 s 23: see para 1297 ante. As to the agreement of a youth offender contract with the offender see para 1297 ante.

2     As to the duration of youth offender contracts see para 1298 ante.

3     See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346. 'The specified team', in relation to an offender to whom a referral order applies (or two or more associated referral orders apply), means the youth offending team for the time being specified in the order (or orders): Powers of Criminal Courts (Sentencing) Act 2000 s 32.

4     Ibid s 26(1). As to meetings in relation to youth offender panels see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346.

5     See the Home Office, Lord Chancellor's Department and Youth Justice Board publication *Referral Orders and Youth Offender Panels--Guidance for Courts, Youth Offending Teams and Youth Offender Panels* (February 2002) para 9.2.

6     Powers of Criminal Courts (Sentencing) Act 2000 s 26(2).

7     Ibid s 26(3)(a)(i).

8     As to referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

9     Powers of Criminal Courts (Sentencing) Act 2000 s 26(3)(a)(ii). As to the appropriate court see para 1302 note 2 post.

10    Ibid s 26(3)(b).

11    Ibid s 26(4).

12    Ibid s 26(4)(a).

13    Ibid s 26(4)(b).

14    Ibid s 26(4)(c). See the Home Office, Lord Chancellor's Department and Youth Justice Board publication *Referral Orders and Youth Offender Panels--Guidance for Courts, Youth Offending Teams and Youth Offender Panels* (February 2002) para 9.14.

15    Powers of Criminal Courts (Sentencing) Act 2000 s 26(4)(d). Where the panel has discussed with the offender such a request as is mentioned in s 26(4)(d), the panel may, if it is satisfied that there is (or is soon to be) such a change in circumstances as is mentioned in s 26(3)(a)(ii), decide to end the meeting and refer the offender back to the appropriate court: s 26(10).

16    Ibid s 26(5)(a).

17    Ibid s 26(5)(b).

18    Ibid s 26(6).

- 19 Ibid s 26(7).
- 20 Ibid s 26(7).
- 21 Ie produced in pursuance of ibid s 26(6): see the text and note 18 supra.
- 22 Ibid s 26(8).
- 23 Ie ibid s 23(2), (3), (4): see para 1297 ante.
- 24 Ie as varied under ibid s 26.
- 25 Ibid s 26(9). The text refers to a programme of behaviour, the aim (or principal aim) of which is the prevention of re-offending by the offender: see s 23(1); and para 1297 ante.

## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1301. Final meeting of youth offender panel.

### **1301. Final meeting of youth offender panel.**

Where the compliance period<sup>1</sup> in the case of a youth offender contract is due to expire, the specified youth offending team<sup>2</sup> must arrange for the holding, before the end of that period, of a meeting of the youth offender panel ('the final meeting')<sup>3</sup>. At the final meeting the panel must:

- 1139 (1) review the extent of the offender's compliance to date with the terms of the contract<sup>4</sup>; and
- 1140 (2) decide, in the light of that review, whether his compliance with those terms has been such as to justify the conclusion that, by the time the compliance period expires, he will have satisfactorily completed the contract<sup>5</sup>,

and the panel must give the offender written confirmation of its decision<sup>6</sup>.

Where the panel decides that the offender's compliance with the terms of the contract has been such as to justify that conclusion, the panel's decision has the effect of discharging the referral order (or orders) as from the end of the compliance period<sup>7</sup>. Otherwise the panel must refer the offender back to the appropriate court<sup>8</sup>.

It is not permitted<sup>9</sup> for the final meeting to be adjourned (or re-adjourned) to a time falling after the end of the compliance period<sup>10</sup>.

1 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000, 'the compliance period', in relation to a youth offender contract, means the period for which the contract has effect in accordance with s 24 (see para 1298 ante); s 27(7). As to the offender's compliance with the programme agreed between the offender and the youth offender panel see para 1297 ante.

2 I.e. the specified youth offending team: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 346. For the meaning of 'the specified team' see para 1300 note 3 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 27(1). As to meetings in relation to youth offender panels see para 1300 note 3 ante.

4 Ibid s 27(2)(a).

5 Ibid s 27(2)(b).

6 Ibid s 27(2).

7 Ibid s 27(3). Nothing in s 22(2) (power of the youth offender panel to adjourn or end the meeting if the young offender fails to attend any part of that meeting) prevents the panel from making the decision mentioned in s 27(3) in the offender's absence if it appears to the panel to be appropriate to do that instead of exercising either of its powers under s 22(2) (see para 1296 ante); s 27(5).

8 Ibid s 27(4). See also para 1302 post. As to the appropriate court see para 1302 note 2 post.

9 I.e. under the provisions of ibid s 22(2)(a): see para 1296 ante.

10 Ibid s 27(6).



## **UPDATE**

### **1290-1303 Referral to Youth Offender Panels**

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(iv) Referral Orders/A. REFERRAL TO YOUTH OFFENDER PANELS/1302. Referral back to appropriate court.

### **1302. Referral back to appropriate court.**

Provision is made for what is to happen when a youth offender panel<sup>1</sup> refers an offender back to the appropriate court<sup>2</sup>. The panel makes the referral by sending a report to the appropriate court explaining why the offender is being referred back to it<sup>3</sup>. Where the appropriate court receives such a report, the court must cause the offender to appear before it<sup>4</sup>. For the purpose of securing the attendance of the offender before the court, a justice acting for the local justice area for which the court acts may issue a summons requiring the offender to appear at the place and time specified in it, or if the report is substantiated on oath, issue a warrant for the offender's arrest<sup>5</sup>. Where the offender is arrested in pursuance of a warrant<sup>6</sup> and cannot be brought immediately before the appropriate court:

- 1141 (1) the person in whose custody he is may make arrangements for his detention in a place of safety<sup>7</sup> for a period of not more than 72 hours from the time of the arrest (and it is lawful for him to be detained in pursuance of those arrangements)<sup>8</sup>; and
- 1142 (2) that person must within that period bring him before a court which<sup>9</sup>, if he is under the age of 18 when he is brought before the court, must be a youth court<sup>10</sup>, and if he has then attained that age, must be a magistrate's court other than a youth court<sup>11</sup>.

If it is proved to the satisfaction of the appropriate court as regards any decision of the panel which resulted in the offender being referred back to the court that<sup>12</sup>:

- 1143 (a) so far as the decision relied on any finding of fact by the panel, the panel was entitled to make that finding in the circumstances<sup>13</sup>; and
- 1144 (b) that, so far as the decision involved any exercise of discretion by the panel, the panel reasonably exercised that discretion in the circumstances<sup>14</sup>,

the court may exercise the power to revoke a referral order<sup>15</sup>.

The court may then deal with the offender for the offence for which the revoked order was originally made<sup>16</sup>. The offender may appeal to the Crown Court against that sentence<sup>17</sup>.

The following provisions<sup>18</sup> apply where the appropriate court decides that the matters mentioned in heads (a) and (b) above have not been proved to its satisfaction, or where, although by virtue of head (a) above the appropriate court is able to exercise the power to revoke the referral order<sup>19</sup>, or would be able to do so if the offender were present before it, the court (for any reason) decides not to exercise that power<sup>20</sup>. If either no contract has taken effect<sup>21</sup> between the offender and the panel, or a contract has so taken effect but the period for which it has effect has not expired, the offender must continue to remain subject to the referral order (or orders) in all respects as if he had not been referred back to the court<sup>22</sup>; and if a contract had taken effect<sup>23</sup>, but the period for which it has effect has expired<sup>24</sup>, the court must make an order declaring that the referral order (or each of the referral orders) is discharged<sup>25</sup>.

If, in a case where the offender is referred back to the court<sup>26</sup>, the court decides (contrary to the decision of the panel) that the offender's compliance with the terms of the contract has, or will

have, been such as to justify the conclusion that he has satisfactorily completed the contract, the court must make an order declaring that the referral order (or each of the referral orders) is discharged<sup>27</sup>.

1 As to youth offender panels see para 1295 et seq.

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 28, Sch 1 Pt I, which applies where a youth offender panel refers an offender back to the appropriate court under s 22(2) (see para 1296 ante), s 25(2) or (3) (see para 1299 ante), s 26(5), (8) or (10) (see para 1300 ante) or s 27(4) (see para 1301 ante): Sch 1 Pt I para 1(1). For these purposes, the appropriate court is:

3294 (1) in the case of an offender aged under 18 at the time when (in pursuance of the referral back) he first appears before the court, a youth court acting for the local justice area in which it appears to the youth offender panel that the offender resides or will reside (Sch 1 Pt 1 para 1(2)(a) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 81(a))); and

3295 (2) otherwise, a magistrates' court (other than a youth court) acting in that area (Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 1(2)(b) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, Schedule para 81(a))).

3 Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 2.

4 Ibid Sch 1 Pt I para 3(1).

5 Ibid Sch 1 Pt I para 3(2) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, Schedule para 81(a)). Any summons or warrant issued under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 3(2) (as amended) must direct the offender to appear or be brought before the appropriate court: Sch 1 Pt I para 3(3).

6 Ie under ibid Sch 1 Pt I para 3(2) (as amended): see the text and note 5 supra.

7 For the meaning of 'place of safety' see the Children and Young Persons Act 1933 s 107(1) (as amended); and para 608 note 4 ante.

8 Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 4(1)(a).

9 Ibid Sch 1 Pt I para 4(1)(b). Where the court before which the offender is brought under Sch 1 Pt I para 4(1)(b) ('the alternative court') is not the appropriate court (Sch 1 Pt I para 4(2)):

3296 (1) the alternative court may direct that he is to be released immediately or remand him (Sch 1 Pt I para 4(3));

3297 (2) the Magistrates' Courts Act 1980 s 128 (as amended) (remand in custody or on bail) (see MAGISTRATES vol 29(2) (Reissue) para 715 et seq) has effect where the alternative court has power under the Powers of Criminal Court (Sentencing) Act 2000 Sch 1 Pt I para 4(3) to remand the offender as if the court referred to in the Magistrates' Courts Act 1980 s 128(1)(a), (3), (4)(a), (5) (s 128(1)(a) as amended) were the appropriate court (Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 4(4));

3298 (3) the Magistrates' Courts Act 1980 s 128 (as amended) has effect where the alternative court has power so to remand him, or the appropriate court has (by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 4(4))) power to further remand him, as if in the Magistrates' Courts Act 1980 s 128(1) (as amended) there were inserted after s 128(1)(c) 'or (d) if he is aged under 18, remand him to accommodation provided by or on behalf of a local authority (within the meaning of the Children Act 1989) (see para 863 note 2 ante) and, if it does so, must designate as the authority who are to receive him the local authority for the area in which it appears to the court that he resides or will reside' (Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt I para 4(5)).

10 Ibid Sch 1 Pt I para 4(1)(b)(i). As to youth courts see para 1263 et seq ante.

11 Ibid Sch 1 Pt I para 4(1)(b)(ii).

12 Ibid Sch 1 Pt I para 5(1).

13 Ibid Sch 1 Pt I para 5(1)(a).

14 Ibid Sch 1 Pt I para 5(1)(b).

15 Ibid Sch 1 Pt I para 5(2). As to the power to revoke the referral order (or each of the referral orders) see Sch 1 Pt I para 5(2). The revocation under Sch 1 Pt I para 5(2) of a referral order has the effect of revoking any related order under Sch 1 Pt II para 11 or 12 (see para 1304 post): Sch 1 Pt I para 5(3). Where any order is revoked under Sch 1 Pt I para 5(2) or by virtue of Sch 1 Pt I para 5(3), the appropriate court may deal with the offender in accordance with Sch 1 Pt I para 5(5) for the offence in respect of which the revoked order was made: Sch 1 Pt I para 5(4). In so dealing with the offender for such an offence, the appropriate court:

3299 (1) may deal with him in any way in which (assuming s 16 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344) had not applied) he could have been dealt with for that offence by the court which made the order (Sch 1 Pt I para 5(5)(a)); and

3300 (2) must have regard to the circumstances of his referral back to the court, and where a contract has taken effect under s 23 (see para 1297 ante) between the offender and the panel, the extent of his compliance with the terms of the contract (Sch 1 Pt I para 5(5)(b)).

The appropriate court may not exercise the powers conferred by Sch 1 Pt I para 5(2) or Sch 1 Pt I para 5(4) unless the offender is present before it; but those powers are exercisable even if, in a case where a contract has taken effect under s 23, the period for which the contract has effect has expired (whether before or after the referral of the offender back to the court): Sch 1 Pt I para 5(6).

16 Ie in exercise of the power conferred by ibid Sch 1 Pt I para 5(4): see note 15 supra.

17 Ibid Sch 1 Pt I para 6.

18 Ie ibid Sch 1 Pt I para 7: see the text and notes 19-25 infra.

19 Ie the power conferred by ibid Sch 1 Pt I para 5(2): see the text and note 15 supra.

20 Ibid Sch 1 Pt I para 7(1).

21 Ie under ibid s 23: see para 1297 ante.

22 Ibid Sch 1 Pt I para 7(2).

23 See note 21 supra.

24 Ie expired otherwise than by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s 24(6): see para 1298 ante.

25 Ibid Sch 1 Pt I para 7(3). The discharge under Sch 1 Pt I para 7(3) of a referral order has the effect of discharging any related order under Sch 1 Pt I para 11 or 12 (see para 1304 post): Sch 1 Pt I para 9.

26 Ie under ibid s 27(4): see para 1301 ante.

27 Ibid Sch 1 Pt I para 8. The discharge under Sch 1 Pt I para 8 of a referral order has the effect of discharging any related order under Sch 1 Pt I para 11 or 12: Sch 1 Pt I para 9.

## UPDATE

### 1290-1303 Referral to Youth Offender Panels

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth

offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

### **1302 Referral back to appropriate court**

TEXT AND NOTES--Powers of Criminal Courts (Sentencing) Act 2000 s 28, Sch 1 Pt 1 further amended: Criminal Justice and Immigration Act 2008 s 36(3), Sch 4 para 107, Sch 26 paras 43, 49.

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### **1303. Referral of parent or guardian.**

Provision is made for what is to happen when a youth offender panel<sup>1</sup> refers an offender's<sup>2</sup> parent or guardian to a youth court<sup>3</sup>. The panel makes the referral by sending a report to the youth court explaining why the parent is being referred to it<sup>4</sup>. Where the youth court receives such a report it must cause the parent to appear before it<sup>5</sup>. For the purpose of securing the attendance of the parent before the court, a justice acting in the local justice area in which the court acts may issue a summons requiring the parent to appear at the place and time specified in it or, if the report is substantiated on oath, issue a warrant for the parent's arrest<sup>6</sup>. Where the parent appears or is so brought before the youth court<sup>7</sup>, the court may make a parenting order in respect of the parent if:

- 1145 (1) it is proved to the satisfaction of the court that the parent has failed without reasonable excuse to comply with the order<sup>8</sup>; and
- 1146 (2) the court is satisfied that the parenting order would be desirable in the interests of preventing the commission of any further offence by the offender<sup>9</sup>.

A 'parenting order'<sup>10</sup> is an order which requires the parent: (a) to comply, for a period not exceeding twelve months, with such requirements as are specified in the order<sup>11</sup>; and (b) to attend<sup>12</sup>, for a concurrent period not exceeding three months, such counselling or guidance programme<sup>13</sup> as may be specified in directions given by the responsible officer<sup>14</sup>.

Before making such a parenting order where the offender is aged under 16, the court must obtain and consider information about his family circumstances and the likely effect of the order on those circumstances<sup>15</sup>.

1 As to youth offender panels see para 1295 et seq.

2 'The offender' means the offender whose parent or guardian is referred under the Powers of Criminal Courts (Sentencing) Act 2000 s 22(2A) (as added) (see para 1296 ante): Sch 1 Pt 1A para 9A(2)(a) (Sch 1 Pt 1A added by the Criminal Justice Act 2003 s 324, Sch 34 para 6). 'The parent' means the parent or guardian so referred: Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A para 9A(2)(b) (as so added).

3 See *ibid* Sch 1 Pt 1A para 9A(1) (added: see note 2 *supra*). 'The youth court' means a youth court as mentioned in s 22(2A) (as added) (see para 1296 ante): Sch 1 Pt 1A para 9A(2)(c) (as so added).

4 *Ibid* Sch 1 Pt 1A para 9B (as added: see note 2 *supra*).

5 *Ibid* Sch 1 Pt 1A para 9C(1) (as added: see note 2 *supra*).

6 *Ibid* Sch 1 Pt 1A para 9C(2) (as added (see note 2 *supra*); and amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 81(b)). Any summons or warrant so issued must direct the parent to appear or be brought before the youth court: Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A para 9C(3) (as so added).

7 *Ie* under *ibid* Sch 1 Pt 1A para 9C (as added).

8 *Ibid* Sch 1 Pt 1A para 9D(1)(a) (as added: see note 2 *supra*).

9 *Ibid* Sch 1 Pt 1A para 9D(1)(b) (as added: see note 2 *supra*).

10 The Crime and Disorder Act 1998 s 8(3), (8) (see para 1319 post), s 9(3)-(7) (see para 1319 post) and s 18(3), (4) (see para 1319 post) apply in relation to a parenting order made under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A para 9D (as added) as they apply in relation to any other parenting order: Sch 1 Pt 1A para 9D(7) (as added: see note 2 supra). An appeal lies to the Crown Court against the making of a parenting order under Sch 1 Pt 1A para 9D (as added): Sch 1 Pt 1A para 9E(1) (as so added). The provisions of the Crime and Disorder Act 1998 s 10(2), (3) (see para 1322 post) apply in relation to an appeal under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A para 9E (as added) as they apply in relation to an appeal under the Crime and Disorder Act 1998 s 10(1)(b): Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt 1A para 9E(2) (as so added).

11 Ibid Sch 1 Pt 1A para 9D(2)(a) (as added: see note 2 supra). The order referred to in the text is one under s 20 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 348). The making of a parenting order under Sch 1 Pt 1A para 9D (as added) is without prejudice to the continuance of the order under s 20: Sch 1 Pt 1A para 9F(1) (as so added). The provisions of the Magistrates' Courts Act 1980 s 63(1)-(4) (power of magistrates' court to deal with person for breach of order, etc) apply (as well as the Powers of Criminal Courts (Sentencing) Act 2000 s 22(2A) (as added) and Sch 1 Pt 1A (as added)) in relation to an order under s 20 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 348): Sch 1 Pt 1A para 9F(2).

The requirements that may be specified under head (a) in the text are those which the court considers desirable in the interests of preventing the commission of any further offence by the offender: Sch 1 Pt 1A para 9D(3) (as so added). As to parenting orders see paras 1319-1322 post.

12 A parenting order may, but need not, include a requirement mentioned in head (b) in the text in any case where a parenting order under ibid Sch 1 Pt 1A para 9D (as added) or any other enactment has been made in respect of the parent on a previous occasion: Sch 1 Pt 1A para 9D(4) (as added: see note 2 supra).

13 A counselling or guidance programme which a parent is required to attend by virtue of head (b) in the text may be or include a residential course but only if the court is satisfied:

3301 (1) that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in preventing the commission of any further offence by the offender (ibid Sch 1 Pt 1A para 9D(5)(a) (as added: see note 2 supra)); and

3302 (2) that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances (Sch 1 Pt 1A para 9D(5)(b) (as so added)).

14 Ibid Sch 1 Pt 1A para 9D(2)(b) (as added: see note 2 supra).

15 Ibid Sch 1 Pt 1A para 9D(6) (as added: see note 2 supra).

## UPDATE

### 1290-1303 Referral to Youth Offender Panels

The Powers of Criminal Courts (Sentencing) Act 2000 s 27A (added by the Criminal Justice and Immigration Act 2008 s 36(2)) provides a power for a youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the referral order to be revoked; this will allow a young offender's referral order to be revoked early where the offender makes good progress or where there are other good reasons to do so.

The Powers of Criminal Courts (Sentencing) Act 2000 s 27B, Sch 1 Pt 1ZA (added by the Criminal Justice and Immigration Act 2008 s 37) provides a power for the youth offender panel to refer the offender back to the appropriate court where they consider it is in the interests of justice for the period of the referral order to be extended.

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## ***B. FURTHER CONVICTIONS DURING REFERRALS***

### **1304. Extension of referral.**

Provision is made for what is to happen when an offender is convicted of further offences while for the time being subject to a referral order<sup>1</sup>. If:

- 1147 (1) the occasion on which the offender was referred to the youth offender panel<sup>2</sup> is the only other occasion on which it has fallen to a court in the United Kingdom<sup>3</sup> to deal with the offender for any offence or offences<sup>4</sup>, and the offender committed the relevant offence<sup>5</sup>, and any connected offence, before he was referred to the panel<sup>6</sup>, the relevant court may sentence the offender for the offence by making an order extending his compliance period<sup>7</sup>; and
- 1148 (2) if head (1) above applies, but the offender committed the relevant offence<sup>8</sup>, or any connected offence, after he was referred to the panel, the relevant court may sentence the offender for the offence by making an order extending his compliance period, but only if the relevant requirements<sup>9</sup> are complied with<sup>10</sup>.

An order under head (1) or head (2) above, or two or more orders under one or other of those heads made in respect of connected offences, must not so extend the offender's compliance period as to cause it to exceed 12 months<sup>11</sup>.

Where the relevant court makes an order<sup>12</sup> in respect of the relevant offence<sup>13</sup>, it:

- 1149 (a) may not deal with the offender for that offence in any of the specified prohibited ways<sup>14</sup>;
- 1150 (b) must, in respect of any connected offence, either sentence the offender by making an order under the same provision as the original order<sup>15</sup>, or make an order discharging him absolutely<sup>16</sup>;
- 1151 (c) may not deal with the offender for any connected offence in any of those prohibited ways<sup>17</sup>; and
- 1152 (d) may not, in connection with the conviction of the offender for the offence or any connected offence, make:

35

- 21. (i) an order binding him over to keep the peace or to be of good behaviour;
- 22. (ii) an order binding over the offender's parent or guardian; or
- 23. (iii) a parenting order<sup>18</sup>.

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For the purposes of heads (1) and (2) above, any occasion on which the offender was discharged absolutely<sup>19</sup> in respect of the offence, or each of the offences, for which he was being dealt with must be disregarded<sup>20</sup>. Any occasion on which, in criminal proceedings in England, Wales or Northern Ireland, the offender was bound over<sup>21</sup> to keep the peace or to be of good behaviour must be regarded for those purposes as an occasion on which it fell to a court in the United Kingdom to deal with the offender for an offence<sup>22</sup>.



The Secretary of State<sup>23</sup> may by regulations make such amendments of the above provisions<sup>24</sup> as he considers appropriate for altering in any way the descriptions of offenders in the case of which an order extending the compliance period may be made<sup>25</sup>.

1 See the Powers of Criminal Courts (Sentencing) Act 2000 s 28, Sch 1 Pt II; the text and notes 2-25 infra; and para 1305 post. For the purposes of Sch 1 Pt II, an offender is for the time being subject to referral if:

3303 (1) a referral order has been made in respect of him and that order has not been discharged (whether by virtue of s 27(3) (see para 1301 ante) or under Sch 1 Pt I para 7(3) or 8 (see para 1302 ante)) or revoked (whether under Sch 1 Pt I para 5(2) (see para 1302 ante) or by virtue of Sch 1 Pt II para 14(2) (see para 1305 post)) (Sch 1 Pt II para 15(1)); or

3304 (2) two or more referral orders have been made in respect of him and any of those orders has not been discharged (whether by virtue of s 27(3) (see para 1301 ante) or under Sch 1 Pt I para 7(3) or 8 (see para 1302 ante)) or revoked (whether under Sch 1 Pt I para 5(2) (see para 1302 ante) or by virtue of Sch 1 Pt II para 14(2) (see para 1305 post)) (Sch 1 Pt II para 15(1)(b)).

2 As to youth offender panels see para 1295 et seq.

3 For the meaning of 'United Kingdom' see para 102 note 7 ante.

4 Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II para 11(a). Schedule 1 Pt II paras 11 and 12 apply where, at a time when an offender aged under 18 is subject to referral, a youth court or other magistrates' court ('the relevant court') is dealing with him for an offence in relation to which the provisions of s 16(1)(a)-(c) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344) are applicable: Sch 1 Pt II para 10(1). However, Sch 1 Pt II paras 11 and 12 do not apply unless the offender's compliance period is less than 12 months: Sch 1 Pt II para 10(2). As to youth courts see para 1263 et seq ante.

5 Ie the offence mentioned in ibid Sch 1 Pt II para 10: see note 4 supra.

6 Ibid Sch 1 Pt II para 11(b). As to the application of Sch 1 Pt II para 11 see note 4 supra.

7 Ibid Sch 1 Pt II para 11. As to the application of Sch 1 Pt II para 11 see note 4 supra. For the purposes of Sch 1 Pt II, 'compliance period', in relation to an offender who is for the time being subject to referral, means the period for which (in accordance with s 24 (see para 1298 ante)) any youth offender contract taking effect in his case under s 23 (see para 1297 ante) has (or would have) effect: Sch 1 Pt II para 15(2).

8 See note 5 supra.

9 The relevant requirements are that the court must:

3305 (1) be satisfied, on the basis of a report made to it by the relevant body, that there are exceptional circumstances which indicate that, even though the offender has re-offended since being referred to the panel, extending his compliance period is likely to help prevent further re-offending by him (Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II para 12(2)(a)); and

3306 (2) state in open court that it is so satisfied and why it is (Sch 1 Pt II para 12(2)(b)).

For these purposes, 'the relevant body' means the panel to which the offender has been referred or, if no contract has yet taken effect between the offender and the panel under s 23, the specified youth offending team: Sch 1 Pt II para 12(3). For the meaning of 'the specified team' see para 1300 note 3 ante.

10 Ibid Sch 1 Pt II para 12(1). As to the application of Sch 1 Pt II para 12 see note 4 supra.

11 Ibid Sch 1 Pt II para 13(1).

12 Ie an order under ibid Sch 1 Pt II para 11 or Sch 1 Pt II para 12: see the text and notes 4-10 supra.

13 Ibid Sch 1 Pt II para 13(2). The relevant offence is that which is mentioned in Sch 1 Pt II para 10: see note 4 supra. However, heads (a)-(d) in the text do not affect the exercise of any power to deal with the offender conferred by Sch 1 Pt II para 5 or 14: Sch 1 Pt II para 13(2).

14 Ibid Sch 1 Pt II para 13(3). The prohibited ways are those specified in s 19(4): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 347.

- 15 le under ibid Sch 1 Pt II para 11 or Sch 1 Pt II para 12, as the case may be: see the text and notes 6-10 supra.
- 16 Ibid Sch 1 Pt II para 13(4)(a).
- 17 Ibid Sch 1 Pt II para 13(4)(b).
- 18 Ibid Sch 1 Pt II para 13(5). The orders that are described in the text are those that are mentioned in s 19(5): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 347. Parenting orders are made under the Crime and Disorder Act 1998 s 8 (as amended): see para 1319 et seq post.
- 19 As to absolute discharge see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.
- 20 Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II para 13(6).
- 21 As to binding over see para 1288 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151 et seq.
- 22 Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II para 13(7).
- 23 As to the Secretary of State see para 155 ante.
- 24 le the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II paras 10, 11, 12: see the text and notes 4-10 supra.
- 25 Ibid Sch 1 Pt II para 13(8). The Secretary of State may also by regulations make such amendments of Sch 1 Pt II para 13 as he considers appropriate: Sch 1 Pt II para 13(8). At the date at which this volume states the law no such regulations have been made. As to the power to make regulations see para 1307 post. Any description of offender having effect by virtue of regulations under Sch 1 Pt II para 13(8) may be framed by reference to such matters as the Secretary of State considers appropriate, including, in particular, one or more of the following:
- 3307 (1) the offender's age (s 17(4)(a), Sch 1 Pt II para 13(8));
  - 3308 (2) how the offender has pleaded (s 17(4)(b), Sch 1 Pt II para 13(8));
  - 3309 (3) the offence (or offences) of which the offender has been convicted (s 17(4)(c), Sch 1 Pt II para 13(8));
  - 3310 (4) the offender's previous convictions, if any (s 17(4)(d), Sch 1 Pt II para 13(8));
  - 3311 (5) how, if at all, the offender has been previously punished or otherwise dealt with by any court (s 17(4)(e), Sch 1 Pt II para 13(8)); and
  - 3312 (6) any characteristics or behaviour of, or circumstances relating to, any person who has at any time been charged in the same proceedings as the offender (whether or not in respect of the same offence) (s 17(4)(f), Sch 1 Pt II para 13(8)).

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### **1305. Further convictions which lead to revocation of referral.**

The following provisions<sup>1</sup> apply where, at a time when an offender is subject to referral<sup>2</sup>, a court in England and Wales deals with him for an offence (whether committed before or after he was referred to the youth offender panel<sup>3</sup>) by making an order other than an order for extension of referral<sup>4</sup>, or an order discharging him absolutely<sup>5</sup>. In such a case the order of the court has the effect of revoking the referral order (or orders), and any related order or orders<sup>6</sup>. Where any order is so revoked<sup>7</sup>, the court may, if appears to the court that it would be in the interests of justice to do so, deal with the offender for the offence in respect of which the revoked order was made in any way in which<sup>8</sup> he could have been dealt with for that offence by the court which made the order<sup>9</sup>.

<sup>1</sup> I.e. the Powers of Criminal Courts (Sentencing) Act 2000 s 28, Sch 1 Pt II para 14: see the text and notes 5-9 *infra*.

<sup>2</sup> As to when an offender is subject to referral for these purposes see para 1304 *ante*.

<sup>3</sup> As to youth offender panels see para 1295 *et seq*.

<sup>4</sup> I.e. an order under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 Pt II para 11 or Sch 1 Pt II para 12: see para 1304 *ante*.

<sup>5</sup> *Ibid* Sch 1 Pt II para 14(1). As to absolute discharge see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 40.

<sup>6</sup> *Ibid* Sch 1 Pt II para 14(2). The related order or orders mentioned in the text are those under Sch 1 Pt II para 11 or Sch 1 Pt II para 12: see para 1304 *ante*.

<sup>7</sup> I.e. by virtue of *ibid* Sch 1 Pt II para 14(2): see the text and note 6 *supra*.

<sup>8</sup> I.e. assuming *ibid* s 16 had not applied: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344.

<sup>9</sup> *Ibid* Sch 1 Pt II para 14(3). When dealing with the offender under Sch 1 Pt II para 14(3), the court must, where a contract has taken effect between the offender and the panel under s 23 (see para 1297 *ante*), have regard to the extent of his compliance with the terms of the contract: Sch 1 Pt II para 14(4).

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### **1306. Functions of youth offending teams.**

The functions of a youth offending team responsible for implementing a referral order<sup>1</sup> include, in particular, arranging for the provision of such administrative staff, accommodation or other facilities as are required by the youth offender panel<sup>2</sup> established in pursuance of the order<sup>3</sup>.

During the period for which a youth offender contract<sup>4</sup> between a youth offender panel and an offender has effect:

- 1153 (1) the specified youth offending team<sup>5</sup> must make arrangements for supervising the offender's compliance with the terms of the contract<sup>6</sup>; and
- 1154 (2) the person who is the member of the panel appointed by the youth offending team from among its members<sup>7</sup> must ensure that records are kept of the offender's compliance (or non-compliance) with those terms<sup>8</sup>.

1 As to referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq. In implementing referral orders a youth offending team must have regard to any guidance given from time to time by the Secretary of State: Powers of Criminal Courts (Sentencing) Act 2000 s 29(3). As to the Secretary of State see para 155 ante.

2 As to youth offender panels see para 1295 et seq.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 29(1).

4 As to the duration of youth offender contracts see para 1298 ante.

5 See para 1300 note 3 ante.

6 Powers of Criminal Courts (Sentencing) Act 2000 s 29(2)(a).

7 Ie appointed under ibid s 21(3)(a): see para 1295 ante.

8 Ibid s 29(2)(b).

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### **1307. Regulations and rules of court.**

Any power of the Secretary of State<sup>1</sup> to make regulations<sup>2</sup> in relation to Part III of the Powers of Criminal Courts (Sentencing) Act 2000<sup>3</sup> is exercisable by statutory instrument<sup>4</sup>. Any such regulations made by the Secretary of State may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit<sup>5</sup>.

The Criminal Procedure Rules Committee<sup>6</sup> may make such provision as appears to be necessary or expedient for the purposes of Part III of the Powers of Criminal Courts (Sentencing) Act 2000<sup>7</sup>.

1 As to the Secretary of State see para 155 ante.

2 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 17(3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 345), s 21(4) (see para 1295 ante) or s 28, Sch 1 Pt II para 13(8) (see para 1304 ante).

3 Ie ibid Pt III (ss 16-32): see para 1295 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

4 Ibid s 30(1). A statutory instrument containing any regulations under s 21(4) is subject to annulment in pursuance of a resolution of either House of Parliament: s 30(2). No regulations may be made under s 17(3) or Sch 1 para 13(8), unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 30(3).

5 Ibid s 30(4).

6 Ibid s 31(1) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 39, 40(1), (2)(b)). References to 'rules of court' must now be taken to be references to the Criminal Procedure Rules (see COURTS; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1238); and reference to the 'authority' must now be taken to be reference to the Criminal Procedure Rule Committee (see COURTS): Powers of Criminal Courts (Sentencing) Act 2000 s 31(1) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 39, 40).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 31(1). Nothing in s 31 is to be taken to affect the generality of any enactment conferring power to make such rules: s 31(1).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(v) Reparation Orders/1308. Reparation orders.

## **(v) Reparation Orders**

### **1308. Reparation orders.**

Where a child<sup>1</sup> or young person (that is to say, any person aged under 18) is convicted of an offence other than one for which the sentence is fixed by law, the court by or before which he is convicted may make an order (a 'reparation order') requiring him to make reparation<sup>2</sup> specified in the order to a person or persons so specified, or to the community at large<sup>3</sup>. Any person so specified must be a person identified by the court as a victim of the offence or a person otherwise affected by it<sup>4</sup>. The court must not make a reparation order unless it has been notified by the Secretary of State<sup>5</sup> that arrangements for implementing such orders are available in the area proposed to be named in the order<sup>6</sup> and the notice has not been withdrawn<sup>7</sup>. The court must not make a reparation order in respect of the offender if it proposes to pass on him a custodial sentence, or to make in respect of him a community order<sup>8</sup>, a supervision order<sup>9</sup>, an action plan order<sup>10</sup> or a referral order<sup>11</sup>.

A reparation order must not require the offender to work for more than 24 hours in aggregate, or to make reparation to any person without the consent of that person<sup>12</sup>. Requirements specified in a reparation order must be such as in the opinion of the court are commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it<sup>13</sup>. Requirements so specified must, as far as practicable, be such as to avoid any conflict with the offender's religious beliefs or with the requirements of any community order or youth community order to which he may be subject<sup>14</sup>, and any interference with the times, if any, at which the offender normally works or attends school or any other educational establishment<sup>15</sup>. Any reparation required by a reparation order must be made under the supervision of the responsible officer<sup>16</sup>, and must be made within a period of three months from the date of the making of the order<sup>17</sup>. The court must give reasons if it does not make a reparation order in a case where it has power to do so<sup>18</sup>.

Before making a reparation order, a court must obtain and consider a written report by an officer of a local probation board, a social worker of a local authority or a member of a youth offending team, indicating the type of work that is suitable for the offender, and the attitude of the victim or victims to the requirements proposed to be included in the order<sup>19</sup>.

1 For the meaning of 'child' see para 1259 note 1 ante.

2 'Make reparation', in relation to an offender, means make reparation for the offence otherwise than by the payment of compensation and the requirements that may be specified in a reparation order are subject to the Powers of Criminal Courts (Sentencing) Act 2000 s 74(1)-(3) (see the text and notes 12-15 infra): s 73(3). For provisions as to breach of a reparation order, revocation and amendment of a reparation order, and the requirement as to the offender being in court, see para 1367 et seq post.

3 Ibid s 73(1), (2). A reparation order must name the local justice area in which it appears to the court making the order, or to the court varying any provision included in it, that the offender resides or will reside: s 74(4) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 76).

4 Powers of Criminal Courts (Sentencing) Act 2000 s 73(1).

5 As to the Secretary of State see para 155 ante.

6 le under the Powers of Criminal Courts (Sentencing) Act 2000 s 74(4) (as amended): see note 3 supra.

7 Ibid s 73(6).

8 le an order under the Criminal Justice Act 2003 s 177: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 168 et seq.

9 le an order which includes requirements imposed in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 (s 63 as amended; Sch 6 prospectively amended): see para 1344 et seq post.

10 See para 1365 et seq post.

11 Powers of Criminal Courts (Sentencing) Act 2000 s 73(4) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 106(1), (2)). As to referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

12 Powers of Criminal Courts (Sentencing) Act 2000 s 74(1).

13 Ibid s 74(2). This is expressed as being subject to s 74(1) (see the text and note 12 supra).

14 Ibid s 74(3)(a) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 107).

15 Powers of Criminal Courts (Sentencing) Act 2000 s 74(3)(b).

16 'Responsible officer', in relation to an offender subject to a reparation order, means one of the following who is specified in the order:

3313 (1) an officer of a local probation board (ibid s 74(5)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 4(1)(a), (2)));

3314 (2) a social worker of a local authority (Powers of Criminal Courts (Sentencing) Act 2000 s 74(5)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4)); and

3315 (3) a member of a youth offending team (Powers of Criminal Courts (Sentencing) Act 2000 s 74(5)(c)).

Where a reparation order specifies an officer of the local probation board under the Powers of Criminal Courts (Sentencing) Act 2000 s 74(5) (as amended), the officer specified must be an officer appointed for or assigned to the local justice area named in the order: s 74(6) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 76). Where a reparation order specifies under the Powers of Criminal Courts (Sentencing) Act 2000 s 74(5) (as amended) a social worker of a local authority, or a member of a youth offending team, the social worker or member specified must be a social worker of, or a member of a youth offending team established by, the local authority within whose area it appears to the court that the child or young person resides or will reside: s 74(7) (amended by the Children Act 2004 Sch 5 Pt 4). As to youth offending teams (ie as established under the Crime and Disorder Act 1998 s 39 (as amended)) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703.

17 Powers of Criminal Courts (Sentencing) Act 2000 s 74(8).

18 Ibid s 73(8).

19 Ibid s 73(5) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2); and the Children Act 2004 Sch 5 Pt 4).

## UPDATE

### 1308 Reparation orders

TEXT AND NOTE 11--Powers of Criminal Courts (Sentencing) Act 2000 s 73(4) further amended, s 73(4A), (4B) added: Criminal Justice and Immigration Act 2008 Sch 4 para 53.

TEXT AND NOTE 14--Powers of Criminal Courts (Sentencing) Act 2000 s 74(3)(a) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 54, Sch 28 Pt 1 (partly in force: SI 2009/3074).

TEXT AND NOTES 16, 19--2000 Act ss 73(5), 74(5)(a) further amended, s 74(6A) added: SI 2008/912.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/A. PARENTING CONTRACTS IN RELATION TO EDUCATION/1309. Parenting contracts in respect of schooling.

## **(vi) Parenting Contracts**

### **A. PARENTING CONTRACTS IN RELATION TO EDUCATION**

#### **1309. Parenting contracts in respect of schooling.**

A parenting contract is a document which contains:

- 1155 (1) a statement by the parent<sup>1</sup> that he agrees to comply with such requirements as may be specified in the document for such period as may be so specified<sup>2</sup>; and
- 1156 (2) a statement by the local education authority<sup>3</sup> or governing body that it agrees to provide support to the parent for the purpose of complying with those requirements<sup>4</sup>.

The requirements may include, in particular, a requirement to attend a counselling or guidance programme<sup>5</sup>. A parenting contract must be signed by the parent and signed on behalf of the local education authority or governing body<sup>6</sup>. A parenting contract does not create any obligations in respect of whose breach any liability arises in contract or in tort<sup>7</sup>. Local education authorities and governing bodies of relevant schools must, in carrying out their functions in relation to parenting contracts, have regard to any guidance which is issued by the appropriate person<sup>8</sup> from time to time for that purpose<sup>9</sup>.

1 'Parent' is to be construed in accordance with the Education Act 1996 s 576 (see EDUCATION vol 15(1) (2006 Reissue) para 510), but does not include a person who is not an individual: Anti-social Behaviour Act 2003 s 24.

2 Ibid s 19(4)(a).

3 For the meaning of 'local education authority' see EDUCATION vol 15(1) (2006 Reissue) para 20; definition applied by ibid s 24.

4 Ibid s 19(4)(b).

5 Ibid s 19(5). The purpose of the requirements in a case falling within s 19(1) (see para 1310 post) or s 19(1A) (as added and prospectively added) (see para 1310 post) is to improve the behaviour of the pupil, and in a case falling within s 19(2) (see para 1310 post), is to ensure that the child attends regularly at the relevant school at which he is a registered pupil: s 19(6) (amended by the Education and Inspections Act 2006 s 97(1), (3)). At the date at which this volume states the law, the reference to the Anti-social Behaviour Act 2003 s 19(1A) (prospectively added) had not been brought into force in relation to Wales. 'Relevant school' means a qualifying school as defined in the Education Act 2002 s 1(3) (see EDUCATION vol 15(1) (2006 Reissue) para 14), or a pupil referral unit as defined in the Education Act 1996 s 19(2) (see EDUCATION vol 15(1) (2006 Reissue) para 457): Anti-social Behaviour Act 2003 s 24. 'Registered pupil' has the meaning given by the Education Act 1996 s 434(5) (see EDUCATION vol 15(1) (2006 Reissue) para 512): Anti-social Behaviour Act 2003 s 24. 'Pupil' is to be construed in accordance with the Education Act 1996 s 3(1), (1A) (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 16): Anti-social Behaviour Act 2003 s 24.

6 Ibid s 19(7).

7 Ibid s 19(8).

8 The 'appropriate person' means, in relation to England, the Secretary of State and, in relation to Wales, the Welsh Ministers: *ibid* s 24.

9 *Ibid* s 19(9).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/A. PARENTING CONTRACTS IN RELATION TO EDUCATION/1310. Entering a parenting contract in respect of schooling.

### **1310. Entering a parenting contract in respect of schooling.**

A local education authority<sup>1</sup> or the governing body of a relevant school<sup>2</sup> may enter into a parenting contract with a parent<sup>3</sup> of the pupil<sup>4</sup> or child<sup>5</sup>. This applies where:

- 1157 (1) a pupil has been excluded on disciplinary grounds from a relevant school for a fixed period or permanently<sup>6</sup>;
- 1158 (2) a child of compulsory school age<sup>7</sup> has failed to attend regularly at a specified place of education<sup>8</sup>.

In relation to England (and, as from a day to be appointed, in relation to Wales)<sup>9</sup>, the above<sup>10</sup> also applies where a local education authority or the governing body of a relevant school has reason to believe that a child who is a registered pupil at a relevant school has engaged in behaviour connected with the school which:

- 1159 (a) has caused, or is likely to cause, significant disruption to the education of other pupils or significant detriment to the welfare of the child himself or of other pupils or to the health or safety of any staff<sup>11</sup>; or
- 1160 (b) forms part of a pattern of behaviour which, if continued, will give rise to a risk of future exclusion from the school on disciplinary grounds<sup>12</sup>.

For these purposes<sup>13</sup>, the child's behaviour is connected with the school to the extent that it consists of conduct at the school or conduct elsewhere in circumstances in which it would be reasonable for the school to regulate his conduct<sup>14</sup>.

1 For the meaning of 'local education authority' see para 1309 note 3 ante.

2 For the meaning of 'relevant school' see para 1309 note 5 ante.

3 For the meaning of 'parent' see para 1309 note 1 ante.

4 For the meaning of 'pupil' see para 1309 note 5 ante.

5 Anti-social Behaviour Act 2003 s 19(3).

6 Ibid s 19(1). As to the purpose of requirements relating to head (1) in the text see para 1309 note 5 ante.

7 For the meanings of 'child' and 'child of compulsory school age' see EDUCATION vol 15(1) (2006 Reissue) paras 15-16; definitions applied by the Anti-social Behaviour Act 2003 s 24.

8 Ibid s 19(2). The places specified are:

3316 (1) a relevant school at which he is a registered pupil (s 19(2)(a) (s 19(2)(a)-(c) substituted by the Education Act 2005 s 117, Sch 18 para 15));

3317 (2) any place at which education is provided for him in the circumstances mentioned in the Education Act 1996 s 444ZA(1) (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 522) (Anti-social Behaviour Act 2003 s 19(2)(b) (as so substituted)); or

3318 (3) any place at which he is required to attend in the circumstances mentioned in the Education Act 1996 s 444ZA(2) (as added) (see EDUCATION vol 15(1) (2006 Reissue) para 522) (Anti-social Behaviour Act 2003 s 19(2)(c) (as so substituted)).

See para 1309 note 5 ante. For the meaning of 'registered pupil' see para 1309 note 5 ante.

9 Ibid s 19(1A), (1B) is added by the Education and Inspections Act 2006 s 97(1), (2) as from a day to be appointed under s 188(3). At the date at which this volume states the law these provisions had been brought into force in relation to England, but no day had been appointed for their commencement in relation to Wales.

10 Ie the Anti-social Behaviour Act 2003 s 1 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 782).

11 Ibid s 19(1A)(a) (as added: see note 9 supra).

12 Ibid s 19(1A)(b) (as added: see note 9 supra).

13 Ie the purposes of ibid s 19(1A) (as added).

14 Ibid s 19(1B) (as added: see note 9 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1310 Entering a parenting contract in respect of schooling**

TEXT AND NOTE 8--Anti-social Behaviour Act 2003 s 19(2) amended: Education and Skills Act 2008 Sch 1 para 80 (not yet in force).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/A. PARENTING CONTRACTS IN RELATION TO EDUCATION/1311. Further provisions.

### **1311. Further provisions.**

In relation to England, the following provisions have effect<sup>1</sup>. The appropriate person<sup>2</sup> may by regulations<sup>3</sup> make further provision about the exercise by local education authorities and the governing bodies of relevant schools of their functions relating to parenting contracts<sup>6</sup>. The provisions that may be made include:

- 1161 (1) provision limiting the power of a local education authority to enter into a parenting contract in prescribed<sup>7</sup> cases where:
  - 37 24. (a) the school by reference to which the contract is entered into is not in the area of the authority<sup>8</sup>; or
  - 25. (b) the child by reference to whom the contract is entered into does not reside in that area<sup>9</sup>;
- 38 1162 (2) provision requiring one local education authority or governing body to consult with another before taking any prescribed step<sup>10</sup>;
- 1163 (3) provision authorising or requiring the provision of information by one local education authority or governing body to another<sup>11</sup>;
- 1164 (4) provision as to how the costs associated with parenting contracts entered into by local education authorities or governing bodies of relevant schools are to be met<sup>12</sup>.

1 The Anti-social Behaviour Act 2003 s 22A is added by the Education and Inspections Act 2006 s 99(1), (3) as from a day to be appointed under s 188(3). At the date at which this volume states the law this provision had been brought into force in relation to England, but no day had been appointed for its commencement in relation to Wales.

2 For the meaning of 'the appropriate person' see para 1309 note 8 ante.

3 Subordinate legislation (ie: (1) an order of the Secretary of State or the Welsh Ministers under the Anti-social Behaviour Act 2003; (2) regulations under that Act: s 94(1)):

3319 (a) may make different provision for different purposes, different cases and different areas (s 94(2)(a));

3320 (b) may include incidental, supplemental, consequential, saving or transitional provisions (including provisions applying, with or without modification, provision contained in an enactment) (s 94(2)(b)).

A power to make subordinate legislation is exercisable by statutory instrument: s 94(3). As respects England, a statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament if it contains subordinate legislation made by the Secretary of State other than regulations under s 81 or s 83 or an order under s 93: s 94(4). No regulations may be made by the Secretary of State under s 81 or s 83 (whether alone or with other provisions) unless a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 94(5). As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

At the date at which this volume states the law no regulations had been made under s 22A (as added).

4 For the meaning of 'local education authority' see para 1309 note 3 ante.

- 5 For the meaning of 'relevant schools' see para 1309 note 5 ante.
- 6 Anti-social Behaviour Act 2003 s 22A(1)(a) (as added: see note 1 supra).
- 7 For these purposes, 'prescribed' means prescribed by regulations made by the appropriate person: *ibid* s 22A(3) (as added: see note 1 supra). See note 3 supra.
- 8 *Ibid* s 22A(2)(a)(i) (as added: see note 1 supra).
- 9 *Ibid* s 22A(2)(a)(ii) (as added: see note 1 supra).
- 10 *Ibid* s 22A(2)(c) (as added: see note 1 supra).
- 11 *Ibid* s 22A(2)(d) (as added: see note 1 supra).
- 12 *Ibid* s 22A(2)(e) (as added: see note 1 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/B. PARENTING CONTRACTS IN RESPECT OF CRIMINAL CONDUCT AND ANTI-SOCIAL BEHAVIOUR: YOUTH OFFENDING TEAMS/1312. Parenting contracts in respect of criminal conduct and anti-social behaviour: youth offending teams.

## ***B. PARENTING CONTRACTS IN RESPECT OF CRIMINAL CONDUCT AND ANTI-SOCIAL BEHAVIOUR: YOUTH OFFENDING TEAMS***

### **1312. Parenting contracts in respect of criminal conduct and anti-social behaviour: youth offending teams.**

A parenting contract is a document which contains:

- 1165 (1) a statement by the parent<sup>1</sup> that he agrees to comply with such requirements as may be specified in the document for such period as may be so specified<sup>2</sup>; and
- 1166 (2) a statement by the youth offending team<sup>3</sup> that it agrees to provide support to the parent for the purpose of complying with those requirements<sup>4</sup>.

The requirements in head (1) above may include, in particular, a requirement to attend a counselling or guidance programme<sup>5</sup>. A parenting contract must be signed by the parent and signed on behalf of the youth offending team<sup>6</sup>. A parenting contract does not create any obligations in respect of whose breach any liability arises in contract or in tort<sup>7</sup>. Youth offending teams must, in carrying out their functions in relation to parenting contracts, have regard to any guidance which is issued by the Secretary of State from time to time for that purpose<sup>8</sup>.

1 'Parent' includes guardian: Anti-social Behaviour Act 2003 s 29(1). 'Guardian' has the same meaning as in the Children and Young Persons Act 1933 (see para 1234 note 5 ante): Anti-social Behaviour Act 2003 s 29(1).

2 Ibid s 25(3)(a).

3 'Youth offending team' means a team established under the Crime and Disorder Act 1998 s 39 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703): Anti-social Behaviour Act 2003 s 29(1).

4 Ibid s 25(3)(b).

5 Ibid s 25(4). The purpose of the requirement in head (1) in the text is to prevent the child or young person from engaging in criminal conduct or anti-social behaviour or further criminal conduct or further anti-social behaviour: s 25(5). 'Anti-social behaviour' means behaviour by a person which causes or is likely to cause harassment, alarm or distress to one or more other persons not of the same household as the person: s 29(1). 'Child' has the same meaning as in the Crime and Disorder Act 1998 (see para 627 note 5 post): Anti-social Behaviour Act 2003 s 29(1).

6 Ibid s 25(6).

7 Ibid s 25(7).

8 Ibid s 25(8).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/B. PARENTING CONTRACTS IN RESPECT OF CRIMINAL CONDUCT AND ANTI-SOCIAL BEHAVIOUR: YOUTH OFFENDING TEAMS/1313. Entering a parenting contract in relation to criminal conduct and anti-social behaviour.

### **1313. Entering a parenting contract in relation to criminal conduct and anti-social behaviour.**

Where a child<sup>1</sup> or young person<sup>2</sup> has been referred to a youth offending team<sup>3</sup>, the youth offending team may enter into a parenting contract with a parent<sup>4</sup> of the child or young person if a member of that team has reason to believe that the child or young person has engaged, or is likely to engage, in criminal conduct<sup>5</sup> or anti-social behaviour<sup>6</sup>.

1 For the meaning of 'child' see para 1310 note 7 ante.

2 For the meaning of 'young person' see para 627 note 6 ante.

3 For the meaning of 'youth offending team' see para 1312 note 3 ante.

4 For the meanings of 'parent' and 'guardian' see para 1312 note 1 ante.

5 'Criminal conduct' means conduct which constitutes a criminal offence or, in the case of conduct by a person under the age of ten, would constitute a criminal offence if that person were not under that age: Anti-social Behaviour Act 2003 s 29(1).

6 Ibid s 25(1), (2). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/C. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: LOCAL AUTHORITIES/1314. Parenting contracts in respect of anti-social behaviour: local authorities.

### ***C. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: LOCAL AUTHORITIES***

#### **1314. Parenting contracts in respect of anti-social behaviour: local authorities.**

A parenting contract is a document which contains:

- 1167 (1) a statement by the parent<sup>1</sup> that he agrees to comply with such requirements as may be specified in the document for such period as may be so specified<sup>2</sup>; and
- 1168 (2) a statement by the local authority<sup>3</sup> that it agrees to provide support to the parent for the purpose of complying with those requirements<sup>4</sup>.

The requirements mentioned in head (1) above may include, in particular, a requirement to attend a counselling or guidance programme<sup>5</sup>.

A parenting contract must be signed by the parent and signed on behalf of the local authority<sup>6</sup>.

A parenting contract does not create any obligations in respect of whose breach any liability arises in contract or in tort<sup>7</sup>.

1 For the meaning of 'parent' see para 1312 note 1 ante.

2 Anti-social Behaviour Act 2003 s 25A(2)(a) (s 25A added by the Police and Justice Act 2006 s 23(1)).

3 'Local authority' means: (1) a county council in England; (2) a metropolitan district council; (3) a non-metropolitan district council for an area for which there is no county council; (4) a London borough council; (5) the Common Council of the City of London; (6) the Council of the Isles of Scilly; (7) a county council or county borough council in Wales: Anti-social Behaviour Act 2003 s 29(1) (definition added by the Police and Justice Act 2006 s 23(2)). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; as to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 30, 35-39, 59 et seq; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) paras 51-55; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

4 Anti-social Behaviour Act 2003 s 25A(2)(b) (as added: see note 2 supra).

5 Ibid s 25A(3) (as added: see note 2 supra). The purpose of the requirements mentioned in head (1) in the text is to prevent the child or young person from engaging in anti-social behaviour or further anti-social behaviour: s 25A(4) (as so added). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

6 Ibid s 25A(5) (as added: see note 2 supra).

7 Ibid s 25A(6) (as added: see note 2 supra).

### **UPDATE**

#### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**1314 Parenting contracts in respect of anti-social behaviour: local authorities**

NOTE 3--Definition of 'local authority' in Anti-social Behaviour Act 2003 s 29(1) amended: Criminal Justice and Immigration Act 2008 s 125(2).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/C. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: LOCAL AUTHORITIES/1315. Local authority functions.

### **1315. Local authority functions.**

In carrying out their functions in relation to parenting contracts<sup>1</sup>:

- 1169 (1) local authorities<sup>2</sup> in England must have regard to any guidance which is issued by the Secretary of State<sup>3</sup> from time to time for that purpose<sup>4</sup>; and
- 1170 (2) local authorities in Wales must have regard to any guidance which is issued by the Welsh Ministers<sup>5</sup> from time to time for that purpose<sup>6</sup>.

An order made by the Secretary of State as regards local authorities in England<sup>7</sup>, or the Welsh Ministers as regards local authorities in Wales<sup>8</sup>, may provide that a local authority may make arrangements with a person who is specified in the order, or is of a description so specified, for the exercise of the above functions<sup>9</sup>. The order may provide:

- 1171 (a) that the power of the local authority to make the arrangements is subject to such conditions as are specified in the order<sup>10</sup>;
- 1172 (b) that the arrangements must be subject to such conditions as are so specified<sup>11</sup>;
- 1173 (c) that the arrangements may be made subject to such other conditions as the local authority thinks appropriate<sup>12</sup>.

The order may provide that the arrangements may authorise the exercise of the function:

- 1174 (i) either wholly or to such extent as may be specified in the order or arrangements<sup>13</sup>;
- 1175 (ii) either generally or in such cases or areas as may be so specified<sup>14</sup>.

Any arrangements made by a local authority in pursuance of an order do not prevent the local authority from exercising the function to which the arrangements relate<sup>15</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers must not make an order without first consulting such representatives of local government as appear to be appropriate, and such other persons as appear to be appropriate<sup>16</sup>.

1 As to parenting contracts see para 1314 ante.

2 For the meaning of 'local authority' see para 1314 note 3 ante.

3 As to the Secretary of State see para 155 ante.

4 Anti-social Behaviour Act 2003 s 25A(7)(a) (s 25A added by the Police and Justice Act 2006 s 23(1)).

5 As to the Welsh Ministers see para 155 ante.

6 Anti-social Behaviour Act 2003 s 25A(7)(b) (as added: see note 4 supra).

7 Local authorities in England and any person with whom they make arrangements in pursuance of an order under *ibid* s 28A (as added) must have regard to any guidance issued by the Secretary of State for the purposes of s 28A (as added): s 28A(9) (added: see note 4 *supra*).

8 Local authorities in Wales and any person with whom they make arrangements in pursuance of an order under s 28A (as added) must have regard to any guidance issued by the Welsh Ministers for the purposes of s 28A (as added): s 28A(10) (as added: see note 4 *supra*).

9 *Ibid* s 28A(1) (as added: see note 4 *supra*). An order under s 28A (as added) may provide that the person with whom arrangements are made in pursuance of an order is to be treated as if he were a public body for the purposes of the Local Authorities (Goods and Services) Act 1970 s 1: Anti-social Behaviour Act 2003 s 28A(4) (as so added). The following provisions of the Deregulation and Contracting Out Act 1994 apply for the purposes of arrangements made in pursuance of an order under the Anti-social Behaviour Act 2003 s 28A (as added) as they apply for the purposes of an authorisation to exercise functions by virtue of an order under the Deregulation and Contracting Out Act 1994 s 70(2): (1) s 72 (effect of contracting out); (2) s 73 (termination of contracting out); (3) s 75 and Sch 15 (provision relating to disclosure of information); (4) Sch 16 para 3 of Sch 16 (authorised persons to be treated as officers of local authority): Anti-social Behaviour Act 2003 s 28A(7) (as so added).

For these purposes, any reference in the provisions specified in heads (1)-(4) *supra* to a person authorised to exercise a function is to be construed as a reference to a person with whom an arrangement is made for the exercise of the function in pursuance of an order under s 28A (as added): s 28A(8) (as so added).

10 *Ibid* s 28A(2)(a) (as added: see note 4 *supra*).

11 *Ibid* s 28A(2)(b) (as added: see note 4 *supra*).

12 *Ibid* s 28A(2)(c) (as added: see note 4 *supra*).

13 *Ibid* s 28A(3)(a) (as added: see note 4 *supra*).

14 *Ibid* s 28A(3)(b) (as added: see note 4 *supra*).

15 *Ibid* s 28A(6) (as added: see note 4 *supra*).

16 *Ibid* s 28A(5) (as added: see note 4 *supra*).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/C. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: LOCAL AUTHORITIES/1316. Entering a parenting contract in relation to anti-social behaviour: local authorities.

### **1316. Entering a parenting contract in relation to anti-social behaviour: local authorities.**

A local authority<sup>1</sup> may enter into a parenting contract<sup>2</sup> with a parent<sup>3</sup> of a child<sup>4</sup> or young person<sup>5</sup> if:

- 1176 (1) the local authority has reason to believe that the child or young person has engaged, or is likely to engage, in anti-social behaviour<sup>6</sup>; and
- 1177 (2) the child or young person resides, or appears to reside, in the local authority's area<sup>7</sup>.

1 For the meaning of 'local authority' see para 1314 note 3 ante.

2 As to a parenting contract see para 1314 ante.

3 For the meaning of 'parent' see para 1312 note 1 ante.

4 For the meaning of 'child' see para 627 note 5 ante.

5 For the meaning of 'young person' see para 627 note 6 ante.

6 Anti-social Behaviour Act 2003 s 25A(1)(a) (s 25A added by the Police and Justice Act 2006 s 23(1)). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

7 Anti-social Behaviour Act 2003 s 25A(1)(b) (as added: see note 6 supra).

### **UPDATE**

#### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/D. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: REGISTERED SOCIAL LANDLORDS/1317. Parenting contracts in respect of anti-social behaviour: registered social landlords.

#### ***D. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: REGISTERED SOCIAL LANDLORDS***

##### **1317. Parenting contracts in respect of anti-social behaviour: registered social landlords.**

A parenting contract is a document which contains:

- 1178 (1) a statement by the parent<sup>1</sup> that he agrees to comply with such requirements as may be specified in the document for such period as may be so specified<sup>2</sup>; and
- 1179 (2) a statement by the registered social landlord<sup>3</sup> that the landlord agrees to make arrangements for the provision of support to the parent for the purpose of complying with those requirements<sup>4</sup>.

The requirements mentioned in head (1) above may include, in particular, a requirement to attend a counselling or guidance programme<sup>5</sup>. A parenting contract must be signed by the parent and signed on behalf of the registered social landlord<sup>6</sup>. A parenting contract does not create any obligations in respect of whose breach any liability arises in contract or in tort<sup>7</sup>. In carrying out their functions in relation to parenting contracts:

- 1180 (a) registered social landlords on the register maintained by the Housing Corporation must have regard to any guidance which is issued by the Secretary of State<sup>8</sup> from time to time for that purpose<sup>9</sup>;
- 1181 (b) registered social landlords on the register maintained by the Welsh Ministers<sup>10</sup> must have regard to any guidance which is issued by them from time to time for that purpose<sup>11</sup>.

1 For the meaning of 'parent' see para 1312 note 1 ante.

2 Anti-social Behaviour Act 2003 s 25B(2)(a) (s 25B added by the Police and Justice Act 2006 s 23(1)).

3 'Registered social landlord' means a body registered as such under the Housing Act 1996 ss 1-7 (see HOUSING vol 22 (2006 Reissue) para 67); Anti-social Behaviour Act 2003 s 29(1) (definition added by the Police and Justice Act 2006 s 23(2)).

4 Anti-social Behaviour Act 2003 s 25B(2)(b) (as added: see note 2 supra).

5 Ibid s 25B(3) (as added: see note 2 supra). The purpose of the requirements mentioned in head (1) in the text is to prevent the child or young person from engaging in anti-social behaviour or further anti-social behaviour: s 25B(4) (as so added).

6 Ibid s 25B(5) (as added: see note 2 supra).

7 Ibid s 25B(6) (as added: see note 2 supra).

8 As to the Secretary of State see para 155 ante.

9 Anti-social Behaviour Act 2003 s 25B(7)(a) (as added: see note 2 supra).

- 10 As to the Welsh Ministers see para 155 ante.
- 11 Anti-social Behaviour Act 2003 s 25B(7)(b) (as added: see note 2 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/(vi) Parenting Contracts/D. PARENTING CONTRACTS IN RESPECT OF ANTI-SOCIAL BEHAVIOUR: REGISTERED SOCIAL LANDLORDS/1318. Entering a parenting contract in relation to anti-social behaviour: registered social landlords.

### **1318. Entering a parenting contract in relation to anti-social behaviour: registered social landlords.**

A registered social landlord<sup>1</sup> may enter into a parenting contract<sup>2</sup> with a parent<sup>3</sup> of a child<sup>4</sup> or young person<sup>5</sup> if:

- 1182 (1) the registered social landlord has reason to believe that the child or young person:
  - 39 26. (a) has engaged in anti-social behaviour<sup>6</sup>; or
  - 27. (b) is likely to engage in such behaviour<sup>7</sup>; and
  - 40
- 1183 (2) that behaviour directly or indirectly relates to or affects the housing management functions<sup>8</sup> of the registered social landlord (or, where head (1)(b) above applies, would do so if the behaviour were engaged in)<sup>9</sup>.

1 For the meaning of 'registered social landlord' see para 1317 note 3 ante.

2 As to parenting contracts see para 1317 ante.

3 For the meaning of 'parent' see para 1312 note 1 ante.

4 For the meaning of 'child' see para 627 note 5 ante.

5 For the meaning of 'young person' see para 627 note 6 ante.

6 Anti-social Behaviour Act 2003 s 25B(1)(a)(i) (s 25B added by the Police and Justice Act 2006 s 23(1)). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

7 Ibid s 25B(1)(a)(ii) (as added: see note 6 supra).

8 'Housing management functions', in relation to a registered social landlord, include functions conferred by or under any enactment and the powers and duties of the landlord as the holder of an estate or interest in housing accommodation; and 'housing accommodation' has the meaning given by the Housing Act 1996 s 153E(9) (as added): Anti-social Behaviour Act 2003 s 29(1) (definitions added by the Police and Justice Act 2006 s 23(2)).

9 Anti-social Behaviour Act 2003 s 25B(1)(b) (as added: see note 6 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/A. PARENTING ORDERS UNDER THE CRIME AND DISORDER ACT 1998/1319. Parenting orders.

## **(vii) Parenting Orders**

### ***A. PARENTING ORDERS UNDER THE CRIME AND DISORDER ACT 1998***

#### **1319. Parenting orders.**

A parenting order is a court order which requires the parent to comply, for a period not exceeding 12 months, with such requirements as are specified in the order<sup>1</sup>, and to attend such counselling or guidance sessions as may be specified in directions<sup>2</sup> given by the responsible officer<sup>3</sup>, for a concurrent period not exceeding three months<sup>4</sup>. A court may not make a parenting order unless it has been notified by the Secretary of State<sup>5</sup> that arrangements for implementing such orders are available in the area in which it appears to the court that the parent resides or will reside and the notice has not been withdrawn<sup>6</sup>.

Before making a parenting order the court must explain to the parent in ordinary language:

- 1184 (1) the effect of the order and of the requirements proposed to be included in it<sup>7</sup>;
- 1185 (2) the consequences which may follow<sup>8</sup> if he fails to comply with any of those requirements<sup>9</sup>; and
- 1186 (3) that the court has power to review the order<sup>10</sup> on the application either of the parent or of the responsible officer<sup>11</sup>.

If while a parenting order is in force the parent without reasonable excuse fails to comply with any requirement included in the order, or specified in directions given by the responsible officer, he is liable on summary conviction to a fine<sup>12</sup>.

1 Crime and Disorder Act 1998 s 8(4)(a) (s 8(4) substituted by the Anti-social Behaviour Act 2003 s 18(1), (2)). The requirements that may be specified in the order are those which the court considers desirable in the interests of preventing the repetition of the behaviour which led to a child safety order, parental compensation order, an anti-social behaviour order or sexual offences prevention order being made or, as the case may be, the commission of any further offence: see the Crime and Disorder Act 1998 s 8(6), (7) (s 8(6) as amended). Requirements specified in, and directions given under, a parenting order must, as far as practicable, be such as to avoid any conflict with the parent's religious beliefs and any interference with the times, if any, at which he normally works or attends an educational establishment: Crime and Disorder Act 1998 s 9(4). As to parenting contracts and orders in cases of truancy and exclusion from school see the Anti-social Behaviour Act 2003 ss 19-22; and para 1309 et seq post. As to parenting contracts and orders in respect of criminal conduct and anti-social behaviour see ss 25-29; and para 1312 et seq post. For the purposes of the Crime and Disorder Act 1998, 'child' means a person under the age of 14 years: s 117. As to child safety orders see para 625 ante; and as to anti-social behaviour orders and sexual offences prevention orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 304 et seq, 360 et seq, 496 et seq, 600 et seq.

2 A parenting order may, but need not, include a requirement to attend a counselling or guidance programme in any case where a parenting order under *ibid* s 8 or any other enactment has been made in respect of the parent on a previous occasion: s 8(5). A counselling or guidance programme which a parent is required to attend by virtue of s 8(4)(b) may be or include a residential course but only if the court is satisfied:

3321 (1) that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in preventing any such repetition or, as the case

may be, the commission of any such further offence (s 8(7A)(a) (added by the Anti-social Behaviour Act 2003 s 18(3))); and

- 3322 (2) that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances (Crime and Disorder Act 1998 s 8(7A)(b) (as so added)).

A parenting order must be in the form set out in *Practice Direction (criminal proceedings: consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, Annex D; *Amendment to the Consolidated Criminal Practice Direction (forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: see CrimPR 50.2(1). Parenting orders are compatible with both the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS (1953); Cmd 8969) art 6 and the right to respect for family life under art 8: *R (on the application of M) v Inner London Crown Court* [2003] EWHC 301 (Admin), [2004] 1 FCR 178, [2003] 1 FLR 994, DC.

3 A 'responsible officer', in relation to a parenting order, means any one of the following who is specified in the order, namely:

- 3323 (1) an officer of a local probation board (Crime and Disorder Act 1998 s 8(8)(a) (substituted by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 4(1)(a), (2)));
- 3324 (2) a social worker of a local authority (Crime and Disorder Act 1998 s 8(8)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4));
- 3325 (3) a person nominated by a person appointed as director of children's services under the Children Act 2004 s 18 (see para 190 ante) or by a person appointed as chief education officer under the Education Act 1996 s 532 (see EDUCATION vol 15(1) (2006 Reissue) para 51) (Crime and Disorder Act 1998 s 8(8)(bb) (added by the Criminal Justice and Court Services Act 2000 s 73 and amended by the Children Act 2004 s 18(9), 910), Sch 2 para 5(1), (2)); or
- 3326 (4) a member of a youth offending team (Crime and Disorder Act 1998 s 8(8)(c)).

Where directions under a parenting order are to be given by an officer of a local probation board, the officer of a local probation board must be an officer appointed for or assigned to the local justice area within which it appears to the court that the child or, as the case may be, the parent resides or will reside: Crime and Disorder Act 1998 s 18(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1), (2)). Where the supervision under a child safety order is to be provided, or directions under an individual support order or a parenting order are to be given, by a social worker of a local authority or a member of a youth offending team, the social worker or member must be a social worker of, or a member of a youth offending team established by, the local authority within whose area it appears to the court that the child, defendant or parent, as the case may be, resides or will reside: Crime and Disorder Act 1998 s 18(4) (amended by the Criminal Justice Act 2003 s 323(1), (4); and the Children Act 2004 Sch 5 Pt 4).

A parenting order may, but need not, include such a requirement as is mentioned in the Crime and Disorder Act 1998 s 8(4)(b) (as substituted) in any case where a parenting order under s 8 (as amended) or any other enactment has been made in respect of the parent on a previous occasion: s 8(5) (substituted by the Anti-social Behaviour Act 2003 s 18(1), (2)).

4 Crime and Disorder Act 1998 s 8(4)(b) (as substituted: see note 1 supra).

5 As to the Secretary of State see para 155 ante.

6 Crime and Disorder Act 1998 s 8(3).

7 Ibid s 9(3)(a).

8 Ie under ibid s 9(7): see the text and note 12 infra.

9 Ibid s 9(3)(b).

10 Ie under ibid s 9(5): see para 1321 post.

11 Ibid s 9(3)(c).

12 Ibid s 9(7). The fine must not exceed level 3 on the standard scale: s 9(7). As to the standard scale see para 132 note 2 ante.

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1319 Parenting orders**

NOTE 2--CrimPR Pt 50 now Criminal Procedure Rules 2010, SI 2010/60, Pt 50.

NOTE 3--1998 Act s 8(8)(a) amended: SI 2008/912. See also 1998 Act s 18(3A) (added by SI 2008/912).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/A. PARENTING ORDERS UNDER THE CRIME AND DISORDER ACT 1998/1320. Making a parenting order.

### **1320. Making a parenting order.**

Where, in any court proceedings:

- 1187 (1) a child safety order<sup>1</sup> is made in respect of a child<sup>2</sup> or the court determines on an application<sup>3</sup> that a child has failed to comply with any requirement included in such an order<sup>4</sup>;
- 1188 (2) a parental compensation order<sup>5</sup> is made in relation to a child's behaviour<sup>6</sup>;
- 1189 (3) an anti-social behaviour order<sup>7</sup> or sexual offences prevention order<sup>8</sup> is made in respect of a child or young person<sup>9</sup>;
- 1190 (4) a child or young person is convicted of an offence<sup>10</sup>; or
- 1191 (5) a person is convicted of failing to comply with a school attendance order or of failing to secure at school the attendance of a registered pupil under the Education Act 1996<sup>11</sup>,

the court, if satisfied that the relevant condition is fulfilled, may make a parenting order<sup>12</sup> in respect of a person who is a parent or guardian of the child or young person or, as the case may be, the person convicted of an offence mentioned in head (5) above<sup>13</sup>. The relevant condition is that the parenting order would be desirable in the interests of preventing: (a) in a case falling within head (1), (2) or (3) above, any repetition of the kind of behaviour which led to the child safety order, parenting compensation order, anti-social behaviour order or sexual offences prevention order being made<sup>14</sup>; (b) in a case falling within head (4) above, the commission of any further such offence by the child or young person<sup>15</sup>; or (c) in a case falling within head (5) above, the commission of any further offence under the relevant provisions<sup>16</sup> of the Education Act 1996<sup>17</sup>.

Before making a parenting order:

- 1192 (i) in case falling within head (1) above<sup>18</sup>; or
- 1193 (ii) where the person concerned is under the age of 16 years, a case falling within head (3) or head (4) above<sup>19</sup>; or
- 1194 (iii) where the person to whom the offence related is under the age of 16 years, in a case falling within head (5) above<sup>20</sup>,

the court must obtain and consider information about the person's family circumstances and the likely effect of the order on those circumstances<sup>21</sup>.

Where a person under the age of 16 years is convicted of an offence, the court by or before which he is so convicted must make a parenting order if it is satisfied that the relevant condition is fulfilled; and if it is not so satisfied, it must state in open court that it is not satisfied and why it is not satisfied<sup>22</sup>. However, these requirements<sup>23</sup> do not apply where the court makes a referral order<sup>24</sup> in respect of the offence<sup>25</sup>.

If an anti-social behaviour order is made in respect of a person under the age of 16, the court which makes the order must make a parenting order if it is satisfied that the relevant condition is fulfilled; and if it is not so satisfied, it must state in open court that it is not and why it is not<sup>26</sup>.

- 1 As to child safety orders see para 625 ante.
- 2 For the meaning of 'child' see para 627 note 5 ante.
- 3 Ie under the Crime and Disorder Act 1998 s 12(6): see para 625 ante.
- 4 Ibid s 8(1)(a) (amended by the Children Act 2004 s 60(1), (2)).
- 5 As to parental compensation orders see paras 1335-1338 post.
- 6 Crime and Disorder Act 1998 s 8(1)(aa) (added by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 Pt 1 paras 1, 3(1), (2)). Until a day to be appointed, the Crime and Disorder Act 1998 s 8(1)(aa) (as added) is only in force in relation to certain appointed areas: see the Serious Organised Crime and Police Act 2005 (Commencement) (No 8) Order 2006, SI 2006/1871. At the date at which this volume states the law no such day had been appointed.
- 7 As to anti-social behaviour orders see para 1237 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 304 et seq, 496 et seq.
- 8 'Sexual offences prevention order' means an order under the Sexual Offences Act 2003 s 104: Crime and Disorder Act 1998 s 9 (added by the Violent Crime Reduction Act 2006 s 60(1), (2)(b)). As to sexual offences prevention orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 360 et seq, 600 et seq.
- 9 Crime and Disorder Act 1998 s 8(1)(b) (amended by the Violent Crime Reduction Act 2006 s 60(1), (2)(a)). For the meaning of 'young person' see para 627 note 6 ante.
- 10 Crime and Disorder Act 1998 s 8(1)(c).
- 11 Ibid s 8(1)(d). The relevant offences are those under the Education Act 1996 s 443 (failure to comply with school attendance order), s 444 (as amended) (failure to secure regular attendance at school of registered pupil): see EDUCATION vol 15(1) (2006 Reissue) paras 520-521.
- 12 See para 1319 ante.
- 13 Crime and Disorder Act 1998 s 8(2). This provision is expressed to be subject to s 8(3) (see para 1319 ante), s 9(1) (see note 22 infra), and the Powers of Criminal Courts (Sentencing) Act 2000 s 19(5), Sch 1 Pt II para 13(5) (see para 1304 ante): Crime and Disorder Act 1998 s 8(2) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 194; and the Criminal Justice Act 2003 ss 324, 332, Sch 34 para 1, Sch 37 Pt 12).
- 14 Crime and Disorder Act 1998 s 8(6)(a) (amended by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 Pt 1 paras 1, 3(1), (3); and the Violent Crime Reduction Act 2006 s 60(1), (2)).
- 15 Crime and Disorder Act 1998 s 8(6)(b).
- 16 Ie any further offence under the Education Act 1996 ss 443, 444 (see EDUCATION vol 15(1) (2006 Reissue) paras 520-521).
- 17 Crime and Disorder Act 1998 s 8(6)(c).
- 18 Ibid s 9(2)(a).
- 19 Ibid s 9(2)(b).
- 20 Ibid s 9(2)(c).
- 21 Ibid s 9(2).
- 22 Ibid s 9(1).
- 23 Ie the requirements under ibid s 9(1): see the text and note 22 supra.
- 24 For these purposes, 'referral order' means an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 16(2) or (3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344): Crime and Disorder Act 1998 s 9(7A) (added by the Criminal Justice Act 2003 s 324, Sch 34 para 2(1), (4)). In a case where a court proposes to make both a referral order in respect of a child or young person convicted of an offence and a

parenting order, before making the parenting order the court must obtain and consider a report by an appropriate officer indicating the requirements proposed by that officer to be included in the parenting order and the reasons why he considers those requirements would be desirable in the interests of preventing the commission of any further offence by the child or young person, and, if the child or young person is aged under 16, containing the information required by the Crime and Disorder Act 1998 s 9(2) (see the text and notes 18-21 supra): s 9(2A) (s 9(2A), (2B) added by the Criminal Justice Act 2003 Sch 34 para 2(3)). 'An appropriate officer' means an officer of a local probation board, a social worker of a local authority, or a member of a youth offending team: Crime and Disorder Act 1998 s 9(2B) (as so added; and amended by the Children Act 2004 Sch 5 Pt 4).

25 Crime and Disorder Act 1998 s 9(1A) (added by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 25, 27; and substituted by the Criminal Justice Act 2003 s 324, Sch 34 para 2(1), (2)).

26 Crime and Disorder Act 1998 s 9(1B) (added by the Anti-social Behaviour Act 2003 s 85(1), (8)).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1320 Making a parenting order**

NOTE 24--1998 Act s 9(2B) further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/A. PARENTING ORDERS UNDER THE CRIME AND DISORDER ACT 1998/1321. Variation and discharge of parenting orders.

### **1321. Variation and discharge of parenting orders.**

If while a parenting order<sup>1</sup> is in force it appears to the court which made it, on the application of the responsible officer<sup>2</sup> or the parent, that it is appropriate to do so, the court may make an order discharging the parenting order or varying it by cancelling any provision included in it, or by inserting in it (either in addition to or in substitution for any of its provisions) any provision that could have been included in the order if the court had then had power to make it and were exercising the power<sup>3</sup>.

Where an application for the discharge of a parenting order<sup>4</sup> is dismissed, no further application for its discharge may be made by any person except with the consent of the court which made the order<sup>5</sup>.

1 For the meaning of 'parenting order' see para 1319 ante.

2 For the meaning of 'responsible officer' see para 1319 note 3 ante.

3 Crime and Disorder Act 1998 s 9(5). An application to a magistrates' court for a variation of a parenting order made under s 9(5) or the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 para 9D (as added) (see para 1303 ante) must be made by complaint: see CrimPR 50.3(1)(a), (b). Such an application must be made to the magistrates' court which made the order and must specify the reason why the applicant for variation believes the court should vary the order: see the CrimPR 50.3(2).

4 Ie an application under the Crime and Disorder Act 1998 s 9(5): see the text and notes 1-3 supra.

5 Ibid s 9(6).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1321 Variation and discharge of parenting orders**

NOTE 3--CrimPR 50.3 now Criminal Procedure Rules 2010, SI 2010/60, r 50.3.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/A. PARENTING ORDERS UNDER THE CRIME AND DISORDER ACT 1998/1322. Appeals against parenting orders.

### **1322. Appeals against parenting orders.**

An appeal lies:

- 1195 (1) to the High Court against the making of a parenting order<sup>1</sup> by virtue of the making of a child safety order<sup>2</sup> in respect of a child<sup>3</sup> or where the court determines on an application that a child has failed to comply with any requirement included in such an order<sup>4</sup>; and
- 1196 (2) to the Crown Court against the making of a parenting order<sup>5</sup> by virtue of the making of an anti-social behaviour order<sup>6</sup> or sexual offences prevention order<sup>7</sup> in respect of a child or young person<sup>8</sup>.

On such an appeal the High Court or the Crown Court may make such orders as may be necessary to give effect to its determination of the appeal; and may also make such incidental or consequential orders as appear to it to be just<sup>9</sup>.

Any person in respect of whom a parenting order is made as a consequence of a child or young person being convicted of an offence<sup>10</sup> has the same right of appeal against the making of the order as if the offence that led to the making of the order were an offence committed by him, and the order were a sentence passed on him for the offence<sup>11</sup>.

Any person in respect of whom a parenting order is made following a conviction for failing to comply with a school attendance order or for failing to secure the attendance at school of a registered pupil under the Education Act 1996<sup>12</sup> has the same right of appeal against the making of the order as if the order were a sentence passed on him for the offence that led to the making of the order<sup>13</sup>.

1    le by virtue of the Crime and Disorder Act 1998 s 8(1)(a): see para 1320 ante. For the meaning of 'parenting order' see para 1319 ante.

2    As to child safety orders see para 625 ante.

3    For the meaning of 'child' see para 627 note 5 ante.

4    Crime and Disorder Act 1998 s 10(1)(a). The Lord Chancellor may with the concurrence of the Lord Chief Justice by order make provision as to the circumstances in which appeals to the High Court may be made against decisions taken by courts on questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of any order under the Children Act 1989 s 92, Sch 11 para 2 (see para 208 ante): Crime and Disorder Act 1998 s 10(6) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 276, 277(1), (2)). At the date at which this volume states the law no such orders had been made. Except to the extent provided for in any order made under the Crime and Disorder Act 1998 s 10(6) (as amended), no appeal may be made against any decision of a kind mentioned in s 10(6) (as amended): s 10(7). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq. The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005: see CONSTITUTIONAL LAW AND HUMAN RIGHTS) to exercise his functions under the Crime and Disorder Act 2003 s 10 (as amended): s 10(8) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 276, 277(1)).

5    le by virtue of the Crime and Disorder Act 1998 s 8(1)(b): see para 1320 ante.

6 As to anti-social behaviour orders see para 1237 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 304 et seq, 496 et seq.

7 As to sexual offences prevention orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 360 et seq, 600 et seq.

8 Crime and Disorder Act 1998 s 10(1)(b). The text refers to the making of a parenting order by virtue of s 8(1)(b): see para 1320 ante. For the meaning of 'young person' see para 627 note 6 ante. Any order of the High Court or the Crown Court made on an appeal under s 10(1) (other than an order directing that an application be re-heard by a magistrates' court) is, for the purposes of s 9(5)-(7) (see paras 1319-1321 ante), treated as if it were an order of the court from which the appeal was brought and not an order of the High Court or the Crown Court: s 10(3).

9 Ibid s 10(2).

10 Ie under ibid s 8(1)(c): see para 1320 ante.

11 Ibid s 10(4).

12 Ie under ibid s 8(1)(d): see para 1320 ante.

13 Ibid s 10(5).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1322 Appeals against parenting orders**

TEXT AND NOTES--References to the High Court are now to a county court: Crime and Disorder Act 1998 s 10 (amended by SI 2009/871).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/(A) In Relation to Education/1323. Parenting orders in cases of exclusion from school.

## ***B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003***

### **(A) IN RELATION TO EDUCATION**

#### **1323. Parenting orders in cases of exclusion from school.**

A parenting order is an order which requires the parent<sup>1</sup>:

- 1197 (1) to comply, for a period not exceeding 12 months, with such requirements as are specified in the order<sup>2</sup>; and
- 1198 (2) to attend<sup>3</sup>, for a concurrent period not exceeding three months, such counselling or guidance programme as may be specified in directions given by the responsible officer<sup>4</sup>.

A parenting order may, but need not, include a requirement to attend a counselling or guidance programme in any case where a parenting order<sup>5</sup> has been made in respect of the parent on a previous occasion<sup>6</sup>. A counselling or guidance programme which a parent is required to attend by virtue of head (2) above may be or include a residential course but only if the court is satisfied that two conditions are fulfilled<sup>7</sup>. The first condition is that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in improving the behaviour of the pupil<sup>8</sup>. The second condition is that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances<sup>9</sup>.

An appeal lies to the Crown Court against the making of a parenting order<sup>10</sup>.

1 For the meaning of 'parent' see para 1309 note 1 ante.

2 Anti-social Behaviour Act 2003 s 20(4)(a).

3 I.e subject to ibid s 20(5): see the text and note 6 infra.

4 Ibid s 20(4)(b). 'Responsible officer', in relation to a parenting order, means one of the following who is specified in the order, namely:

3327 (1) an officer of a local education authority; and

3328 (2) a head teacher or a person nominated by a head teacher,

but a person falling within head (2) supra may not be specified in the order without his consent: s 24. 'Head teacher' includes acting head teacher, teacher in charge and acting teacher in charge: s 24.

5 I.e made under ibid s 20 or any other enactment.

6 Ibid s 20(5).

7 Ibid s 20(6).

8 Ibid s 20(7).

9 Ibid s 20(8).

10 Ibid s 22(1). The provisions of the Crime and Disorder Act 1998 s 10(2), (3) (see para 1322 ante) apply in relation to an appeal under the Anti-social Behaviour Act 2003 s 22 as they apply in relation to an appeal under the Crime and Disorder Act 1998 s 10(1)(b) (see para 1322 ante): Anti-social Behaviour Act 2003 s 22(2).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/(A) In Relation to Education/1324. Making parenting orders in cases of exclusion, or potential exclusion, from school.

### **1324. Making parenting orders in cases of exclusion, or potential exclusion, from school.**

In relation to England (and, as from a day to be appointed, in relation to Wales)<sup>1</sup>, where a pupil<sup>2</sup> has been excluded on disciplinary grounds from a relevant school<sup>3</sup> for a fixed period or permanently, and such conditions as may be prescribed in regulations made by the appropriate person<sup>4</sup> are satisfied, a relevant body<sup>5</sup> may apply to a magistrates' court for a parenting order in respect of a parent<sup>6</sup> of the pupil<sup>7</sup>. A relevant body may also apply to a magistrates' court for a parenting order in respect of a pupil at a relevant school if:

- 1199 (1) it appears to the body making the application that the pupil has engaged in behaviour which would warrant the exclusion of the pupil from the school on disciplinary grounds for a fixed period or permanently<sup>8</sup>; and
- 1200 (2) such conditions as may be prescribed in regulations made by the appropriate person are satisfied<sup>9</sup>.

If an application is so made<sup>10</sup>, the court may make a parenting order in respect of a pupil if it is satisfied:

- 1201 (a) in the case of an application under heads (1) and (2) above, that the pupil has engaged in behaviour of the kind mentioned<sup>11</sup>; and
- 1202 (b) in any case, that the making of the order would be desirable in the interests of improving the behaviour of the pupil<sup>12</sup>.

Until a day to be appointed, the following provisions apply in relation to Wales<sup>13</sup>. Where a pupil has been excluded on disciplinary grounds from a relevant school for a fixed period or permanently and such conditions as may be prescribed in regulations made by the appropriate person are satisfied, a local education authority<sup>14</sup> may apply to a magistrates' court for a parenting order in respect of a parent of the pupil<sup>15</sup>. If such an application is made, the court may make a parenting order in respect of a parent of the pupil if it is satisfied that making the order would be desirable in the interests of improving the behaviour of the pupil<sup>16</sup>.

1 The Anti-social Behaviour Act 2003 s 20(1)-(3) is amended, as from a day to be appointed, by the Education and Inspections Act 2006 s 98. At the date at which this volume states the law, these amendments had been brought into force in relation to England, but no day had been appointed for their commencement in relation to Wales.

2 For the meaning of 'pupil' see para 1309 note 5 ante.

3 'Relevant school' means: (1) a community, foundation or voluntary school; (2) a community or foundation special school; (3) a maintained nursery school as defined in the School Standards and Framework Act 1998 s 22(9); (4) a pupil referral unit as defined in the Education Act 1996 s 19(2); (5) an Academy; (6) a city technology college; or (7) a city college for the technology of the arts: Anti-social Behaviour Act 2003 s 24 (definition substituted by the Education and Inspections Act 2006 s 161, Sch 16 Pt 2 para 4). As to community, foundation or voluntary schools, and community or foundation special schools, see EDUCATION vol 15(1) (2006 Reissue) para 94 et seq.

4 For the meaning of 'appropriate person' see para 1309 note 8 ante.

5 'Relevant body' means:

3329 (1) a local authority (Anti-social Behaviour Act 2003 s 20(9)(a) (added by the Education and Inspections Act 2006 s 98(1), (6)));

3330 (2) the governing body of any relevant school of England at which the pupil to whom the application relates is a pupil or from which he has been excluded (Anti-social Behaviour Act 2003 s 20(9)(b) (as so added)).

6 For the meaning of 'parent' see para 1312 note 1 ante.

7 Anti-social Behaviour Act 2003 s 20(1), (2) (amended by the Education and Inspections Act 2006 s 98(1)-(3)). Such an application must be made by complaint and in the form set out in the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, Sch 1 (amended by SI 2007/2222): Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 3. As to the form the parenting order must take see Sch 2 (amended by SI 2007/2222): Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 4. As to the conditions that are prescribed for the purposes of the Anti-social Behaviour Act 2003 s 20(1)(b) see the Education (Parenting Contracts and Parenting Orders) (England) Regulations 2007, SI 2007/1869, regs 3, 4.

8 Anti-social Behaviour Act 2003 s 20(2A)(a) (s 20(2A), (2B) added by the Education and Inspections Act 2006 s 98(1), (5)). For the purposes of the Anti-social Behaviour Act 2003 s 20(2A) (as added), there are to be disregarded:

3331 (1) any practice restricting the use of exclusion at a particular school, or at schools of a particular description (s 20(2B)(a) (as so added)); and

3332 (2) any grounds that might exist for not excluding the pupil, to the extent that those grounds relate to his education or welfare after exclusion (s 20(2B)(b) (as so added)).

9 Ibid s 20(2A)(b) (as added: see note 8 supra). As to the prescribed condition for the purposes of s 20(2A)(b) (as added) see the Education (Parenting Contracts and Parenting Orders) (England) Regulations 2007, SI 2007/1869, regs 5, 6.

10 Ie under the Anti-social Behaviour Act 2003 s 20(2) (as amended) or s 20(2A) (as added).

11 Ibid s 20(3)(a) (substituted by the Education and Inspections Act 2006 s 98(1), (5)).

12 Anti-social Behaviour Act 2003 s 20(3)(b) (substituted by the Education and Inspections Act 2006 s 98(1), (5)).

13 See note 1 supra.

14 For the meaning of 'local education authority' see EDUCATION vol 15(1) (2006 Reissue) para 20.

15 Anti-social Behaviour Act 2003 s 20(1), (2). Such an application must be made by complaint and in the form set out in the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, Sch 1 (amended by SI 2007/2222): Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 3. As to the prescribed conditions see the Education (Parenting Orders) (Wales) Regulations 2006, SI 2006/1277, reg 3(2).

16 Anti-social Behaviour Act 2003 s 20(3).

## UPDATE

### 1309-1338 Parenting Contracts

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/(A) In Relation to Education/1325. Supplemental provisions in respect of parenting orders in cases of exclusion from school.

### **1325. Supplemental provisions in respect of parenting orders in cases of exclusion from school.**

In deciding whether to make a parenting order<sup>1</sup>, a court must take into account, among other things, any refusal by the parent to enter into a parenting contract<sup>2</sup> in respect of the pupil<sup>3</sup> in a case where a pupil has been excluded on disciplinary grounds from a relevant school<sup>4</sup> for a fixed period or permanently, or, if the parent<sup>5</sup> has entered into such a parenting contract, any failure by the parent to comply with the requirements specified in the contract<sup>6</sup>. Before making a parenting order in the case of a pupil under the age of 16, a court must obtain and consider information about the pupil's family circumstances and the likely effect of the order on those circumstances<sup>7</sup>. Local education authorities<sup>8</sup>, head teachers<sup>9</sup>, responsible officers and, in relation to England (and, as from a day to be appointed, in relation to Wales)<sup>10</sup>, governing bodies, must, in carrying out their functions in relation to parenting orders, have regard to any guidance which is issued by the appropriate person from time to time for that purpose<sup>11</sup>. In relation to England (and, as from a day to be appointed, in relation to Wales)<sup>12</sup>, in deciding whether to make a parenting order<sup>13</sup> a court must also take into account any failure by the parent without reasonable excuse to attend a reintegration interview<sup>14</sup> when requested to do so in accordance with regulations<sup>15</sup>.

In relation to Wales, until a day to be appointed<sup>16</sup>, the appropriate person may by regulations make provision as to how the costs associated with the requirements of parenting orders, including the costs of providing counselling or guidance programmes, are to be borne<sup>17</sup>.

1    Ie a parenting order under the Anti-social Behaviour Act 2003 s 20: see para 1324 ante.

2    As to parenting contracts see para 1309 et seq ante.

3    For the meaning of 'pupil' see para 1309 note 5 ante.

4    For the meaning of 'relevant school' see para 1324 note 3 ante.

5    For the meaning of 'parent' see para 1312 note 1 ante.

6    Anti-social Behaviour Act 2003 s 21(1).

7    Ibid s 21(2). Supplemental provision about parenting orders contained in the Crime and Disorder Act 1998 s 9(3)-(7) (see paras 1319, 1321 ante) apply in relation to a parenting order under the Anti-social Behaviour Act 2003 s 20 (see para 1324 ante) as they apply in relation to a parenting order under the Crime and Disorder Act 1998 s 8 (see para 1319 ante): see the Anti-social Behaviour Act 2003 s 21(3).

8    For the meaning of 'local education authority' see EDUCATION vol 15(1) (2006 Reissue) para 20.

9    For the meaning of 'head teacher' see para 1323 note 4 ante.

10   The Anti-social Behaviour Act 2003 s 21(5) is amended, as from a day to be appointed, by the Education and Inspections Act 2006 s 99(2)(d). At the date at which this volume states the law, this amendment had been brought into force in relation to England, but no day had been appointed for its commencement in relation to Wales.

11   Anti-social Behaviour Act 2003 s 21(5) (amended by the Education and Inspections Act 2006 s 99(2)(d)).

12 The Anti-social Behaviour Act 2003 s 21(1A) is added, as from a day to be appointed, by the Education and Inspections Act 2006 s 99(1), (2)(b). At the date at which this volume states the law, this amendment had been brought into force in relation to England, but no day had been appointed for its commencement in relation to Wales.

13 Ie under the Anti-social Behaviour Act 2003 s 20: see para 1323 et seq ante.

14 Ie under the Education and Inspections Act 2006 s 102 (reintegration interview in case of fixed period exclusion): see EDUCATION.

15 Anti-social Behaviour Act 2003 s 21(1A) (added by the Education and Inspections Act 2006 s 99(1), (2)(b)). The text refers to regulations under s 102: see EDUCATION.

16 The Anti-social Behaviour Act 2003 s 21(4) is repealed by the Education and Inspections Act 2006 ss 99(1), (2)(c), 184, Sch 18 Pt 6 as from a day to be appointed under s 188(3). At the date at which this volume states the law this repeal was effective in relation to England, but no day had been appointed for it to come into effect in relation to Wales.

17 Anti-social Behaviour Act 2003 s 21(4). The costs associated with the requirements of parenting orders, including the costs of providing counselling or guidance programmes, must be borne by the local education authority: Education (Parenting Orders) (Wales) Regulations 2006, SI 2006/1277, reg 5. As to local education authorities see EDUCATION vol 15(1) (2006 Reissue) para 20 et seq.

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/(A) In Relation to Education/1326. Further provisions in relation to local education authorities and governing bodies.

### **1326. Further provisions in relation to local education authorities and governing bodies.**

In relation to England, and as from a day to be appointed in relation to Wales, the following provisions have effect<sup>1</sup>. The appropriate person<sup>2</sup> may by regulations<sup>3</sup> make further provision about the exercise by local education authorities and the governing bodies of relevant schools of their functions relating to parenting orders<sup>4</sup>. The provision that may be made includes:

- 1203 (1) provision limiting the power of a local education authority to apply for a parenting order in prescribed<sup>5</sup> cases where:
  - 41 28. (a) the school by reference to which the application is made is not in the area of the authority<sup>6</sup>; or
  - 29. (b) the child by reference to whom the application is made does not reside in that area<sup>7</sup>;
- 42 1204 (2) provision as to which government body may apply for a parenting order in cases where a pupil has been admitted to a relevant school after being permanently excluded from another<sup>8</sup>;
- 1205 (3) provision requiring one local education authority or governing body to consult with another before taking any prescribed step<sup>9</sup>;
- 1206 (4) provision authorising or requiring the provision of information by one local education authority or governing body to another<sup>10</sup>;
- 1207 (5) provision as to how the costs associated with the requirements of parenting orders are to be met<sup>11</sup>.

1 The Anti-social Behaviour Act 2003 s 22A is added by the Education and Inspections Act 2006 s 99(1), (3) as from a day to be appointed under s 188(3). At the date at which this volume states the law this provision had been brought into force in relation to England, but no day had been appointed for its commencement in relation to Wales.

2 For the meaning of 'the appropriate person' see para 1309 note 8 ante.

3 Subordinate legislation (ie: (1) an order of the Secretary of State or the Welsh Ministers under the Anti-social Behaviour Act 2003; (2) regulations under that Act: s 94(1)):

3333 (a) may make different provision for different purposes, different cases and different areas (s 94(2)(a));

3334 (b) may include incidental, supplemental, consequential, saving or transitional provisions (including provisions applying, with or without modification, provision contained in an enactment) (s 94(2)(b)).

A power to make subordinate legislation is exercisable by statutory instrument: s 94(3). As respects England, a statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament if it contains subordinate legislation made by the Secretary of State other than regulations under s 81 or s 83 or an order under s 93: s 94(4). No regulations must be made by the Secretary of State under s 81 or s 83 (whether alone or with other provisions) unless a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 94(5). As to the bringing of

subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

As to regulations made see the Education (Parenting Contracts and Parenting Orders) (England) Regulations 2007, SI 2007/1869.

4 Anti-social Behaviour Act 2003 s 22A(1)(b) (as added: see note 1 supra). The text refers to orders made under s 20 (see para 1323 et seq ante).

5 For these purposes, 'prescribed' means prescribed by regulations made by the appropriate person: *ibid* s 22A(3) (as added: see note 1 supra).

6 *Ibid* s 22A(2)(a)(i) (as added: see note 1 supra).

7 *Ibid* s 22A(2)(a)(ii) (as added: see note 1 supra).

8 *Ibid* s 22A(2)(b) (as added: see note 1 supra).

9 *Ibid* s 22A(2)(c) (as added: see note 1 supra).

10 *Ibid* s 22A(2)(d) (as added: see note 1 supra).

11 *Ibid* s 22A(2)(e) (as added: see note 1 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (B) In Relation to Criminal Conduct and Anti-social Behaviour: Youth Offending Teams/1327. Parenting orders in cases of criminal conduct and anti-social behaviour: youth offending teams.

## (B) IN RELATION TO CRIMINAL CONDUCT AND ANTI-SOCIAL BEHAVIOUR: YOUTH OFFENDING TEAMS

### **1327. Parenting orders in cases of criminal conduct and anti-social behaviour: youth offending teams.**

A parenting order is an order which requires the parent<sup>1</sup>:

- 1208 (1) to comply, for a period not exceeding 12 months, with such requirements as are specified in the order<sup>2</sup>; and
- 1209 (2) to attend<sup>3</sup>, for a concurrent period not exceeding three months, such counselling or guidance programme as may be specified in directions given by the responsible officer<sup>4</sup>.

A parenting order may, but need not, include a requirement to attend a counselling or guidance programme in any case where a parenting order<sup>5</sup> has been made in respect of the parent on a previous occasion<sup>6</sup>. A counselling or guidance programme which a parent is required to attend by virtue of head (2) above may be or include a residential course but only if the court is satisfied that two conditions are fulfilled<sup>7</sup>. The first condition is that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in preventing the child or young person from engaging in further criminal conduct or further anti-social behaviour<sup>8</sup>. The second condition is that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances<sup>9</sup>.

An appeal lies to the Crown Court against the making of such a parenting order<sup>10</sup>.

1 For the meaning of 'parent' see para 1309 note 1 ante.

2 Anti-social Behaviour Act 2003 s 26(4)(a).

3 *Ie* subject to *ibid* s 26(5) (see the text and note 6 *infra*).

4 *Ibid* s 26(4)(b). A person is eligible to be the responsible officer in relation to a parenting order under s 26 (as amended) if he is a member of a youth offending team: s 26(9) (added by the Police and Justice Act 2006 s 52, Sch 14 para 54(1), (3)) 'Responsible officer', in relation to a parenting order, means the person who is specified as such in the order: Anti-social Behaviour Act 2003 s 29(1) (definition amended by the Police and Justice Act 2006 Sch 14 para 57).

5 *Ie* made under the Anti-social Behaviour Act 2003 s 26 (as amended) or any other enactment.

6 *Ibid* s 26(5).

7 *Ibid* s 26(6).

8 *Ibid* s 26(7).

9 *Ibid* s 26(8).

10 Ibid s 28(1). The provisions of the Crime and Disorder Act 1998 s 10(2), (3) (see para 1322 ante) apply in relation to an appeal under the Anti-social Behaviour Act 2003 s 26 (as amended) as they apply in relation to an appeal under the Crime and Disorder Act 1998 s 10(1)(b) (see para 1322 ante): Anti-social Behaviour Act 2003 s 28(2).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (B) In Relation to Criminal Conduct and Anti-social Behaviour: Youth Offending Teams/1328. Making parenting orders in cases of criminal conduct and anti-social behaviour: youth offending teams.

### **1328. Making parenting orders in cases of criminal conduct and anti-social behaviour: youth offending teams.**

Where a child<sup>1</sup> or young person<sup>2</sup> has been referred to a youth offending team<sup>3</sup>, a member of the youth offending team may apply to a magistrates' court for a parenting order in respect of a parent<sup>4</sup> of the child or young person<sup>5</sup>. If such an application is made, the court may make a parenting order in respect of a parent of the child or young person if it is satisfied that the child or young person has engaged in criminal conduct<sup>6</sup> or anti-social behaviour<sup>7</sup>, and that making the order would be desirable in the interests of preventing the child or young person from engaging in further criminal conduct or further anti-social behaviour<sup>8</sup>.

In deciding whether to make a parenting order, a court must take into account, among other things, any refusal by the parent to enter into a parenting contract<sup>9</sup> in respect of the child or young person, or, if the parent has entered into such a parenting contract, any failure by the parent to comply with the requirements specified in the contract<sup>10</sup>. Before making a parenting order in the case of a child or a young person under the age of 16, a court must obtain and consider information about the child or young person's family circumstances and the likely effect of the order on those circumstances<sup>11</sup>. Members of youth offending teams and responsible officers must, in carrying out their functions in relation to parenting orders, have regard to any guidance which is issued by the Secretary of State from time to time for that purpose<sup>12</sup>.

1 For the meaning of 'child' see para 627 note 5 ante.

2 For the meaning of 'young person' see para 627 note 6 ante.

3 For the meaning of 'youth offending team' see para 1312 note 3 ante.

4 For the meaning of 'parent' see para 1312 note 1 ante.

5 Anti-social Behaviour Act 2003 s 26(1), (2). Such an application must be made by complaint and in the form set out in the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, Sch 3 (amended by SI 2007/2222): Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 5.

6 For the meaning of 'criminal conduct' see para 1313 note 5 ante.

7 For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

8 Anti-social Behaviour Act 2003 s 26(3). A parenting order must be in the form set out in the Magistrates' Court (Parenting Orders) Rules 2004, SI 2004/247, Sch 4 or a form to like effect: r 6.

9 Ie under the Anti-social Behaviour Act 2003 s 25 (see paras 1312-1313 ante), ss 25A, 25B (both added) (see paras 1314-1318 ante). As to parenting contracts see para 1309 et seq ante.

10 Ibid s 27(1) (amended by the Police and Justice Act 2006 s 52, Sch 14, para 55).

11 Anti-social Behaviour Act 2003 s 27(2). Supplemental provisions about parenting orders contained in the Crime and Disorder Act 1998 s 9(3)-(7) (see paras 1319, 1321 ante) apply in relation to a parenting order under the Anti-social Behaviour Act 2003 s 26 (as amended) as they apply in relation to a parenting order under the Crime and Disorder Act 1998 s 8 (see paras 1319-1320 ante): see the Anti-social Behaviour Act 2003 s 27(3).

12 Ibid s 27(4).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (C) In Relation to Anti-social Behaviour: Local Authorities/1329. Parenting orders in cases of anti-social behaviour: local authorities.

## (C) IN RELATION TO ANTI-SOCIAL BEHAVIOUR: LOCAL AUTHORITIES

### **1329. Parenting orders in cases of anti-social behaviour: local authorities.**

A parenting order is an order which requires the parent<sup>1</sup>:

- 1210 (1) to comply, for a period not exceeding 12 months, with such requirements as are specified in the order<sup>2</sup>; and
- 1211 (2) to attend, for a concurrent period not exceeding three months, such counselling or guidance programme as may be specified in directions given by the responsible officer<sup>3</sup>.

A counselling or guidance programme which a parent is required to attend by virtue of head (2) above may be or include a residential course but only if the court is satisfied that the following two conditions are fulfilled<sup>4</sup>. The first condition is that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in preventing the child or young person from engaging in further anti-social behaviour<sup>5</sup>. The second condition is that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances<sup>6</sup>.

An appeal lies to the Crown Court and the High Court against the making of such a parenting order<sup>7</sup>.

1 For the meaning of 'parent' see para 1312 note 1 ante.

2 Anti-social Behaviour Act 2003 s 26A(3)(a) (s 26A added by the Police and Justice Act 2006 s 24).

3 Anti-social Behaviour Act 2003 s 26A(3)(b) (as added: see note 2 supra). A person is eligible to be the responsible officer in relation to a parenting order under s 26A (as added) only if he is:

3335 (1) an officer of the local authority which applied for the order (s 26A(8)(a) (as so added));  
or

3336 (2) a person nominated by that authority or by a person or body requested by the authority to make a nomination (s 26A(8)(b) (as so added)).

A person may not be nominated under head (2) supra without his consent: s 26A(8) (as so added).

A parenting order under s 26A (as added) may, but need not, include a requirement mentioned in head (2) in the text in any case where a parenting order under s 26A (as added) or any other enactment has been made in respect of the parent on a previous occasion: s 26A(4) (as so added).

4 Ibid s 26A(5) (as added: see note 2 supra).

5 Ibid s 26A(6) (as added: see note 2 supra).

6 Ibid s 26A(7) (as added: see note 2 supra).

7 See ibid s 28(1), (1A) (s 28(1) amended, and s 28(1A) added, by the Police and Justice Act 2006 s 52, Sch 14 para 56). The provisions of the Crime and Disorder Act 1998 s 10(2), (3) (see para 1322 ante) apply in

relation to an appeal under the Anti-social Behaviour Act 2003 s 26A (as added) (see para 1330 post) as they apply in relation to an appeal under the Crime and Disorder Act 1998 s 10(1) (see para 1322 ante); Anti-social Behaviour Act 2003 s 28(2) (amended by the Police and Justice Act 2006 Sch 14 para 56).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (C) In Relation to Anti-social Behaviour: Local Authorities/1330. Making parenting orders in cases of anti-social behaviour: local authorities.

### **1330. Making parenting orders in cases of anti-social behaviour: local authorities.**

A local authority<sup>1</sup> may apply for a parenting order in respect of a parent<sup>2</sup> of a child<sup>3</sup> or young person<sup>4</sup> if:

- 1212 (1) the local authority has reason to believe that the child or young person has engaged in anti-social behaviour<sup>5</sup>; and
- 1213 (2) the child or young person resides, or appears to reside, in the local authority's area<sup>6</sup>.

An application for such an order may be made to a magistrates' court or, where provisions so allow<sup>7</sup>, to a county court<sup>8</sup>.

If such an application is made, the court may make a parenting order in respect of a parent of the child or young person if it is satisfied:

- 1214 (a) that the child or young person has engaged in anti-social behaviour<sup>9</sup>; and
- 1215 (b) that making the order would be desirable in the interests of preventing the child or young person from engaging in further anti-social behaviour<sup>10</sup>.

In deciding whether to make a parenting order<sup>11</sup>, a court must take into account, among other things, any refusal by the parent to enter into a parenting contract<sup>12</sup> in respect of the child or young person, or, if the parent has entered into such a parenting contract, any failure by the parent to comply with the requirements specified in the contract<sup>13</sup>. Before making a parenting order in the case of a child or a young person under the age of 16, a court must obtain and consider information about the child or young person's family circumstances and the likely effect of the order on those circumstances<sup>14</sup>. In carrying out their functions in relation to parenting orders, local authorities in England and responsible officers in relation to parenting orders made on the application of local authorities in England must have regard to any guidance which is issued by the Secretary of State from time to time for that purpose<sup>15</sup>. In carrying out their functions in relation to parenting orders, local authorities in Wales and responsible officers in relation to parenting orders made on the application of local authorities in Wales must have regard to any guidance which is issued by the Welsh Ministers from time to time for that purpose<sup>16</sup>.

1 For the meaning of 'local authority' see para 1314 note 3 ante.

2 For the meaning of 'parent' see para 1312 note 1 ante.

3 For the meaning of 'child' see para 627 note 5 ante.

4 For the meaning of 'young person' see para 627 note 6 ante.

5 Anti-social Behaviour Act 2003 s 26A(1)(a) (s 26A added by the Police and Justice Act 2006 s 24). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.

6 Anti-social Behaviour Act 2003 s 26A(1)(b) (as added: see note 5 supra).

7 Where a local authority or registered social landlord (a 'relevant authority') is a party to proceedings in a county court and considers that a party to those proceedings is a person in relation to whom it would be reasonable for it to make an application for a parenting order under *ibid* s 26A (as added) or s 26B (as added) (see paras 1332-1333 post) (a 'parenting order application'), it may make such an application to that court in relation to that person: s 26C(1) (added by the Police and Justice Act 2006 s 24). Where a relevant authority considers that a party to proceedings in a county court is a person in relation to whom it would be reasonable for it to make a parenting order application but the relevant authority is not a party to those proceedings, it may apply to be joined to those proceedings to enable it to make a parenting order application: Anti-social Behaviour Act 2003 s 26C(2) (as so added). Where there are proceedings in a county court to which a relevant authority is a party and the relevant authority considers that a child or young person has engaged in anti-social behaviour that is material in relation to the proceedings, the relevant authority may apply for a person who is a parent of the child or young person to be joined to the proceedings to enable it to make a parenting order application in relation to him: s 26C(3) (as so added). A person must not be joined to proceedings in pursuance of s 26C(3) (as added) unless the anti-social behaviour in question is material in relation to those proceedings: s 26C(4) (as so added).

8 *Ibid* s 26A(1) (as added: see note 5 supra). As to the form of application see the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 7, Sch 5 (added by SI 2007/2222); and CPR 65.37-65.41.

9 Anti-social Behaviour Act 2003 s 26A(2)(a) (as added: see note 5 supra).

10 *Ibid* s 26A(2)(b) (as added: see note 5 supra). As to the form of the parenting order see the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 8, Sch 6 (added by SI 2007/2222); and CPR 65.37-65.41.

11 *Ie* an order under the Anti-social Behaviour Act 2003 s 26A (as added).

12 *Ie* under *ibid* s 25 (see paras 1312-1313 ante), s 25A (as added) (see paras 1314-1316 ante), and s 25B (as added) (see paras 1317-1318 ante). As to parenting contracts see para 1309 et seq ante.

13 *Ibid* s 27(1) (amended by the Police and Justice Act 2006 s 52, Sch 14 para 55).

14 Anti-social Behaviour Act 2003 s 27(2) (amended by the Police and Justice Act 2006 Sch 14 para 55). Supplemental provisions about parenting orders contained in the Crime and Disorder Act 1998 s 9(3)-(7) (see paras 1319, 1321 ante) apply in relation to a parenting order under the Anti-social Behaviour Act 2003 s 26 (as amended), s 26A (as added) or s 26B (as added) as they apply in relation to a parenting order under the Crime and Disorder Act 1998 s 8 (see para 1319 ante): see the Anti-social Behaviour Act 2003 s 27(3)(a), (b) (amended by the Police and Justice Act 2006 Sch 14 para 55). Proceedings for an offence under the Crime and Disorder Act 1998 s 9(7) (parenting orders: breach of requirement etc) as applied by the Anti-social Behaviour Act 2003 s 27(3)(b) (as amended) may be brought by the local authority for the area where the child or young person resides or appears to reside, or (if different) the local authority for the area where the person alleged to be in breach resides or appears to reside: s 27(3A) (added by the Police and Justice Act 2006 Sch 14 para 55).

15 Anti-social Behaviour Act 2003 s 27(4) (substituted by the Police and Justice Act 2006 Sch 14 para 55).

16 Anti-social Behaviour Act 2003 s 27(4A) (added by the Police and Justice Act 2006 Sch 14 para 55).

## UPDATE

### 1309-1338 Parenting Contracts

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1330 Making parenting orders in cases of anti-social behaviour: local authorities

NOTE 14--Anti-social Behaviour Act 2003 s 27(3A), (3B) substituted, for s 27(3A): Criminal Justice and Immigration Act 2008 s 125(4).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (C) In Relation to Anti-social Behaviour: Local Authorities/1331. Local authority functions.

### **1331. Local authority functions.**

An order made by the Secretary of State as regards local authorities in England<sup>2</sup>, or the Welsh Ministers as regards local authorities in Wales<sup>3</sup>, may provide that a local authority may make arrangements with a person who is specified in the order, or is of a description so specified, for the exercise of certain functions<sup>4</sup>. The order may provide:

- 1216 (1) that the power of the local authority to make the arrangements is subject to such conditions as are specified in the order<sup>5</sup>;
- 1217 (2) that the arrangements must be subject to such conditions as are so specified<sup>6</sup>;
- 1218 (3) that the arrangements may be made subject to such other conditions as the local authority thinks appropriate<sup>7</sup>.

The order may provide that the arrangements may authorise the exercise of the function:

- 1219 (a) either wholly or to such extent as may be specified in the order or arrangements<sup>8</sup>;
- 1220 (b) either generally or in such cases or areas as may be so specified<sup>9</sup>.

Any arrangements made by a local authority in pursuance of an order do not prevent the local authority from exercising the function to which the arrangements relate<sup>10</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers must not make an order without first consulting such representatives of local government as appear to be appropriate, and such other persons as appear to be appropriate<sup>11</sup>.

1 Local authorities in England and any person with whom they make arrangements in pursuance of an order under the Anti-social Behaviour Act 2003 s 28A (as added) must have regard to any guidance issued by the Secretary of State for the purposes of s 28A (as added): s 28A(9) (s 28A added by the Police and Justice Act 2006 s 25). As to the Secretary of State see para 155 ante.

2 Local authorities in Wales and any person with whom they make arrangements in pursuance of an order under s 28A (as added) must have regard to any guidance issued by the Welsh Ministers for the purposes of s 28A (as added): s 28A(10) (as added: see note 1 supra). As to the Welsh Ministers see para 155 ante.

3 Ibid s 28A(1) (as added: see note 1 supra). The text refers to functions under s 26A (as added) (see paras 1329-1330 ante). An order under s 28A (as added) may provide that the person with whom arrangements are made in pursuance of an order is to be treated as if he were a public body for the purposes of the Local Authorities (Goods and Services) Act 1970 s 1: Anti-social Behaviour Act 2003 s 28A(4) (as so added). The following provisions of the Deregulation and Contracting Out Act 1994 apply for the purposes of arrangements made in pursuance of an order under the Anti-social Behaviour Act 2003 s 28A (as added) as they apply for the purposes of an authorisation to exercise functions by virtue of an order under the Deregulation and Contracting Out Act 1994 s 70(2): (1) s 72 (effect of contracting out); (2) s 73 (termination of contracting out); (3) s 75 and Sch 15 (provision relating to disclosure of information); (4) Sch 16 para 3 (authorised persons to be treated as officers of local authority): Anti-social Behaviour Act 2003 s 28A(7) (as so added). For these purposes, any reference in the provisions specified in heads (1)-(4) supra to a person authorised to exercise a function is to be construed as a reference to a person with whom an arrangement is made for the exercise of the function in pursuance of an order under s 28A (as added): s 28A(8) (as so added).

- 4 Ibid s 28A(2)(a) (as added: see note 1 supra).
- 5 Ibid s 28A(2)(b) (as added: see note 1 supra).
- 6 Ibid s 28A(2)(c) (as added: see note 1 supra).
- 7 Ibid s 28A(3)(a) (as added: see note 1 supra).
- 8 Ibid s 28A(3)(b) (as added: see note 1 supra).
- 9 Ibid s 28A(6) (as added: see note 1 supra).
- 10 Ibid s 28A(5) (as added: see note 1 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (D) In Relation to Anti-social Behaviour: Registered Social Landlords/1332. Parenting orders in cases of anti-social behaviour: registered social landlords.

## (D) IN RELATION TO ANTI-SOCIAL BEHAVIOUR: REGISTERED SOCIAL LANDLORDS

### **1332. Parenting orders in cases of anti-social behaviour: registered social landlords.**

The following applies to a parenting order made in respect of an application by a registered social landlord<sup>1</sup>. A parenting order is an order which requires the parent<sup>2</sup>:

- 1221 (1) to comply, for a period not exceeding 12 months, with such requirements as are specified in the order<sup>3</sup>; and
- 1222 (2) to attend, for a concurrent period not exceeding three months, such counselling or guidance programme as may be specified in directions given by the responsible officer<sup>4</sup>.

A counselling or guidance programme which a parent is required to attend by virtue of head (2) above may be or include a residential course but only if the court is satisfied that the following two conditions are fulfilled<sup>5</sup>. The first condition is that the attendance of the parent at a residential course is likely to be more effective than his attendance at a non-residential course in preventing the child or young person from engaging in further anti-social behaviour<sup>6</sup>. The second condition is that any interference with family life which is likely to result from the attendance of the parent at a residential course is proportionate in all the circumstances<sup>7</sup>.

An appeal lies to the Crown Court and the High Court against the making of such a parenting order<sup>8</sup>.

1 For the meaning of 'registered social landlord' see para 1317 note 3 ante.

2 For the meaning of 'parent' see para 1312 note 1 ante.

3 Anti-social Behaviour Act 2003 s 26B(3)(a) (s 26B added by the Police and Justice Act 2006 s 24).

4 Anti-social Behaviour Act 2003 s 26B(3)(b) (as added: see note 2 supra). A person is eligible to be the responsible officer in relation to a parenting order under s 26B (as added) only if he is:

3337 (1) an officer of the registered social landlord which applied for the order (s 26B(9)(a) (as so added)); or

3338 (2) a person nominated by that registered social landlord (s 26B(9)(b) (as so added)).

A person may not be nominated under head (2) supra without his consent: s 26B(9) (as so added). In deciding whom to nominate under head (2) supra a registered social landlord must take into account the views of the local authority mentioned in s 26B(8) (as added) (see para 1333 post), and such other persons or bodies as the registered social landlord thinks appropriate: s 26B(10) (as so added). A parenting order under s 26B (as added) may, but need not, include a requirement mentioned in s 26B(3)(b) (as added) (see the text and note 4 supra) in any case where a parenting order under s 26B (as added) or any other enactment has been made in respect of the parent on a previous occasion: s 26B(4) (as so added).

5 Ibid s 26B(5) (as added: see note 2 supra).

6 Ibid s 26B(6) (as added: see note 2 supra).

7 Ibid s 26B(7) (as added: see note 2 supra).

8 See ibid s 28B(1), (1A) (s 28B(1) amended, and s 28B(1A) added, by the Police and Justice Act 2006 s 52, Sch 14 para 56). The provisions of the Crime and Disorder Act 1998 s 10(2), (3) (see para 1322 ante) apply in relation to an appeal under the Anti-social Behaviour Act 2003 s 26B (as added) (see paras 1333-1334 post) as they apply in relation to an appeal under the Crime and Disorder Act 1998 s 10(1)(b) (see para 1322 ante): Anti-social Behaviour Act 2003 s 28(2) (amended by the Police and Justice Act 2006 Sch 14 para 56).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1332 Parenting orders in cases of anti-social behaviour: registered social landlords**

NOTE 4--Anti-social Behaviour Act 2003 s 26B(10) amended: Criminal Justice and Immigration Act 2008 s 125(3)(c).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/ (D) In Relation to Anti-social Behaviour: Registered Social Landlords/1333. Making parenting orders in cases of anti-social behaviour: registered social landlords.

### **1333. Making parenting orders in cases of anti-social behaviour: registered social landlords.**

A registered social landlord<sup>1</sup> may apply for a parenting order<sup>2</sup> in respect of a parent<sup>3</sup> of a child<sup>4</sup> or young person<sup>5</sup> if:

- 1223 (1) the registered social landlord has reason to believe that the child or young person has engaged in anti-social behaviour<sup>6</sup>; and
- 1224 (2) the behaviour in question directly or indirectly relates to or affects the housing management functions<sup>7</sup> of the registered social landlord<sup>8</sup>.

An application for such an order may be made to a magistrates' court or, where so allowed<sup>9</sup>, to a county court<sup>10</sup>.

If such an application is made, the court may make a parenting order in respect of a parent of the child or young person if it is satisfied:

- 1225 (a) that the child or young person has engaged in anti-social behaviour<sup>11</sup>; and
- 1226 (b) that making the order would be desirable in the interests of preventing the child or young person from engaging in further anti-social behaviour<sup>12</sup>.

A registered social landlord must not make such an application without first consulting the local authority<sup>13</sup> in whose area the child or young person in question resides or appears to reside<sup>14</sup>.

In deciding whether to make a parenting order<sup>15</sup>, a court must take into account, among other things, any refusal by the parent to enter into a parenting contract<sup>16</sup> in respect of the child or young person, or, if the parent has entered into such a parenting contract, any failure by the parent to comply with the requirements specified in the contract<sup>17</sup>. Before making a parenting order in the case of a child or a young person under the age of 16, a court must obtain and consider information about the child or young person's family circumstances and the likely effect of the order on those circumstances<sup>18</sup>. In carrying out their functions in relation to parenting orders, registered social landlords on the register maintained by the Housing Corporation and responsible officers in relation to parenting orders made on the application of registered social landlords on that register must have regard to any guidance which is issued by the Secretary of State from time to time for that purpose<sup>19</sup>. In carrying out their functions in relation to parenting orders registered social landlords on the register maintained by the Welsh Ministers and responsible officers in relation to parenting orders made on the application of registered social landlords on that register must have regard to any guidance which is issued by the Welsh Ministers from time to time for that purpose<sup>20</sup>.

1 For the meaning of 'registered social landlord' see para 1317 note 3 ante.

2 For the meaning of 'parenting order' see para 1332 ante.

3 For the meaning of 'parent' see para 1312 note 1 ante.

- 4 For the meaning of 'child' see para 627 note 5 ante.
- 5 For the meaning of 'young person' see para 627 note 6 ante.
- 6 Anti-social Behaviour Act 2003 s 26B(1)(a) (s 26B added by the Police and Justice Act 2006 s 24). For the meaning of 'anti-social behaviour' see para 1312 note 5 ante.
- 7 For the meaning of 'housing management functions' see para 1318 note 8 ante.
- 8 Anti-social Behaviour Act 2003 s 26B(1)(b) (as added: see note 6 supra).
- 9 Where a local authority or registered social landlord (a 'relevant authority') is a party to proceedings in a county court and considers that a party to those proceedings is a person in relation to whom it would be reasonable for it to make an application for a parenting order under *ibid* s 26A (as added) (see paras 1329-1330 ante) or s 26B (as added) (a 'parenting order application'), it may make such an application to that court in relation to that person: s 26C(1) (s 26C added by the Police and Justice Act 2006 s 24). Where a relevant authority considers that a party to proceedings in a county court is a person in relation to whom it would be reasonable for it to make a parenting order application but the relevant authority is not a party to those proceedings, it may apply to be joined to those proceedings to enable it to make a parenting order application: Anti-social Behaviour Act 2003 s 26C(2) (as so added). Where there are proceedings in a county court to which a relevant authority is a party and the relevant authority considers that a child or young person has engaged in anti-social behaviour that is material in relation to the proceedings, the relevant authority may apply for a person who is a parent of the child or young person to be joined to the proceedings to enable it to make a parenting order application in relation to him: s 26C(3) (as so added). A person must not be joined to proceedings in pursuance of s 26C(3) (as added) unless the anti-social behaviour in question is material in relation to those proceedings: s 26C(4) (as so added).
- 10 *Ibid* s 26B(1) (as added: see note 6 supra). As to the form of application see the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 9, Sch 7 (added by SI 2007/2222); and CPR 65.37-65.41.
- 11 Anti-social Behaviour Act 2003 s 26B(2)(a) (as added: see note 6 supra).
- 12 *Ibid* s 26B(2)(b) (as added: see note 6 supra). As to the form of the order see the Magistrates' Courts (Parenting Orders) Rules 2004, SI 2004/247, r 10, Sch 8 (added by SI 2007/2222); and CPR 65.37-65.41.
- 13 For the meaning of 'local authority' see para 1314 note 3 ante.
- 14 Anti-social Behaviour Act 2003 s 26B(8) (as added: see note 6 supra).
- 15 *Ie* an order under *ibid* s 26B (as added).
- 16 *Ie* under *ibid* s 25 (see paras 1312-1313 ante) and ss 25A, 25B (both as added) (see paras 1316-1318 ante). As to parenting contracts see para 1309 et seq ante.
- 17 *Ibid* s 27(1) (amended by the Police and Justice Act 2006 s 52, Sch 14 para 55).
- 18 Anti-social Behaviour Act 2003 s 27(2) (amended by the Police and Justice Act 2006 Sch 14 para 55). Supplemental provisions about parenting orders contained in the Crime and Disorder Act 1998 s 9(3)-(7) (see paras 1319, 1321 ante) apply in relation to a parenting order under the Anti-social Behaviour Act 2003 s 26B (as added) as they apply in relation to a parenting order under the Crime and Disorder Act 1998 s 8 (see para 1319 ante): see the Anti-social Behaviour Act 2003 s 27(3)(c) (amended by the Police and Justice Act 2006 Sch 14 para 55).
- 19 Anti-social Behaviour Act 2003 s 27(4) (substituted by the Police and Justice Act 2006 Sch 14 para 55).
- 20 Anti-social Behaviour Act 2003 s 27(4A) (added by the Police and Justice Act 2006 Sch 14 para 55).

## UPDATE

### 1309-1338 Parenting Contracts

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



**1333 Making parenting orders in cases of anti-social behaviour: registered social landlords**

TEXT AND NOTE 14--Anti-social Behaviour Act 2003 s 26B(8) amended, s 26B(8A) added: Criminal Justice and Immigration Act 2008 s 125(3)(a), (b).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (vii) Parenting Orders/B. PARENTING ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR ACT 2003/(E) Applications in County Court Proceedings/1334. Applications in county court proceedings.

## (E) APPLICATIONS IN COUNTY COURT PROCEEDINGS

### **1334. Applications in county court proceedings.**

Where a local authority<sup>1</sup> or registered social landlord<sup>2</sup> (a 'relevant authority') is a party to proceedings in a county court, and considers that a party to those proceedings is a person in relation to whom it would be reasonable for it to make an application for a parenting order<sup>3</sup> (a 'parenting order application'), it may make such an application to that court in relation to that person<sup>4</sup>.

Where a relevant authority considers that a party to proceedings in a county court is a person in relation to whom it would be reasonable for it to make a parenting order application, but the relevant authority is not a party to those proceedings, it may apply to be joined to those proceedings to enable it to make a parenting order application<sup>5</sup>.

Where there are proceedings in a county court to which a relevant authority is a party, and the relevant authority considers that a child or young person has engaged in anti-social behaviour that is material in relation to the proceedings, the relevant authority may apply for a person who is a parent of the child or young person to be joined to the proceedings to enable it to make a parenting order application in relation to him<sup>6</sup>.

1 For the meaning of 'local authority' see para 1314 note 3 ante.

2 For the meaning of 'registered social landlord' see para 1317 note 3 ante.

3 Ie under the Anti-social Behaviour Act 2003 s 26A (as added) (see paras 1329-1330 ante) or s 26B (as added) (see paras 1332-1333 ante).

4 Ibid s 26B(1) (s 26B added by the Police and Justice Act 2006 s 24).

5 Anti-social Behaviour Act 2003 s 26B(2) (as added: see note 4 supra).

6 Ibid s 26B(3) (as added: see note 4 supra). A person must not be joined to proceedings in pursuance of s 26B(3) (as added) unless the anti-social behaviour in question is material in relation to those proceedings: s 26B(4) (as so added).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (viii) Parenting Compensation Orders/1335. Parental compensation orders.

## **(viii) Parenting Compensation Orders**

### **1335. Parental compensation orders.**

The following provisions have effect for the purposes of certain areas<sup>1</sup>. A magistrates' court may make an order (a 'parental compensation order') if, on the application of a local authority<sup>2</sup>, it is satisfied (on the civil standard of proof) that the condition mentioned below is fulfilled with respect to a child under the age of ten, and that it would be desirable to make the order in the interests of preventing a repetition of the behaviour in question<sup>3</sup>. The condition is that the child has taken, or caused loss of or damage to, property in the course of:

- 1227 (1) committing an act which, if he had been aged ten or over, would have constituted an offence<sup>4</sup>; or
- 1228 (2) acting in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself<sup>5</sup>.

A parental compensation order is an order which requires any person specified in the order who is a parent or guardian of the child (other than a local authority) to pay compensation of an amount specified in the order to any person or persons specified in the order who is, or are, affected by the taking of the property or its loss or damage<sup>6</sup>. The amount of compensation specified may not exceed £5,000 in all<sup>7</sup>. For the purposes of collection and enforcement, a parental compensation order is to be treated as if it were a sum adjudged to be paid on the conviction by the magistrates' court which made the order of the person or persons specified in the order as liable to pay the compensation<sup>8</sup>.

Before deciding whether or not to make a parental compensation order in favour of any person, the magistrates' court must take into account the views of that person about whether a parental compensation order should be made in his favour<sup>9</sup>.

Before making a parental compensation order, the magistrates' court must:

- 1229 (a) obtain and consider information about the child's family circumstances and the likely effect of the order on those circumstances<sup>10</sup>;
- 1230 (b) explain to the parent or guardian of the child in ordinary language:  
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  - 30. (i) the effect of the order and of the requirements proposed to be included in it<sup>11</sup>;
  - 31. (ii) the consequences which may follow<sup>12</sup> as a result of failure to comply with any of those requirements<sup>13</sup>;
  - 32. (iii) that the court has power<sup>14</sup> to review the order on the application either of the parent or guardian or of the local authority<sup>15</sup>.

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A magistrates' court which has made a parental compensation order<sup>16</sup> may make an order<sup>17</sup> discharging the order or varying it if while the order is in force:

- 1231 (A) it appears to the court, on the application of the local authority or the parent or guardian subject to the order, that it is appropriate to make an order discharging the order or varying it<sup>18</sup>; or
- 1232 (B) it is proved to the satisfaction of the court, on the application of the local authority, that the parent or guardian subject to it has failed to comply with any requirement included in the order<sup>19</sup>.

Where an application<sup>20</sup> for the discharge of a parental compensation order is dismissed, no further application for its discharge may be made by any person except with the consent of the court which made the order<sup>21</sup>.

1 The Crime and Disorder Act 1998 ss 13A-13E were added by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 paras 1, 2 but do not apply in relation to any conduct which occurred before 20 July 2006: see the Criminal Justice Act 2003 (Commencement No 6 and Transitional Provisions) Order 2004, SI 2004/3033, art 2, Schedule para 6. At the date at which this volume states the law these provisions have been brought into force only in relation to:

- 3339 (1) the counties of Hampshire, Hertfordshire, Nottinghamshire and Worcestershire (Schedule para 1);
- 3340 (2) the cities of Leicester and York (Schedule para 2);
- 3341 (3) the metropolitan boroughs of Gateshead and South Tyneside (Schedule para 3); and
- 3342 (4) the London boroughs of Southwark and Wandsworth (Schedule para 4).

2 'Local authority' has the same meaning as in the Children Act 1989 (see para 1240 note 1 ante): Crime and Disorder Act 1998 s 13A(7) (as added: see note 1 supra).

3 Ibid s 13A(1) (as added: see note 1 supra).

4 Ibid s 13A(2)(a) (as added: see note 1 supra).

5 Ibid s 13A(2)(b) (as added: see note 1 supra).

6 Ibid s 13A(3) (as added: see note 1 supra).

7 Ibid s 13A(4) (as added: see note 1 supra). The Secretary of State may by order amend s 13A(4) (as added) so as to substitute a different amount: s 13A(5) (as so added).

8 Ibid s 13A(6) (as added: see note 1 supra).

9 Ibid s 13C(1) (as added: see note 1 supra).

10 Ibid s 13C(2) (as added: see note 1 supra).

11 Ibid s 13C(3)(a) (as added: see note 1 supra).

12 Ie under ibid s 13C(4)(b) (as added): see the text and note 19 infra.

13 Ibid s 13C(3)(b) (as added: see note 1 supra).

14 Ie under ibid s 13C(4)(a) (as added): see the text and note 18 infra.

15 Ibid s 13C(3)(c) (as added: see note 1 supra).

16 References in ibid s 13C (as added) to the magistrates' court which made a parental compensation order include any magistrates' court acting in the same local justice area as that court: s 13C(7) (as added: see note 1 supra).

17 Ie under ibid s 13C(5) (as added). An order under s 13C(5) (as added) is an order discharging the parental compensation order or varying it:

3343 (1) by cancelling any provision included in it (s 13C(5)(a) (as added: see note 1 supra)); or

3344 (2) by inserting in it (either in addition to or in substitution for any of its provisions) any provision that could have been included in the order if the court had then had power to make it and were exercising the power (s 13C(5) (as so added)).

18 Ibid s 13C(4)(a) (as added: see note 1 supra).

19 Ibid s 13C(4)(b) (as added: see note 1 supra).

20 Ie under ibid s 13C(4) (as added): see the text and notes 16-19 supra.

21 Ibid s 13C(6) (as added: see note 1 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (viii) Parenting Compensation Orders/1336. The compensation.

### **1336. The compensation.**

The following provisions have effect for the purposes of certain areas<sup>1</sup>. When specifying the amount of compensation for the purposes of a parental compensation order<sup>2</sup>, the magistrates' court must take into account:

- 1233 (1) the value of the property taken or damaged, or whose loss was caused, by the child<sup>3</sup>;
- 1234 (2) any further loss which flowed from the taking of or damage to the property, or from its loss<sup>4</sup>;
- 1235 (3) whether the child, or any parent or guardian of his, has already paid any compensation for the property (and if so, how much)<sup>5</sup>;
- 1236 (4) whether the child, or any parent or guardian of his, has already made any reparation (and if so, what it consisted of)<sup>6</sup>;
- 1237 (5) the means of those to be specified in the order as liable to pay the compensation, so far as the court can ascertain them<sup>7</sup>;
- 1238 (6) whether there was any lack of care on the part of the person affected by the taking of the property or its loss or damage which made it easier for the child to take or damage the property or to cause its loss<sup>8</sup>.

If property taken is recovered before compensation is ordered to be paid in respect of it: (a) the court must not order any such compensation to be payable in respect of it if it is not damaged<sup>9</sup>; (b) if it is damaged, the damage must be treated for the purposes of making a parental compensation order as having been caused by the child, regardless of how it was caused and who caused it<sup>10</sup>.

The court must specify in the order how and by when the compensation is to be paid<sup>11</sup>.

For the purpose of ascertaining the means of the parent or guardian, the court may, before specifying the amount of compensation, order him to provide the court, within such period as it may specify in the order, such a statement of his financial circumstances as the court may require<sup>12</sup>. A person who without reasonable excuse fails to comply with such an order is guilty of an offence and is liable on summary conviction to a fine<sup>13</sup>. If, in providing a statement of his financial circumstances pursuant to such an order, a person makes a statement which he knows to be false in a material particular, recklessly provides a statement which is false in a material particular, or knowingly fails to disclose any material fact, he is liable on summary conviction to a fine<sup>14</sup>.

<sup>1</sup> The Crime and Disorder Act 1998 ss 13A-13E were added by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 paras 1, 2 but do not apply in relation to any conduct which occurred before 20 July 2006: see the Serious Organised Crime and Police Act 2005 (Commencement) (No 8) Order 2006, SI 2006/1871, art 2, Schedule para 6. At the date at which this volume states the law these provisions have been brought into force only in relation to certain areas: see para 1335 note 1 ante.

<sup>2</sup> le for the purposes of the Crime and Disorder Act 1998 s 13A(3) (as added): see para 1335 ante.

<sup>3</sup> Ibid s 13B(1)(a) (as added: see note 1 supra).

<sup>4</sup> Ibid s 13B(1)(b) (as added: see note 1 supra).

5 Ibid s 13B(1)(c) (as added: see note 1 supra).

6 Ibid s 13B(1)(d) (as added: see note 1 supra).

7 Ibid s 13B(1)(e) (as added: see note 1 supra).

8 Ibid s 13B(1)(f) (as added: see note 1 supra).

9 Ibid s 13B(2)(a) (as added: see note 1 supra).

10 Ibid s 13B(2)(b) (as added: see note 1 supra).

11 Ibid s 13B(3) (as added: see note 1 supra). For example, it may specify that the compensation is to be paid by instalments, and specify the date by which each instalment must be paid: s 13B(3) (as so added).

12 Ibid s 13B(4) (as added: see note 1 supra).

13 Ibid s 13B(5) (as added: see note 1 supra). The fine must not exceed level 3 on the standard scale: see s 13B(5) (as so added). As to the standard scale see para 132 note 2 ante.

14 Ibid s 13B(6) (as added: see note 1 supra). The fine must not exceed level 4 on the standard scale: see s 13B(6) (as so added).

Proceedings in respect of an offence under s 13B(6) (as added) may, despite anything in the Magistrates' Courts Act 1980 s 127(1) (see MAGISTRATES vol 29(2) (Reissue) para 589), be commenced at any time within two years from the date of the commission of the offence or within six months of its first discovery by the local authority, whichever period expires earlier: Crime and Disorder Act 1998 s 13B(7) (as so added).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (viii) Parenting Compensation Orders/1337. Appeal.

### **1337. Appeal.**

The following provisions have effect for the purposes of certain areas<sup>1</sup>. If a magistrates' court makes a parental compensation order<sup>2</sup>, the parent or guardian may appeal to the Crown Court against the making of the order, or against the amount of compensation specified in the order<sup>3</sup>. On the appeal the Crown Court:

- 1239 (1) may make such orders as may be necessary to give effect to its determination of the appeal<sup>4</sup>;
- 1240 (2) may also make such incidental or consequential orders as appear to it to be just<sup>5</sup>.

Any order of the Crown Court made on such an appeal (other than one directing that an application be re-heard by a magistrates' court) must be treated<sup>6</sup> as if it were an order of the magistrates' court from which the appeal was brought and not an order of the Crown Court<sup>7</sup>.

A person in whose favour a parental compensation order is made is not entitled to receive any compensation under it until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside<sup>8</sup>.

1 The Crime and Disorder Act 1998 ss 13A-13E were added by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 paras 1, 2 but do not apply in relation to any conduct which occurred before 20 July 2006: see the Serious Organised Crime and Police Act 2005 (Commencement) (No 8) Order 2006, SI 2006/1871, art 2, Schedule para 6. At the date at which this volume states the law these provisions have been brought into force only in relation to certain areas: see para 1335 note 1 ante.

2 See para 1335 ante.

3 Crime and Disorder Act 1998 s 13D(1), (2) (as added: see note 1 supra). As to the amount of compensation see para 1335 ante.

4 Ibid s 13D(3)(a) (as added: see note 1 supra).

5 Ibid s 13D(3)(b) (as added: see note 1 supra).

6 Ie for the purposes of ibid s 13C (as added): see para 1335 ante.

7 Ibid s 13D(4) (as added: see note 1 supra).

8 Ibid s 13D(5) (as added: see note 1 supra).

### **UPDATE**

#### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.





Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(4) SENTENCING CHILDREN AND YOUNG PERSONS/ (viii) Parenting Compensation Orders/1338. Effect of parental compensation order on subsequent award of damages in civil proceedings.

### **1338. Effect of parental compensation order on subsequent award of damages in civil proceedings.**

The following provisions have effect for the purposes of certain areas<sup>1</sup>. Where

- 1241 (1) a parental compensation order<sup>2</sup> has been made in favour of any person in respect of any taking or loss of property or damage to it<sup>3</sup>; and
- 1242 (2) a claim by him in civil proceedings for damages in respect of the taking, loss or damage is then to be determined<sup>4</sup>,

the damages in the civil proceedings must be assessed without regard to the parental compensation order, but the claimant may recover only an amount equal to the aggregate of the following:

- 1243 (a) any amount by which they exceed the compensation<sup>5</sup>; and
- 1244 (b) a sum equal to any portion of the compensation which he fails to recover<sup>6</sup>.

The claimant may not enforce the judgment, so far as it relates to such a sum as is mentioned in head (b) above, without the permission of the court<sup>7</sup>.

1 The Crime and Disorder Act 1998 ss 13A-13E were added by the Serious Organised Crime and Police Act 2005 s 144, Sch 10 paras 1, 2 but do not apply in relation to any conduct which occurred before 20 July 2006: see the Serious Organised Crime and Police Act 2005 (Commencement) (No 8) Order 2006, SI 2006/1871, art 2, Schedule para 6. At the date at which this volume states the law these provisions have been brought into force only in relation to certain areas: see para 1335 note 1 ante.

2 See para 1335 ante.

3 Crime and Disorder Act 1998 s 13E(1)(a) (as added: see note 1 supra).

4 Ibid s 13E(1)(b) (as added: see note 1 supra).

5 Ibid s 13E(2)(a) (as added: see note 1 supra).

6 Ibid s 13E(2)(b) (as added: see note 1 supra).

7 Ibid s 13E(3) (as added: see note 1 supra).

## **UPDATE**

### **1309-1338 Parenting Contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/A. GENERALLY/1339. Electronic monitoring requirements.

## **(5) COMMUNITY ORDERS**

### **(i) Youth Community Orders**

#### **A. GENERALLY**

##### **1339. Electronic monitoring requirements.**

A youth community order<sup>1</sup> may include requirements for securing the electronic monitoring of the offender's compliance with any other requirements imposed by the order<sup>2</sup>. An order which includes such requirements must include provision for making a person responsible for the monitoring; and a person who is made so responsible must be of a description specified in an order made by the Secretary of State<sup>3</sup>.

However, a court must not include such an electronic monitoring requirement in a youth community order unless the court:

- 1245 (1) has been notified by the Secretary of State that electronic monitoring arrangements are available in the relevant areas<sup>4</sup>; and
- 1246 (2) is satisfied that the necessary provision can be made under those arrangements<sup>5</sup>.

Where it is proposed to include in an exclusion order a requirement for securing electronic monitoring, but there is a person (other than the offender) without whose co-operation it will not be practicable to secure the monitoring, the requirement must not be included in the order without that person's consent<sup>6</sup>.

The Secretary of State may make rules<sup>7</sup> for regulating:

- 1247 (a) the electronic monitoring of compliance with requirements included in a youth community order<sup>8</sup>; and
- 1248 (b) without prejudice to the generality of head (a) above, the functions of persons made responsible for securing the electronic monitoring of compliance with requirements included in the order<sup>9</sup>.

1 For the meaning of 'youth community order' see para 1283 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 36B(1) (s 36B added by the Criminal Justice and Court Services Act 2000 s 52; and the Powers of Criminal Courts (Sentencing) Act 2000 s 36B(1) amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 96(1), (3)). At the date at which this volume states the law the Powers of Criminal Courts (Sentencing) Act 2000 s 36B (as added) was not in force in relation to exclusion requirements: see the Criminal Justice and Court Services Act 2000 s 80(1); and the Criminal Justice and Court Services Act 2000 (Commencement No 7) Order 2001, SI 2001/2232, art 2(1), (2)(b). For the meaning of 'exclusion requirement' see para 290 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 36B(5) (as added: see note 2 supra). As to persons specified to be made responsible for electronic monitoring see the Community Order (Electronic Monitoring of Requirements) (Responsible Officer) Order 2001, SI 2001/2233 (amended by SI 2001/3346; SI 2005/984); and

SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230. Any power of the Secretary of State to make rules or orders under the Powers of Criminal Courts (Sentencing) Act 2000 is exercisable by statutory instrument: s 160(1). A statutory instrument containing rules made by the Secretary of State under s 36B(6) (as added), s 40(1), s 40C(1) (as added), or any order made by the Secretary of State under s 40(2)(b), s 40C(2) (as added) or s 68, is subject to annulment in pursuance of a resolution of either House of Parliament: s 160(2) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 160, 196; and the Criminal Justice Act 2003 s 332, Sch 37 Pt 7). The Secretary of State must not make any order under the Powers of Criminal Courts (Sentencing) Act 2000 s 15(1), s 40(2)(a), s 100(2)(b)(ii), s 103(2) or Sch 3 para 1(1A) (as added) unless a draft of the order or rules has been laid before, and approved by a resolution of, each House of Parliament: s 160(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 196; and the Criminal Justice Act 2003 s 332, Sch 37 Pt 7). Any order under the Powers of Criminal Courts (Sentencing) Act 2000 s 36B(5) (as added), s 37(6), s 40(2), s 40A(6) (as added) or s 40C(2) (as added), and any rules under s 36B (as added), s 40(1) or s 40C(1) (as added), may make provision for different cases or classes of case and any order made by the Secretary of State under the Powers of Criminal Courts Sentencing Act 2000 may make such transitional provision as appears to him necessary or expedient in connection with any provision made by the order: s 160(5), (6) (s 160(5) substituted by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 196; and amended by the Criminal Justice Act 2000 s 332, Sch 37 Pt 7). As to the Secretary of State see para 155 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 36B(2)(a) (as added: see note 2 supra). The relevant areas mentioned in the text are as follows:

3345 (1) in the case of a curfew order or an exclusion order, the relevant area is the area in which the place proposed to be specified in the order is situated (s 36B(7) (as so added));

3346 (2) in the case of a supervision order or an action plan order, the relevant area is the local justice area proposed to be specified in the order (s 36B(9) (as so added; and amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7; and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 1));

3347 (3) in the case of an attendance centre order, the relevant area is the local justice area in which the attendance centre proposed to be specified in the order is situated (Powers of Criminal Courts (Sentencing) Act 2000 s 36B(10) (as so added; and amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 1)).

In head (1) supra, 'place' in relation to an exclusion order has same the meaning as in the Powers of Criminal Courts (Sentencing) Act 2000 s 40A (as added) (see para 1364 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 232): s 36B(7) (as so added). As to curfew orders see para 1363 post. As to exclusion orders see para 1364 post. As to supervision orders generally see para 1340 et seq post. As to attendance centre orders see paras 1358-1362 post. As to action plan orders see para 1365 et seq post. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

5 Ibid s 36B(2)(b) (as added: see note 2 supra). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

6 Ibid s 36B(3) (as added: see note 2 supra). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

7 At the date at which this volume states the law no such rules had been made.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 36B(6)(a) (as added (see note 2 supra); and amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 96(1), (4)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 36B(6)(b) (as added: see note 2 supra). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

## UPDATE

### 1339 Electronic monitoring requirements

TEXT AND NOTES--Powers of Criminal Courts (Sentencing) Act 2000 s 36B repealed: Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force).

NOTE 3--Powers of Criminal Courts (Sentencing) Act 2000 s 160(3) amended and repealed in part: Criminal Justice and Immigration Act 2008 Sch 4 para 60(3), Sch 28 Pt 1 (not yet in force).

Powers of Criminal Courts (Sentencing) Act 2000 s 160(2), (5) substituted: Coroners and Justice Act 2009 Sch 21 para 94.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(A) Generally/1340. Supervision orders.

## **B. SUPERVISION ORDERS**

### **(A) GENERALLY**

#### **1340. Supervision orders.**

Where a child<sup>1</sup> or any person aged under 18 is convicted of an offence, the court by or before which he is convicted may<sup>2</sup> make an order placing him under the supervision of<sup>3</sup>:

- 1249 (1) a local authority<sup>4</sup> designated by the order<sup>5</sup>;
- 1250 (2) an officer of a local probation board<sup>6</sup>; or
- 1251 (3) a member of a youth offending team<sup>7</sup>.

Such an order is referred to as a 'supervision order'<sup>8</sup>.

A supervision order, unless it has previously been revoked, ceases to have effect at the end of the period of three years, or such shorter period as may be specified in the order, beginning with the date on which the order was originally made<sup>9</sup>.

1 For the meaning of 'child' see para 1259 note 1 ante.

2 <sup>1</sup>le subject to the Criminal Justice Act 2003 s 148 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 164), s 150 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 166), s 156 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 617, 626).

3 Powers of Criminal Courts (Sentencing) Act 2000 s 63(1) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 103). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250 et seq.

4 Unless the contrary intention appears, in the Powers of Criminal Courts (Sentencing) Act 2000 ss 63-66 and Schs 6, 7 (both as amended), 'local authority' means the council of a county or of a county borough, metropolitan district or London borough or the Common Council of the City of London: s 67(1). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) paras 5, 29-30, 35 et seq. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) para 51 et seq.

5 Ibid s 63(1)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250.

6 Ibid s 63(1)(b) (substituted by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt I para 4(1) (a), (2)). 'Local probation board' means a local probation board established under the Criminal Justice and Court Services Act 2000 s 4: Powers of Criminal Courts (Sentencing) Act 2000 s 163(1) (added by Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 197(f)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250.

7 Powers of Criminal Courts (Sentencing) Act 2000 s 63(1)(c). 'Youth offending team' means a team established under the Crime and Disorder Act 1998 s 39 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703): Powers of Criminal Courts (Sentencing) Act 2000 s 163(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250.

8 Ibid s 63(2). For the requirements which may be included in supervision orders see s 63(4), Sch 6; and para 1344 et seq post.

In their application to the Isles of Scilly:

3348 (1) s 63 (as amended), s 64 (as amended), s 65, s 66 (as amended), s 67, Sch 6 (as amended), Sch 7 (as amended); and

3349 (2) s 163 (as amended; prospectively further amended) (definitions) in its application to those provisions given in head (1) supra,

have effect with such modifications as the Secretary of State may specify: s 68(1). An order under s 68 may make different provision for different circumstances, provide for exemptions from any provisions of the order, and contain such incidental and supplemental provisions as the Secretary of State considers expedient for the purposes of the order: s 68(2). At the date at which this volume states the law no such order had been made. As to the Secretary of State see para 155 ante.

Nothing in Pt IV Ch V (ss 63-72) prevents a court which makes a supervision order in respect of an offender from also making a curfew order in respect of him: s 64A (added by the Anti-social Behaviour Act 2003 Sch 2 para 3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 251.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 63(7). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1340 Supervision orders**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(A) Generally/1341. Making of supervision orders.

### **1341. Making of supervision orders.**

A court must not make a supervision order<sup>1</sup> unless it is satisfied that the offender resides<sup>2</sup> or will reside in the area of a local authority<sup>3</sup>.

A supervision order must: (1) name the area of the local authority and the local justice area in which it appears to the court making the order (or to the court amending<sup>4</sup> any provision included in the order<sup>5</sup>) that the offender resides or will reside<sup>6</sup>; and (2) may contain such prescribed provisions<sup>7</sup> as the court making the order (or amending it) considers appropriate for facilitating the performance by the supervisor<sup>8</sup> of his functions<sup>9</sup>, including any prescribed provisions for requiring visits to be made by the offender to the supervisor<sup>10</sup>.

A court which makes a supervision order must immediately send a copy of its order:

- 1252 (a) to the offender and, if the offender is aged under 14, to his parent or guardian<sup>11</sup>;
- 1253 (b) to the supervisor<sup>12</sup>;
- 1254 (c) to any local authority which is not entitled by virtue of head (b) above to such a copy and whose area is named in the supervision order<sup>13</sup>;
- 1255 (d) where the offender is required by the order to reside with an individual or to undergo treatment by or under the direction of an individual or at any place, to the individual or the person in charge of that place<sup>14</sup>; and
- 1256 (e) where a local justice area named in the order<sup>15</sup> is not that for which the court acts, to the designated officer for the local justice area for the local justice area so named<sup>16</sup>.

If a court makes a supervision order while another such order made by any court is in force in respect of the offender, the court making the new order may revoke the earlier order<sup>17</sup>.

1 For the meaning of 'supervision order' see para 1340 ante.

2 'Reside' means habitually reside; and cognate expressions are to be construed accordingly except in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6(2), (3): s 67(1). For the meaning of 'local authority' see para 1340 note 4 ante.

3 Ibid s 63(5). A court is entitled to be satisfied that the offender will so reside if he is required so to reside by a provision to be included in the order in pursuance of Sch 6 para 1 (see para 1344 post): s 63(5). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 251.

4 Ie under ibid Sch 7: see paras 1352-1357 post.

5 Ie included in the order in pursuance of ibid s 63(6): see the text and notes 6-10 infra.

6 Ibid s 63(6)(a) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 73(a)).

7 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 63(6)(b), 'prescribed' means prescribed by the Criminal Procedure Rules: Powers of Criminal Courts (Sentencing) Act 2000 s 63(6) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2004/2035, art 3, Schedule paras 39, 41). As to the Criminal Procedure Rules see COURTS; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1238. At the date at which this volume states the law no such provisions had been prescribed.



8 'Supervisor', in relation to a supervision order, means the person under whose supervision the offender is placed or to be placed by the order: Powers of Criminal Courts (Sentencing) Act 2000 s 63(3). As to the selection and duty of a supervisor see para 1342 post.

9 le under ibid s 64(4): see para 1342 post.

10 Ibid s 63(6)(b).

11 Ibid s 63(8)(a). In the case of a child or young person whose father and mother were not married to each other at the time of his birth, and with respect to whom a residence order is in force in favour of the father, any reference in ss 63-66 (ss 63, 64, 66 as amended) and Schs 6, 7 (both as amended) to the parent of the child or young person includes a reference to the father: s 67(2). Section 67(2) is without prejudice to the operation of the Family Law Reform Act 1987 s 1(1) (construction of references to relationships) in relation to the provisions of the Powers of Criminal Courts (Sentencing) Act 2000 other than those mentioned in s 67(2): s 67(3). For the meaning of 'residence order' for the purposes of s 67(2) see the Children Act 1989 s 8(1); and para 262 ante (definition applied by the Powers of Criminal Courts (Sentencing) Act 2000 s 67(3)).

12 Ibid s 63(8)(b).

13 Ibid s 63(8)(c). The text refers to an area named in the supervision order in pursuance of s 63(6): see the text to notes 6-10 supra.

14 Ibid s 63(8)(d).

15 le the local justice area named in the order in pursuance of ibid s 63(6): see the text and notes 4-10 supra.

16 Ibid s 63(8)(e) (substituted by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 73(b)). In a case falling within the Powers of Criminal Courts (Sentencing) Act 2000 s 63(8) (e) (as substituted), the court must also send to the designated officer in question such documents and information relating to the case as the court considers likely to be of assistance to him: s 63(8).

17 Ibid s 63(9). In addition, Sch 7 para 10 (supplementary provision) (see para 1355 post) is to apply to the revocation: s 63(9).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(A) Generally/1342. Selection and duty of supervisor.

### **1342. Selection and duty of supervisor.**

A court must not designate a local authority as the supervisor<sup>1</sup> by a provision of a supervision order<sup>2</sup> unless the authority agrees, or it appears to the court that the offender resides or will reside in the area of the authority<sup>3</sup>. Where a provision of a supervision order places the offender under the supervision of an officer of a local probation board, the supervisor must be an officer of a local probation board appointed for or assigned to the local justice area named in the order<sup>4</sup>. Where a provision of a supervision order places the offender under the supervision of a member of a youth offending team<sup>5</sup>, the supervisor must be a member of a team established by the local authority within whose area it appears to the court that the offender resides or will reside<sup>6</sup>.

While a supervision order is in force, the supervisor must advise, assist and befriend the offender<sup>7</sup>.

Where a supervision order requires compliance with the relevant directions<sup>8</sup>, or includes<sup>9</sup> a requirement which involves the use of facilities for the time being specified in a scheme in force<sup>10</sup> for an area in which the offender resides or will reside, any expenditure incurred by the supervisor for the purposes of the directions or requirements must be defrayed by the local authority whose area is named in the order<sup>11</sup>.

1 For the meaning of 'supervisor' see para 1341 note 8 ante.

2 As to the making of a supervision order see para 1341 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 64(1). As to the application of s 64 (as amended) to the Isles of Scilly see para 1340 ante.

4 Ibid s 64(2) (amended by the Criminal Justice and Court Services Act 2000 ss 65, 72, 74, 75, Sch 7 Pt I para 4(1)(a), (2), Sch 7 Pt II paras 160, 174, Sch 8; and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 74). The local justice area mentioned in the text is named in the order in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 s 63(6): see para 1341 ante.

5 As to youth offending teams (ie as established under the Crime and Disorder Act 1998 s 39 (as amended)) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703.

6 Powers of Criminal Courts (Sentencing) Act 2000 s 64(3).

7 Ibid s 64(4).

8 Ie those given by virtue of ibid s 63 (as amended), Sch 6 para 2(1): see para 1345 post.

9 Ie by virtue of ibid Sch 6 para 3(2): see para 1346 post.

10 Ie a scheme in force under ibid s 66 (as amended): see para 1343 post.

11 Ibid s 64(5). The area named in the order is so named in pursuance of s 63(6): see para 1341 ante.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(A) Generally/1343. Facilities for implementing supervision orders.

### **1343. Facilities for implementing supervision orders.**

A local authority<sup>1</sup> must, acting either individually or in association with other local authorities, make arrangements with such persons as appear to it to be appropriate for the provision by those persons of facilities for enabling directions given<sup>2</sup> to persons resident in its area, and requirements that<sup>3</sup> may only be included in a supervision order<sup>4</sup> if they are for the time being specified in a scheme, to be carried out effectively<sup>5</sup>. The authority or authorities making any such arrangements<sup>6</sup> must consult each local probation board<sup>7</sup> as to the arrangements<sup>8</sup>. Any such arrangements must be specified in a scheme made by the authority or authorities making them<sup>9</sup>.

The authority or authorities making a scheme:

- 1257 (1) must send copies of it to the designated officer for each local justice area of which any part is included in the area to which the scheme relates<sup>10</sup>;
- 1258 (2) must keep a copy of such a scheme available at the principal office of every authority which is a party to it for inspection by members of the public at all reasonable hours, and any such authority must on demand by any person supply him with a copy of the scheme free of charge<sup>11</sup>;
- 1259 (3) may at any time make a further scheme altering the arrangements or specifying arrangements to be substituted for those previously specified<sup>12</sup>; and
- 1260 (4) must send notice to the designated officer for each local justice area of which any part is included in the area for which arrangements have been specified in the scheme notice of any exercise of a power conferred by head (3) above, specifying the date for the coming into force, and giving details of the effect, of the new or altered arrangements; and the new or altered arrangements must come into force on that date<sup>13</sup>.

Arrangements must not be made<sup>14</sup> for the provision of any facilities unless the facilities are approved or are of a kind approved by the Secretary of State<sup>15</sup> for these purposes<sup>16</sup>.

1 For the meaning of 'local authority' see para 1340 note 4 ante.

2 I.e. the directions given by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s 63 (as amended), Sch 6 para 2(1): see para 1345 post.

3 I.e. by virtue of *ibid* Sch 6 para 3(7): see para 1346 post.

4 I.e. by virtue of *ibid* Sch 6 para 3(2): see para 1346 post. As to the making of supervision orders see para 1341 ante.

5 *Ibid* s 66(1). As to the application of s 66 (as amended) to the Isles of Scilly see para 1340 note 8 ante.

6 I.e. in accordance with *ibid* s 66(1): see the text and note 5 supra.

7 For the purposes of *ibid* s 66 (as amended), 'local probation board' means a local probation board for an area of which any part is included in the area to which a scheme under s 66 (as amended) relates: s 66(12) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 160, 175).

8 Powers of Criminal Courts (Sentencing) Act 2000 s 66(2).

9 Ibid s 66(3). Such a scheme comes into force on a date to be specified in it: s 66(4).

10 Ibid s 66(5) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 75).

11 Powers of Criminal Courts (Sentencing) Act 2000 s 66(6).

12 Ibid s 66(7). The powers conferred by s 66(7) are not exercisable by an authority or authorities unless it has or they have first consulted each local probation board: s 66(9) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 175). A scheme which specifies arrangements to be substituted for those specified in a previous scheme must revoke the previous scheme: Powers of Criminal Courts (Sentencing) Act 2000 s 66(8).

13 Ibid s 66(10) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 75).

14 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 66.

15 As to the Secretary of State see para 155 ante.

16 Powers of Criminal Courts (Sentencing) Act 2000 s 66(11). As to the relevant purposes see the text and notes 1-15 supra.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1344. Requirement to reside with named individual.

## (B) REQUIREMENTS WHICH MAY BE INCLUDED

### **1344. Requirement to reside with named individual.**

A supervision order<sup>1</sup> may require the offender to reside with an individual named in the order who agrees to the requirement<sup>2</sup>.

<sup>1</sup> As to the making of supervision orders see para 1341 ante.

<sup>2</sup> See the Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 1 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 252. A requirement imposed by a supervision order in pursuance of Sch 6 para 1 (as amended) is subject to any such requirement of the order as is authorised by Sch 6 para 2, 3, 6, 6A (as added) or 7: see paras 1345-1346, 1349-1351 post. As to the application of Sch 6 (as amended) to the Isles of Scilly see para 1340 ante.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1345. Requirement to comply with directions of supervisor.

### **1345. Requirement to comply with directions of supervisor.**

A supervision order<sup>1</sup> may require the offender to comply with any directions given from time to time by the supervisor<sup>2</sup> requiring him to do all or any of the following things<sup>3</sup>:

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33. (1) to live at a place or places specified in the directions for a period or periods so specified<sup>4</sup>;
  34. (2) to present himself to a person or persons specified in the directions at a place or places and on a day or days so specified<sup>5</sup>; or
  35. (3) to participate in activities specified in the directions on a day or days so specified<sup>6</sup>.
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However, a supervision order must not require compliance with such directions unless the court making it is satisfied that a local authority scheme<sup>7</sup> is in force for the area where the offender resides or will reside; and no such directions may involve the use of facilities which are not for the time being specified in a scheme in force for that area<sup>8</sup>.

1 As to the making of supervision orders see para 1341 ante.

2 For the meaning of 'supervisor' see para 1341 note 8 ante. It is for the supervisor to decide whether and to what extent he exercises any power to give directions conferred on him by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 2(1), and the form of any directions: Sch 6 para 2(4).

3 Ibid Sch 6 para 2(1). A requirement imposed by a supervision order in pursuance of Sch 6 para 2(1) is subject to any such requirement of the order as is authorised by Sch 6 para 6 (as amended) (see para 1349 post): Sch 6 para 2(3).

4 Ibid Sch 6 para 2(1)(a). The total number of days in respect of which an offender may be required to comply with directions given by virtue of head (1), head (2) or head (3) in the text must not exceed 180 or such lesser number, if any, as the order may specify for these purposes: Sch 6 para 2(5) (amended by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 4(2)). For the purpose of calculating the total number of days in respect of which such directions may be given, the supervisor is entitled to disregard any day in respect of which directions were previously given in pursuance of the order and on which the directions were not complied with: Powers of Criminal Courts (Sentencing) Act 2003 Sch 6 para 2(6). As to the application of Sch 6 to the Isles of Scilly see para 1340 ante.

5 Ibid Sch 6 para 2(1)(b). As to the total number of days in respect of which an offender may be required to comply with directions given by virtue of head (2) in the text see note 4 supra. Directions given by the supervisor by virtue of head (2) or head (3) in the text must, as far as practicable, be such as to avoid:

3350 (1) any conflict with the offender's religious beliefs or with the requirements of any other community order to which he may be subject (Sch 6 para 2(7)(a)); and

3351 (2) any interference with the times, if any, at which he normally works or attends school or any other educational establishment (Sch 6 para 2(7)(b)).

6 Ibid Sch 6 para 2(1)(c). As to the total number of days in respect of which an offender may be required to comply with directions given by virtue of head (3) in the text see note 4 supra. As to what the directions given

by the supervisor by virtue of head (3) in the text must, as far as practicable, be such as to avoid see note 5 supra.

7 le under ibid s 66 (as amended) (see para 1343 ante).

8 Ibid Sch 6 para 2(2).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1346. Requirements as to activities, reparation etc.

### **1346. Requirements as to activities, reparation etc.**

A supervision order<sup>1</sup> may require<sup>2</sup> the offender subject to certain provisions<sup>3</sup>:

- 1261 (1) to live at a place or places specified in the order for a period or periods so specified<sup>4</sup>;
- 1262 (2) to present himself to a person or persons specified in the order at a place or places and on a day or days so specified<sup>5</sup>;
- 1263 (3) to participate in activities specified in the order on a day or days so specified<sup>6</sup>;
- 1264 (4) to make reparation<sup>7</sup> specified in the order to a person or persons so specified or to the community at large<sup>8</sup>; or
- 1265 (5) to refrain from participating in activities specified in the order on a specified day or days during the period for which the supervision order is in force, or during the whole of that period or a specified portion of it<sup>9</sup>.

The court may not include requirements in a supervision order unless: (a) it has first consulted the supervisor<sup>10</sup> as to the offender's circumstances, and the feasibility of securing compliance with the requirements, and is satisfied, having regard to the supervisor's report, that it is feasible to secure compliance with them<sup>11</sup>; (b) having regard to the circumstances of the case, it considers the requirements necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences<sup>12</sup>; and (c) if the offender is aged under 16, it has obtained and considered information about his family circumstances and the likely effect of the requirements on those circumstances<sup>13</sup>.

The court must not include in such a supervision order:

- 1266 (i) any requirement that would involve the co-operation of a person other than the supervisor and the offender, unless that other person consents to its inclusion<sup>14</sup>;
- 1267 (ii) any requirement to make reparation to any person unless that person is identified by the court as a victim of the offence or a person otherwise affected by it, and consents to the inclusion of the requirement<sup>15</sup>;
- 1268 (iii) any requirement requiring the offender to reside with a specified individual<sup>16</sup>;
- or
- 1269 (iv) any requirement relating to treatment for the offender's mental condition<sup>17</sup>,

nor may such a supervision order<sup>18</sup> include<sup>19</sup>:

- 1270 (A) any requirement that would involve the offender in absence from home for more than two consecutive nights, or for more than two nights in any one week<sup>20</sup>;
- or
- 1271 (B) if the offender is of compulsory school age<sup>21</sup>, any requirement to participate in activities during normal school hours<sup>22</sup>,

unless the court making the order is satisfied that the facilities whose use would be involved are for the time being specified in a scheme in force<sup>23</sup> for the area in which the offender resides or will reside<sup>24</sup>.

1 As to the making of supervision orders see para 1341 ante.

2 Powers of Criminal Courts (Sentencing) Act 2003 s 63, Sch 6 para 3(2) (amended by the Anti-social Behaviour Act 2003 s 92, Sch 3). The provisions mentioned in the text are those of the Powers of Criminal Courts (Sentencing) Act 2003 Sch 6 para 3(3)-(9). Schedule 6 para 3 applies to a supervision order unless the order requires the offender to comply with directions given by the supervisor under Sch 6 para 2(1) (see para 1345 ante): Sch 6 para 3(1).

3 Ibid Sch 6 para 3(2)(a). The total number of days in respect of which an offender may be subject to requirements imposed by virtue of Sch 6 para 3(2)(a), (b), (c) or (d) (see heads (1)-(4) in the text) must not exceed 180: Sch 6 para 3(3) (amended by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 4(1), (3)(b)(ii)).

4 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 3(2)(a). Any power to include a requirement in a supervision order which is exercisable in relation to a person by virtue of Sch 6 para 3 may be exercised in relation to him whether or not any other power is so exercised: Sch 6 para 8(1). This is without prejudice to the power to include in a supervision order any other combination of requirements under different paragraphs of Sch 6 that is authorised: Sch 6 para 8(2). As to the application of Sch 6 to the Isles of Scilly see para 1340 ante.

5 Ibid Sch 6 para 3(2)(b). As to the total number of days in respect of which an offender may be subject to requirements imposed by virtue of Sch 6 para 3(2)(b) see note 3 supra.

Requirements included in a supervision order by virtue of Sch 6 para 3(2)(b) or Sch 6 para 3(2)(c) (see the text and note 6 infra) must, as far as practicable, be such as to avoid:

3352 (1) any conflict with the offender's religious beliefs or with the requirements of any other youth community order to which he may be subject (Sch 6 para 3(6)(a) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 127(b))); and

3353 (2) any interference with the times, if any, at which he normally works or attends school or any other educational establishment (Powers of Criminal Courts (Sentencing) Act 2003 Sch 6 para 3(6)(b)).

The provisions of Schedule 6 para 3(7), (8) (see the text and notes 18-24 infra) are without prejudice to Sch 6 para 3(6): Sch 6 para 3(6).

6 Ibid Sch 6 para 3(2)(c). As to the total number of days in respect of which an offender may be subject to requirements imposed by virtue of Sch 6 para 3(2)(c) see note 3 supra.

7 For the purposes of ibid Sch 6 para 3, 'make reparation' means make reparation for the offence otherwise than by the payment of compensation: Sch 6 para 3(2).

8 Ibid Sch 6 para 3(2)(d). As to the total number of days in respect of which an offender may be subject to requirements imposed by virtue of Sch 6 para 3(2)(d) see note 3 supra.

9 Ibid Sch 6 para 3(2)(f).

10 For the meaning of 'supervisor' see para 1341 note 8 ante.

11 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 3(4)(a).

12 Ibid Sch 6 para 3(4)(b).

13 Ibid Sch 6 para 3(4)(c).

14 Ibid Sch 6 para 3(5)(a).

15 Ibid Sch 6 para 3(5)(b).

16 Ibid Sch 6 para 3(5)(c).

17 Ibid Sch 6 para 3(5)(d). Head (iv) in the text refers to such a requirement as is mentioned in Sch 6 para 6(2) (see para 1349 post).

18    Ie a supervision order by virtue of *ibid* Sch 6 para 3(2) (as amended).

19    This does not apply to activities carried out in accordance with arrangements made or approved by the local education authority in whose area the offender resides or will reside: *ibid* Sch 6 para 3(8). For the meaning of 'local education authority' see the Education Act 1996 s 12; and EDUCATION vol 15(1) (2006 Reissue) para 20.

20    Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 3(7)(a).

21    For the meaning of 'compulsory school age' see the Education Act 1996 s 8; and EDUCATION vol 15(1) (2006 Reissue) para 15 (definition applied by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 3(9)).

22    *Ibid* Sch 6 para 3(7)(b). Schedule 6 para 3(7)(b) does not apply to activities carried out in accordance with arrangements made or approved by the local education authority in whose area the offender resides or will reside: Sch 6 para 3(8).

23    Ie a scheme in force under *ibid* s 66 (as amended).

24    *Ibid* Sch 6 para 3(7). For the meaning of 'reside' see para 1341 note 2 ante.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1347. Requirement to live for specified period in local authority accommodation.

### **1347. Requirement to live for specified period in local authority accommodation.**

Subject to the following conditions, a supervision order<sup>1</sup> may impose a requirement ('a local authority residence requirement') that the offender live for a specified period in local authority accommodation<sup>2</sup>. The conditions are that:

- 1272 (1) a supervision order has previously been made in respect of the offender<sup>3</sup>;
- 1273 (2) the order imposed:
- 46
- 36. (a) a requirement to reside with a named individual<sup>4</sup>; a requirement to comply with directions of a supervisor<sup>5</sup>; requirements as to activities, reparation and night restrictions<sup>6</sup>; or requirements as to education<sup>7</sup>; or
- 37. (b) a local authority residence requirement<sup>8</sup>;
- 47
- 1274 (3) the offender fails to comply with that requirement, or is convicted of an offence committed while that order was in force<sup>9</sup>; and
- 1275 (4) the court is satisfied that:
- 48
- 38. (a) the failure to comply with the requirement, or the behaviour which constituted the offence, was due to a significant extent to the circumstances in which the offender was living<sup>10</sup>; and
- 39. (b) the imposition of a local authority residence requirement will assist in his rehabilitation<sup>11</sup>.
- 49

A local authority residence requirement must designate the local authority which is to receive the offender, and that authority must be the authority in whose area the offender resides<sup>12</sup>.

The court must not impose a local authority residence requirement without first consulting the designated authority<sup>13</sup>. A court must not impose a local authority residence requirement in respect of an offender who is not legally represented at the relevant time<sup>14</sup> in that court unless:

- 1276 (i) he was granted a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service for the purposes of the proceedings but the right was withdrawn because of his conduct or because it appeared that his financial resources were such that he was not eligible to be granted such a right<sup>15</sup>;
- 1277 (ii) he applied for such representation and the application was refused because it appeared that his financial resources were such that he was not eligible to be granted a right to it<sup>16</sup>; or
- 1278 (iii) he has been informed of his right to apply for such representation for the purposes of the proceedings and has had the opportunity to do so, but nevertheless refused or failed to apply<sup>17</sup>.

<sup>1</sup> As to the making of supervision orders see para 1341 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 5(1). For the meaning of 'local authority accommodation' see para 1348 note 19 post. A local authority residence requirement may stipulate that the offender must not live with a named person: Sch 6 para 5(5). The maximum period which may be specified in a local authority residence requirement is six months: Sch 6 para 5(6). A supervision order imposing a local authority residence requirement may also impose any of the requirements mentioned in Sch 6 paras 2, 3, 6 and 7: see paras 1345-1346 ante, 1348-1351 post. As to the application of Sch 6 to the Isles of Scilly see para 1340 note 8 ante.

3 Ibid Sch 6 para 5(2)(a).

4 Ie under ibid Sch 6 para 1 (see para 1344 ante).

5 Ie under ibid Sch 6 para 2 (see para 1345 ante). For the meaning of 'supervisor' see para 1341 note 8 ante.

6 Ie under ibid Sch 6 para 3 (see para 1346 ante).

7 Ie under ibid Sch 6 para 7 (see para 1351 post).

8 Ibid Sch 6 para 5(2)(b).

9 Ibid Sch 6 para 5(2)(c).

10 Ibid Sch 6 para 5(2)(d)(i). However, head (4)(a) in the text does not apply where the condition in head (2)(b) in the text is satisfied: Sch 6 para 5(2).

11 Ibid Sch 6 para 5(2)(d)(ii).

12 Ibid Sch 6 para 5(3).

13 Ibid Sch 6 para 5(4).

14 For these purposes, 'the relevant time' means the time when the court is considering whether or not to impose the requirement (ibid Sch 6 para 5(8)(a)); and 'the proceedings' means the whole proceedings, or the part of the proceedings relating to the imposition of the requirement (Sch 6 para 5(8)(b)).

15 Ibid Sch 6 para 3(7)(a) (amended by the Criminal Defence Service Act 2006 s 4(2)(b), (3)(a)).

16 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5(7)(aa) (added by the Criminal Defence Service Act 2006 s 4(2)(c), (3)(b)).

17 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5(7)(b).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1348. Requirement to live with for a specified period with local authority foster parent.

**1348. Requirement to live with for a specified period with local authority foster parent.**

Subject to the following conditions, a supervision order<sup>1</sup> may impose a requirement ('a foster parent requirement') that the offender must live for a specified period with a local authority foster parent<sup>2</sup>. The conditions are that:

- 1279 (1) the offence is punishable with imprisonment in the case of an offender aged 18 or over<sup>3</sup>;
- 1280 (2) the offence, or the combination of the offence and one or more offences associated with it, was so serious that a custodial sentence would normally be appropriate (or, where the offender is aged 10 or 11, would normally be appropriate if the offender were aged 12 or over)<sup>4</sup>; and
- 1281 (3) the court is satisfied that:
  - 50 40. (a) the behaviour which constituted the offence was due to a significant extent to the circumstances in which the offender was living<sup>5</sup>; and
  - 41. (b) the imposition of a foster parent residence requirement will assist in his rehabilitation<sup>6</sup>.
- 51

A foster parent residence requirement must designate the local authority which is to place the offender with a local authority foster parent<sup>7</sup>, and that authority must be the authority in whose area the offender resides<sup>8</sup>.

A court must not impose a foster parent residence requirement unless:

- 1282 (i) the court has been notified by the Secretary of State<sup>9</sup> that arrangements for implementing such a requirement are available in the area of the designated authority<sup>10</sup>;
- 1283 (ii) the notice has not been withdrawn<sup>11</sup>; and
- 1284 (iii) the court has consulted the designated authority<sup>12</sup>.

A court must not impose a foster parent residence requirement in respect of an offender who is not legally represented at the relevant time<sup>13</sup> in that court unless:

- 1285 (A) he was granted a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service for the purposes of the proceedings but the right was withdrawn because of his conduct or because it appeared that his financial resources were such that he was not eligible to be granted such a right<sup>14</sup>;
- 1286 (B) he applied for such representation and the application was refused because it appeared that his financial resources were such that he was not eligible to be granted a right to it<sup>15</sup>; or

- 1287 (c) he has been informed of his right to apply for such representation for the purposes of the proceedings<sup>16</sup> and has had opportunity to do so, but nevertheless refused or failed to apply<sup>17</sup>.

If, at any time while a supervision order imposing a foster parent residence requirement is in force, the supervisor notifies the offender that no suitable local authority foster parent is available, and that the supervisor has applied or proposes to apply for the variation or revocation of the order<sup>18</sup>, the foster parent residence requirement must, until the determination of the application, be taken to require the offender to live in local authority accommodation<sup>19</sup>.

1 As to the making of supervision orders see para 1341 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 5A(1) (Sch 6 para 5A added by the Anti-social Behaviour Act 2003 ss 88, 92, Sch 2 para 4(1), (4), Sch 3). Subject to the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 5(2A) (as added) (see para 1353 post), the maximum period which may be specified in a foster parent residence requirement is 12 months: Sch 6 para 5A(5) (as so added). A supervision order imposing a foster parent residence requirement may also impose any of the requirements mentioned in Sch 6 paras 2, 3, 6 and 7: see paras 1345-1346 ante, 1349-1351 post. Schedule 6 para 5A (as added) does not affect the power of a local authority to place with a local authority foster parent an offender to whom a local authority residence requirement under Sch 6 para 5 (see para 1347 ante) relates: Sch 6 para 5A(10) (as so added). As to the application of Sch 6 to the Isles of Scilly see para 1340 ante. A supervision order imposing a foster parent residence requirement may also impose any of the requirements mentioned in Sch 6 paras 2, 3, 6, 7: Sch 6 para 5A(8) (as so added).

3 Ibid Sch 6 para 5A(2)(a) (as added: see note 2 supra).

4 Ibid Sch 6 para 5A(2)(b) (as added: see note 2 supra).

5 Ibid Sch 6 para 5A(2)(c)(i) (as added: see note 2 supra).

6 Ibid Sch 6 para 5A(2)(c)(ii) (as added: see note 2 supra).

7 Ie under the Children Act 1989 s 23(2)(a) (see para 900 ante): Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5A(10) (as added: see note 2 supra).

8 Ibid Sch 6 para 5A(3) (as added: see note 2 supra).

9 As to the Secretary of State see para 155 ante.

10 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5A(4)(a) (as added: see note 2 supra).

11 Ibid Sch 6 para 5A(4)(b) (as added: see note 2 supra).

12 Ibid Sch 6 para 5A(4)(c) (as added: see note 2 supra).

13 For these purposes, 'the relevant time' means the time when the court is considering whether or not to impose the requirement: ibid Sch 6 para 5A(7)(a) (as added: see note 2 supra).

14 Ibid Sch 6 para 5A(6)(a) (as added: see note 2 supra).

15 Ibid Sch 6 para 5A(6)(aa) (Sch 6 para 5A as added (see note 2 supra); Sch 6 para 5A(6)(aa) added by the Criminal Defence Service Act 2006 s 4(2)(e), (3)(b)).

16 For these purposes, 'the proceedings' means the whole proceedings or the part of the proceedings relating to the imposition of the requirement: Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5A(7) (as added: see note 2 supra).

17 Ibid Sch 6 para 5A(6)(b) (as added: see note 2 supra).

18 Ie under ibid Sch 7 para 5 (see para 1353 post).

19 Ibid Sch 6 para 5A(9) (as added: see note 2 supra). 'Local authority accommodation' means accommodation provided by or on behalf of a local authority; and for these purposes 'accommodation provided

by or on behalf of a local authority' has the same meaning as it has in the Children Act 1989 s 105: Powers of Criminal Courts (Sentencing) Act 2000 s 163.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1349. Requirements as to treatment for mental condition.

### **1349. Requirements as to treatment for mental condition.**

Where a court which proposes to make a supervision order<sup>1</sup> is satisfied on the evidence of a registered medical practitioner<sup>2</sup> that the mental condition of the offender is such as requires and may be susceptible to treatment, but is not such as to warrant the making of a hospital order or a guardianship order<sup>3</sup>, the court may include<sup>4</sup> in the supervision order a requirement that the offender must, for a period specified in the order, submit to treatment of one of the following descriptions so specified, that is to say:

- 1288 (1) treatment as a resident patient in an independent hospital or care home<sup>5</sup> or a hospital<sup>6</sup>, but not a hospital at which high security psychiatric services<sup>7</sup> are provided<sup>8</sup>;
- 1289 (2) treatment as a non-resident patient at an institution or place specified in the order<sup>9</sup>;
- 1290 (3) treatment by or under the direction of a registered medical practitioner specified in the order<sup>10</sup>; or
- 1291 (4) treatment by or under the direction of a chartered psychologist specified in the order<sup>11</sup>.

A requirement must not be included in a supervision order by virtue of heads (1) to (4) above:

- 1292 (a) in any case, unless the court is satisfied that arrangements have been or can be made for the treatment in question and, in the case of treatment as a resident patient, for the reception of the patient<sup>12</sup>;
- 1293 (b) in the case of an order made or to be made in respect of a person aged 14 or over, unless he consents to its inclusion<sup>13</sup>,

and a requirement so included must not in any case continue in force after the offender attains the age of 18<sup>14</sup>.

1 As to the making of supervision orders see para 1341 ante.

2 ie a registered medical practitioner approved for the purposes of the Mental Health Act 1983 s 12 (see MENTAL HEALTH vol 30(2) (Reissue) para 480 et seq).

3 Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 6(1). As to hospital orders and guardianship orders see MENTAL HEALTH vol 30(2) (Reissue) para 486 et seq. The provisions of the Mental Health Act 1983 s 54(2), (3) (see MENTAL HEALTH vol 30(2) (Reissue) para 492) have effect with regard to proof for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6(1) of an offender's mental condition as they have effect with respect to proof of an offender's mental condition for the purposes of the Mental Health Act 1983 s 37(2)(a) (see MENTAL HEALTH vol 30(2) (Reissue) para 491); Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6(4). As to the application of Sch 6 to the Isles of Scilly see para 1340 ante.

4 Any power to include a requirement in a supervision order which is exercisable in relation to a person by virtue of ibid Sch 6 para 6 may be exercised in relation to him whether or not any other power is so exercised: Sch 6 para 8(1). This is without prejudice to the power to include in a supervision order any other combination of requirements under different paragraphs of Sch 6 that is authorised: Sch 6 para 8(2).

5 For the meaning of 'independent hospital' see the Care Standards Act 2000 ss 2(1)-(3), (6)-(8); and for the meaning of 'care home' see ss 3, 121(9); and see SOCIAL SERVICES AND COMMUNITY CARE.

6 le within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 417).

7 le within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) para 418).

8 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6(2)(a) (amended by the Care Standards Act 2000 s 116, Sch 4 para 28(1), (3)).

9 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6(2)(b).

10 Ibid Sch 6 para 6(2)(c).

11 Ibid Sch 6 para 6(2)(d). 'Chartered psychologist' means a person for the time being listed in the British Psychological Society's Register of Chartered Psychologists: Sch 6 para 6(5).

12 Ibid Sch 6 para 6(3)(a).

13 Ibid Sch 6 para 6(3)(b).

14 Ibid Sch 6 para 6(3).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(B) Requirements which may be Included/1350. Requirements as to drug treatment and testing.

### **1350. Requirements as to drug treatment and testing.**

The following provisions have effect for the purposes of certain areas<sup>1</sup>. Where a court proposing to make a supervision order<sup>2</sup> is satisfied that the offender is dependent on, or has a propensity to misuse, drugs and that his dependency or propensity is such as requires and may be susceptible to treatment<sup>3</sup>, the court may include in the supervision order a requirement that the offender must, for a period specified in the order ('the treatment period'), submit to treatment by or under the direction of a specified person having the necessary qualifications and experience ('the treatment provider') with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs<sup>4</sup>.

The required treatment must be:

- 1294 (1) treatment as a resident in such institution or place as may be specified in the order<sup>5</sup>; or
- 1295 (2) treatment as a non-resident at such institution or place, and at such intervals, as may be so specified<sup>6</sup>,

but the nature of the treatment must not be specified in the order except as mentioned in head (1) or head (2) above<sup>7</sup>.

A requirement must not be included in a supervision order<sup>8</sup>:

- 1296 (a) in any case, unless:  
52
  - 42. (i) the court is satisfied that arrangements have been or can be made for the treatment intended to be specified in the order (including arrangements for the reception of the offender where he is to be required to submit to treatment as a resident)<sup>9</sup>; and
  - 43. (ii) the requirement has been recommended to the court as suitable for the offender by an officer of a local probation board or by a member of a youth offending team<sup>10</sup>; and
- 53
  - 1297 (b) in the case of an order made or to be made in respect of a person aged 14 or over, unless he consents to its inclusion<sup>11</sup>.

A supervision order which includes a treatment requirement may also include a requirement ('a testing requirement') that, for the purpose of ascertaining whether he has any drug in his body during the treatment period, the offender must during that period, at such times or in such circumstances as may (subject to the provisions of the order) be determined by the supervisor or the treatment provider, provide samples of such description as may be so determined<sup>12</sup>. However, a testing requirement must not be included in a supervision order unless the offender is aged 14 or over and consents to its inclusion, and the court has been notified by the Secretary of State<sup>13</sup> that arrangements for implementing such requirements are in force in the area proposed to be specified in the order<sup>14</sup>.

A supervision order including a testing requirement must provide for the results of tests carried out on any samples provided by the offender in pursuance of the requirement to a person other than the supervisor to be communicated to the supervisor<sup>15</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6A was added by the Criminal Justice Act 2003 s 279, Sch 24 para 2(1), (3) but does not apply to conduct which occurred before 1 December 2004: see the Criminal Justice Act 2003 (Commencement No 6 and Transitional Provisions) Order 2004, SI 2004/3033, art 2(1), (3). At the date at which this volume states the law these provisions have been brought into force only in relation to the petty sessions areas of Bradford, Calderdale, Keighley, Manchester and Newham, and that part of Teesside petty sessions area that is coterminous with the borough of Middlesbrough: see art 2(2). As to the application of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 to the Isles of Scilly see para 1340 ante.

2 As to the making of supervision orders see para 1341 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 63, Sch 6 para 6A(1) (as added: see note 1 supra).

4 Ibid Sch 6 para 6A(2) (as added: see note 1 supra).

5 Ibid Sch 6 para 6A(3)(a) (as added: see note 1 supra).

6 Ibid Sch 6 para 6A(3)(b) (as added: see note 1 supra).

7 Ibid Sch 6 para 6A(3) (as added: see note 1 supra).

8 Ie by virtue of ibid Sch 6 para 6A(2) (as added): see the text and note 4 supra.

9 Ibid Sch 6 para 6A(4)(a)(i) (as added: see note 1 supra).

10 Ibid Sch 6 para 6A(4)(a)(ii) (as added: see note 1 supra).

11 Ibid Sch 6 para 6A(4)(b) (as added: see note 1 supra).

12 Ibid Sch 6 para 6A(5) (as added: see note 1 supra). A testing requirement must specify for each month the minimum number of occasions on which samples are to be provided: Sch 6 para 6A(7) (as so added).

13 As to the Secretary of State see para 155 ante.

14 Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6A(6) (as added: see note 1 supra).

15 Ibid Sch 6 para 6A(8) (as added: see note 1 supra).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1350 Requirements as to drug treatment and testing**

NOTE 1--Criminal Justice Act 2003 s 279, Sch 24 repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 94, 97, Sch 28 Pt 1.

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### **1351. Requirements as to education.**

A supervision order<sup>1</sup> may require<sup>2</sup> the offender, if he is of compulsory school age, to comply, for as long as he is of that age and the order remains in force, with such arrangements for his education as may from time to time be made by his parent, being arrangements for the time being approved by the local education authority<sup>3</sup>. The court must not include such a requirement in a supervision order unless:

- 1298 (1) it has consulted the local education authority with regard to its proposal to include the requirement<sup>4</sup>; and
- 1299 (2) it is satisfied that in the view of the local education authority arrangements exist for the offender to receive efficient full time education suitable to his age, ability and aptitude and to any special educational need he may have<sup>5</sup>.

Nor may the court include the above requirement unless it has first consulted the supervisor as to the offender's circumstances and, having regard to the circumstances of the case, it considers the requirement necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences<sup>6</sup>.

1 As to the making of supervision orders see para 1341 ante.

2 Any power to include a requirement in a supervision order which is exercisable in relation to a person by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 7 may be exercised in relation to him whether or not any other power is so exercised: Sch 6 para 8(1). This is without prejudice to the power to include in a supervision order any other combination of requirements under different paragraphs of Sch 6 that is authorised: Sch 6 para 8(2).

3 Ibid s 63, Sch 6 para 7(2). Schedule 6 para 7 applies to a supervision order unless the order requires the offender to comply with directions given by the supervisor under Sch 6 para 2(1) (see para 1345 ante): Sch 6 para 7(1). For the meaning of 'special educational need' see the Education Act 1996 s 312(1); and EDUCATION vol 15(2) (2006 Reissue) para 984 (definition applied by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 7(4)). As to the application of Sch 6 to the Isles of Scilly see para 1340 ante.

4 Ibid Sch 6 para 7(3)(a).

5 Ibid Sch 6 para 7(3)(b).

6 Ibid Sch 6 para 7(5).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

**1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(C) Breach and Revocation/1352. Breach of requirement of supervision order.

## (C) BREACH AND REVOCATION

### **1352. Breach of requirement of supervision order.**

If while a supervision order<sup>1</sup> is in force in respect of an offender it is proved to the satisfaction of a relevant court<sup>2</sup>, on the application of the supervisor<sup>3</sup>, that the offender has failed to comply with any requirement included<sup>4</sup> in the supervision order<sup>5</sup>, the court:

- 1300 (1) whether or not it also makes an order revoking or amending the supervision order<sup>6</sup> may:
- 54
44. (a) order the offender to pay a fine of an amount not exceeding a stated amount<sup>7</sup>;
45. (b) make a curfew order in respect of him<sup>8</sup>; or
46. (c) make an attendance centre order in respect of him<sup>9</sup>;
- 55
- 1301 (2) if the supervision order was made by a magistrates' court, may revoke the supervision order and deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made<sup>10</sup>; or
- 1302 (3) if the supervision order was made by the Crown Court, may commit him in custody or release him on bail until he can be brought or appear before the Crown Court<sup>11</sup>.

Where a court deals with an offender under head (3) above, it must send to the Crown Court a certificate signed by a justice of the peace giving particulars of the offender's failure to comply with the requirement in question, and such other particulars of the case as may be desirable<sup>12</sup>. A certificate purporting to be so signed is admissible as evidence of the failure before the Crown Court<sup>13</sup>. Where by virtue of head (3) above the offender is brought or appears before the Crown Court, and it is proved to the satisfaction of the court that he has failed to comply with the requirement in question, that court may deal with him, for the offence in respect of which the supervision order was made, in any way in which it could have dealt with him for that offence if it had not made the order<sup>14</sup>. Where the Crown Court so deals with an offender, it must revoke the supervision order if it is still in force<sup>15</sup>.

In dealing with an offender under the provisions relating to breach of a requirement of a supervision order<sup>16</sup>, a court must take into account the extent to which he has complied with the requirements of the supervision order<sup>17</sup>.

Where a supervision order has been made on appeal, for these purposes<sup>18</sup> it is deemed: (i) if it was made on an appeal brought from a magistrates' court, to have been made by that magistrates' court; and (ii) if it was made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, to have been made by the Crown Court<sup>19</sup>.

1 As to the making of supervision orders see para 1341 ante.



2 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7, 'relevant court', in relation to a supervision order, means:

3354 (1) where the offender is under the age of 18, a youth court acting for the local justice area for the time being named in the order in pursuance of s 63(6) (see para 1341 ante) (s 65, Sch 7 para 1(1)(a) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule, para 84(a))); and

3355 (2) where the offender has attained that age, a magistrates' court other than a youth court, being a magistrates' court acting for the local justice area for the time being so named (Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 1(1)(b) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule, para 84(a))).

If an application to a youth court is made in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 and while it is pending the offender to whom it relates attains the age of 18, the youth court must deal with the application as if he had not attained that age: Sch 7 para 1(2). As to youth courts see para 1263 et seq ante. As to the application of Sch 7 to the Isles of Scilly see para 1340 ante.

3 For the meaning of 'supervisor' see para 1341 note 8 ante.

4 Is included in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 s 63 (as amended), Sch 6 para 1, 2, 3, 5, 5A (as added), 6A (as added) or 7, or s 63(6)(b): see paras 1344-1348, 1350-1351 ante.

5 Ibid Sch 7 para 2(1) (amended by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 6(1), (2)(a); and the Criminal Justice Act 2003 s 279, Sch 24 para 3). Subject to the Powers of Criminal Courts (Sentencing) Act 2003 Sch 7 para 7(9) (see para 1357 post) a court must not make an order under Sch 7 para 2 unless the offender is present before the court: Sch 7 para 7(1).

6 Is an order under ibid Sch 7 para 5(1): see para 1353 post.

7 Ibid Sch 7 para 2(2)(a)(i). At the date at which this volume states the law the fine may not exceed £1000: Sch 7 para 2(2)(a)(i). A fine imposed under Sch 7 para 2 is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction: Sch 7 para 2(6).

8 Ibid Sch 7 para 2(2)(a)(ii) (amended by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 6(1), (2)(b)). This is expressed as being subject to the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 2(2A) (as added) and Sch 7 para 3. The court may not make a curfew order under Sch 7 para 2(2)(a)(ii) where the offender is already subject to a curfew order: Sch 7 para 2(2A) (added by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 6(1), (2)(c)). Where a court considers it appropriate to make an order in respect of any person in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 2(2)(a)(ii) (see para 1367 post), it may make an order requiring him to remain, for periods specified in the order, at a place so specified: s 37(1) (modified by Sch 7 para 3(1)). Section 37(3)-(12) (s 37(10) repealed) and, so far as applicable, s 36B (as added), s 40, Sch 3 so far as relating to curfew orders, have effect in relation to a curfew order made by virtue of Sch 7 para 2(2)(a)(ii) as they have effect in relation to any other curfew order, subject to Sch 7 para 3(4), (5): Sch 7 para 3(2) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 201(1), (2)(a); and the Criminal Justice Act 2003 s 304, Sch 32 Pt I paras 90, 128(a)(i)). The Criminal Justice Act 2003 ss 148, 157 (restrictions and procedural requirements for community sentences) do not apply in relation to a curfew order made by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 2(2)(a)(ii): Sch 7 para 3(3) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 128(a)(ii)). The Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (breach, revocation and amendment of orders) has effect, with modifications, in relation to such curfew orders: see Sch 7 para 3(5). For the purposes of Sch 7 para 3(5)(a), (c), as applied by Sch 7 para 3(5), if the supervision order is no longer in force the relevant court's powers are to be determined on the assumption that it is still in force: Sch 7 para 3(6).

9 Ibid Sch 7 para 2(2)(a)(iii). This is expressed as being subject to Sch 7 para 4. The Criminal Justice Act 2003 ss 148, 156 do not apply in relation to an attendance centre order made by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 2(2)(a)(iii): Sch 7 para 4(3) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 128(b)). Where a court considers it appropriate to make an order in respect of any person in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 2(2)(a)(iii), the court may, if it has been notified by the Secretary of State that an attendance centre is available for the reception of persons of his description, order him to attend at such a centre, to be specified in the order, for such number of hours as may be so specified: s 60(1) (modified by Sch 7 para 4(1)); and see para 1358 post. The provisions of s 60(3)-(11) (aggregate number of hours for which an attendance centre order may require a person to attend an attendance centre; when a court may make an attendance centre order; the times at which a person may be required to attend an attendance centre; and who must receive a copy of the attendance centre order) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 267) and, so far as applicable, s 61, Sch 5 (breach, revocation and amendment of attendance centre orders) have effect, with modifications, in relation to an attendance centre order made by virtue of Sch 7 para 2(2)(a)(iii) as they have effect in relation to

any other attendance centre order, subject to Sch 7 para 4(4): Sch 7 para 4(2). If it is proved to the satisfaction of the magistrates' court before which an offender appears or is brought under Sch 5 para 1 that he has failed without reasonable excuse to attend as mentioned in Sch 5 para 1(1)(a) or has committed such a breach of rules as is mentioned in Sch 5 para 1(1)(b), that court may deal with him where the attendance centre order was made by a magistrates' court, in any way in which he could have been dealt with by the court which made the order if the order had not been made: Sch 5 para 2(1)(b) (modified by Sch 7 para 4(4)). Any power conferred by Sch 5 para 4 on a magistrates' court to revoke an attendance centre order made by such a court, or on the Crown Court to revoke an attendance centre order made by the Crown Court, includes power to deal with the offender in any way in which he could have been dealt with by the court which made the order if the order had not been made: Sch 5 para 4(3) (modified by Sch 7 para 4(4)). A person sentenced under Sch 5 para 1(1)(b) may appeal to the Crown Court against the sentence: Sch 5 para 2(6) (modified by Sch 7 para 4(4)). A person sentenced by a magistrates' court under Sch 5 para 1(3) may appeal to the Crown Court against the sentence: Sch 5 para 4(4) (modified by Sch 7 para 4(4)).

10 Ibid Sch 7 para 2(2)(b).

11 Ibid Sch 7 para 2(2)(c).

12 Ibid Sch 7 para 2(3).

13 Ibid Sch 7 para 2(3). As to bail generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1165-1201.

14 Ibid Sch 7 para 2(4).

15 Ibid Sch 7 para 2(5).

16 Ie ibid Sch 7 para 2: see the text and notes 5-15 supra, 17-19 infra.

17 Ibid Sch 7 para 2(7).

18 Ie for the purposes of ibid Sch 7 para 2: see the text and notes 5-17 supra, 19 infra.

19 Ibid Sch 7 para 2(8). Where Sch 7 para 2 applies, if the supervision order was made by a magistrates' court, the court may revoke the supervision order and deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order: Sch 7 para 2(2)(b) (modified by Sch 7 para 2(8)). Where, by virtue of Sch 7 para 2(2)(c) (see the text and note 11 supra), the offender is brought or appears before the Crown Court, and it is proved to the satisfaction of the court that he has failed to comply with the requirement in question, that court may deal with him, for the offence in respect of which the supervision order was made, in any way in which it could have dealt with him for that offence: Sch 7 para 2(4) (modified by Sch 7 para 2(8)).

## UPDATE

### 1340-1357 Supervision Orders

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### 1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1352 Breach of requirement of supervision order

NOTE 5--Criminal Justice Act 2003 s 279, Sch 24 repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 94, 97, Sch 28 Pt 1.

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### **1353. Revocation and amendment of supervision order on the application of the supervisor.**

If while a supervision order<sup>1</sup> is in force in respect of an offender it appears to a relevant court<sup>2</sup>, on the application of the supervisor<sup>3</sup> or the offender, that it is appropriate to make an order revoking or amending the supervision order, the court may<sup>4</sup>:

- 1303 (1) make an order revoking the supervision order<sup>5</sup>; or
- 1304 (2) make an order amending it by cancelling any requirement included in it<sup>6</sup>, or by inserting in it (either in addition to or in substitution for any of its provisions) any provision which could have been included in the order if the court had then had power to make it and were exercising the power<sup>7</sup>.

In relation to a supervision order imposing a foster parent residence requirement<sup>8</sup>, the court may extend the period specified to a period of not more than 18 months beginning with the day on which the requirement first had effect<sup>9</sup>.

The powers of amendment so conferred do not include power to insert in the supervision order, after the end of three months beginning with the date when the order was originally made, a requirement for treatment for a mental condition<sup>10</sup>, unless it is in substitution for such a requirement already included in the order<sup>11</sup>. Where an application<sup>12</sup> for the revocation of a supervision order is dismissed, no further application for its revocation may be made<sup>13</sup> by any person during the period of three months beginning with the date of the dismissal except with the consent of a court having jurisdiction to entertain such an application<sup>14</sup>.

1 As to the making of a supervision order see para 1341 ante.

2 For the meaning of 'relevant court' see para 1352 note 2 ante.

3 For the meaning of 'supervisor' see para 1341 note 8 ante.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 5(1). Subject to Sch 7 para 7(9) (see para 1357 post) a court must not make an order under Sch 7 para 5(1) unless the offender is present before the court: Sch 7 para 7(1). Schedule 7 para 5(1) has effect subject to Sch 7 paras 7-9 (Sch 7 para 7 prospectively amended) (see para 1357 post): Sch 7 para 5(2). Without prejudice to any power apart from Sch 7 para 12(1) to bring proceedings on behalf of another person, any power to make an application which is exercisable by a child or young person by virtue of Sch 7 para 5(1) is also exercisable on his behalf by his parent or guardian: Sch 7 para 12(1). For the purposes of Sch 7 para 12, 'guardian' includes any person who was a guardian of the child or young person in question at the time when any supervision order to which the application relates was originally made: Sch 7 para 12(2). As to the restrictions on a court's powers to revoke or amend a supervision order see para 1356 post. As to the application of Sch 7 (prospectively amended) to the Isles of Scilly see para 1340 ante.

5 Ibid Sch 7 para 5(1)(a).

6 Ie in pursuance of ibid Sch 6 (as amended) or s 63(6)(b): see paras 1341, 1344 et seq ante.

7 Ibid Sch 7 para 5(1)(b).

8 Ie under ibid Sch 6 para 5A (as added) (see para 1348 ante).

- 9 Ibid Sch 7 para 5(2A) (added by the Anti-social Behaviour Act 2003 s 88, Sch 2 para 6(1), (3)(a)).
- 10 Ie in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6 (as amended): see para 1349 ante.
- 11 Ibid Sch 7 para 5(3)(a).
- 12 Ie under ibid Sch 7 para 5(1): see note 4 supra.
- 13 See note 12 supra.
- 14 Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 5(4).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1345-1353 Requirement to comply with directions of supervisor...Revocation and amendment of supervision order on the application of the supervisor**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **1354. Amendment of supervision order on report of medical practitioner.**

If a medical practitioner by whom or under whose direction an offender is being treated for his mental condition in pursuance of a requirement included in a supervision order<sup>1</sup> is unwilling to continue to treat or direct the treatment of the offender, or is of the opinion<sup>2</sup>:

- 1305 (1) that the treatment of the offender should be continued beyond the period specified in that behalf in the order<sup>3</sup>;
- 1306 (2) that the offender needs different treatment<sup>4</sup>;
- 1307 (3) that the offender is not susceptible to treatment<sup>5</sup>; or
- 1308 (4) that the offender does not require further treatment<sup>6</sup>,

the practitioner must make a report in writing to that effect to the supervisor<sup>7</sup>.

On receiving such a report the supervisor<sup>8</sup> must refer it to a relevant court<sup>9</sup>, and on such a reference the court may make an order cancelling or varying the requirement<sup>10</sup>.

1    Ie under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 5A (as added) (see para 1348 ante). As to the making of a supervision order see para 1341 ante.

2    Ibid Sch 7 para 6(1).

3    Ibid Sch 7 para 6(2)(a).

4    Ibid Sch 7 para 6(2)(b).

5    Ibid Sch 7 para 6(2)(c).

6    Ibid Sch 7 para 6(2)(d).

7    Ibid Sch 7 para 6(1).

8    For the meaning of 'supervisor' see para 1341 note 8 ante.

9    For the meaning of 'relevant court' see para 1352 note 2 ante.

10   Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 6(3). Schedule 7 para 6(3) has effect subject to Sch 7 paras 7-9 (see para 1357 post): Sch 7 para 6(4). Subject to Sch 7 para 7(9) (see para 1357 post), a court must not make an order under Sch 7 para 6(3) unless the offender is present before the court: Sch 7 para 7(1).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for

children and young people. For provision with respect to youth rehabilitation orders  
see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

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### **1355. Copies of amending or revoking orders.**

A court which makes an order amending or revoking a supervision order<sup>1</sup> must immediately send a copy of its order<sup>2</sup>:

- 1309 (1) to the offender and, if the offender is aged under 14, to his parent or guardian<sup>3</sup>;
- 1310 (2) to the supervisor and any person who has ceased to be the supervisor by virtue of the order<sup>4</sup>;
- 1311 (3) to any local authority which is not entitled by virtue of head (2) above to such a copy and whose area is named in the supervision order<sup>5</sup> or has ceased to be so named by virtue of the court's order<sup>6</sup>;
- 1312 (4) where the offender is required by the order, or was required by the supervision order before it was amended or revoked, to reside with an individual or to undergo treatment by or under the direction of an individual or at any place, to the individual or the person in charge of that place<sup>7</sup>; and
- 1313 (5) where a local justice area named in the order or revoked order<sup>8</sup> is not that for which the court acts, to the designated officer for the local justice area so named<sup>9</sup>.

1 As to the making of a supervision order see para 1341 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 10.

3 Ibid Sch 7 para 10(a).

4 Ibid Sch 7 para 10(b).

5 Ie in pursuance of ibid s 63(6): see para 1341 ante.

6 Ibid Sch 7 para 10(c).

7 Ibid Sch 7 para 10(d).

8 See note 5 supra.

9 Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 10(e) (substituted by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 84(b)). In a case falling within head (5) in the text, the court must also send to the designated officer in question such documents and information relating to the case as the court considers likely to be of assistance: Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 10.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.





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### **1356. Restrictions on court's powers to revoke or amend supervision orders.**

A youth court<sup>1</sup> must not:

- 1314 (1) exercise its powers<sup>2</sup> to make an order:  
56
  - 47. (a) revoking a supervision order<sup>3</sup>;
  - 48. (b) inserting in a supervision order an authorised requirement<sup>4</sup>; or
  - 49. (c) varying or cancelling such a requirement<sup>5</sup>,
- 57 1315 except in a case where the court is satisfied that the offender either is unlikely to receive the care or control<sup>6</sup> he needs unless the court makes the order or is likely to receive it notwithstanding the order<sup>7</sup>;
- 1316 (2) exercise its powers to make an order cancelling or varying a requirement<sup>8</sup> except in such a case as is mentioned in head (1) above<sup>9</sup>;
- 1317 (3) exercise its powers<sup>10</sup> to make an order inserting an authorised requirement<sup>11</sup> in a supervision order which does not already contain such a requirement, unless the court is satisfied<sup>12</sup> as to certain matters relating to mental condition<sup>13</sup>.

Where the offender has attained the age of 14, then except with his consent a court must not make an order that revokes or amends a supervision order<sup>14</sup> or cancels or varies a requirement<sup>15</sup>, and which contains provisions which insert in the supervision order an authorised requirement<sup>16</sup>, or which alter such a requirement already included in the supervision order otherwise than by removing it or reducing its duration<sup>17</sup>.

1 As to youth courts see para 1263 et seq ante.

2 I.e its powers under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 5(1): see para 1353 ante.

3 Ibid Sch 7 para 8(1)(a)(i). As to the making of a supervision order see para 1341 ante.

4 Ibid Sch 7 para 8(1)(a)(ii). The text refers to a requirement authorised by s 63 (as amended), Sch 6.

5 Ibid Sch 7 para 8(1)(a)(iii).

6 For the purposes of ibid Sch 7 para 8, 'care' includes protection and guidance; and 'control' includes discipline: Sch 7 para 8(2).

7 Ibid Sch 7 para 8(1)(a). As to the application of Sch 7 (prospectively amended) to the Isles of Scilly see para 1340 ante.

8 I.e under ibid Sch 7 para 6(3): see para 1354 ante.

9 Ibid Sch 7 para 8(1)(b).

10 I.e under ibid Sch 7 para 5(1): see para 1353 ante.

11 I.e authorised by ibid Sch 6 para 6.

- 12    le satisfied as mentioned in *ibid* Sch 6 para 6(1): see para 1349 ante.
- 13    *Ibid* Sch 7 para 8(1)(c).
- 14    le an order under *ibid* Sch 7 para 5(1): see para 1353 ante.
- 15    le an order under *ibid* Sch 7 para 6(3): see para 1354 ante.
- 16    le authorised by *ibid* Sch 6 para 6 (as amended): see para 1349 ante.
- 17    *Ibid* Sch 7 para 9.

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/B. SUPERVISION ORDERS/(D) Presence of Offender in Court/1357. Presence of offender in court.

## (D) PRESENCE OF OFFENDER IN COURT

### **1357. Presence of offender in court.**

Where the supervisor<sup>1</sup> makes an application or reference<sup>2</sup> to a court he may bring the offender before the court<sup>3</sup>. Without prejudice to any power to issue a summons or warrant<sup>4</sup>, a justice may issue a summons or warrant for the purpose of securing the attendance of an offender before the court to which any of the specified applications or references in respect of him is made<sup>5</sup>. Where the offender is arrested in pursuance of such a warrant and cannot be brought immediately before the appropriate court<sup>6</sup>, the person in whose custody he is may make arrangements for his detention in a place of safety<sup>7</sup> for a period of not more than 72 hours from the time of the arrest (and it is lawful for him to be detained in pursuance of the arrangements), and must within that period, unless within it the offender is brought before that appropriate court, bring him before a justice<sup>8</sup>. Where an offender is so brought before a justice, the justice may direct that he be released immediately, or remand him to local authority accommodation<sup>9</sup>. However, where the offender is aged 18 or over at the time when he is brought before a justice, or is aged 18 or over at a time when<sup>10</sup> a youth court could exercise its powers<sup>11</sup> in respect of him, he must not be remanded to local authority accommodation but may instead be remanded to a remand centre, if the justice or youth court has been notified that such a centre is available for the reception of persons<sup>12</sup>, or to a prison, if the justice or youth court has not been so notified<sup>13</sup>.

Where an application is made to a youth court<sup>14</sup>, the court may remand (or further remand) the offender to local authority accommodation if a warrant has been issued<sup>15</sup> for the purpose of securing the attendance of the offender before the court, or the court considers that remanding (or further remanding) him will enable information to be obtained which is likely to assist the court in deciding whether and, if so, how to exercise its powers to revoke or amend the supervision order<sup>16</sup>. A justice or court remanding a person to local authority accommodation<sup>17</sup> must designate, as the authority which is to receive him, the authority named in the supervision order<sup>18</sup>.

A court may make an order revoking or amending a supervision order<sup>19</sup> or cancelling or varying a requirement included in a supervision order<sup>20</sup> in the absence of the offender if the effect of the order is confined to one or more of the following, that is to say: (1) revoking the supervision order; (2) cancelling a provision included in the supervision order<sup>21</sup>; (3) reducing the duration of the supervision order or any provision included in it<sup>22</sup>; (4) altering in the supervision order the name of any area; or (5) changing the supervisor<sup>23</sup>.

The offender may appeal to the Crown Court against any order: (a) resulting from a breach of a requirement of a supervision order<sup>24</sup>; (b) revoking or amending a supervision order; (c) cancelling or varying a requirement included in a supervision order, except an order made or which could have been made in the absence of the offender<sup>25</sup>, and an order containing only provisions to which the offender consented<sup>26</sup>. The offender may also appeal to the Crown Court against the dismissal of an application<sup>27</sup> to revoke a supervision order<sup>28</sup>.

1 For the meaning of 'supervisor' see para 1341 note 8 ante.

2 le under the Powers of Criminal Courts (Sentencing) Act 2000 s 65, Sch 7 para 2(1), 5(1) or 6(3): see paras 1352-1353 ante.

3 Ibid Sch 7 para 7(1). Subject to Sch 7 para 7(9) (see the text and notes 19-23 *infra*), a court must not make an order under Sch 7 para 2, 5(1) or 6(3) unless the offender is present before the court: Sch 7 para 7(1). As to the application of Sch 7 (prospectively amended) to the Isles of Scilly see para 1340 ante.

4 le apart from the power under *ibid* Sch 7 para 7(2): see the text and notes 5-6 *infra*.

5 Ibid Sch 7 para 7(2). The specified applications and references are those under Sch 7 para 2(1), 5(1) or 6(3): see paras 1352-1353 ante. The court must not begin to hear the complaint in the absence of the defendant or issue a warrant under the Magistrates' Courts Act 1980 s 55 (see *MAGISTRATES*) unless either it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the summons cannot be served or was served on him within what appears to the court to be a reasonable time before the hearing or adjourned hearing or the defendant has appeared on a previous occasion to answer to the complaint: s 55(3) (modified by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 7(3)). Where the defendant fails to appear at an adjourned hearing, the court must not issue a warrant under the Magistrates' Courts Act 1980 unless it is satisfied that he has had adequate notice of the time and place of the adjourned hearing: s 55(4).

6 le the court referred to in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 7(2): see the text to note 5 *supra*.

7 For the meaning of 'place of safety' see para 608 note 4; definition applied by *ibid* Sch 7 para 7(4).

8 Ibid Sch 7 para 7(4).

9 Ibid Sch 7 para 7(5).

10 le apart from *ibid* Sch 7 para 7(7) (prospectively amended): see the text and note 13 *infra*.

11 le under *ibid* Sch 7 para 7(6): see the text and notes 14-16 *infra*.

12 le for the reception of persons under *ibid* Sch 7 para 7(7): see the text and note 13 *infra*. As to youth courts see para 1263 *et seq* ante.

13 Ibid Sch 7 para 7(7). As from a day to be appointed Sch 7 para 7(7) is amended to provide that where the offender is aged 18 or over at the time when he is brought before a justice, or is aged 18 or over at a time when (apart from Sch 7 para 7(7)) a youth court could exercise its powers under Sch 7 para 7(6) in respect of him, he must not be remanded to local authority accommodation but may instead be remanded to a prison: Sch 7 para 7(7) (prospectively amended by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 Pt II paras 160, 201(1), (3)(a), (b), Sch 8). At the date at which this volume states the law no such day had been appointed.

14 le under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 5(1): see para 1353 ante.

15 le under *ibid* Sch 7 para 7(2): see the text and notes 4-5 *supra*.

16 Ibid Sch 7 para 7(6). For the court's powers to revoke or amend the supervision order see Sch 7 para 5(1); and para 1353 ante. However, Sch 7 para 7(6) is subject to Sch 7 para 7(7) (prospectively amended): see note 13 *supra*.

17 le under *ibid* Sch 7 para 7 (prospectively amended).

18 Ibid Sch 7 para 7(8).

19 le under *ibid* Sch 7 para 5(1): see para 1353 ante.

20 le under *ibid* Sch 7 para 6(3): see para 1349 ante.

21 le included in the supervision order in pursuance of *ibid* Sch 6 (as amended) or s 63(6)(b): see paras 1341, 1349 ante.

22 le included in it in pursuance of *ibid* Sch 6 (as amended): see para 1344 *et seq* ante.

23 Ibid Sch 7 para 7(9).

24 le an order made under *ibid* Sch 7 para 2(2): see para 1352 ante.

25     le by virtue of *ibid* Sch 7 para 7(9): see the text and note 23 *supra*.

26     *Ibid* Sch 7 para 11(a). Such consent as is mentioned in the text is made in pursuance of Sch 7 para 9: see para 1356 *ante*.

27     le under *ibid* Sch 7 para 5(1): see para 1353 *ante*.

28     *Ibid* Sch 7 para 11(b).

## **UPDATE**

### **1340-1357 Supervision Orders**

Supervision orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 *et seq*.

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### ***C. ATTENDANCE CENTRE ORDERS***

#### **1358. Attendance centre orders.**

Where:

- 1318 (1) a person aged under 16 is convicted by or before a court of an offence punishable with imprisonment<sup>1</sup>; or
- 1319 (2) a court would have power<sup>2</sup> to commit a person aged under 21<sup>3</sup> to prison in default of payment of any sum of money or for failing to do or abstain from doing anything required to be done or left undone<sup>4</sup>,

the court may, if it has been notified by the Secretary of State<sup>5</sup> that an attendance centre<sup>6</sup> is available for the reception of persons of his description, order him to attend at such a centre, to be specified in the order, for such number of hours as may be so specified<sup>7</sup>. Such an order is referred to as an 'attendance centre order'<sup>8</sup>.

The aggregate number of hours for which an attendance centre order may require a person to attend at an attendance centre must not be less than 12 except where:

- 1320 (a) he is aged under 14<sup>9</sup>; and
- 1321 (b) the court is of the opinion that 12 hours would be excessive, having regard to his age or any other circumstances<sup>10</sup>.

The aggregate number of hours must not exceed 12 except where the court is of the opinion, having regard to all the circumstances, that 12 hours would be inadequate, and in that case:

- 1322 (i) must not exceed 24 where the person is aged under 16<sup>11</sup>; and
- 1323 (ii) must not exceed 36 where the person is aged 16 or over but under 21<sup>12</sup>.

A court may make an attendance centre order in respect of a person before a previous attendance centre order made in respect of him has ceased to have effect, and may determine the number of hours to be specified in the order without regard to the number specified in the previous order, or to the fact that that order is still in effect<sup>13</sup>. However, an attendance centre order must not be made unless the court is satisfied that the attendance centre to be specified in it is reasonably accessible to the person concerned, having regard to his age, the means of access available to him and any other circumstances<sup>14</sup>.

The times at which a person is required to attend at an attendance centre must, as far as practicable, be such as to avoid any conflict with his religious beliefs or with the requirements of any other community order to which he may be subject, and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>15</sup>. The first time at which the person is required to attend at an attendance centre must be a time at which the centre is available for his attendance in accordance with the notification of the Secretary of State, and must be specified in the order<sup>16</sup>. The subsequent times must be fixed by the officer in charge of the centre, having regard to the person's circumstances<sup>17</sup>. However, a

person must not be required to attend at an attendance centre on more than one occasion on any day, or for more than three hours on any occasion<sup>18</sup>.

Where a court makes an attendance centre order, the designated officer for the court must deliver or send a copy of the order to the officer in charge of the attendance centre specified in it, and deliver a copy of the order to the person in respect of whom it is made or send a copy by registered post or the recorded delivery service addressed to his last or usual place of abode<sup>19</sup>.

Where a person ('the defaulter') has been ordered to attend at an attendance centre in default of the payment of any sum of money, on payment of the whole sum to any person authorised to receive it, the attendance centre order ceases to have effect, and on payment of a part of the sum to any such person, the total number of hours for which the defaulter is required to attend at the centre must be reduced proportionately, that is to say by such number of complete hours as bears to the total number the proportion most nearly approximating to, without exceeding, the proportion which the part bears to the whole sum<sup>20</sup>.

1 Powers of Criminal Courts (Sentencing) Act 2000 s 60(1)(a) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 102(1), (2)(a)). This is subject to the Criminal Justice Act 2003 ss 148, 150, 156 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 164, 166, 617, 626): Powers of Criminal Courts (Sentencing) Act 2000 s 60(1)(a) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 102(1), (2)(a)). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 267.

2 *Ie but for the Powers of Criminal Courts (Sentencing) Act 2000 s 89 (which restricts imposing imprisonment for persons under 21): see para 1397 post. As from a day to be appointed, s 60(1)(b) is amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 173 so as to refer to a court that 'has or would have' power. At the date at which this volume states the law no such day had been appointed.*

3 At a date to be appointed, this age is reduced to 16 years by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 102(1), (2)(b). At the date at which this volume states the law no such day had been appointed.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 60(1)(b) (prospectively amended: see notes 2, 3 *supra*). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 267.

5 As to the Secretary of State see para 155 *ante*.

6 'Attendance centre' means a place at which offenders aged under 21 may be required to attend and be given under supervision appropriate occupation or instruction in pursuance of attendance centre orders: Criminal Justice Act 2003 s 221(2) (definition applied by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s 163 (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt I paras 90, 123(1), (2))). The Secretary of State may continue to provide attendance centres (Criminal Justice Act 2003 s 221(1)), and may make arrangements with any local authority or police authority for the use of premises of that authority for the purposes of providing attendance centres (s 221(3)).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 60(1). As to the power of a court to commit a person aged at least 21 but under 25 to prison in default of payment of any sum of money see s 60(1)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 267.

8 *Ibid* s 60(2).

9 *Ibid* s 60(3)(a).

10 *Ibid* s 60(3)(b).

11 *Ibid* s 60(4)(a). As from a day to be appointed the words 'must not exceed 24' are substituted for the wording of s 60(4)(a), (b): see the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 102(1), (3). At the date at which this volume states the law no such day had been appointed.

12 Powers of Criminal Courts (Sentencing) Act 2000 s 60(4)(b). See note 11 *supra*.

13 *Ibid* s 60(5).

14 *Ibid* s 60(6).



15 Ibid s 60(7).

16 Ibid s 60(8).

17 Ibid s 60(9).

18 Ibid s 60(10).

19 Ibid s 60(11) (amended by the Access to Justice Act 1999 (Transfer of Justices' Clerks' Functions) Order 2001, SI 2001/618, art 5(1), (4); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 72).

20 Powers of Criminal Courts (Sentencing) Act 2000 s 60(12).

## **UPDATE**

### **1358-1362 Attendance Centre Orders**

Attendance centre orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force). See the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1358 Attendance centre orders**

TEXT AND NOTE 1--Powers of Criminal Courts (Sentencing) Act 2000 s 60(1)(a) repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

NOTE 6--Criminal Justice Act 2003 s 221(2) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 92, Sch 26 para 2(2) (Sch 4 para 92 partly in force: SI 2009/3074).

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### **1359. Breach of attendance centre order or attendance centre rules.**

Where an attendance centre order<sup>1</sup> is in force and it appears on information to a justice<sup>2</sup> that the offender<sup>3</sup>:

- 1324 (1) has failed to attend in accordance with the order<sup>4</sup>; or
- 1325 (2) while attending has committed a breach of rules<sup>5</sup> which cannot be adequately dealt with under those rules<sup>6</sup>,

the justice may issue a summons<sup>7</sup> requiring the offender to appear at the place and time specified in the summons or, if the information is in writing and on oath, may issue a warrant<sup>8</sup> for the offender's arrest<sup>9</sup>.

If it is proved to the satisfaction of the magistrates' court before which an offender appears or is brought<sup>10</sup> that he has failed without reasonable excuse to attend as mentioned in head (1) above or has committed such a breach of rules as is mentioned in head (2) above, that court may deal with him in any one of the following ways<sup>11</sup>:

- 1326 (a) it may impose on him a fine not exceeding a stated amount<sup>12</sup>;
- 1327 (b) where the attendance centre order was made by a magistrates' court, it may deal with him, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made<sup>13</sup>; or
- 1328 (c) where the order was made by the Crown Court, it may commit him to custody or release him on bail<sup>14</sup> until he can be brought or appear before the Crown Court<sup>15</sup>.

In dealing with an offender under head (b) above, a magistrates' court must take into account the extent to which the offender has complied with the requirements of the attendance centre order, and in the case of an offender who has wilfully and persistently failed to comply with those requirements, may impose a custodial sentence<sup>16</sup>. A person sentenced under head (b) above for an offence may appeal to the Crown Court against the sentence<sup>17</sup>.

A magistrates' court which deals with an offender's case under head (c) above must send to the Crown Court a certificate signed by a justice of the peace giving particulars of the offender's failure to attend or, as the case may be, the breach of the rules which he has committed, and such other particulars of the case as may be desirable<sup>18</sup>. A certificate purporting to be so signed is admissible as evidence of the failure or the breach before the Crown Court<sup>19</sup>.

Where by virtue of head (c) above the offender is brought or appears before the Crown Court and it is proved to the satisfaction of the court that he has failed without reasonable excuse to attend as mentioned in head (1) above, or that he has committed such a breach of rules as is mentioned in head (2) above, that court may deal with him, for the offence in respect of which the order was made, in any way in which it could have dealt with him for that offence if it had not made the order<sup>20</sup>. In so dealing with an offender<sup>21</sup>, the Crown Court must take into account the extent to which the offender has complied with the requirements of the attendance centre

order, and in the case of an offender who has wilfully and persistently failed to comply with those requirements, may impose a custodial sentence<sup>22</sup>.

1 For the meaning of 'attendance centre order' see para 1358 ante.

2 Any summons or warrant issued under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 1(2) must direct the offender to appear or be brought before a magistrates' court acting for the local justice area in which the offender resides, or if it is not known where the offender resides, before a magistrates' court acting for the local justice area in which is situated the attendance centre which the offender is required to attend by the order or by virtue of an order under Sch 5 para 5(1)(b): Sch 5 para 1(2) (substituted by the Domestic Violence, Crime and Victims Act 2004 s 29, Sch 5 para 6(3)).

3 References in the Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 (as amended) to an 'offender' include a person who has been ordered to attend at an attendance centre for such a default or failure as is mentioned in s 60(1)(b) (prospectively amended) or s 60(1)(c) (see para 1358 ante): Sch 5 para 7(1).

4 Ibid Sch 5 para 1(2)(a).

5 The rules made under the Criminal Justice Act 2003 s 222(1)(d) or (e): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 285.

6 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 1(1)(b) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt I paras 90, 126(a)).

7 As to a magistrates' court summons see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 912 et seq.

8 As to arrest warrants see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 912 et seq.

9 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 1(1) (amended by the Domestic Violence, Crime and Victims Act 2004 Sch 5 para 6(1), (2)). If it is proved to the satisfaction of the magistrates' court before which an offender appears or is brought under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 1 (as amended) that he has failed without reasonable excuse to attend or has committed a breach of rules made under the Criminal Justice Act 2003 s 222(1)(d) or (e) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 285) which cannot be adequately dealt with under those rules, that court may, where the attendance centre order was made by a magistrates' court, deal with him in any way in which he could have been dealt with by the court which made the order if the order had not been made: Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 2(1)(b) (modified by Sch 5 para 7(2)). Where, by virtue of Sch 5 para 2(1)(c) (which provides that, where the order was made by the Crown Court, it may commit the offender to custody or release him on bail until he can be brought or appear before the Crown Court), the offender is brought or appears before the Crown Court and it is proved to the satisfaction of the court that he has failed without reasonable excuse to attend, or that he has committed a breach of rules made under s 62(3) which cannot be adequately dealt with under those rules, that court may deal with him in any way in which it could have dealt with him if it had not made the order: Sch 5 para 3(1) (modified by Sch 5 para 7(2)). Any power conferred by Sch 5 para 4 on a magistrates' court to revoke an attendance centre order made by such a court, or on the Crown Court to revoke an attendance centre order made by the Crown Court, includes power to deal with the offender in any way in which he could have been dealt with by the court which made the order if the order had not been made: Sch 5 para 4(3) (modified by Sch 5 para 7(2)). Where a person has been ordered to attend at an attendance centre for such a default or failure as is mentioned in s 60(1)(b) (prospectively amended) or s 60(1)(c) (see para 1358 ante), the provisions of Sch 5 paras 2(5)(b), 3(3)(b), which relate to custodial sentences for offences, do not apply: Sch 5 para 7(2).

10 The under ibid Sch 5 para 5(1): see para 1361 post.

11 Ibid Sch 5 para 2(1).

12 Ibid Sch 5 para 2(1)(a). At the date at which this volume states the law the fine may not exceed £1000: Sch 5 para 2(1)(a). Any exercise by the court of its power under Sch 5 para 2(1)(a) is without prejudice to the continuation of the order: Sch 5 para 2(2). A fine imposed under Sch 5 para 2(1)(a) is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction: Sch 5 para 2(3). Where a magistrates' court dealing with an offender under Sch 5 para 2(1)(a) would not otherwise have the power to amend the order under Sch 5 para 5 (see para 1361 post), Sch 5 para 5 has effect as if references to an appropriate magistrates' court were references to the court dealing with the offender: Sch 5 para 2(5A) (added by the Domestic Violence, Crime and Victims Act 2004 Sch 5 para 6(1), (4)).

- 13 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 2(1)(b). Where a magistrates' court deals with an offender under Sch 5 para 2(1)(b), it must revoke the attendance centre order if it is still in force: Sch 5 para 2(4).
- 14 As to bail see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1165-1201.
- 15 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 2(1)(c).
- 16 Ibid Sch 5 para 2(5). This notwithstanding anything in the Criminal Justice Act 2003 s 152(2): see para 1398 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 19.
- 17 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 2(6).
- 18 Ibid Sch 5 para 2(7).
- 19 Ibid Sch 5 para 2(7).
- 20 Ibid Sch 5 para 3(1). Where the Crown Court deals with an offender under Sch 5 para 3(1), it must revoke the attendance centre order if it is still in force: Sch 5 para 3(2).
- 21 Ie under ibid Sch 5 para 3(1): see the text and note 20 supra. In proceedings before the Crown Court under Sch 5 para 3 any question whether there has been a failure to attend or a breach of the rules must be determined by the court and not by the verdict of a jury: Sch 5 para 3(4).
- 22 Ibid Sch 5 para 3(3).

## **UPDATE**

### **1358-1362 Attendance Centre Orders**

Attendance centre orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force). See the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/C. ATTENDANCE CENTRE ORDERS/1360. Revocation of attendance centre order with or without re-sentencing.

### **1360. Revocation of attendance centre order with or without re-sentencing.**

Where an attendance centre order<sup>1</sup> is in force in respect of an offender, an appropriate court<sup>2</sup> may, on an application made by the offender or by the officer in charge of the relevant attendance centre<sup>3</sup>, revoke the order<sup>4</sup>. Any power conferred<sup>5</sup> on a magistrates' court to revoke an attendance centre order made by such a court, or on the Crown Court to revoke an attendance centre order made by the Crown Court, includes power to deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made<sup>6</sup>. A person so sentenced by a magistrates' court<sup>7</sup> for an offence may appeal to the Crown Court against the sentence<sup>8</sup>.

The proper officer<sup>9</sup> of a court which makes an order revoking an attendance centre order must deliver a copy of the revoking order to the offender or send a copy by registered post or the recorded delivery service addressed to the offender's last or usual place of abode, and deliver or send a copy to the officer in charge of the relevant attendance centre<sup>10</sup>.

1 For the meaning of 'attendance centre order' see para 1358 ante.

2 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 61, Sch 5 para 4(1), 'an appropriate court' means:

3356 (1) where the court which made the order was the Crown Court and there is included in the order a direction that the power to revoke the order is reserved to that court, the Crown Court (Sch 5 para 4(2)(a)); and

3357 (2) in any other case, either a magistrates' court acting for the local justice area in which the relevant attendance centre is situated, or the court which made the order (Sch 5 para 4(2)(b) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 83(e))).

3 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 4 (as amended), 'the relevant attendance centre', in relation to an attendance centre order, means the attendance centre specified in the order or substituted for the attendance centre so specified by an order made by virtue of Sch 5 para 5(1) (b) (see para 1361 post): Sch 5 para 4(6).

4 Ibid Sch 5 para 4(1).

5 Ie conferred by ibid Sch 5 para 4.

6 Ibid Sch 5 para 4(3).

7 Ie under ibid Sch 5 para 4(3): see the text and notes 5-6 supra.

8 Ibid Sch 5 para 4(4).

9 For the purposes of ibid Sch 5 para 4 (as amended), 'proper officer' means, in relation to a magistrates' court, the designated officer for the court and, in relation to the Crown Court, the appropriate officer: Sch 5 para 4(7) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 83(d)).

10 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 4(5).

### **UPDATE**

### **1358-1362 Attendance Centre Orders**

Attendance centre orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force). See the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/C. ATTENDANCE CENTRE ORDERS/1361. Amendment of attendance centre order.

### **1361. Amendment of attendance centre order.**

Where an attendance centre order<sup>1</sup> is in force in respect of an offender, an appropriate magistrates' court<sup>2</sup> may:

- 1329 (1) on an application made by the offender or by the officer in charge of the relevant attendance centre, by order vary the day or hour specified in the order for the offender's first attendance at the relevant attendance centre<sup>3</sup>; or
- 1330 (2) substitute for the relevant attendance centre an attendance centre which the court is satisfied is reasonably accessible to the offender, having regard to his age, the means of access available to him and any other circumstances<sup>4</sup>.

The designated officer for a court which makes an order for an amendment of an attendance centre order must:

- 1331 (a) deliver a copy to the offender or send a copy by registered post or the recorded delivery service addressed to the offender's last or usual place of abode<sup>5</sup>; and
- 1332 (b) deliver or send a copy, if the order is made by virtue of head (1) above, to the officer in charge of the relevant attendance centre, and, if it is made by virtue of head (2) above, to the officer in charge of the attendance centre which the order as amended will require the offender to attend<sup>6</sup>.

1 For the meaning of 'attendance centre order' see para 1358 ante.

2 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 61, Sch 5 para 5(1), 'an appropriate magistrates' court' means a magistrates' court acting for the local justice area in which the relevant attendance centre is situated, or (except where the attendance centre order was made by the Crown Court) the magistrates' court which made the order: Sch 5 para 5(2) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 83(e)).

3 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 5(1)(a). For the meaning of 'the relevant attendance centre' see para 1360 note 3 ante; definition applied by Sch 5 para 5(4).

4 Ibid Sch 5 para 5(1)(b). Where a magistrates' court dealing with an offender by imposing on him a fine not exceeding £1,000 (ie under Sch 5 para 2(1)(b): see para 1359 ante) would not otherwise have the power to amend the order under head (2) in the text, Sch 5 para 5(1)(b) has effect as if references to an appropriate magistrates' court were references to the court dealing with the offender: Sch 5 para 2(5A) (added by the Domestic Violence, Crime and Victims Act 2004 s 29, Sch 5 para 6 (2)).

5 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 5(3)(a) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, Schedule para 83(f)).

6 Powers of Criminal Courts (Sentencing) Act 2000 Sch 5 para 5(3)(b).

## **UPDATE**

### **1358-1362 Attendance Centre Orders**

Attendance centre orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force). See the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/C. ATTENDANCE CENTRE ORDERS/1362. Attendance centre orders made on appeal.

### **1362. Attendance centre orders made on appeal.**

Where an attendance centre order<sup>1</sup> has been made on appeal, it is deemed<sup>2</sup>:

- 1333 (1) if it was made on an appeal brought from a magistrates' court, to have been made by that magistrates' court<sup>3</sup>; and
- 1334 (2) if it was made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, to have been made by the Crown Court<sup>4</sup>.

1 For the meaning of 'attendance centre order' see para 1358 ante.

2 See for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 61, Sch 5: see paras 1359-1361 ante.

3 Ibid Sch 5 para 6(1)(a).

4 Ibid Sch 5 para 6(1)(b). If it is proved to the satisfaction of the magistrates' court before which an offender appears or is brought under Sch 5 para 1 that he has failed without reasonable excuse to attend as mentioned in Sch 5 para 1(1)(a) (see para 1359 ante) or has committed such a breach of rules as is mentioned in Sch 5 para 1(1)(b) (see para 1359 ante) that court may deal with him, where the attendance centre order was made by a magistrates' court, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order: Sch 5 para 2(1)(b) (modified by Sch 5 para 6(2)). Any power conferred by Sch 5 para 4 on a magistrates' court to revoke an attendance centre order made by such a court, or on the Crown Court to revoke an attendance centre order made by the Crown Court, includes power to deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order: Sch 5 para 4(3) (modified by Sch 5 para 6(2)). Where by virtue of Sch 5 para 2(1)(c) (see para 1359 ante) the offender is brought or appears before the Crown Court and it is proved to the satisfaction of the court that he has failed without reasonable excuse to attend as mentioned in Sch 5 para 1(1)(a), or that he has committed such a breach of rules as is mentioned in Sch 5 para 1(1)(b), that court may deal with him, for the offence in respect of which the order was made, in any way in which it could have dealt with him for that offence if it had not made the order: Sch 5 para 3(1) (modified by Sch 5 para 6(2)).

## **UPDATE**

### **1358-1362 Attendance Centre Orders**

Attendance centre orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1 (not yet in force). See the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/D. CURFEW ORDERS/1363. Curfew orders.

## **D. CURFEW ORDERS**

### **1363. Curfew orders.**

Where a person aged under 16 is convicted of an offence, the court by or before which he is convicted may<sup>1</sup> make an order requiring him to remain, for periods specified in the order, at a place so specified<sup>2</sup>. Such an order is known as a 'curfew order'<sup>3</sup>.

A curfew order may specify different places or different periods for different days, but must not specify:

- 1335 (1) periods which fall outside the period of six months<sup>4</sup> beginning with the day on which it is made<sup>5</sup>; or
- 1336 (2) periods which amount to less than two hours or more than twelve hours in any one day<sup>6</sup>.

The requirements in a curfew order must, as far as practicable, be such as to avoid any conflict with the offender's religious beliefs or with the requirements of any other youth community order to which he may be subject; and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>7</sup>. A curfew order must include provision for making a person responsible for monitoring the offender's whereabouts during the curfew periods specified in the order; and a person who is made so responsible must be of a description specified in an order made by the Secretary of State<sup>8</sup>. A court must not make a curfew order unless the court has been notified by the Secretary of State that arrangements for monitoring the offender's whereabouts are available in the area in which the place proposed to be specified in the order is situated and the notice has not been withdrawn<sup>9</sup>. Before making a curfew order, the court must obtain and consider information about the place proposed to be specified in the order (including information as to the attitude of persons likely to be affected by the enforced presence there of the offender)<sup>10</sup>. Before making a curfew order in respect of an offender, the court must obtain and consider information about his family circumstances and the likely effect of such an order on those circumstances<sup>11</sup>.

A curfew order may include requirements for the electronic monitoring of the offender's whereabouts during the specified curfew periods where the court has been notified by the Secretary of State that electronic monitoring arrangements are available in the relevant areas and it is satisfied that the necessary provision can be made under those arrangements<sup>12</sup>.

Provision is also made for the breach, revocation and amendment of curfew orders<sup>13</sup>.

<sup>1</sup> He is subject to the Criminal Justice Act 2003 ss 148, 150 and 156: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 164, 166, 617, 626.

<sup>2</sup> See the Powers of Criminal Court (Sentencing) Act 2000 s 37(1) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 97(1), (2)).

<sup>3</sup> See the Powers of Criminal Courts (Sentencing) Act 2000 s 37(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231. As to other forms of community orders see paras 1339 et seq ante, 1370 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163 et seq. As to supplementary

provisions relating to curfew orders see s 40 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231.

4 Until a day to be appointed, in relation to an offender aged under 16 on conviction, the period is three months: *ibid* s 37(4) (prospectively repealed by the Anti-social Behaviour Act 2003 ss 88, 92, Sch 2 para 2(1), (2), Sch 3). At the date at which this volume states the law, this repeal was in force in relation to 33 different local authority areas specified in the Anti-social Behaviour Act (Commencement No 4) Order 2004, SI 2004/2168, art 3(2), but was not otherwise in force.

5 Powers of Criminal Courts (Sentencing) Act 2000 s 37(3)(a).

6 *Ibid* s 37(3)(b).

7 *Ibid* s 37(5) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 97(1), (3)).

8 Powers of Criminal Courts (Sentencing) Act 2000 s 37(6). As to the Secretary of State see para 155 ante.

9 *Ibid* s 37(7).

10 *Ibid* s 37(8).

11 *Ibid* s 37(9) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7).

12 See the Powers of Criminal Courts (Sentencing) Act 2000 s 36B (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 230.

13 See *ibid* Sch 3 (prospectively substituted); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

## UPDATE

### 1363 Curfew orders

TEXT AND NOTES--Curfew orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/E. EXCLUSION ORDERS/1364. Exclusion orders.

## ***E. EXCLUSION ORDERS***

### **1364. Exclusion orders.**

Where a person aged under 16 is convicted of an offence, the court by or before which he is convicted may<sup>1</sup> make an order prohibiting him from entering a place specified in the order for a period so specified of not more than three months<sup>2</sup>. Such an order is known as an 'exclusion order'<sup>3</sup>. An exclusion order:

- 1337 (1) may provide for the prohibition to operate only during the periods specified in the order<sup>4</sup>;
- 1338 (2) may specify different places for different periods or days<sup>5</sup>.

The requirements in an exclusion order must, as far as practicable, be such as to avoid any conflict with the offender's religious beliefs or with the requirements of any other youth community order to which he may be subject; and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>6</sup>. A court must not make an exclusion order unless the court has been notified by the Secretary of State that arrangements for monitoring the offender's whereabouts are available in the area in which the place proposed to be specified in the order is situated and the notice has not been withdrawn<sup>7</sup>. Before making an exclusion order in respect of an offender, the court must obtain and consider information about his family circumstances and the likely effect of such an order on those circumstances<sup>8</sup>. An exclusion order must include provision for making a person responsible for monitoring the offender's whereabouts during the periods when the prohibition operates; and a person who is made so responsible must be of a description specified in an order made by the Secretary of State<sup>9</sup>.

The court by which an exclusion order is made must: (a) give a copy of the order to the offender and the responsible officer<sup>10</sup>; and (b) give to any affected person<sup>11</sup> any information relating to the order which the court considers it appropriate for him to have<sup>12</sup>.

Provision is also made for the breach, revocation and amendment of exclusion orders<sup>13</sup>.

1    Ie subject to the Criminal Justice Act 2003 ss 148, 150 and 156.

2    Powers of Criminal Courts (Sentencing) Act 2000 s 40A(1) (ss 40A, 40C added by the Criminal Justice and Court Services Act 2000 s 46; and the Powers of Criminal Courts (Sentencing) Act 2000 s 40A(1) amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 100(1), (2)). 'Place' includes an area: Powers of Criminal Courts (Sentencing) Act 2000 s 40A(12) (as so added).

3    Ibid s 40A(2) (as added: see note 2 supra). The Secretary of State may make rules for regulating: (1) the monitoring of the whereabouts of persons who are subject to exclusion orders; and (2) without prejudice to the generality of head (1) supra, the functions of persons who are responsible officers in relation to offenders subject to exclusion orders: s 40C(1) (as so added). At the date at which this volume states the law no such rules had been made.

4    Ibid s 40A(3)(a) (as added: see note 2 supra).

5    Ibid s 40A(3)(b) (as added: see note 2 supra).

6 Ibid s 40A(5) (as added: see note 2 supra). An exclusion order must specify the local justice area in which the offender resides or will reside: s 40A(7) (as so added; and amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 67). The Secretary of State may by order direct that the Powers of Criminal Courts (Sentencing) Act 2000 s 40A(5) (as added) is to have effect with such additional restrictions as may be specified in the order: s 40C(2) (as so added). At the date at which this volume states the law no such order had been made.

7 Ibid s 40A(8) (as added: see note 2 supra). From 2 September 2004 arrangements were made available in Greater Manchester, West Midlands and Hampshire/Wessex pilot areas for the electronic monitoring of compliance with exclusion orders: see Home Office Circular 61/2004.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 40A(9) (as added (see note 2 supra); and amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7).

9 Powers of Criminal Courts (Sentencing) Act 2000 s 40A(6) (as added: see note 2 supra).

10 Ibid s 40A(11)(a) (as added: see note 2 supra). 'Responsible officer' in relation to an offender subject to an exclusion order, means the person who is responsible for monitoring the offender's whereabouts during the periods when the prohibition operates: s 40A(14) (as so added).

11 A person is an affected person in relation to an exclusion order if:

3358 (1) a requirement under ibid s 36B(1) (as added) (see para 1339 ante) is included in the order by virtue of his consent (s 40A(13)(a) (as added: see note 2 supra)); or

3359 (2) a prohibition is included in the order for the purpose (or partly for the purpose) of protecting him from being approached by the offender (s 40A(13)(b) (as so added)).

12 Ibid s 40A(11)(b) (as added: see note 2 supra).

13 See ibid Sch 3 (prospectively substituted); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

## **UPDATE**

### **1364 Exclusion orders**

TEXT AND NOTES--Exclusion orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/F. ACTION PLAN ORDERS/1365. Action plan orders.

## **F. ACTION PLAN ORDERS**

### **1365. Action plan orders.**

Where a child<sup>1</sup> or young person (that is to say, any person aged under 18) is convicted of an offence and the court by or before which he is convicted is of the opinion mentioned below, the court may<sup>2</sup> make an order which:

- 1339 (1) requires the offender, for a period of three months beginning with the date of the order, to comply with an action plan, that is to say, a series of requirements with respect to his actions and whereabouts during that period<sup>3</sup>;
- 1340 (2) places the offender under the supervision for that period of the responsible officer<sup>4</sup>; and
- 1341 (3) requires the offender to comply with any directions given by that officer with a view to the implementation of that plan<sup>5</sup>.

Such an order is known as an 'action plan order'<sup>6</sup>. The opinion referred to above is that the making of an action plan order is desirable in the interests of securing the rehabilitation of the offender or preventing the commission by him of further offences<sup>7</sup>. The court must not make an action plan order unless it has been notified by the Secretary of State<sup>8</sup> that arrangements for implementing such orders are available in the area proposed to be named in the order and the notice has not been withdrawn<sup>9</sup>. The court must not make an action plan order in respect of the offender if he is already the subject of such an order, or the court proposes to pass on him a custodial sentence or to make in respect of him a community order<sup>10</sup>, an attendance centre order<sup>11</sup>, a supervision order<sup>12</sup> or a referral order<sup>13</sup>.

1 For the meaning of 'child' see para 1259 note 1 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 69(2)(a). The requirements included in the order, and any directions given by the responsible officer, may include requirements authorised by s 70 (see para 1366 post): s 69(1). An action plan order must name the local justice area in which it appears to the court making the order, or to the court varying any provision included in it, that the offender resides or will reside: s 69(8) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 76). Before making an action plan order, the court must obtain and consider:

3360 (1) a written report by an officer of a local probation board, a social worker of a local authority or a member of a youth offending team indicating:

195.(a) the requirements proposed by that person to be included in the order (Powers of Criminal Courts (Sentencing) Act 2000 s 69(6)(a)(i));

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196.(b) the benefits to the offender that the proposed requirements are designed to achieve (s 69(6)(a)(ii)); and

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197.(c) the attitude of a parent or guardian of the offender to the proposed requirements (s 69(6)(a)(iii)); and

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3361 (2) where the offender is aged under 16, information about the offender's family circumstances and the likely effect of the order on those circumstances (s 69(6)(b)).

3 Ibid s 69(1)(a).

4 Ibid s 69(1)(b). 'Responsible officer', in relation to an offender subject to an action plan order, means one of the following who is specified in the order:

3362 (1) an officer of a local probation board (s 69(4)(a) (substituted by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 4(1)(a), (2)));

3363 (2) a social worker of a local authority (Powers of Criminal Courts (Sentencing) Act 2000 s 69(4)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4)); and

3364 (3) a member of a youth offending team (Powers of Criminal Courts (Sentencing) Act 2000 s 69(4)(c)).

As to youth offending teams (ie as established under the Crime and Disorder Act 1998 s 39 (as amended)) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703. Where an action plan order specifies an officer of a local probation board under the Powers of Criminal Courts (Sentencing) Act 2000 s 69(4) (as amended), the officer specified must be an officer appointed for or assigned to the local justice area named in the order: s 69(9) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 76). Where an action plan order specifies under the Powers of Criminal Courts (Sentencing) Act 2000 s 69(4) (as amended) a social worker of a local authority or a member of a youth offending team, the social worker or member specified must be a social worker of, or a member of a youth offending team established by, the local authority within whose area it appears to the court that the offender resides or will reside: s 69(10) (amended by the Children Act 2004 Sch 5 Pt 4).

5 Powers of Criminal Courts (Sentencing) Act 2000 s 69(1)(c).

6 Ibid s 69(2).

7 Ibid s 69(3).

8 As to the Secretary of State see para 155 ante.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 69(7).

10 Ie under the Criminal Justice Act 2003 s 177: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 229.

11 See para 1358 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 267 et seq.

12 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250 et seq.

13 Powers of Criminal Courts (Sentencing) Act 2000 s 69(5) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 104(1), (3)). As to referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

## UPDATE

### 1365-1369 Action Plan Orders

Action plan orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(i) Youth Community Orders/F. ACTION PLAN ORDERS/1366. Requirements included in action plan orders.

### **1366. Requirements included in action plan orders.**

Requirements included in an action plan order<sup>1</sup>, or directions given by a responsible officer<sup>2</sup>, may require the offender to do all or any of the following things<sup>3</sup>:

- 1342 (1) to participate in activities specified in the requirements or directions at a time or times so specified<sup>4</sup>;
- 1343 (2) to present himself to a person or persons specified in the requirements or directions at a place or places and at a time or times so specified<sup>5</sup>;
- 1344 (3) to attend at an attendance centre specified in the requirements or directions for a number of hours so specified<sup>6</sup>;
- 1345 (4) to stay away from a place or places specified in the requirements or directions<sup>7</sup>;
- 1346 (5) to comply with any arrangements for his education specified in the requirements or directions<sup>8</sup>;
- 1347 (6) to make reparation<sup>9</sup> specified in the requirements or directions to a person or persons so specified<sup>10</sup> or to the community at large<sup>11</sup>; and
- 1348 (7) to attend any hearing fixed by the court<sup>12</sup>.

Where a court proposing to make an action plan order is satisfied that the offender is dependent on, or has a propensity to misuse, drugs, and that his dependency or propensity is such as requires and may be susceptible to treatment<sup>13</sup>, requirements included in an action plan order may require the offender for a period specified in the order ('the treatment period') to submit to treatment by or under the direction of a specified person having the necessary qualifications and experience ('the treatment provider') with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs<sup>14</sup>. The required treatment must be:

- 1349 (a) treatment as a resident in such institution or place as may be specified in the order<sup>15</sup>; or
- 1350 (b) treatment as a non-resident at such institution or place, and at such intervals, as may be so specified<sup>16</sup>,

but the nature of the treatment must not be specified in the order except as mentioned in head (a) or head (b) above<sup>17</sup>.

An action plan order which includes such a requirement may, if the offender is aged 14 or over, also include a requirement ('a testing requirement') that, for the purpose of ascertaining whether he has any drug in his body during the treatment period, the offender must during that period, at such times or in such circumstances as may (subject to the provisions of the order) be determined by the responsible officer or the treatment provider, provide samples of such description as may be so determined<sup>18</sup>.

Requirements and directions must, as far as practicable, be such as to avoid any conflict with the offender's religious beliefs or with the requirements of any other youth community order or any community order to which he may be subject, and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>19</sup>.



Immediately after making an action plan order, a court may fix a further hearing for a date not more than 21 days after the making of the order, and direct the responsible officer to make, at that hearing, a report as to the effectiveness of the order and the extent to which it has been implemented<sup>20</sup>. At such hearing, the court must consider the responsible officer's report, and may, on the application of the responsible officer or the offender, vary the order<sup>21</sup>.

1 For the meaning of 'action plan order' see para 1365 ante.

2 For the meaning of 'responsible officer' see para 1365 note 4 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 70(1).

4 Ibid s 70(1)(a).

5 Ibid s 70(1)(b).

6 Ibid s 70(1)(c). Head (c) in the text applies only where the offence committed by the offender is an offence punishable with imprisonment: s 70(2). As to reparation orders see para 1308 ante.

7 Ibid s 70(1)(d).

8 Ibid s 70(1)(e).

9 For the purposes of head (6) in the text, 'make reparation', in relation to an offender, means make reparation for the offence otherwise than by the payment of compensation: ibid s 70(3).

10 A person must not be specified in requirements or directions under head (6) in the text unless he is identified by the court or (as the case may be) the responsible officer as a victim of the offence or a person otherwise affected by it, and he consents to the reparation being made: ibid s 70(4).

11 Ibid s 70(1)(f).

12 Ibid s 70(1)(g).

13 Ibid s 70(4A) (s 70(4A)-(4H) added by the Criminal Justice Act 2003 s 279, Sch 24 para 1).

14 Powers of Criminal Courts (Sentencing) Act 2000 s 70(4B) (as added: see note 13 supra). A requirement must not be included in an action plan order by virtue of s 70(4B) (as added):

3365 (1) in any case, unless:

198.(a) the court is satisfied that arrangements have been or can be made for the treatment intended to be specified in the order (including arrangements for the reception of the offender where he is to be required to submit to treatment as a resident) (s 70(4D)(a)(i) (as so added)); and

26

199.(b) the requirement has been recommended to the court as suitable for the offender by an officer of a local probation board or by a member of a youth offending team (s 70(4D)(a)(ii) (as so added)); and

27

3366 (2) in the case of an order made or to be made in respect of a person aged 14 or over, unless he consents to its inclusion (s 70(4D)(b) (as so added)).

15 Ibid s 70(4C)(a) (as added: see note 13 supra).

16 Ibid s 70(4C)(b) (as added: see note 13 supra).

17 Ibid s 70(4C) (as added: see note 13 supra).

18 Ibid s 70(4E) (as added: see note 13 supra). A testing requirement must not be included in an action plan order by virtue of s 70(4E) (as added) unless the offender is aged 14 or over and consents to its inclusion, and the court has been notified by the Secretary of State that arrangements for implementing such requirements are in force in the area proposed to be specified in the order: s 70(4F) (as so added). A testing requirement must specify for each month the minimum number of occasions on which samples are to be provided: s 70(4G)

(as so added). An action plan order including a testing requirement must provide for the results of tests carried out on any samples provided by the offender in pursuance of the requirement to a person other than the responsible officer to be communicated to the responsible officer: s 70(4H) (as so added).

19 Ibid s 70(5) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 105)).

20 Powers of Criminal Courts (Sentencing) Act 2000 s 71(1).

21 Ibid s 71(2). The order may be varied by cancelling any provision included in it, or by inserting in it (either in addition to or in substitution for any of its provisions) any provision that the court could originally have included in it: s 71(2).

## **UPDATE**

### **1365-1369 Action Plan Orders**

Action plan orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1366 Requirements included in action plan orders**

NOTE 13--Criminal Justice Act 2003 s 279, Sch 24 repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 94, 97, Sch 28 Pt 1.

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### **1367. Breach of requirement of action plan order or reparation order.**

If while an action plan order<sup>1</sup> or reparation order<sup>2</sup> is in force in respect of an offender it is proved to the satisfaction of the appropriate court<sup>3</sup>, on the application of the responsible officer<sup>4</sup>, that the offender has failed to comply with any requirement included in the order<sup>5</sup>, the court:

- 1351 (1) whether or not it also makes an order revoking or amending the action plan order or reparation order<sup>6</sup>;
- 58
50. (a) may order the offender to pay a fine of an amount not exceeding a stated amount<sup>7</sup>;
51. (b) may make a curfew order in respect of him<sup>8</sup>; or
52. (c) may make an attendance centre order in respect of him<sup>9</sup>;
- 59
- 1352 (2) if the action plan order or reparation order was made by a magistrates' court, may revoke the order and deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made<sup>10</sup>; or
- 1353 (3) if the action plan order or reparation order was made by the Crown Court, may commit him in custody or release him on bail until he can be brought or appear before the Crown Court<sup>11</sup>.

Where a court deals with an offender under head (3) above, it must send to the Crown Court a certificate signed by a justice of the peace giving particulars of the offender's failure to comply with the requirement in question, and such other particulars of the case as may be desirable<sup>12</sup>. A certificate purporting to be so signed is admissible as evidence of the failure before the Crown Court<sup>13</sup>. Where by virtue of head (3) above the offender is brought or appears before the Crown Court, and it is proved to the satisfaction of the court that he has failed to comply with the requirement in question, that court may deal with him, for the offence in respect of which the order was made, in any way in which it could have dealt with him for that offence if it had not made the order<sup>14</sup>.

In dealing with an offender under the provisions relating to breach of requirement of an action plan order or a reparation order<sup>15</sup>, a court must take into account the extent to which he has complied with the requirements of the action plan order or reparation order<sup>16</sup>.

Where a reparation order or action plan order has been made on appeal, for these purposes<sup>17</sup> it is deemed: (i) if it was made on an appeal brought from a magistrates' court, to have been made by that magistrates' court; and (ii) if it was made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, to have been made by the Crown Court<sup>18</sup>.

The above provisions<sup>19</sup> have effect subject to the provision<sup>20</sup> relating to the presence of the offender in court when an application<sup>21</sup> is made by the appropriate officer<sup>22</sup>.

1 As to action plan orders see para 1365 ante.

2 As to reparation orders see para 1308 ante.

3 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 ss 72, 75, Sch 8, 'the appropriate court', in relation to an action plan order or reparation order, means a youth court acting for the local justice area for the time being named in the order in pursuance of s 69(8) (see para 1365 ante) or, as the case may be, s 74(4) (see para 1308 ante): Sch 8 para 1 (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 1). As to youth courts see para 1263 et seq ante.

4 For the meaning of 'responsible officer' in relation to an offender subject to an action plan order see para 1365 note 4 ante. For the meaning of 'responsible officer' in relation to an offender subject to a reparation order see para 1308 note 16 ante.

5 Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 2(1).

6 Ibid Sch 8 para 2(2)(a). Such an order which revokes or amends the action plan order or reparation order is made under Sch 8 para 5(1): see para 1368 post.

7 Ibid Sch 8 para 2(2)(a)(i). At the date at which this volume states the law the fine may not exceed £1000: Sch 8 para 2(2)(a)(i). A fine imposed under Sch 8 para 2 is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction: Sch 8 para 2(6).

8 Ibid Sch 8 para 2(2)(a)(ii). Where a court considers it appropriate to make an order in respect of any person in pursuance of Sch 8 para 2(2)(a)(ii), it may make an order requiring him to remain, for periods specified in the order, at a place so specified. Section 37(3)-(12) (provisions relating to curfew orders), and s 36B (as added), s 40 and Sch 3 so far as relating to curfew orders, have effect in relation to a curfew order made by virtue of Sch 8 para 2(2)(a)(ii) as they have effect in relation to any other curfew order, subject to Sch 8 para 3(5): Sch 8 para 3(2) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 202(1), (2)(a); and the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 129(a)(i)). The Criminal Justice Act 2003 ss 148, 156 (restrictions and procedural requirements for community sentences) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 164, 617, 626) do not apply in relation to a curfew order made by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 2(2)(a)(ii): Sch 8 para 3(3) (amended by the Criminal Justice Act 2003 Sch 32 Pt 1 paras 90, 129(a)(ii)).

In relation to an offender aged under 16 on the date when his failure to comply with the action plan order or reparation order is proved to the court, a curfew order may specify different places or different periods for different days, but must not specify periods which fall outside the period of six months beginning with the day on which it is made: Powers of Criminal Courts (Sentencing) Act 2000 s 37(3). Until a day to be appointed in relation to an offender aged under 16 on conviction, this provision has effect as if the reference to six months were a reference to three months: s 37(4) (prospectively repealed by the Anti-social Behaviour Act 2003 s 88, 92, Sch 2 para 2(1), (3), Sch 3). The repeal of this provision is in force in relation to areas specified in the Anti-social Behaviour Act 2003 (Commencement No 4) Order 2004, SI 2004/2168, art 3. Before making a curfew order in respect of an offender the court must obtain and consider information about his family circumstances and the likely effect of such an order on those circumstances: Powers of Criminal Courts (Sentencing) Act 2000 s 37(9) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7).

The Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (as amended; prospectively substituted) (breach of requirement of certain community orders) has effect, with modifications, in relation to such curfew orders: see Sch 8 para 3(5), (6).

9 Ibid Sch 8 para 2(2)(a)(iii). Where a court considers it appropriate to make an order in respect of any person in pursuance of Sch 8 para 2(2)(a)(iii), the court may, if it has been notified by the Secretary of State that an attendance centre is available for the reception of persons of his description, order him to attend at such a centre, to be specified in the order, for such number of hours as may be so specified: s 60(1) (modified by Sch 8 para 3(1)). Section 60(3)-(11) (see para 1358 ante), and so far as applicable, s 61, Sch 5, have effect in relation to an attendance centre order made by virtue of Sch 8 para 2(2)(a)(iii) as they have effect in relation to any other attendance centre order, subject to Sch 8 para 4(4): Sch 8 para 4(2). If it is proved to the satisfaction of the magistrates' court before which an offender appears or is brought under Sch 5 para 1 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 268) that he has failed without reasonable excuse to attend in accordance with the attendance centre order or has committed a breach of rules for the regulation and management of attendance centres, that court may, where the attendance centre order was made by a magistrates' court, deal with him in any way in which he could have been dealt with by the court which made the order if the order had not been made: Sch 5 para 2(1)(b) (modified by Sch 8 para 4(4)). Any power conferred by Sch 5 para 4 (see para 1360 ante) on a magistrates' court to revoke an attendance centre order made by such a court, or on the Crown Court to revoke an attendance centre order made by the Crown Court, includes power to deal with the offender in any way in which he could have been dealt with by the court which made the order if the order had not been made: Sch 5 para 4(3) (modified by Sch 8 para 4(4)). A person sentenced under Sch 5 para 2(1)(b) may appeal to the Crown Court against the sentence: Sch 5 para 2(6) (modified by Sch 8 para 4(4)). A person sentenced by a magistrates' court under Sch 5 para 4(3) may appeal to the Crown Court against the sentence: Sch 5 para 4(4) (modified by Sch 8 para 4(4)). The Criminal Justice Act

2003 ss 148 and 156 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 164, 617, 626) do not apply in relation to an attendance centre order made by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 2(2)(a)(iii): Sch 8 para 4(3) (amended by the Criminal Justice Act 2003 Sch 32 Pt 1 para 42(1), (34)).

10 Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 2(2)(b).

11 Ibid Sch 8 para 2(2)(c). As to bail generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1165-1201.

12 Ibid Sch 8 para 2(3).

13 Ibid Sch 8 para 2(3).

14 Ibid Sch 8 para 2(4). Where the Crown Court deals with an offender under Sch 8 para 2(4), it must revoke the action plan order or reparation order if it is still in force: Sch 8 para 2(5).

15 Ie under ibid Sch 8 para 2.

16 Ibid Sch 8 para 2(7).

17 Ie for the purposes of ibid Sch 8 para 2.

18 Ibid Sch 8 para 2(8). Where Sch 8 para 2 applies, the court, if the action plan order or reparation order was made by a magistrates' court, may revoke the order and deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order: Sch 8 para 2(2)(b) (modified by Sch 8 para 2(8)). Where, by virtue of Sch 8 para 2(2)(c), the offender is brought or appears before the Crown Court, and it is proved to the satisfaction of the court that he has failed to comply with the requirement in question, that court may deal with him, for the offence in respect of which the order was made, in any way in which it could have dealt with him for that offence: Sch 8 para 2(4) (modified by Sch 8 para 2(8)).

19 Ie ibid Sch 8 para 2: see the text and notes 1-18 supra, 20-22 infra.

20 Ie ibid Sch 8 para 6: see para 1639 ante.

21 Ie an application under ibid Sch 8 para 2(1) (see note 5 supra) or Sch 8 para 5(1) (see para 1386 post).

22 Ibid Sch 8 para 2(9).

## UPDATE

### 1365-1369 Action Plan Orders

Action plan orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### 1367 Breach of requirement of action plan order or reparation order

TEXT AND NOTES--Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 amended and repealed in part: Criminal Justice and Immigration Act 2008 Sch 4 paras 62, 108, Sch 28 Pt 1.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--Powers of Criminal Courts (Sentencing) Act 2000 s 75 amended: Criminal Justice and Immigration Act 2008 Sch 4 para 55.



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### **1368. Revocation and amendment of reparation and action plan orders.**

If while an action plan order<sup>1</sup> or reparation order<sup>2</sup> is in force in respect of an offender it appears to the appropriate court, on the application of the responsible officer<sup>3</sup> or the offender, that it is appropriate to make an order revoking or amending the action plan order or reparation order, the court may<sup>4</sup>:

- 1354 (1) make an order revoking the action plan order or reparation order<sup>5</sup>; or
- 1355 (2) make an order amending it by cancelling any provision included in it, or by inserting in it (either in addition to or in substitution for any of its provisions) any provision which could have been included in the order if the court had then had power to make it and were exercising the power<sup>6</sup>.

Where an application under head (1) above for the revocation of an action plan order or reparation order is dismissed, no further application for its revocation may be made under head (1) above by any person except with the consent of the appropriate court<sup>7</sup>.

1 As to action plan orders see para 1365 ante.

2 As to reparation orders see para 1308 ante.

3 For the meaning of 'responsible officer' in relation to an offender subject to an action plan order see para 1365 note 4 ante. For the meaning of 'responsible officer' in relation to an offender subject to a reparation order see para 1308 note 16 ante.

4 Powers of Criminal Courts (Sentencing) Act 2000 ss 72, 75, Sch 8 para 5(1). Schedule 8 para 5(1) has effect subject to Sch 8 para 6 (see para 1369 post): Sch 8 para 5(2).

5 Ibid Sch 8 para 5(1)(a).

6 Ibid Sch 8 para 5(1)(b).

7 Ibid Sch 8 para 5(3).

### **UPDATE**

#### **1365-1369 Action Plan Orders**

Action plan orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

#### **1368 Revocation and amendment of reparation and action plan orders**

TEXT AND NOTES--Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 5  
amended: Criminal Justice and Immigration Act 2008 Sch 4 paras 62(7), 108(4), Sch 28  
Pt 1.



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### **1369. Presence of offender in court.**

Where the responsible officer<sup>1</sup> makes an application to the appropriate court that the offender has failed to comply with any requirement included in the action plan order or reparation order<sup>2</sup>, or makes an application that it is appropriate for the court to make an order revoking or amending the action plan order or reparation order<sup>3</sup>, he may bring the offender before the court<sup>4</sup>. Without prejudice to any power to issue a summons or warrant<sup>5</sup>, the court to which such an application is made may issue a summons or warrant for the purpose of securing the attendance of the offender before it<sup>6</sup>. Where the offender is arrested in pursuance of such a warrant<sup>7</sup> and cannot be brought immediately before the appropriate court, the person in whose custody he is may make arrangements for his detention in a place of safety<sup>8</sup> for a period of not more than 72 hours from the time of the arrest (and it is lawful for him to be detained in pursuance of the arrangements), and must within that period bring him before a youth court<sup>9</sup>. Where an offender is so brought before a youth court other than the appropriate court, the youth court may direct that he be released immediately, or remand him to local authority accommodation<sup>10</sup>. Where an application is made to a court that it is appropriate for the court to make an order revoking or amending the action plan order or reparation order<sup>11</sup>, the court may remand (or further remand) the offender to local authority accommodation if a warrant has been issued<sup>12</sup> for the purpose of securing the attendance of the offender before the court, or the court considers that remanding (or further remanding) him will enable information to be obtained which is likely to assist the court in deciding whether and, if so, how to exercise its powers to revoke or amend the action plan order or reparation order<sup>13</sup>.

A court remanding an offender to local authority accommodation<sup>14</sup> must designate, as the authority which is to receive him, the local authority for the area in which the offender resides or, where it appears to the court that he does not reside in the area of a local authority, the local authority specified by the court, and in whose area the offence or an offence associated with it was committed<sup>15</sup>.

A court may make an order revoking or amending the action plan order or reparation order<sup>16</sup> in the absence of the offender if the effect of the order is confined to one or more of the following, that is to say<sup>17</sup>:

- 1356 (1) revoking the action plan order or reparation order<sup>18</sup>;
- 1357 (2) cancelling a requirement included in the action plan order or reparation order<sup>19</sup>;
- 1358 (3) altering in the action plan order or reparation order the name of any area<sup>20</sup>; or
- 1359 (4) changing the responsible officer<sup>21</sup>.

The offender may appeal to the Crown Court against: (a) any order which makes him pay a fine, makes him the subject of a curfew order, makes an attendance centre order in respect of him<sup>22</sup>, or revokes or amends the action plan order or reparation order<sup>23</sup>, except an order made or which could have been made in his absence<sup>24</sup>; and (b) the dismissal of an application<sup>25</sup> to revoke an action plan order or reparation order<sup>26</sup>.

1 For the meaning of 'responsible officer' in relation to an offender subject to an action plan order see para 1365 note 4 ante. For the meaning of 'responsible officer' in relation to an offender subject to a reparation order see para 1308 note 16 ante.

2 Ie an application under the Powers of Criminal Courts (Sentencing) Act 2000 ss 72, 75, Sch 8 para 2(1): see para 1367 ante.

3 Ie an application under *ibid* Sch 8 para 5(1): see para 1368 ante.

4 *Ibid* Sch 8 para 6(1). Subject to Sch 8 para 6(9) (see the text to notes 17-21 *infra*), a court must not make an order under Sch 8 para 2(1) (see para 1367 ante) or Sch 8 para 5(1) (see para 1368 ante) unless the offender is present before the court: Sch 8 para 6(1).

5 Ie apart from the power under *ibid* Sch 8 para 6(2): see the text to note 6 *infra*. As to the issue of summonses and warrants see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 912 *et seq*.

6 *Ibid* Sch 8 para 6(2). The court must not begin to hear the complaint in the absence of the defendant or issue a warrant under the Magistrates' Courts Act 1980 s 55 (see MAGISTRATES) unless either it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the summons cannot be served or was served on him within what appears to the court to be a reasonable time before the hearing or adjourned hearing or the defendant has appeared on a previous occasion to answer to the complaint: s 55(3) (modified by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 6(3)). Where the defendant fails to appear at an adjourned hearing, the court must not issue a warrant under the Magistrates' Courts Act 1980 s 55 unless it is satisfied that he has had adequate notice of the time and place of the adjourned hearing: s 55(4).

7 Ie a warrant issued by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 6(2): see the text to note 6 *supra*.

8 For the meaning of 'place of safety' see para 608 note 4 ante; definition applied by *ibid* Sch 8 para 6(4).

9 *Ibid* Sch 8 para 6(4). As to youth courts see para 1263 *et seq* ante. As to where the offender is aged 18 or over at the time when he is brought before a youth court other than the appropriate court under Sch 8 para 6(4), or is aged 18 or over at a time when (apart from Sch 8 para 6(7)) the appropriate court could exercise its powers under Sch 8 para 6(6) (see the text to note 13 *infra*) in respect of him see Sch 8 para 6(7) (prospectively amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 249.

10 *Ibid* Sch 8 para 6(5).

11 See note 3 *supra*.

12 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 6(2): see para 1349 ante.

13 *Ibid* Sch 8 para 6(6).

14 Ie under *ibid* Sch 8 para 6: see the text and notes 1-13 *supra*, 15-21 *infra*.

15 *Ibid* Sch 8 para 6(8).

16 See note 3 *supra*.

17 Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 6(9).

18 *Ibid* Sch 8 para 6(9)(a).

19 *Ibid* Sch 8 para 6(9)(b).

20 *Ibid* Sch 8 para 6(9)(c).

21 *Ibid* Sch 8 para 6(9)(d).

22 Ie under *ibid* Sch 8 para 2(2): see para 1367 ante.

23 See note 3 *supra*.

24 Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 para 7(a). An order may be made in the absence of the offender by virtue of Sch 8 para 6(9): see the text to note 17 *supra*.

25 Ie under *ibid* Sch 8 para 5(1): see para 1368 ante.

26 Ibid Sch 8 para 7(b).

## **UPDATE**

### **1365-1369 Action Plan Orders**

Action plan orders are abolished by the Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1. See now the Criminal Justice and Immigration Act 2008 Pt 1 (ss 1-8) which introduces youth rehabilitation orders, a new generic community sentence for children and young people. For provision with respect to youth rehabilitation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 202 et seq.

### **1369 Presence of offender in court**

TEXT AND NOTES--Powers of Criminal Courts (Sentencing) Act 2000 Sch 8 amended: Criminal Justice and Immigration Act 2008 Sch 4 paras 62, 108, Sch 28 Pt 1.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/A. COMMUNITY REHABILITATION ORDERS, COMMUNITY PUNISHMENT ORDERS AND COMMUNITY PUNISHMENT AND REHABILITATION ORDERS/1370. Community rehabilitation orders.

## **(ii) Community Orders before 4 April 2009**

### ***A. COMMUNITY REHABILITATION ORDERS, COMMUNITY PUNISHMENT ORDERS AND COMMUNITY PUNISHMENT AND REHABILITATION ORDERS***

#### **1370. Community rehabilitation orders.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. Where the court by or before which he is convicted is of the opinion that his supervision is desirable in the interests of securing his rehabilitation, or protecting the public from harm from him or preventing the commission by him of further offences, the court may<sup>2</sup> make a community rehabilitation order<sup>3</sup> requiring him to be under supervision for a period specified in the order of not less than six months nor more than three years<sup>4</sup>. If the offender is aged under 18 at the time when the community rehabilitation order is made, he must<sup>5</sup> be under the supervision of<sup>6</sup>:

- 1360 (1) an officer of a local probation board appointed for or assigned to the local justice area specified in the order<sup>7</sup>; or
- 1361 (2) a member of a youth offending team<sup>8</sup> established by a local authority specified in the order<sup>9</sup>.

A community rehabilitation order may in addition require the offender to comply during the whole or any part of the community rehabilitation period with such requirements as the court, having regard to the circumstances of the case, considers desirable in the interests of securing the rehabilitation of the offender or protecting the public from harm from him or preventing the commission by him of further offences<sup>10</sup>.

Before making a community rehabilitation order, the court must explain to the offender in ordinary language:

- 1362 (a) the effect of the order<sup>11</sup>;
- 1363 (b) the consequences which may follow<sup>12</sup> if he fails to comply with any of the requirements of the order; and
- 1364 (c) that the court has power<sup>13</sup> to review the order on the application either of the offender or of the responsible officer<sup>14</sup>.

On making a community rehabilitation order, the court may, if it thinks it expedient for the purpose of the offender's reformation, allow any person who consents to do so to give security for the good behaviour of the offender<sup>15</sup>.

If the offender is aged under 18, the court by which a community rehabilitation order is made must immediately give copies of the order to an officer of a local probation board or member of a youth offending team assigned to the court<sup>16</sup>. A copy must also be given to the offender, to the responsible officer and to the person in charge of any institution in which the offender is required by the order to reside<sup>17</sup>. The court by which such an order is made must also, except

where it itself acts for the local justice area specified in the order, send to the justices' chief executive for that area a copy of the order, and such documents and information relating to the case as it considers likely to be of assistance to a court acting for that area in the exercise of its functions in relation to the order<sup>18</sup>.

The procedure enacted for dealing with failures to comply with the requirements of certain community orders, for revoking such orders with or without the substitution of other sentences and for amending such orders<sup>19</sup> has effect so far as it relates to community rehabilitation orders<sup>20</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1371-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)). Likewise, as from 4 April 2009 the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see note 3 infra) is substituted by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 125 and will only apply to curfew and exclusion orders (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233).

2 The subject to the Powers of Criminal Courts (Sentencing) Act 2000 ss 34-36 (repealed subject to savings in respect of offences committed before 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 2 para 5).

3 Until 1 April 2001, community rehabilitation orders were known as probation orders: see the Powers of Criminal Courts (Sentencing) Act 2000 s 41; the Criminal Justice and Court Services Act 2000 s 43(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 676. A community rehabilitation order is a 'relevant order' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq): see Sch 3 para 1(1)(b) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 1(1), (2)). As to the breach of a requirement of the order see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 3-9 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 233-235. A community rehabilitation order may be revoked under Sch 3 paras 10-17 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 236-238) and the circumstances in which such an order may be revoked include the offender's making good progress or his responding satisfactorily to supervision or, as the case may be, treatment: Sch 3 paras 10(3)(a), (4), 11(2)(a), (3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 199(1), (14)). Where a community rehabilitation order is in force, and no appeal against the order is pending, the court may, on application by the offender or the responsible officer, substitute the order for an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 12(1)(b) (see para 1289 ante): see Sch 3 para 12 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 3(1)(a), (2), 160, 199(1), (16)-(18); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(b)).

A court may amend a community rehabilitation order:

3367 (1) on the application of the offender, the responsible officer or any affected person by cancelling or adding any requirements (see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 19 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 3(1)(a), (2), 160, 199(1), (2), (17), (21); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241);

3368 (2) where the offender proposes to change, or has changed, his residence from one local justice area to another unless, in the opinion of the court, the order cannot then be complied with (see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 18 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 3(1)(a), (2), 160, 199(1), (3), (20); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(b)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241).

A community rehabilitation order may be amended under head (1) supra where the medical practitioner or other person by whom or under whose direction an offender is, in pursuance of any requirement of a community rehabilitation order, being treated for his mental condition or his dependency on or propensity to misuse drugs or alcohol: (a) is of the opinion that the treatment of the offender should be continued beyond the period specified in that behalf in the order; that the offender needs different treatment; that the offender is not susceptible to treatment; or that the offender does not require further treatment; or (b) is for any reason unwilling to continue to treat or direct the treatment of the offender: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 20 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras

160, 199(1), (16), (22); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)). As to supplementary provisions see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 23, 24 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241.

4 Ibid s 41(1), (2) (s 41(2) amended by the Criminal Justice and Court Services Act 2000 s 43(3)(a)). The Secretary of State may by order direct that the Powers of Criminal Courts (Sentencing) Act 2000 s 41(1) is to be amended by substituting, for the minimum or maximum period specified in that provision as originally enacted or as previously amended under s 45(1) (as amended), such period as may be specified in the order: s 45(1) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 1(1)(b), (2)). Such an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 45(1) (as amended) may make in Sch 3 para 19(2)(a) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241) any amendment which the Secretary of State thinks necessary in consequence of any substitution made by the order: s 45(2). As from a day to be appointed, s 45(2) is amended to provide that an order under s 45(1) (as amended) may make in Sch 3 para 2A(4), (5) (prospectively added) or Sch 3 para 19(2)(a) (as amended) any amendment which the Secretary of State thinks necessary in consequence of any substitution made by the order: s 45(2) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 167). At the date at which this volume states the law no such day had been appointed. As to the Secretary of State see para 155 ante. A community rehabilitation order must specify the local justice area in which the offender resides or will reside: Powers of Criminal Courts (Sentencing) Act 2000 s 41(3) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 1(1)(a), (2)). Provision is made for the making and amendment in England and Wales of certain community orders relating to persons residing in Scotland or Northern Ireland: see the Powers of Criminal Courts (Sentencing) Act 2000 s 44 (as amended), Sch 4 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS.

5 Ibid subject to ibid Sch 3 para 18 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-240.

6 Ibid s 41(5). If an order specifies a local authority for the purposes of head (2) in the text, the authority specified must be the local authority within whose area it appears to the court that the offender resides or will reside: s 41(5). Where the offender is aged 18 or over at the time when the community rehabilitation order is made, he must, subject to Sch 3 para 18 (offender's change of area) be required to be under the supervision of an officer of a local probation board appointed for or assigned to the local justice area specified in the order: s 41(4) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 paras 1(1)(a), (2), 4(1)(a), (2); and Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 68(a)).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 41(5)(a) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2)).

8 As to youth offending teams see para 1306 ante.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 41(5)(b).

10 Ibid s 42(1) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 160, 166). Without prejudice to the power of the court under the Powers of Criminal Courts (Sentencing) Act 2000 s 130 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq) to make a compensation order, the payment of sums by way of such damages for injury or compensation for loss must not be included among the additional requirements of a community rehabilitation order: s 42(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 1(1)(a), (2)).

Without prejudice to the generality of the Powers of Criminal Courts (Sentencing) Act 2000 s 42(1) (as amended) the additional requirements which may be included in a community rehabilitation order must include the requirements which are authorised by Sch 2 (repealed subject to savings): s 42(2)(a) (amended by the Criminal Justice and Court Services Act 2000 s 49(1)(a), Sch 7 Pt I para 1(1)(a), (2)). Without prejudice to the generality of the Powers of Criminal Courts (Sentencing) Act 2000 s 42(1) (as amended) and subject to s 42(2D), (2F) (as added), the order must, if the first set of conditions is satisfied, include a drug abstinence requirement and may include such a requirement if the second set of conditions is satisfied: s 42(2)(b) (added by the Criminal Justice and Court Services Act 2000 s 49(1)(b)). For these purposes, a drug abstinence requirement is a requirement for the offender to abstain from misusing specified Class A drugs and to provide, when instructed to do so by the responsible officer, any sample mentioned in the instruction for the purpose of ascertaining whether he has any specified Class A drug in his body: Powers of Criminal Courts (Sentencing) Act 2000 s 42(2A) (s 42(2A)-(2F) added by the Criminal Justice and Court Services Act 2000 s 49(1)(b)). The function of giving instructions for these purposes must be exercised in accordance with guidance given from time to time by the Secretary of State; and the Secretary of State may make rules for regulating the provision of samples in pursuance of such instructions: Powers of Criminal Courts (Sentencing) Act 2000 s 42(2E) (as so added).

The first set of conditions are that the offender was aged 18 or over on the date of his conviction for the offence; that, in the opinion of the court, the offender is dependent on or has a propensity to misuse specified Class A drugs; and that the offence is a trigger offence: s 42(2B) (as so added). The second set of conditions are

that the offender was aged 18 or over on the date of his conviction for the offence; and that, in the opinion of the court the offender is dependent on or has a propensity to misuse specified Class A drugs and the misuse by the offender of any specified Class A drug caused or contributed to the offence: s 42(2C) (as so added).

The order may not include a drug abstinence requirement if the community rehabilitation order includes any requirement in respect of drugs under Sch 2 para 6 (repealed subject to savings) or the community sentence includes a drug treatment and testing order or a drug abstinence order: s 42(2D) (as so added). The court must not include a drug abstinence requirement in the order unless the court has been notified by the Secretary of State that arrangements for implementing such requirements are available in the area proposed to be specified under s 41(3) (as amended) (see note 4 supra) and the notice has not been withdrawn: s 42(2F) (as so added).

11 This must include any additional requirements proposed to be included in the order in accordance with *ibid* s 42 (as amended; prospectively further amended): see note 10 supra.

12 *Ie* under *ibid* Sch 3 Pt II (as amended; prospectively further amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

13 *Ie* under *ibid* Sch 3 Pt III (as amended; prospectively further amended) and Pt IV (as amended; prospectively further amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 236 et seq.

14 *Ibid* s 41(7) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(b), (2)). As from a day to be appointed, the Powers of Criminal Courts (Sentencing) Act 2000 s 41(7) (as amended) is further amended to provide that before making a community rehabilitation order, the court must explain to the offender in ordinary language:

3369 (1) the effect of the order (including any additional requirements proposed to be included in the order in accordance with s 42 (as amended; prospectively further amended) (see note 10 supra) (s 41(7)(a));

3370 (2) the consequences which may follow, under Sch 3 Pt II (as amended; prospectively further amended), if he fails to comply with any of the requirements of the order (s 41(7)(b)); and

3371 (3) that the court has power, under Sch 3 Pt III (as amended; prospectively further amended) and Sch 3 Pt IV (as amended; prospectively further amended), to review the order on the application of the offender, the responsible officer or any affected person (s 41(7)(c) (prospectively amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 165(a)).

At the date at which this volume states the law no such day had been appointed. For these purposes, 'responsible officer', in relation to an offender who is subject to a community rehabilitation order, means the officer of a local probation board or member of a youth offending team responsible for his supervision: Powers of Criminal Courts (Sentencing) Act 2000 s 41(6) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(b), (2)). An offender in respect of whom a community rehabilitation order is made must keep in touch with the responsible officer in accordance with such instructions as he may from time to time be given by that officer, and must notify him of any change of address: Powers of Criminal Courts (Sentencing) Act 2000 s 41(11) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 1(1)(a), (2)). For these purposes, a person is an affected person in relation to a community rehabilitation order if:

3372 (a) requirements for securing the electronic monitoring of the offender's compliance with any other requirements imposed by the community order under the Powers of Criminal Courts (Sentencing) Act 2000 s 36B(1) (prospectively added) are included in the order by virtue of his consent (s 41(12)(a) (prospectively added by the Criminal Justice and Court Services Act 2000 Sch 7 Pt II paras 160, 165(c))); or

3373 (b) a requirement is included in the order under the Powers of Criminal Courts Sentencing Act 2000 s 42 (as amended; prospectively further amended), Sch 2 para 8(1) (prospectively added) for the purpose (or partly for the purpose) of protecting him from being approached by the offender (s 41(12)(b) (as so prospectively added)).

15 *Ibid* s 41(8) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 1(1)(a), (2)).

16 Powers of Criminal Courts (Sentencing) Act 2000 s 41(9)(b) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 4(1)(a), (2)). As to the position where the offender is aged 18 or over see the Powers of Criminal Courts (Sentencing) Act 2000 s 41(9)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 paras 1, 4).

17 Powers of Criminal Courts (Sentencing) Act 2000 s 41(9). As from a day to be appointed, the court by which such an order is made must give to any affected person any information relating to the order which the court considers it appropriate for him to have: s 41(9A) (added by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 165(b)). At the date at which this volume states the law no such day had been appointed.

18 Powers of Criminal Courts (Sentencing) Act 2000 s 41(10).

19 See *ibid* Sch 3 (as amended; prospectively further amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

20 *Ibid* s 43 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 1(1)(b), (2)).

## **UPDATE**

### **1370-1373 Community Rehabilitation Orders, Community Punishment Orders and Community Punishment and Rehabilitation Orders**

Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

#### **1370 Community rehabilitation orders**

TEXT AND NOTES 1-18--2000 Act s 41(4)-(6), (9) further amended: SI 2008/912.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/A. COMMUNITY REHABILITATION ORDERS, COMMUNITY PUNISHMENT ORDERS AND COMMUNITY PUNISHMENT AND REHABILITATION ORDERS/1371. Community punishment orders.

### **1371. Community punishment orders.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. The offence is punishable with imprisonment, the court by or before which he is convicted may<sup>2</sup> make a community punishment order<sup>3</sup> requiring him to perform unpaid work<sup>4</sup>. The number of hours which a person may be required to work under a community punishment order must be specified in the order and must be in the aggregate<sup>5</sup> not less than 40<sup>6</sup>, and not more than 240<sup>7</sup>.

A court must not make a community punishment order in respect of an offender unless, after hearing (if the court thinks it necessary) an appropriate officer<sup>8</sup>, the court is satisfied that the offender is a suitable person to perform work under such an order<sup>9</sup>; nor may it make a community punishment order in respect of an offender unless it is satisfied that provision for him to perform work under such an order can be made under the arrangements for persons to perform work under such orders which exist in the local justice area in which he resides or will reside<sup>10</sup>.

Where a court makes community punishment orders in respect of two or more offences of which the offender has been convicted by or before the court, the court may direct that the hours of work specified in any of those orders are to be concurrent with or additional to those specified in any other of those orders, but so that the total number of hours which are not concurrent must not exceed the specified maximum<sup>11</sup>.

A community punishment order must specify the local justice area in which the offender resides or will reside, and where the offender is aged under 18 at the time the order is made, may also specify a local authority<sup>12</sup>; and if the order specifies a local authority for those purposes, the authority specified must be the local authority within whose area it appears to the court that the offender resides or will reside<sup>13</sup>.

Before making a community punishment order, the court must explain to the offender in ordinary language<sup>14</sup>:

- 1365 (1) the purpose and effect of the order<sup>15</sup>;
- 1366 (2) the consequences which may follow<sup>16</sup> if he fails to comply with any of those requirements<sup>17</sup>; and
- 1367 (3) that the court has power<sup>18</sup> to review the order on the application either of the offender or of the responsible officer<sup>19</sup>.

If the offender is aged under 18, the court by which a community punishment order is made must immediately give copies of the order to an officer of a local probation board or member of a youth offending team<sup>20</sup>. A copy must also be given to the offender and to the responsible officer<sup>21</sup>. The court by which such an order is made must also, except where it itself acts for the local justice area specified in the order, send to the justices' chief executive for that area a copy of the order, and such documents and information relating to the case as it considers likely to be of assistance to a court acting for that area in the exercise of its functions in relation to the order<sup>22</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1370 ante, 1372-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)). Likewise, as from 4 April 2009 the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see note 3 *infra*) is substituted by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 125 and will only apply to curfew and exclusion orders (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231 et seq).

2 Is subject to the Powers of Criminal Courts (Sentencing) Act 2000 ss 34-36 (repealed subject to savings in respect of offences committed before 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 2 para 5).

3 Until 1 April 2001, community punishment orders were known as community service orders: see the Powers of Criminal Courts (Sentencing) Act 2000 s 46 (as amended); the Criminal Justice and Court Services Act 2000 s 44(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 196, 676. A community punishment order is a 'relevant order' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq): see Sch 3 para 1(1)(c) (amended by the Criminal Justice and Court Service Act 2000 Sch 7 para 2(1), (2)). As to the breach of a requirement of the order see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 3-9 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 233-235. A community punishment order may be revoked under Sch 3 paras 10-17 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 236-238. The community punishment order may be amended where the offender proposes to change, or has changed, his residence from one local justice area to another unless, in the opinion of the court, the order cannot then be complied with: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 18 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 3(1)(a), (2), 160, 199(1), (3), (20); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(b)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241. The court may extend a community punishment order on the application of the offender or the relevant officer if the court feels it would be in the interests of justice to do so: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 22 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 3(1)(a), (2), 160, 199(1), (23); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)). As to supplementary provisions see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 23, 24 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 46(1), (2) (s 46(2) amended by the Criminal Justice and Court Services Act 2000 s 44(3)(a)). Such unpaid work is performed in accordance with the Powers of Criminal Courts (Sentencing) Act 2000 s 47 (as amended): see para 1372 post.

5 Ibid s 46(3) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 2(1)(a), (2)). The Secretary of State may by order direct that the Powers of Criminal Courts (Sentencing) Act 2000 s 46(3) (as amended) is to be further amended by substituting, for the maximum number of hours for the time being specified in s 46(3), such number of hours as may be specified in the order: s 50. At the date at which this volume states the law no such order had been made. As to the Secretary of State see para 155 ante.

6 Ibid s 46(3)(a).

7 Ibid s 46(3)(b).

8 For the purposes of *ibid* s 46(4) (as amended), 'an appropriate officer' means, in the case of an offender aged under 18, an officer of a local probation board, a social worker of a local authority or a member of a youth offending team: s 46(5)(b) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2)). As to youth offending teams see para 1306 ante. For the meaning of 'an appropriate officer' in relation to an offender aged 18 or over see the Powers of Criminal Courts (Sentencing) Act 2000 s 46(5)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 4).

9 Powers of Criminal Courts (Sentencing) Act 2000 s 46(4) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

10 Powers of Criminal Courts (Sentencing) Act 2000 s 46(6) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)). The Powers of Criminal Courts (Sentencing) Act 2000 s 46(6) (as amended) has effect subject to s 49 (as amended), Sch 4 paras 3, 4 (as amended) (transfer of order to Scotland or Northern Ireland): s 46(7).

11 Ibid s 46(8) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(b), (2)). The maximum number of hours is that specified in the Powers of Criminal Courts (Sentencing) Act 2000 s 46(3)(b) (as amended): see the text and note 7 *supra*.

12 le for the purposes of *ibid* s 47(5)(b) (cases where functions are to be discharged by member of a youth offending team): see para 1372 post.

13 *Ibid* s 46(9) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

14 Powers of Criminal Courts (Sentencing) Act 2000 s 46(10) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

15 Powers of Criminal Courts (Sentencing) Act 2000 s 46(10)(a). In particular, the court must explain the requirements of the order as specified in s 47(1)-(3) (s 47(1), (3) as amended): see para 1372 post.

16 le under *ibid* s 48 (as amended), Sch 3 Pt II (as amended; prospectively further amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

17 *Ibid* s 46(10)(b).

18 le under *ibid* Sch 3 Pts III, IV (as amended; prospectively further amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 236 et seq.

19 *Ibid* s 46(10)(c). For the purposes of s 46 (as amended), Sch 3 (as amended; prospectively further amended), 'responsible officer', in relation to an offender subject to a community punishment order, means the person mentioned in s 47(4) (as amended) or s 47(5)(b) (see para 1372 post) who, as respects the order, is responsible for discharging the functions conferred by s 47 (as amended): s 46(13) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 160, 168, Sch 8). As to the effects of breach of requirement of a community punishment order see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

20 *Ibid* s 46(11)(b) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 4(1)(a), (2)). As to whom a copy of the community punishment order must be given if the offender is aged 18 or over see the Powers of Criminal Courts (Sentencing) Act 2000 s 46(11)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt 1 para 4).

21 Powers of Criminal Courts (Sentencing) Act 2000 s 46(11) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

22 Powers of Criminal Courts (Sentencing) Act 2000 s 46(12) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)).

## UPDATE

### **1370-1373 Community Rehabilitation Orders, Community Punishment Orders and Community Punishment and Rehabilitation Orders**

Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

### **1371 Community punishment orders**

NOTES 8, 20, 21--2000 Act s 46(5), (11) further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/A. COMMUNITY REHABILITATION ORDERS, COMMUNITY PUNISHMENT ORDERS AND COMMUNITY PUNISHMENT AND REHABILITATION ORDERS/1372. Obligations of person subject to community punishment order.

### **1372. Obligations of person subject to community punishment order.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. An offender in respect of whom a community punishment order<sup>2</sup> is in force must keep in touch with the responsible officer in accordance with such instructions as he may from time to time be given by that officer, and notify him of any change of address, and perform for the number of hours specified in the order such work at such times as he may be instructed by the responsible officer<sup>3</sup>. Such instructions given by the responsible officer must, as far as practicable, be such as to avoid any conflict with the offender's religious beliefs or with the requirements of any other community order to which he may be subject, and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>4</sup>. Subject to the provisions relating to the power to extend a community punishment order<sup>5</sup>, the work required to be performed under a community punishment order must be performed during the period of 12 months beginning with the date of the order, but, unless revoked, the order remains in force until the offender has worked under it for the number of hours specified in it<sup>6</sup>.

If the offender is aged under 18 at the time when the community punishment order is made, the functions conferred on the responsible officer<sup>7</sup> must be discharged by an officer of a local probation board appointed for or assigned to the local justice area specified in the order, or a member of a youth offending team<sup>8</sup> established by a local authority specified in the order<sup>9</sup>.

The procedure enacted for dealing with failures to comply with the requirements of certain community orders, for revoking such orders with or without the substitution of other sentences, and for amending such orders<sup>10</sup>, has effect so far as it relates to community punishment orders<sup>11</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1370-1371 ante, 1374-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)).

2 As to community punishment orders see para 1371 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 47(1) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt I para 2(1)(a), (2)). The Powers of Criminal Courts (Sentencing) Act 2000 Sch 4 (as amended) (which makes provision for and in connection with the making and amendment in England and Wales of certain community orders relating to persons residing in Scotland or Northern Ireland) has effect so far as relating to community punishment orders: s 49 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(b), (2)).

4 Powers of Criminal Courts (Sentencing) Act 2000 s 47(2).

5 Where a community punishment order or community punishment and rehabilitation order is in force in respect of any offender and, on the application of the offender or the responsible officer, it appears to a magistrates' court acting in the local justice area concerned that it would be in the interests of justice to do so having regard to circumstances which have arisen since the order was made, the court may, in relation to the order, extend the period of 12 months specified in *ibid* s 47(3) (as amended) (see the text and note 6 *infra*): Sch

3 para 22 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2), 3(1)(a), (2); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule, para 82(e)).

6 Powers of Criminal Courts (Sentencing) Act 2000 s 47(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(a), (2)). In addition, the Powers of Criminal Courts (Sentencing) Act 2000 s 42(2E) (as added) (function of giving instructions for the purposes of requiring the offender to provide a sample when instructed to do so to be exercised in accordance with guidance given from time to time by the Secretary of State) and s 42(2F) (as added) (court must not include a drug abstinence requirement in the community punishment order unless the court has been notified by the Secretary of State that arrangements for implementing such requirements are available in the area proposed to be specified under s 41(3) (see para 1370 ante) and the notice has not been withdrawn) apply for the purposes of s 47 (as amended) (obligation of persons subject to community punishment order) as they apply for the purposes of s 42 (as amended; prospectively further amended) (additional requirements which may be included in community rehabilitation orders): s 47(3C) (added by the Criminal Justice and Court Services Act 2000 s 49(2)). As to additional provisions that relate to offenders over the age of 18 see the Powers of Criminal Courts (Sentencing) Act 2000 s 47(3A), (3B) (added by the Criminal Justice and Court Services Act 2000 s 49(2)).

7 le conferred by the Powers of Criminal Courts (Sentencing) Act 2000 s 47 (as amended).

8 As to youth offending teams (ie as established under the Crime and Disorder Act 1998 s 39 (as amended)) see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 47(5) (amended by the Criminal Justice and Court Services Act 2000 s 75, Sch 7 Pt II paras 160, 169(b), Sch 8). As to the discharge of the functions of the responsible officer where the offender is aged 18 or over see the Powers of Criminal Courts (Sentencing) Act 2000 s 47(4) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 169 and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 70). The reference in the Powers of Criminal Courts (Sentencing) Act 2000 s 47(5) (as amended) to a local authority specified in the order is a reference to the authority for the time being so specified, whether under s 46(9) (as amended) (see para 1371 ante) or by virtue of Sch 3 Pt IV (as amended; prospectively further amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241): s 47(6).

10 See ibid Sch 3 (as amended; prospectively further amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq.

11 Ibid s 48 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 2(1)(b), (2)).

## UPDATE

### **1370-1373 Community Rehabilitation Orders, Community Punishment Orders and Community Punishment and Rehabilitation Orders**

Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

### **1372 Obligations of person subject to community punishment order**

NOTE 9--2000 Act s 47(4) further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/A. COMMUNITY REHABILITATION ORDERS, COMMUNITY PUNISHMENT ORDERS AND COMMUNITY PUNISHMENT AND REHABILITATION ORDERS/1373. Community punishment and rehabilitation orders.

### **1373. Community punishment and rehabilitation orders.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. Where a person aged 16 or over is convicted of an offence punishable with imprisonment and the court by or before which he is convicted is of the opinion that the making of a community punishment and rehabilitation order<sup>2</sup> is desirable in the interests of securing the rehabilitation of the offender, or protecting the public from harm from him or preventing the commission by him of further offences, the court may<sup>3</sup> make such an order requiring him both:

- 1368 (1) to be under supervision for a period specified in the order, being not less than 12 months nor more than three years; and
- 1369 (2) to perform unpaid work for a number of hours so specified, being in the aggregate not less than 40 nor more than 100<sup>4</sup>.

Certain of the provisions relating to community rehabilitation orders and community punishment orders<sup>5</sup> apply, in relation to community punishment and rehabilitation orders<sup>6</sup> in so far as those orders impose such a requirement as is mentioned in head (1) above, as if they were community rehabilitation orders; and apply, in so far as they impose such a requirement as is mentioned in head (2) above, as if they were community punishment orders<sup>7</sup>. In addition, the provisions for dealing with failures to comply with the requirements of certain community orders, for revoking such orders with or without the substitution of other sentences, and for amending such orders<sup>8</sup>, have effect in relation to community punishment and rehabilitation orders<sup>9</sup>. Further, the provisions for and in connection with the making and amendment in England and Wales of certain community orders relating to persons residing in Scotland or Northern Ireland have effect in relation to community punishment and rehabilitation orders<sup>10</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1370-1372 ante, 1374-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)). Likewise, as from 4 April 2009 the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see note 2 infra) is substituted by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 125 and will only apply to curfew and exclusion orders (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231 et seq).

2 Until 1 April 2001, community punishment and rehabilitation orders were known as combination orders: see the Powers of Criminal Courts (Sentencing) Act 2000 s 51(2) (as amended); the Criminal Justice and Court Services Act 2000 s 45(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 167. A community punishment and rehabilitation order is a 'relevant order' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 et seq): see Sch 3 para 1(1)(d) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 3(1), (2)). As to the breach of a requirement of the order see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 3-9 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 233-235. A community punishment and rehabilitation order may be revoked under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 10-17 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 236-238) and the circumstances in which such an order may be revoked must include the offender's making good progress or

his responding satisfactorily to supervision or, as the case may be, treatment: Sch 3 paras 10(3)(a), (4), 11(2)(a), (3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 199(1), (14)). Where a community punishment and rehabilitation order is in force, and no appeal against the order is pending, the court may, on application by the offender or the responsible officer, substitute the order for an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 12(1)(b) (see para 1289 ante): see Sch 3 para 12 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 3(1)(a), (2), 160, 199(1), (16)-(18); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(b)).

A court may amend a community punishment and rehabilitation order:

3374 (1) on the application of the offender, the responsible officer or any affected person by cancelling or adding any requirements (see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 19 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(a), (2), 3(1)(a), (2), 160, 199(1), (2), (17), (21); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241);

3375 (2) where the offender proposes to change, or has changed, his residence from one local justice area to another unless, in the opinion of the court, the order cannot then be complied with (see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 18 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 3(1)(a), (2), 160, 199(1), (3), (20); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(b)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 239).

A community punishment and rehabilitation order may be amended under head (1) supra where the medical practitioner or other person by whom or under whose direction an offender is, in pursuance of any requirement of a community punishment and rehabilitation order, being treated for his mental condition or his dependency on or propensity to misuse drugs or alcohol: (a) is of the opinion that the treatment of the offender should be continued beyond the period specified in that behalf in the order; that the offender needs different treatment; that the offender is not susceptible to treatment; or that the offender does not require further treatment; or (b) is for any reason unwilling to continue to treat or direct the treatment of the offender: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 20 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 199(1), (16), (22); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)). The court may extend a community punishment order on the application of the offender or the relevant officer if the court feels it would be in the interests of justice to do so: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 22 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 2(1)(a), (2), 3(1)(a), (2), 160, 199(1), (23); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 82(e)). As to supplementary provisions see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 23, 24 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241.

3 le subject to the Powers of Criminal Courts (Sentencing) Act 2000 ss 34-36 (repealed subject to savings in respect of offences committed before 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 2 para 5).

4 Powers of Criminal Courts (Sentencing) Act 2000 s 51(1), (2), (3) (s 51(2), (3) amended by the Criminal Justice and Court Services Act 2000 s 45(3)(a), (2)).

5 le the Powers of Criminal Courts (Sentencing) Act 2000 s 41, s 42, s 46, s 47, Sch 2 (all as amended): see paras 1370-1372 ante. As to community rehabilitation orders see para 1370 ante. As to community punishment orders see para 1371 ante.

6 The application of the relevant provisions (see note 5 supra) is subject to ibid s 51(1): see the text and note 4 supra.

7 Ibid s 51(4) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 1(1)(b), (2), 2(1)(b), (2)).

8 le the Powers of Criminal Courts (Sentencing) Act 2000 s 39, s 43 (as amended), s 48 (as amended), s 51 (as amended), s 56, Sch 3 (as amended).

9 Ibid s 51(5) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 3(1)(b), (2)).

10 Powers of Criminal Courts (Sentencing) Act 2000 s 51(6) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 3(1)(b), (2)).

## UPDATE

**1370-1373 Community Rehabilitation Orders, Community Punishment Orders  
and Community Punishment and Rehabilitation Orders**

Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed: Criminal Justice and  
Immigration Act 2008 Sch 28 Pt 1.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/B. DRUG AND ALCOHOL TREATMENT AND TESTING/1374. Drug treatment and testing orders.

## ***B. DRUG AND ALCOHOL TREATMENT AND TESTING***

### **1374. Drug treatment and testing orders.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. The court by or before which he is convicted may make a drug treatment and testing order<sup>2</sup> which:

- 1370 (1) has effect for a period specified in the order of not less than six months nor more than three years ('the treatment and testing period')<sup>3</sup>; and
- 1371 (2) includes the specified requirements and provisions<sup>4</sup>.

A court must not make a drug treatment and testing order in respect of an offender unless it is satisfied that he is dependent on or has a propensity to misuse drugs, and that his dependency or propensity is such as requires and may be susceptible to treatment<sup>5</sup>. For the purpose of ascertaining<sup>6</sup> whether the offender has any drug in his body, the court may by order require him to provide samples of such description as it may specify, but the court must not make such an order unless the offender expresses his willingness to comply with its requirements<sup>7</sup>.

A court must not make a drug treatment and testing order unless:

- 1372 (a) it has been notified by the Secretary of State<sup>8</sup> that arrangements for implementing such orders are available in the area proposed to be specified in the order<sup>9</sup> and the notice has not been withdrawn<sup>10</sup>; and
- 1373 (b) the offender expresses his willingness to comply with its requirements<sup>11</sup>.

Before making a drug treatment and testing order, the court must explain to the offender in ordinary language:

- 1374 (i) the effect of the order and of the requirements proposed to be included in it<sup>12</sup>;
- 1375 (ii) the consequences which may follow<sup>13</sup> if he fails to comply with any of those requirements<sup>14</sup>;
- 1376 (iii) that the order will be periodically reviewed at intervals as provided for in the order<sup>15</sup>; and
- 1377 (iv) that the order may be reviewed<sup>16</sup> on the application either of the offender or of the responsible officer<sup>17</sup>.

The procedure enacted for dealing with failures to comply with the requirements of certain community orders, for revoking such orders with or without the substitution of other sentences, and for amending such orders<sup>18</sup>, has effect so far as it relates to drug treatment and testing orders<sup>19</sup>.

<sup>1</sup> The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1370-1373 ante, 1375-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras

22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)). Likewise, as from 4 April 2009 the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see note 2 *infra*) is substituted by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 125 and will only apply to curfew and exclusion orders (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231 *et seq*).

2     Ie subject to the Powers of Criminal Courts (Sentencing) Act 2000 ss 34-36 (repealed subject to savings in respect of offences committed before 4 April 2005: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 2 para 5). A drug treatment and testing order is a 'relevant order' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 *et seq*): see Sch 3 para 1(1)(e). As to the breach of a requirement of the order see Sch 3 paras 3-9 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 233-235. A drug treatment and testing order may be revoked under Sch 3 paras 10-17 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 236-238) and the circumstances in which such an order may be revoked include the offender's making good progress or his responding satisfactorily to supervision or, as the case may be, treatment: Sch 3 paras 10(3)(a), (4), 11(2)(a), (3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 199(1), (14)). A court may vary or cancel any of the requirements or provisions of a drug treatment and testing order on the application of the responsible officer where the treatment provider is of the opinion that the order should be varied or cancelled and has provided a written report to that effect: see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 21 (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para s 160, 199(1), (19)). As to supplementary provisions see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 paras 23, 24 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 239-241.

3     Ibid s 52(1), (2)(a). However, s 52 does not apply in relation to an offence committed before 30 September 1998: s 52(1).

4     Ibid s 52(1), (2)(b). The specified requirements and provisions are those mentioned in ss 53, 54 (as amended): see paras 1375-1376 *post*. The Secretary of State may by order amend s 52(1) by substituting a different period for the minimum or maximum period for the time being specified therein: s 58. As to the Secretary of State see para 155 *ante*. As to whom copies of the drug treatment and testing order must be given by the court making the order see s 57 (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7).

5     Powers of Criminal Courts (Sentencing) Act 2000 s 52(3).

6     Ie for the purposes of *ibid* s 52(3): see the text and note 5 *supra*.

7     Ibid s 52(4).

8     As to the Secretary of State see para 155 *ante*.

9     Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 54(1): see para 1376 *post*.

10    Ibid s 52(5).

11    Ibid s 52(7).

12    Ibid s 52(6)(a).

13    Ie under *ibid* s 56, Sch 3 (as amended).

14    Ibid s 52(6)(b).

15    Ibid s 52(6)(c). The periodic review of the order is provided for by virtue of s 54(6): see para 1376 *post*.

16    Ie under *ibid* Sch 3 Pts III, Pt IV (as amended).

17    Ibid s 52(6)(d). 'Responsible officer', in relation to an offender who is subject to a drug treatment and testing order, means the officer of a local probation board responsible for his supervision: s 54(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(b), (2)).

18    See the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 (as amended; prospectively further amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233 *et seq*.

19    Ibid s 56.

## UPDATE

**1374 Drug treatment and testing orders**

NOTES 2, 13, 16, 18--Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed:  
Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

NOTE 4--2000 Act s 57 further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/B. DRUG AND ALCOHOL TREATMENT AND TESTING/1375. Drug treatment and testing requirements.

### **1375. Drug treatment and testing requirements.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. A drug treatment and testing order<sup>2</sup> must include a requirement ('the treatment requirement') that the offender must submit, during the whole of the treatment and testing period, to treatment by or under the direction of a specified person having the necessary qualifications or experience ('the treatment provider') with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs<sup>3</sup>. The required treatment for any particular period must be:

- 1378 (1) treatment as a resident in such institution or place as may be specified in the order<sup>4</sup>; or
- 1379 (2) treatment as a non-resident in or at such institution or place, and at such intervals, as may be so specified<sup>5</sup>.

However, the nature of the treatment must not be specified in the order except as mentioned in head (1) or head (2) above<sup>6</sup>.

A court must not make a drug treatment and testing order unless it is satisfied that arrangements have been or can be made for the treatment intended to be specified in the order (including arrangements for the reception of the offender where he is to be required to submit to treatment as a resident)<sup>7</sup>. A drug treatment and testing order must include a requirement ('the testing requirement') that, for the purpose of ascertaining whether he has any drug in his body during the treatment and testing period, the offender must during that period, at such times or in such circumstances as may (subject to the provisions of the order) be determined by the treatment provider, provide samples of such description as may be so determined<sup>8</sup>. The testing requirement must specify for each month the minimum number of occasions on which samples are to be provided<sup>9</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see paras 1370-1374 ante, 1376-1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)).

2 As to drug treatment and testing orders see para 1374 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 53(1).

4 Ibid s 53(2)(a).

5 Ibid s 53(2)(b).

6 Ibid s 53(2).

7 Ibid s 53(3).

8 Ibid s 53(4).

9 Ibid s 53(5).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/B. DRUG AND ALCOHOL TREATMENT AND TESTING/1376. Provisions of drug treatment and testing orders as to supervision and periodic review.

### **1376. Provisions of drug treatment and testing orders as to supervision and periodic review.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. A drug treatment and testing order<sup>2</sup> must include a provision specifying the local justice area in which it appears to the court making the order that the offender resides or will reside<sup>3</sup>. A drug treatment and testing order must provide that, for the treatment and testing period, the offender is to be under the supervision of an officer of a local probation board appointed for or assigned to the local justice area specified in the order<sup>4</sup>. Such supervision by the responsible officer<sup>5</sup> must be carried out to such extent only as may be necessary for the purpose of enabling him<sup>6</sup>:

- 1380 (1) to report on the offender's progress to the court responsible for the order<sup>7</sup>;
- 1381 (2) to report to that court any failure by the offender to comply with the requirements of the order<sup>8</sup>; and
- 1382 (3) to determine whether the circumstances are such that he should apply to that court for the revocation or amendment of the order<sup>9</sup>.

A drug treatment and testing order must:

- 1383 (a) require the offender to keep in touch with the responsible officer in accordance with such instructions as he may from time to time be given by that officer, and to notify him of any change of address<sup>10</sup>;
- 1384 (b) provide that the results of the tests carried out on the samples provided by the offender in pursuance of the testing requirement are to be communicated to the responsible officer<sup>11</sup>;
- 1385 (c) provide for the order to be reviewed periodically at intervals of not less than one month<sup>12</sup>;
- 1386 (d) provide for each review of the order to be made<sup>13</sup>, at a hearing held for the purpose, by the court responsible for the order (a 'review hearing')<sup>14</sup>;
- 1387 (e) require the offender to attend each review hearing<sup>15</sup>;
- 1388 (f) provide for the responsible officer to make to the court responsible for the order, before each review, a report in writing on the offender's progress under the order<sup>16</sup>; and
- 1389 (g) provide for each such report to include the test results communicated to the responsible officer under head (b) above and the views of the treatment provider as to the treatment and testing of the offender<sup>17</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see para 1370-1375 ante, 1377 post) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)).

2 As to drug treatment and testing orders see para 1374 ante.

- 3 Powers of Criminal Courts (Sentencing) Act 2000 s 54(1).
- 4 Ibid s 54(2) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 4(1)(b), (2)).
- 5 For the meaning of 'responsible officer' see para 1374 note 17 ante.
- 6 Powers of Criminal Courts (Sentencing) Act 2000 s 54(5).
- 7 Ibid s 54(5)(a). For the purposes of s 54 (as amended), references to the court responsible for a drug treatment and testing order are references to:

3376 (1) where a court is specified in the order in accordance with s 54(8), that court (s 54(7)(a)); and

3377 (2) in any other case, the court by which the order is made (s 54(7)(b)).

Where the area specified in a drug treatment and testing order made by a magistrates' court is not the area for which the court acts, the court may, if it thinks fit, include in the order provision specifying for the purposes of s 54(7) a magistrates' court which acts for the area specified in the order: s 54(8). Where a drug treatment and testing order has been made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, for the purposes of s 54(7)(b) it is deemed to have been made by the Crown Court: s 54(9).

- 8 Ibid s 54(5)(b).
- 9 Ibid s 54(5)(c).
- 10 Ibid s 54(4)(a).
- 11 Ibid s 54(4)(b).
- 12 Ibid s 54(6)(a).
- 13 Ie subject to ibid s 55(6): see para 1377 post.
- 14 Ibid s 54(6)(b).
- 15 Ibid s 54(6)(c).
- 16 Ibid s 54(6)(d).
- 17 Ibid s 54(6)(e).

## **UPDATE**

### **1376 Provisions of drug treatment and testing orders as to supervision and periodic review**

TEXT AND NOTE 4--2000 Act s 54(2) further amended: SI 2008/912.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/B. DRUG AND ALCOHOL TREATMENT AND TESTING/1377. Periodic reviews.

### **1377. Periodic reviews.**

Until 4 April 2009 where a person aged 16 or 17 has been convicted of an offence the following provisions apply<sup>1</sup>. At a review hearing<sup>2</sup> the court may, after considering the responsible officer's report<sup>3</sup>, amend any requirement or provision of the drug treatment and testing order<sup>4</sup>. The court:

- 1390 (1) must not amend the treatment or testing requirement unless the offender expresses his willingness to comply with the requirement as amended<sup>5</sup>;
- 1391 (2) must not amend any provision of the order so as to reduce the treatment and testing period below the minimum specified<sup>6</sup>, or to increase it above the maximum so specified<sup>7</sup>; and
- 1392 (3) except with the consent of the offender, must not amend any requirement or provision of the order while an appeal against the order is pending<sup>8</sup>.

If the offender fails to express his willingness to comply with the treatment or testing requirement as proposed to be amended by the court, the court may<sup>9</sup>:

- 1393 (a) revoke the order<sup>10</sup>; and
- 1394 (b) deal with him, for the offence in respect of which the order was made, in any way in which it could deal with him if he had just been convicted by the court of the offence<sup>11</sup>.

In dealing with the offender under head (b) above, the court must take into account the extent to which the offender has complied with the requirements of the order, and may impose a custodial sentence (where the order was made in respect of an offence punishable with such a sentence)<sup>12</sup>.

Where the order was made by a magistrates' court in the case of an offender under 18 years of age in respect of an offence triable only on indictment<sup>13</sup> in the case of an adult, any powers exercisable under head (b) above in respect of the offender after he attains the age of 18 are powers to do either or both of the following<sup>14</sup>:

- 1395 (i) to impose a fine not exceeding a stated amount<sup>15</sup> for the offence in respect of which the order was made<sup>16</sup>; or
- 1396 (ii) to deal with the offender for that offence in any way in which the court could deal with him if it had just convicted him of an offence punishable with imprisonment for a term not exceeding six months<sup>17</sup>.

If at a review hearing the court, after considering the responsible officer's report, is of the opinion that the offender's progress under the order is satisfactory, the court may so amend the order as to provide for each subsequent review to be made by the court without a hearing<sup>18</sup>. If at a review without a hearing the court<sup>19</sup>, after considering the responsible officer's report, is of the opinion that the offender's progress under the order is no longer satisfactory, the court may require the offender to attend a hearing of the court at a specified time and place<sup>20</sup>. At that hearing the court, after considering that report, may exercise its powers<sup>21</sup> as if the hearing were



a review hearing, and so amend the order as to provide for each subsequent review to be made at a review hearing<sup>22</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 41-58 (see para 1370-1376 ante) are repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7. These repeals came into force on 4 April 2005 except in relation to a person aged 16 or 17 convicted of an offence (see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 22, 44(1), (4)(r), Sch 2 paras 7, 8, 12, 13(a), (c)) and come fully into force on 4 April 2009 (see art 2(2), Sch 2 paras 7, 8, 12, 13(a), (c) (art 2(2) amended by SI 2007/391)).

2 For the meaning of 'review hearing' see para 1376 ante.

3 Ie the report referred to in the Powers of Criminal Courts (Sentencing) Act 2000 s 54(6): see para 1376 ante. For the meaning of 'responsible officer' see para 1374 note 17 ante.

4 Ibid s 55(1).

5 Ibid s 55(2)(a).

6 Ie specified in ibid s 52(1): see para 1374 ante.

7 Ibid s 55(2)(b).

8 Ibid s 55(2)(c).

9 Ibid s 55(3).

10 Ibid s 55(3)(a).

11 Ibid s 55(3)(b).

12 Ibid s 55(4).

13 As to offences triable only on indictment see CRIMINAL LAW, EVIDENCE AND PROCEDURE VOL 11(3) (2006 Reissue) para 1102.

14 Powers of Criminal Courts (Sentencing) Act 2000 s 55(5).

15 At the date at which this volume states the law the fine may not exceed £5000: see ibid s 55(5)(a).

16 Ibid s 55(5)(a).

17 Ibid s 55(5)(b).

18 Ibid s 55(6).

19 For the purposes of ibid s 55, any reference to the court, in relation to a review without a hearing, must be construed:

3378 (1) in the case of the Crown Court, as a reference to a judge of the court (s 55(9)(a)); and

3379 (2) in the case of a magistrates' court, as a reference to a justice of the peace acting for the commission area for which the court acts (s 55(9)(b)).

20 Ibid s 55(7).

21 Ie its powers conferred by ibid s 55.

22 Ibid s 55(8).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(ii) Community Orders before 4 April 2009/B. DRUG AND ALCOHOL TREATMENT AND TESTING/1378. Breaches of community orders.

### **1378. Breaches of community orders.**

The provisions relating to the breach of youth community orders by persons under the age of 18 are generally the same as those relating to adult offenders<sup>1</sup>.

<sup>1</sup> See the Powers of Criminal Courts (Sentencing) Act 2000 s 39 (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 90, 98). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 233 et seq.

### **UPDATE**

### **1378 Breaches of community orders**

TEXT AND NOTE 1--Powers of Criminal Courts (Sentencing) Act 2000 s 39 repealed: Criminal Justice and Immigration Act 2008 s 6(1), Sch 28 Pt 1.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1379. General provisions.

### **(iii) Community Orders after 4 April 2009**

#### **1379. General provisions.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. A community order<sup>2</sup> must specify a date by which all the requirements in it must have been complied with, not more than three years after the date of the offence<sup>3</sup>. Before making a community order imposing two or more different requirements, the court must consider whether the requirements are compatible with each other<sup>4</sup>. All community orders must specify the local justice area in which the offender resides<sup>5</sup>. The court must ensure, so far as practicable, that any requirement imposed by a relevant order is such as to avoid any conflict with the offender's religious beliefs or with the requirements of any other relevant order to which he may be subject<sup>6</sup> and any interference with the times, if any, at which he normally works or attends school or any other educational establishment<sup>7</sup>. The court which makes the relevant order must provide copies to the offender and to an officer of the local probation board assigned to the court or a member of a youth offending team<sup>8</sup>.

An offender must keep in touch with the responsible officer in accordance with such instructions as he may from time to time be given by that officer and must notify him of any change of address<sup>9</sup>.

Where the court makes a community order imposing an unpaid work requirement, an activity requirement, a programme requirement, a prohibited activity requirement, a residence requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, a supervision requirement or an attendance centre requirement, the court may also impose an electronic monitoring requirement unless prevented from doing so<sup>10</sup>.

1 The Criminal Justice Act 2003 Chapter 2 (ss 177-180, Schs 8, 9) was brought into force on 4 April 2005 by the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 para 7. However, in so far as the Criminal Justice Act 2003 ss 177-180, Schs 8, 9 apply, where a person aged 16 or 17 is convicted of an offence, those provisions come into force on 4 April 2009: see the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 2005/950, art 2(2) (amended by SI 2007/391).

2 For the meaning of 'community order' see para 1284 ante.

3 Criminal Justice Act 2003 s 177(5). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163.

4 Ibid s 177(6). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 171.

5 Ibid s 216(1) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 1). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 171.

6 Criminal Justice Act 2003 s 217(1)(a). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 172.

7 Ibid s 217(1)(b). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 172.

8 Ibid s 219(1)(a), (c). As to other persons to be provided with copies see Sch 14. See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 168.

9 Ibid s 220(1). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 174.

10 Ibid s 177(4). Electronic monitoring must be imposed with a curfew requirement or exclusion requirement unless exceptions apply: 177(3). Where there is a person other than the offender without whose co-operation it will not be practicable to secure the monitoring, the requirement may not be included without the person's consent: s 215(2). Electronic monitoring may not be imposed unless the court has been notified by the Secretary of State that electronic monitoring arrangements are available and the court is satisfied that the necessary provision can be made: s 218(4). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 171, 284.

## **UPDATE**

### **1379 General provisions**

TEXT AND NOTE 1--Reference to 4 April 2009 now to 4 April 2010: SI 2005/950 art 2(2) (amended by SI 2009/616).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1380. Unpaid work requirement.

### **1380. Unpaid work requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence, the court may make a community order<sup>2</sup> imposing on him an unpaid work requirement<sup>3</sup>. An unpaid work requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender must perform unpaid work<sup>7</sup> for the number of hours specified in the order<sup>8</sup> at such times as he may be instructed by the responsible officer<sup>9</sup>.

A court must not impose an unpaid work requirement unless the court is satisfied that the offender is a suitable person to perform work under such a requirement<sup>10</sup> and that provision for the offender to work under such a requirement can be made in the local justice area in which he resides or will reside<sup>11</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 271.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 199(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271.

8 The number of hours which a person may be required to work under an unpaid work requirement must be specified in the order and must be in the aggregate not less than 40, and not more than 300: see *ibid* s 199(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271. Where the court makes relevant orders in respect of two or more offences of which the offender has been convicted on the same occasion and includes unpaid work requirements in each of them, the hours of work may run concurrent with or additional to those specified in any other of those orders, but the total number must not exceed the maximum of 300: see s 199(5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271. The Secretary of State may by order amend the maximum number of hours which may be specified under an unpaid work requirement: see s 223(1) (a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271. As from a day to be appointed, ss 197(3), 198, 199, 200, 217-219, 222, 223(1) are modified by the Children Act 1989 Sch A1 (added by the Children and Adoption Act 2006 s 4(2), Sch 1) (see para 257 ante). At the date at which this volume states the law no such day had been appointed.

9 See the Criminal Justice Act 2003 s 200(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271. For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104. The work should normally be completed within 12 months, but this time may be extended: see s 200(2), Sch 8 para 20; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 186, 271.

10 See *ibid* s 199(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271.

11 See *ibid* s 218(1) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 271.

### **UPDATE**

**1380 Unpaid work requirement**

NOTE 8--Children Act 1989 Sch 1A in force on 8 December 2008: SI 2008/2870.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1381. Activity requirement.

### **1381. Activity requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him an activity requirement<sup>3</sup>. An activity requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender must do either or both of the following:

- 1397 (1) present himself to a specified person or persons at either a community rehabilitation centre, or a place that has been approved for such purposes by the local probation board, for a specified number of days<sup>7</sup>;
- 1398 (2) participate in specified activities for a specified number of days<sup>8</sup>.

A court must not include an activity requirement unless: (a) the court is satisfied that provision for the offender to participate in the proposed activities can be made in the local justice area in which he resides or will reside<sup>9</sup>; or (b) in the case of an offender aged under 18, either an officer of a local probation board or a member of a youth offending team<sup>10</sup> has been consulted and is satisfied that it is feasible to secure compliance with the requirement<sup>11</sup>; and (c) where compliance with the requirement would involve the co-operation of a person other than the offender and the offender's responsible officer, that other person consents to its inclusion<sup>12</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 272.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 201(1)(a), (7); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272. The aggregate number of days must not exceed 60: see s 201(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272. For the meaning of 'community rehabilitation order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 167, 195.

8 See *ibid* s 201(1)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272. Such specified activities may consist of or include activities whose purpose is that of reparation: see s 201(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272.

9 See *ibid* s 218(2) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272.

10 For the meanings of 'local probation board' and 'youth offending team' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq.

11 See the Criminal Justice Act 2003 s 201(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272.

12 See *ibid* s 201(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 272.

## **UPDATE**

### **1381 Activity requirement**

NOTE 11--Criminal Justice Act 2003 s 201(3) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 85.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1382. Programme requirement.

### **1382. Programme requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a programme requirement<sup>3</sup>. A programme requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender participate in an accredited programme<sup>7</sup> specified in the order at a place so specified on such number of days as may be so specified<sup>8</sup>.

The court may not include a programme requirement unless: (1) the accredited programme has been recommended to the court as being suitable in the case of an offender aged under 18 either by a local probation board or by a member of a youth offending team<sup>9</sup>; or (2) where compliance with the requirement would involve the co-operation of a person other than the offender and the offender's responsible officer, that other person consents to its inclusion<sup>10</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 273.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 The Correctional Services Accreditation Panel as designated by the Secretary of State: see the Criminal Justice Act 2003 s 202(3)(b) (prospectively repealed); the Criminal Justice (Sentencing) (Programme and Electronic Monitoring Requirements) Order 2005, SI 2005/963, art 2; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273.

8 See the Criminal Justice Act 2003 s 202(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273.

9 See *ibid* s 202(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273.

10 See *ibid* s 202(5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273.

### **UPDATE**

#### **1382 Programme requirement**

NOTE 7--Repeal of 2003 Act s 202(3)(b) in force 1 May 2008: SI 2007/3001.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1383. Prohibited activity requirement.

### **1383. Prohibited activity requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a prohibited activity requirement<sup>3</sup>. A prohibited activity requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender refrain from participating in activities specified in the order on a day or days so specified or during a period so specified<sup>7</sup>.

The court may not include a prohibited activity requirement unless the court has consulted an officer of a local probation board or a member of a youth offending team<sup>8</sup>. Amongst the requirements that may be included is a requirement that the offender does not possess, use or carry a firearm<sup>9</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 274.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 203(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 274.

8 See *ibid* s 203(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 274. For the meanings of 'local probation board' and 'youth offending team' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1703; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737 et seq.

9 See *ibid* s 203(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 274. The text refers to a firearm within the meaning of the Firearms Act 1968 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 630).

## **UPDATE**

### **1383 Prohibited activity requirement**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1384. Curfew requirement.

### **1384. Curfew requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a curfew requirement<sup>3</sup>. A curfew requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender remain for specified periods at a specified place<sup>7</sup>.

A curfew requirement may specify different places or different periods for different days, but must not specify:

- 1399 (1) periods which amount to less than two hours or more than twelve hours in any one day<sup>8</sup>; or
- 1400 (2) periods which fall outside the period of six months beginning with the day on which it is made<sup>9</sup>.

Before making a relevant order imposing a curfew requirement, the court must obtain and consider information about the place proposed to be specified in the order including information as to the attitude of persons likely to be affected by the enforced presence there of the offender<sup>10</sup>.

Where the court makes a community order imposing a curfew requirement, the court must also impose an electronic monitoring requirement<sup>11</sup> unless it is prevented from doing so<sup>12</sup> or, in the particular circumstances of the case, it considers it inappropriate to do so<sup>13</sup>.

The Secretary of State may by order amend the number of hours or periods of time which can be specified in a curfew requirement<sup>14</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 275.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 204(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275.

8 See *ibid* s 204(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275.

9 See *ibid* s 204(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275.

10 See *ibid* s 204(6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275.

11 le as defined by *ibid* s 215: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 284.

12 le by virtue of *ibid* s 215(2) and s 218(4): see para 1379 note 10 ante.

13 See *ibid* s 177(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 171.

14 See *ibid* s 223(1)(b), (2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 275. As to the Secretary of State see para 155 ante.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1385. Exclusion requirement.

### **1385. Exclusion requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him an exclusion requirement<sup>3</sup>. An exclusion requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement which prohibits an offender from entering a specified place or places<sup>7</sup> or area<sup>8</sup> during a period specified in the order, lasting for no more than two years<sup>9</sup>. The exclusion requirement may also protect a person from being approached by the offender<sup>10</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 276.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 205(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276.

8 See *ibid* s 205(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276.

9 See *ibid* s 205(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276. The Secretary of State may by order amend the maximum number of hours which may be specified: see s 223(3)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276. As to the Secretary of State see para 155 ante.

10 See *ibid* Sch 14; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 276.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1386. Residence requirement.

### **1386. Residence requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a residence requirement<sup>3</sup>. A residence requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that, during a period specified in the relevant order, the offender must reside at a specified place<sup>7</sup>. However, a residence requirement does not necessarily prohibit the offender from residing, with the prior approval of the responsible officer<sup>8</sup>, at a place other than the specified place<sup>9</sup>. The court may not specify a hostel or other institution as the place where an offender must reside, except on the recommendation of an officer of a local probation board<sup>10</sup>. Before including a residence requirement in an order the court must consider the home surroundings of the offender<sup>11</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 277.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 206(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 277.

8 For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

9 See the Criminal Justice Act 2003 s 206(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 277.

10 See *ibid* s 206(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 277.

11 See *ibid* s 206(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 277.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1387. Mental health treatment requirement.

### **1387. Mental health treatment requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a mental health treatment requirement<sup>3</sup>. A mental health treatment requirement in relation to a community order or a suspended sentence order<sup>4</sup> means a requirement that the offender must submit, during a specified period or periods, to treatment by or under the direction of a registered medical practitioner or a chartered psychologist (or both, for different periods) with a view to the improvement of the offender's mental condition<sup>5</sup>.

Such treatment must be either:

- 1401 (1) treatment as a resident patient in an independent hospital or care home<sup>6</sup>;
- 1402 (2) treatment as a non-resident patient at such an institution or specified place<sup>7</sup>;
- or
- 1403 (3) treatment by or under the direction of such registered medical practitioner or chartered psychologist (or both) as may be so specified<sup>8</sup>.

Before inserting a mental health requirement, the court must be satisfied: (a) that the mental condition of the offender is such as requires and may be susceptible to treatment<sup>9</sup>, but is not so as to warrant the making of a hospital order or guardianship order<sup>10</sup>; (b) arrangements have been or can be made for the treatment intended to be specified in the order<sup>11</sup>; and (c) the offender is willing to comply with the requirement<sup>12</sup>.

While the offender is under treatment, his responsible officer<sup>13</sup> must carry out supervision only to the extent necessary for the purpose of revoking or amending the order<sup>14</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 278.

4 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

5 See the Criminal Justice Act 2003 s 207(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

6 See *ibid* s 207(2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

7 See *ibid* s 207(2)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

8 See *ibid* s 207(2)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278. Treatment may be given at a place not specified in the order if the treating medical practitioner or chartered psychologist is of the opinion that treatment can be better or more conveniently given in or at a different institution or place: see s 208; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278. For the meaning of 'chartered psychologist' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278. As to hospital orders and guardianship orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332 et seq.

9     le on the evidence of a registered medical practitioner approved under the Mental Health Act 1983 s 12 (see MENTAL HEALTH vol 30(2) (Reissue) para 460).

10    See the Criminal Justice Act 2003 s 207(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

11    See ibid s 207(3)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278. Such arrangements include the reception of the offender where he is to be treated: see s 207(3)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

12    See ibid s 207(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

13    For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

14    See the Criminal Justice Act 2003 s 207(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.

## **UPDATE**

### **1387 Mental health treatment requirement**

TEXT AND NOTES 1-8--References to chartered psychologist replaced by references to registered psychologist; see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 278.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1388. Drug rehabilitation requirement.

### **1388. Drug rehabilitation requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a drug rehabilitation treatment requirement<sup>3</sup>. A drug rehabilitation treatment requirement in relation to a community order or a suspended sentence order<sup>4</sup> means a requirement that during a specified period of at least six months<sup>5</sup> ('the treatment and testing period'), the offender:

- 1404 (1) must submit to treatment by or under the direction of a specified person<sup>6</sup> with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs<sup>7</sup>; and
- 1405 (2) for the purpose of ascertaining whether he has any drug in his body during that period, must provide samples of such description as may be so determined<sup>8</sup>.

A court may impose a drug rehabilitation requirement in respect of an offender where it is satisfied:

- 1406 (a) that he is dependent on or has a propensity to misuse drugs<sup>9</sup> and that his dependency or propensity may be susceptible to treatment<sup>10</sup>;
- 1407 (b) arrangements have been or can be made for the treatment intended to be specified in the order<sup>11</sup>;
- 1408 (c) the requirement has been recommended, in the case of an offender aged under 18, by a probation officer or youth offending team<sup>12</sup>; and
- 1409 (d) the offender is willing to comply with its requirements<sup>13</sup>.

The required treatment may be as a resident or non-resident at a specified institution or place<sup>14</sup>. A community order imposing a drug rehabilitation requirement must provide for test results of any samples provided by the offender in pursuance of the requirement to be communicated to the responsible officer<sup>15</sup>.

A drug rehabilitation requirement may (and must if the treatment and testing period is more than 12 months) provide for reviews to be held by the court responsible for the order and require the offender to attend each review hearing<sup>16</sup>. The responsible officer will provide a written report, which will include the results of the offender's drug tests<sup>17</sup>.

At the review hearing, the court may, after considering the responsible officer's report, amend the community order or suspended sentence order, so far as it relates to the drug rehabilitation requirement<sup>18</sup>, provided:

- 1410 (i) the offender is willing to comply with the amendments<sup>19</sup>;
- 1411 (ii) the period of drug rehabilitation requirement is not amended to less than the period of six months<sup>20</sup>;
- 1412 (iii) no appeal is pending, unless the offender consents to the amendment<sup>21</sup>.

If the offender fails to express his willingness to comply with the proposed amended drug rehabilitation requirement, the court may revoke the community order or suspended sentence and deal with him in any way in which he could have been dealt with had the order not been made<sup>22</sup>, taking account of the extent of compliance by the offender, and may impose a custodial sentence<sup>23</sup>. If the offender's progress is satisfactory, the court can state that in future, reviews can be on paper without the offender attending<sup>24</sup>, although this requirement may be re-imposed if the offender's progress then becomes unsatisfactory<sup>25</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 279. As to supervision orders in relation to drug and treatment and testing see the Powers of Criminal Courts (Sentencing) Act 2000 Sch 6 para 6A (as added); and para 1350 ante.

4 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

5 See the Criminal Justice Act 2003 s 209(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

6 This must be a person with the necessary qualifications or experience.

7 See the Criminal Justice Act 2003 s 209(1)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

8 See *ibid* s 209(1)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

9 'Drug' means a controlled drug as defined by the Misuse of Drugs Act 1971 s 2 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) para 238); Criminal Justice Act 2003 s 209(7).

10 See *ibid* s 209(2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

11 See *ibid* s 209(2)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279. Such arrangements include the reception of the offender where he is to be treated: see s 209(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

12 See *ibid* s 209(2)(c)(ii); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

13 See *ibid* s 209(2)(d); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

14 See *ibid* s 209(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279. Treatment as a non-resident may be at specified intervals.

15 See *ibid* s 209(6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 279.

16 See *ibid* s 210(1)(a)-(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

17 See *ibid* s 210(1)(d), (e); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

18 See *ibid* s 211(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

19 See *ibid* s 211(2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

20 See *ibid* ss 209(3), 211(2)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 279-280. The Secretary of State may by order amend the maximum number of hours which may be specified: see s 223(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280. As to the Secretary of State see para 155 ante.

21 See *ibid* s 211(2)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

22 See *ibid* s 211(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

23 See *ibid* s 211(4), (5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

- 24 See *ibid* s 211(6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.
- 25 See *ibid* s 211(7), (8); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 280.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1389. Alcohol treatment requirement.

### **1389. Alcohol treatment requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him an alcohol treatment requirement<sup>3</sup>. An alcohol treatment requirement in relation to a community order or a suspended sentence order<sup>4</sup> means a requirement that during a specified period of at least six months<sup>5</sup> the offender must submit to treatment<sup>6</sup> by or under the direction of a specified person<sup>7</sup> with a view to the reduction or elimination of the offender's dependency on alcohol<sup>8</sup>.

A court may impose an alcohol treatment requirement where it is satisfied:

- 1413 (1) that the offender is dependent on alcohol and that his dependency may be susceptible to treatment<sup>9</sup>; and
- 1414 (2) that arrangements have been made or can be made for his treatment<sup>10</sup>.

However, a court may not impose an alcohol treatment requirement unless the offender expresses his willingness to comply with its requirements<sup>11</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 281.

4 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

5 See the Criminal Justice Act 2003 s 212(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281. The Secretary of State may by order amend the maximum number of hours which may be specified: see s 223(3)(d); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281. As to the Secretary of State see para 155 ante.

6 See *ibid* s 212(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281.

7 This must be a person with the necessary qualifications or experience.

8 See the Criminal Justice Act 2003 s 212(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281.

9 See *ibid* s 212(2)(a), (b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281.

10 See *ibid* s 212(2)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281.

11 See *ibid* s 212(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 281.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/(5) COMMUNITY ORDERS/(iii) Community Orders after 4 April 2009/1390. Supervision requirement.

### **1390. Supervision requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 16 or over is convicted of an offence the court may make a community order<sup>2</sup> imposing on him a supervision requirement<sup>3</sup>. A supervision requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that, during the relevant period, the offender must attend appointments with the responsible officer<sup>7</sup> or another person determined by the responsible officer, at such time and place as may be determined by the officer<sup>8</sup>, the purpose being to promote the offender's rehabilitation<sup>9</sup> during the full duration of the community sentence<sup>10</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 282.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

8 See the Criminal Justice Act 2003 s 213(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 282.

9 See *ibid* s 213(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 282.

10 See *ibid* s 213(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 282.

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### **1391. Attendance centre requirement.**

As from 4 April 2009 the following provisions apply where a person aged 16 or 17 is convicted of an offence<sup>1</sup>. Where an offender aged 25 or under is convicted of an offence the court may make a community order<sup>2</sup> imposing on him an attendance centre requirement<sup>3</sup>. An attendance centre requirement in relation to a community order, a custody plus order<sup>4</sup>, a suspended sentence order<sup>5</sup> or an intermittent custody order<sup>6</sup> means a requirement that the offender must attend at an attendance centre specified in the relevant order for such number of hours as may be so specified<sup>7</sup>. The aggregate number of hours for which the offender may be required to attend at an attendance centre must not be less than 12 or more than 36<sup>8</sup> and may not be for more than one occasion on any day, or for more than three hours on any occasion<sup>9</sup>.

The court may not impose an attendance centre requirement unless the court is satisfied that the attendance centre to be specified in it is reasonably accessible to the offender concerned, having regard to the means of access available to him and any other circumstances<sup>10</sup>.

1 See para 1379 note 1 ante.

2 For the meaning of 'community order' see para 1284 ante.

3 See para 1284 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 163, 283.

4 For the meaning of 'custody plus order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 98.

5 For the meaning of 'suspended sentence order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 110.

6 For the meaning of 'intermittent custody order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100.

7 See the Criminal Justice Act 2003 s 214(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 283.

8 See *ibid* s 214(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 283.

9 See *ibid* s 214(6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 283.

10 See *ibid* s 214(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 283.

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### **1392. Breach of community orders.**

If the responsible officer<sup>1</sup> is of the opinion that the offender has failed without reasonable excuse to comply with any of the requirements of a community order<sup>2</sup>, the officer must give him a warning describing the circumstances of the failure, and stating that such failure is unacceptable and that he will be brought before a court if within 12 months he again fails to comply<sup>3</sup>. Where such a warning has been given and the officer is of the opinion, at any time within the 12 months beginning with the date on which it was given, that the offender has since that date failed to comply with the requirements without reasonable excuse, the officer must cause an information to be laid before a justice of the peace or the Crown Court (as appropriate)<sup>4</sup>. If at any time while a community order is in force it appears on information to a justice of the peace or the Crown Court (as appropriate) that the offender has failed to comply with any of the requirements of the order, a summons may be issued requiring the offender to appear at the place and time specified in it, or, if the information is in writing and on oath, a warrant for his arrest may be issued<sup>5</sup>.

If it is proved to the satisfaction of the magistrates' court or Crown Court (as appropriate) before which an offender appears or is brought that he has failed without reasonable excuse to comply with any of the requirements of the community order<sup>6</sup>, the court must deal with him in respect of the failure in any one of the following ways:

- 1415 (1) by amending the community order so as to impose more onerous requirements<sup>7</sup>;
- 1416 (2) by dealing with him, for the offence in respect of which the order was made, in any way in which the court could deal with him if he had just been convicted by it of the offence<sup>8</sup>; or
- 1417 (3) by dealing with him, where the offence in respect of which the order was made was not an offence punishable by imprisonment and the offender is aged 18 to 21 and has wilfully and persistently failed to comply with the requirements of the order, by imposing a sentence of detention in a young offender institution for a term not exceeding six months<sup>9</sup>.

The court must take into account the extent to which the offender has complied with the requirements of the community order<sup>10</sup>.

1 For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

2 For the meaning of 'community order' see para 1284 ante.

3 See the Criminal Justice Act 2003 s 179, Sch 8 para 5(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 176. A warning is not issued where a previous warning has been issued within 12 months or an information has been laid before a justice of the peace or the Crown Court as appropriate in respect of the failure in question: see Sch 8 para 5(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 176.

4 See *ibid* Sch 8 para 6(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 176.

5 See *ibid* Sch 8 paras 7(1), (2), 8(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 177.

6 Reasonable refusal to undergo any surgical, electrical or other treatment when under a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement is not treated for the purposes of *ibid* Sch 8 paras 9, 10 as failure to comply with that requirement: see Sch 8 para 11; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179.

7 See *ibid* Sch 8 paras 9(1)(a), 10(1)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179. The court may extend the duration of particular requirements (subject to any limit imposed by Pt 12 Ch 4) but may not extend the period specified under s 177(5) (see para 1379 ante): see Sch 8 paras 9(3), 10(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179.

8 See *ibid* Sch 8 paras 9(1)(b), 10(1)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179. The court may impose a custodial sentence where the order was made in respect of an offence punishable with such a sentence and the offender has wilfully and persistently failed to comply with the requirements of the community order: see Sch 8 paras 9(4), 10(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179. Where the court deals with an offender under head (2) or head (3) in the text, the community order must be revoked: see Sch 8 paras 9(5), 10(5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179. Where a community order was made by a magistrates' court in the case of an offender under 18 years of age in respect of an offence triable only on indictment in the case of an adult, any powers exercisable under Sch 8 para 9(1)(b) in respect of the offender after he attains 18 are powers to impose a fine or to deal with him for that offence in any way the magistrates' court could deal with him if it had just convicted him of an offence punishable with imprisonment for a term not exceeding six months: see Sch 8 para 12; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 178. Reasonable refusal to undergo any surgical, electrical or other treatment when under a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement is not treated for the purposes of Sch 8 paras 9, 10 as failure to comply with that requirement: see Sch 8 para 11; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179.

9 See *ibid* Sch 8 paras 9(1)(c), 10(1)(c) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179. See note 8 *supra*.

10 See *ibid* Sch 8 paras 9(2), 10(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 178-179.

## **UPDATE**

### **1392 Breach of community orders**

NOTE 8--Criminal Justice Act 2003 Sch 8 para12 repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 96, Sch 28 Pt 1.



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### **1393. Revocation of community orders.**

If, on the application of the offender or the responsible officer<sup>1</sup>, it appears to the appropriate magistrates' court or Crown Court that, having regard to circumstances which have arisen since the order was made, it would be in the interests of justice for the order to be revoked, or for the offender to be dealt with in some other way for the offence in respect of which the order was made, the court may revoke the order or revoke the order and deal with the offender, for the offence in respect of which the order was made, in any way in which it could deal with him if he had just been convicted by the court of the offence<sup>2</sup>. The circumstances in which a community order may be revoked include the offender making good progress or responding satisfactorily to supervision or treatment<sup>3</sup>.

1 For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

2 See the Criminal Justice Act 2003 s 179, Sch 8 paras 13(1), (2), 14(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 180-181.

3 See *ibid* Sch 8 paras 13(3), 14(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 180-181.

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### **1394. Amendment of community orders.**

Where the offender has changed residence, the court may (and, on the application of the responsible officer<sup>1</sup>, must) amend the community order<sup>2</sup> by substituting the other local justice area for the area specified in the order<sup>3</sup>. However, if in the courts opinion the requirements cannot be complied with unless the offender continues to reside in the local justice area concerned the court may either cancel those requirements or substitute requirements that can be complied with<sup>4</sup>.

The appropriate court may also amend the community order on the application of the offender or the responsible officer, by cancelling any of the requirements of the order, or by replacing any of those requirements with a requirement of the same kind which the court could include if it were then making the order<sup>5</sup>. However, where this applies to a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement, the requirement may not be amended unless the offender is willing to comply with the amendments<sup>6</sup>. Such a requirement may be revoked or the offender may be dealt with, in respect of the offence of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made<sup>7</sup>.

Powers also exist to revoke the community order and deal with the original offence where there has been a subsequent conviction<sup>8</sup>.

1 For the meaning of 'responsible officer' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104.

2 For the meaning of 'community order' see para 1284 ante.

3 See the Criminal Justice Act 2003 s 179, Sch 8 para 16(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 182.

4 See *ibid* Sch 8 para 16(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 182. In order for a court to amend a community order imposing a programme requirement it must appear to the court that the accredited programme specified in the requirement is available in the other local justice area: see Sch 8 para 16(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 182.

5 See *ibid* Sch 8 para 17(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 183. As to the extension of an unpaid work requirement see also Sch 9 para 20; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 186.

6 See *ibid* Sch 8 para 17(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 183. As to the amendment of such treatment requirements see Sch 8 para 18 (amendment of treatment requirements of community order on report of practitioner), Sch 8 para 19 (amendment in relation to review of drug rehabilitation requirement); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 184-185.

7 See *ibid* Sch 8 para 17(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 183.

8 See *ibid* Sch 8 paras 21-23; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 188-189.

## **UPDATE**

### **1395 Fines**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.

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#### **(iv) Financial Orders**

##### **1396. Compensation orders.**

A court by or before which a person is convicted of an offence has the power to make a compensation order against that person<sup>1</sup> instead of dealing with him in any other way, save for serious offences<sup>2</sup> in which case the power is in addition to other sentencing powers<sup>3</sup>.

A compensation order may require the offender:

- 1418 (1) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence<sup>4</sup>; or
- 1419 (2) to make payments for funeral expenses<sup>5</sup> or bereavement<sup>6</sup> in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road<sup>7</sup>.

The compensation awarded is of such amount as the court considers appropriate<sup>8</sup> and in determining this amount the court must have regard to the offender's means, or where appropriate, the parent or guardian's means<sup>9</sup>.

Where the court considers that it would be appropriate both to impose a fine and to make a compensation order, but that the offender has insufficient means to pay both an appropriate fine and appropriate compensation, the court must give preference to compensation (though it may impose a fine as well)<sup>10</sup>.

In the case of a child or young person, the court is required to order a parent or guardian to pay any compensation order imposed against an offender aged under 18<sup>11</sup>.

1 Powers of Criminal Courts (Sentencing) Act 2000 ss 130-134; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq. As to the power of courts to order a statement as to the financial circumstances of the parent or guardian of a young offender see s 136 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383. As to the power of the courts to order the parent or guardian of a young offender to pay compensation see s 137 (as amended; prospectively further amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 139 et seq, 383. As to the fixing of the compensation to be paid by a young offender's parent or guardian see s 138 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 139 et seq; 383.

2 The offences under *ibid* s 110(2) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 772) or s 111(2) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue para 294), the Firearms Act 1968 s 51A(2) (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 662, 664), the Criminal Justice Act 2003 s 225, s 226, s 227 or s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 67 et seq) or the Violent Crime Reduction Act 2006 s 29(4) or (6) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE).

3 Powers of Criminal Courts (Sentencing) Act 2000 s 130(1), (2) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 117; and the Violent Crime Reduction Act 2006 s 49, Sch 1 para 6(b)). A court must give reasons, on passing sentence, if it does not make a compensation order in a case where the Powers of Criminal Courts (Sentencing) Act 2000 s 130 empowers it to do so: s 130(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 376.

4 *Ibid* s 130(1)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 375-376.

5 A compensation order in respect of funeral expenses may be made for the benefit of anyone who incurred the expenses: *ibid* s 130(9). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

6 A compensation order in respect of bereavement may be made only for the benefit of a person for whose benefit a claim for damages for bereavement could be made under the Fatal Accidents Act 1976 s 1A (as added); and the amount of compensation in respect of bereavement must not exceed the amount for the time being specified in s 1A(3) (as added): Powers of Criminal Courts (Sentencing) Act 2000 s 130(10). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

7 *Ibid* s 130(1)(b). A compensation order may only be made in respect of injury, loss or damage (other than loss suffered by a person's dependants in consequence of his death) which was due to an accident arising out of the presence of a motor vehicle on a road if:

3380 (1) it is in respect of damage which is treated by s 130(5) as resulting from an offence under the Theft Act 1968 or the Fraud Act 2006 (Powers of Criminal Courts (Sentencing) Act 2000 s 130(6)(a) (amended by the Fraud Act 2006 s 14(1), Sch 1 para 29));

3381 (2) it is in respect of injury, loss or damage as respect which the offender is uninsured in relation to the use of the vehicle and compensation is not payable under any arrangements to which the Secretary of State is a party (Powers of Criminal Courts (Sentencing) Act 2000 s 130(6)(b)).

A vehicle the use of which is exempted from insurance by the Road Traffic Act 1988 s 144 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) para 938) is not uninsured for the purposes of head (2) *supra*: Powers of Criminal Courts (Sentencing) Act 2000 s 130(8). In the case of an offence under the Theft Act 1968 or the Fraud Act 2006, where the property in question is recovered, any damage to the property occurring while it was out of the owner's possession must be treated for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 130(1) as having resulted from the offence, however and by whomever the damage was caused: s 130(5) (amended by the Fraud Act 2006 s 14(1), Sch 1 para 29). Where a compensation order is made in respect of injury, loss or damage due to an accident arising out of the presence of a motor vehicle on a road, the amount to be paid may include an amount representing the whole or part of any loss of or reduction in preferential rates of insurance attributable to the accident: Powers of Criminal Courts (Sentencing) Act 2000 s 130(7). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375. As to the Secretary of State see para 155 ante.

8 *Ibid* s 130(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 377.

9 *Ibid* s 130(11). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 378.

10 *Ibid* s 130(12). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 376.

11 See *ibid* s 137 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 139 et seq, 383.

## UPDATE

### 1396 Compensation orders

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(6) CUSTODIAL SENTENCES**

### **1397. Custodial sentences for persons under 21.**

No court may pass a sentence of imprisonment on a person for an offence if he is aged under 21 when convicted of the offence, or commit a person aged under 21 to prison for any reason<sup>1</sup>. However, this does not prevent the committal to prison of a person aged under 21 who is remanded in custody, committed in custody for trial or sentence, or sent in custody for trial under the Crime and Disorder Act 1998<sup>2</sup>.

The following forms of custodial sentence are available to a court in relation to persons under the age of 18:

- 1420 (1) detention at Her Majesty's pleasure<sup>3</sup>;
- 1421 (2) detention for a serious offence for a specified period<sup>4</sup>; and
- 1422 (3) detention and training orders<sup>5</sup>.

Where a person under 18 has committed a serious offence<sup>6</sup>, the court must be of the opinion that there is a significant risk to the public of serious harm<sup>7</sup> occasioned by the commission by him of further specified offences<sup>8</sup> before it can impose a sentence of detention for life or for an indeterminate period<sup>9</sup>.

An extended sentence may be imposed where the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, and where the specified offence is a serious offence, and that the case is not one in which the court is required to impose a sentence of detention for life<sup>10</sup>. In such circumstances, the court must impose on the offender an extended sentence of detention, that is to say, a sentence of detention the term of which is equal to the aggregate of:

- 1423 (a) the appropriate custodial term<sup>11</sup>; and
- 1424 (b) a further period ('the extension period') for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by him of further specified offences<sup>12</sup>, not exceeding five years for a specified violent offence or eight years for a specified sexual offence<sup>13</sup>, or in any event, the maximum term of imprisonment permitted for the offence<sup>14</sup>.

At age 21, or 18 years in cases of bad behaviour<sup>15</sup>, a sentence of detention may be converted into a sentence of imprisonment<sup>16</sup>.

<sup>1</sup> Powers of Criminal Courts (Sentencing) Act 2000 s 89(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 11. As from a day to be appointed, s 89(1) is amended so as to provide that no court may pass a sentence of imprisonment on a person for an offence if he is aged under 18 when convicted of the offence, or commit a person aged under 18 to prison for any reason: s 89(1) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 180). At the date at which this volume states the law no such day had been appointed. As to the provisions generally applicable to custodial sentences see the

Powers of Criminal Courts (Sentencing) Act 2000 Pt V Ch I (ss 76-88) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 29 et seq, 67 et seq.

2 Ibid s 89(2) (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 11. The text refers to the Crime and Disorder Act 1998 s 51 and s 51A (as added): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1131 et seq. As from a day to be appointed the Powers of Criminal Courts (Sentencing) Act 2000 s 89(2) (as amended) is further amended so as to provide that nothing in s 89(1) (prospectively amended) prevents the committal to prison of a person aged under 18 who is remanded in custody, committed in custody for trial or sentence, or sent in custody for trial under the Crime and Disorder Act 1998 s 51: Powers of Criminal Courts (Sentencing) Act 2000 s 89(2) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 160, 180). At the date at which this volume states the law no such day had been appointed.

3 See the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended), s 92; para 1405 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81.

4 See ibid s 91 (as amended; prospectively further amended), s 92; para 1404 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

5 See ibid ss 100-105, s 107; paras 1398-1403 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89 et seq.

6 For the meaning of 'serious offence' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 68. The offence must be committed after 4 April 2005: see the Criminal Justice Act 2003 s 226(1)(a); and the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 para 18.

7 In the death or serious personal injury, whether physical or psychological: Criminal Justice Act 2003 s 224(3). In forming an opinion under s 226(1)(b) or s 227(1)(b), the court:

3382 (1) must take into account all such information as is available to it about the nature and circumstances of the offence (see s 156(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 617, 626);

3383 (2) may take into account any information which is before it about any pattern of behaviour of which the offence forms part (see s 156(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 617); and

3384 (3) may take into account any information about the offender which is before it, by obtaining a pre-sentence report (see s 156(2), (3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 626).

8 As to this assessment see ibid s 229; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 69.

9 See ibid s 226; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83.

10 See ibid s 228(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84.

11 See ibid s 228(2)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84.

12 See ibid s 228(2)(b); SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84.

13 See ibid s 228(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84.

14 See ibid s 228(5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84. As to the supervision of young offenders after release see the Criminal Justice Act 1991 s 65 (as amended; prospectively repealed), the Criminal Justice and Court Services Act 2000 s 64 (prospectively amended); and PRISONS vol 36(2) (Reissue) para 628.

15 See the Powers of Criminal Courts (Sentencing) Act 2000 s 99(1)(b) (as amended); para 1407 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 97.

16 See ibid s 99 (as substituted and amended); para 1407 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 97.

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### **1398. Detention and training orders.**

Where a child or young person (that is to say, any person aged under 18) is convicted of an offence which is punishable with imprisonment in the case of a person aged 21 or over, and the court is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence<sup>1</sup>, the sentence that the court is to pass is a detention and training order<sup>2</sup>. However, nothing prevents the court from passing a custodial sentence on the offender if:

- 1425 (1) he fails to express his willingness to comply with a requirement which is proposed by the court to be included in a community order and which requires an expression of such willingness<sup>3</sup>; or
- 1426 (2) he fails to comply with an order for pre-sentence drug testing<sup>4</sup>.

A detention and training order is an order that the offender in respect of whom it is made is to be subject, for the term specified in the order, to a period of detention and training followed by a period of supervision<sup>5</sup>.

A court must not make a detention and training order:

- 1427 (a) in the case of an offender under the age of 15 at the time of the conviction, unless it is of the opinion that he is a persistent offender<sup>6</sup>; and
- 1428 (b) in the case of an offender under the age of 12 at that time, unless it is of the opinion that only a custodial sentence would be adequate to protect the public from further offending by him, and the offence was committed on or after such date as the Secretary of State<sup>7</sup> may by order appoint<sup>8</sup>.

1 He that the Criminal Justice Act 2003 s 152(2) applies or that the case falls within s 152(3).

2 Powers of Criminal Courts (Sentencing) Act 2000 s 100(1) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 111(1), (2)(a)). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89. As from a day to be appointed, the Powers of Criminal Courts (Sentencing) Act 2000 s 100 (as amended) is also amended so as to provide for where a child or young person is convicted of an offence which is punishable with imprisonment in the case of a person aged 18 or over: s 100(1) (as so amended; and further amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 184). At the date at which this volume states the law no such day had been appointed. The Powers of Criminal Courts (Sentencing) Act 2000 s 100(1) is expressed as being subject to ss 90, 91 and the Criminal Justice Act 2003 ss 226, 228. The power to impose an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 100 (as amended) is also subject to the Children and Young Persons Act 1963 s 29: see *Aldis v DPP* [2002] EWHC 403 (Admin), (2002) Times, 6 March, DC.

3 Criminal Justice Act 2003 s 152(3)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89.

4 Ibid s 152(3)(b). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89. Pre-sentence drug testing mentioned in the text refers to testing under s 161(2) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 629).

5 Powers of Criminal Courts (Sentencing) Act 2000 s 100(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89.



6 Ibid s 100(2)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89. In determining whether an offender under 15 could be considered as a persistent offender, account may be taken of offences in respect of which he has been cautioned or given a reprimand or warning (*R v D* [2000] Crim LR 867, CA) or of offences subsequent to the index offence and the matter should be looked at according to the 'good sense of the court' (*R v B* [2000] Crim LR 50).

7 As to the Secretary of State see para 155 ante.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 100(2)(b). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1399. Term of detention and training order.

### **1399. Term of detention and training order.**

The term of a detention and training order<sup>1</sup> made in respect of an offence (whether by a magistrates' court or otherwise) must be 4, 6, 8, 10, 12, 18 or 24 months<sup>2</sup>. However, the term of a detention and training order may not exceed the maximum term of imprisonment that the Crown Court could (in the case of an offender aged 21 or over) impose for the offence<sup>3</sup>. A court making a detention and training order may order that its term is to commence on the expiry of the term of any other detention and training order made by that or any other court<sup>4</sup>. However, a court:

- 1429 (1) must not make in respect of an offender a detention and training order the effect of which would be that he would be subject to detention and training orders for a term which exceeds 24 months<sup>5</sup>; and
- 1430 (2) making a detention and training order must not order that its term is to commence on the expiry of the term of a detention and training order under which the period of supervision has already begun<sup>6</sup>.

Where the term of the detention and training orders to which an offender would otherwise be subject exceeds 24 months, the excess must be treated as remitted<sup>7</sup>.

Where a detention and training order ('the new order') is made in respect of an offender who is subject to a detention and training order under which the period of supervision has begun ('the old order'), the old order must be disregarded in determining<sup>8</sup>:

- 1431 (a) for the purposes of head (1) above, whether the effect of the new order would be that the offender would be subject to detention and training orders for a term which exceeds 24 months<sup>9</sup>; and
- 1432 (b) for the purposes of the provision relating to the excess of the detention and training orders that is treated as remitted where the total term exceeds 24 months<sup>10</sup>, whether the term of the detention and training orders to which the offender would otherwise<sup>11</sup> be subject exceeds 24 months<sup>12</sup>.

In determining the term of a detention and training order for an offence, the court must take account<sup>13</sup> of any period for which the offender has been remanded in custody<sup>14</sup> in connection with the offence, or any other offence the charge for which was founded on the same facts or evidence<sup>15</sup>. However, this<sup>16</sup> does not apply where a court proposes to make detention and training orders in respect of an offender for two or more offences, but in determining the total term of the detention and training orders it proposes to make in respect of the offender the court must take account of the total period (if any) for which he has been remanded in custody<sup>17</sup> in connection with any of those offences, or any other offence the charge for which was founded on the same facts or evidence<sup>18</sup>. Once a period of remand has been taken account of<sup>19</sup> in relation to a detention and training order made in respect of an offender for any offence or offences, it must not subsequently be taken account of<sup>20</sup> in relation to such an order made in respect of the offender for any other offence or offences<sup>21</sup>.

1 As to the making of a detention and training order see para 1398 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 101(1). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90. Section 101(1) is expressed to be subject to s 101(2) and, as from a day to be appointed, s 101(2A) (as added). As from a day to be appointed, s 101(2A) is added by the Criminal Justice Act 2003 s 298(1), (3) so as to provide that where the offence is a summary one and the maximum term for an adult offender is 51 weeks, the term of detention and training must not exceed six months. At the date at which this volume states the law no such day had been appointed.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 101(2). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90. As from a day to be appointed, s 101(2) is amended so as to provide that the term of a detention and training order may not exceed the maximum term of imprisonment that the Crown Court could (in the case of an offender aged 18 or over) impose for the offence: s 101(2) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 185). At the date at which this volume states the law no such day had been appointed.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 101(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90. A court may impose a consecutive detention and training order so that the aggregate term is not a period specified in s 101(1) (see the text and notes 1-2 supra): *R v Morris* [2001] Crim LR 48, CA. A detention and training order cannot be ordered to follow consecutively upon an order for detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended) (or the Children and Young Persons Act 1933 s 53(2) (repealed)): *R v Hayward* [2001] Crim LR 236, CA. A sentence imposed, or other order made, by the Crown Court when dealing with an offender takes effect from the beginning of the day on which it is imposed, unless the court otherwise directs: Powers of Criminal Courts (Sentencing) Act 2000 s 154(1). As to when the sentence of detention takes effect where a court passes a sentence of detention in a young offender institution in the case of an offender who is subject to a detention and training order see s 106(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 95. As to when the detention and training order takes effect where a court makes a detention and training order in the case of an offender who is subject to a sentence of detention in a young offender institution see s 106(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 95.

5 Ibid s 101(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

6 Ibid s 101(6). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90. As to the period of supervision see s 103(1); and para 1401 post.

7 Ibid s 101(5). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

8 Ibid s 101(7). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

9 Ibid s 101(7)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

10 Ie ibid s 101(5): see the text and note 7 supra.

11 Ie apart from ibid s 101(5): see the text and note 7 supra.

12 Ibid s 101(7)(b). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

13 It is considered neither appropriate nor desirable to calculate mathematically the total term by reference to a few days in custody, but weeks or months spent in custody should reduce the sentence to reflect that period: *R v B* [2000] Crim LR 870, CA; *R v Inner London Crown Court, ex p N and S* [2000] Crim LR 871, DC. Accordingly, the court should as a matter of good practice indicate in advance its intention to make such an order so as to be informed of any time in custody on remand: *R v Haringey Youth Court, ex p A* (2000) Times, May 30, DC. A period totalling 24 months may be upheld on appeal despite a guilty plea and a significant period in custody if the court could otherwise have imposed a term of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended): *R v Fieldhouse* [2000] Crim LR 1020, CA.

14 Any reference in the Powers of Criminal Courts (Sentencing) Act 2000 s 101(8) or s 101(9) to an offender's being remanded in custody is a reference to his being: (1) held in police detention; (2) remanded in or committed to custody by an order of a court; (3) remanded or committed to local authority accommodation under the Children and Young Persons Act 1969 s 23 (as substituted and amended; prospectively further amended) (see paras 1247-1253 ante) and placed and kept in secure accommodation or being detained in a secure training centre pursuant to arrangements under the Children and Young Persons Act 1969 s 23(7A) (as added) (see para 1248 ante); or (4) remanded, admitted or removed to hospital under the Mental Health Act 1983 s 35, s 36, s 38 (as amended), or s 48 (prospectively amended) (see MENTAL HEALTH); Powers of Criminal Courts (Sentencing) Act 2000 s 101(11) (amended by the Criminal Justice and Police Act 2001 s 133(3)). For the meaning of 'secure accommodation' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 101(11) (as amended) see para 1248 note 4 ante; definition applied by s 101(12)). A person is in police detention for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 101(11) (as amended): (a)

at any time when he is in police detention for the purposes of the Police and Criminal Evidence Act 1984; and (b) at any time when he is detained under the Terrorism Act 2000 s 41: Powers of Criminal Courts (Sentencing) Act 2000 s 101(12) (amended by the Terrorism Act 2000 s 125, Sch 15 para 20(1), (3)).

15 Powers of Criminal Courts (Sentencing) Act 2000 s 101(8). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

16 *Ie* *ibid* s 101(8): see the text and note 15 *supra*.

17 See note 14 *supra*.

18 Powers of Criminal Courts (Sentencing) Act 2000 s 101(9). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

19 *Ie* under *ibid* s 101(8) or (9): see the text and notes 13-18 *supra*.

20 See note 19 *supra*.

21 Powers of Criminal Courts (Sentencing) Act 2000 s 101(10). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 90.

## **UPDATE**

### **1399 Term of detention and training order**

TEXT AND NOTES 15, 18--Powers of Criminal Courts (Sentencing) Act 2000 s 101(8), (9) amended: Criminal Justice and Immigration Act 2008 s 22(6).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1400. The period of detention and training.

### **1400. The period of detention and training.**

An offender must serve the period of detention and training under a detention and training order<sup>1</sup> in such youth detention accommodation<sup>2</sup> as may be determined by the Secretary of State or by such other person as may be authorised by him for that purpose<sup>3</sup>. The period of detention and training under a detention and training order must be one-half of the term of the order<sup>4</sup>. However:

- 1433 (1) the Secretary of State may at any time release the offender if he is satisfied that exceptional circumstances exist which justify the offender's release on compassionate grounds<sup>5</sup>;
- 1434 (2) the Secretary of State may release the offender in the case of an order for a term of eight months or more but less than 18 months, at any time during the period of one month ending with the half way point of the term of the order, and in the case of an order for a term of 18 months or more, at any time during the period of two months ending with that point<sup>6</sup>; and
- 1435 (3) if a youth court<sup>7</sup> so orders on an application made by the Secretary of State for the purpose, the Secretary of State must release the offender in the case of an order for a term of eight months or more but less than 18 months, one month after the half-way point of the term of the order, and in the case of an order for a term of 18 months or more, one month or two months after that point<sup>8</sup>.

An offender detained in pursuance of a detention and training order is deemed to be in legal custody<sup>9</sup>.

1 As to the making of a detention and training order see para 1398 ante.

2 'Youth detention' accommodation' means (Powers of Criminal Courts (Sentencing) Act 2000 s 107(1) (amended by the Offender Management Act 2007 s 34(1), (5)):

3385 (1) a secure training centre (Powers of Criminal Courts (Sentencing) Act 2000 s 107(1)(a));

3386 (2) a young offender institution (s 107(1)(b));

3387 (3) accommodation provided by a local authority for the purpose of restricting the liberty of children and young persons (s 107(1)(c));

3388 (4) accommodation provided for that purpose under the Children Act 1989 s 82(5) (financial support by the Secretary of State) (see para 158 ante) (Powers of Criminal Courts (Sentencing) Act 2000 s 107(1)(d)); or

3389 (5) such other accommodation provided for the purpose of restricting liberty as the Secretary of State may direct (s 107(1)(e)).

For the purposes of s 102 (amended), s 103 (as amended) (see para 1401 post), s 104 (amended) (see para 1402 post) and s 105 (amended) (see para 1403 post), references to the term of a detention and training order are to be construed in accordance with s 101(13) (see note 4 infra): s 107(2). As to the Secretary of State see para 155 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 102(1) (amended by the Offender Management Act 2007 s 34(1), (2)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

4 Powers of Criminal Court (Sentencing) Act 2000 s 102(2). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91. Section 102(2) is expressed as being subject to s 102(3)-(5): see the text to notes 5-8 infra. For the purpose of any reference in ss 102-105 to the term of a detention and training order, consecutive terms of such orders and terms of such orders which are wholly or partly concurrent must be treated as a single term if the orders were made on the same occasion, or, where they were made on different occasions, the offender has not been released (by virtue of s 102(2), s 102(3) (as amended), s 102(4) or s 102(5) at any time during the period beginning with the first and ending with the last of those occasions: see s 101(13); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

5 Ibid s 102(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

6 Ibid s 102(4) (amended by the Offender Management Act 2007 s 33). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

7 As to youth courts see para 1263 et seq ante.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 102(5). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

9 Ibid s 102(6). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

## **UPDATE**

### **1400 The period of detention and training**

NOTE 2--Reference to Offender Management Act 2007 s 34(1), (5) should include a reference to s 34(6).

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1401. Period of supervision of offender subject to detention and training order.

#### **1401. Period of supervision of offender subject to detention and training order.**

The period of supervision of an offender who is subject to a detention and training order<sup>1</sup> begins with the offender's release, whether at the half-way point of the term of the order or otherwise, and ends when the term of the order ends<sup>2</sup>. However, the Secretary of State<sup>3</sup> may by order provide that the period of supervision must end at such point during the term of a detention and training order<sup>4</sup> as may be specified in the order<sup>5</sup>.

During the period of supervision, the offender must be under the supervision of:

- 1436 (1) an officer of a local probation board<sup>6</sup>;
- 1437 (2) a social worker of a local authority<sup>7</sup>; or
- 1438 (3) a member of a youth offending team<sup>8</sup>.

The category of person to supervise the offender must be determined from time to time by the Secretary of State<sup>9</sup>.

Where the supervision is to be provided by an officer of a local probation board, the officer of a local probation board must be an officer appointed for or assigned to the local justice area within which the offender resides for the time being<sup>10</sup>. Where the supervision is to be provided by a social worker of a local authority, or a member of a youth offending team, the social worker or member must be a social worker of, or a member of a youth offending team established by, the local authority within whose area the offender resides for the time being<sup>11</sup>.

The offender must be given a notice from the Secretary of State specifying:

- 1439 (a) the category of person for the time being responsible for his supervision<sup>12</sup>;
- and
- 1440 (b) any requirements with which he must for the time being comply<sup>13</sup>.

Such a notice must be given to the offender before the commencement of the period of supervision, and before any alteration in the specified matters<sup>14</sup> comes into effect<sup>15</sup>.

1 As to the making of a detention and training order see para 1398 ante.

2 Powers of Criminal Courts (Sentencing) Act 2000 s 103(1). As to the term of a detention and training order see para 1399 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

3 As to the Secretary of State see para 155 ante.

4 See para 1399 ante.

5 Powers of Criminal Courts (Sentencing) Act 2000 s 103(2). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92. At the date at which this volume states the law no such orders had been made.

6 Ibid s 103(3)(a) (substituted by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 4(1)(a), (2)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

7 Powers of Criminal Courts (Sentencing) Act 2000 s 103(3)(b) (amended by the Children Act 2004 s 64, Sch 5 Pt 4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 103(3)(c). As to the functions of youth offending teams (ie as established under the Crime and Disorder Act 1998 s 39 (as amended)) see para 1306 ante. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 103(3).

10 Ibid s 103(4) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 76).

11 Powers of Criminal Courts (Sentencing) Act 2000 s 103(5) (amended by the Children Act 2004 Sch 5 Pt 4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

12 Powers of Criminal Courts (Sentencing) Act 2000 s 103(6)(a). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

13 Ibid s 103(6)(b). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

14 Ie the matters specified in ibid s 103(6): see heads (a), (b) in the text.

15 Ibid s 103(7). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 92.

## **UPDATE**

### **1401 Period of supervision of offender subject to detention and training order**

TEXT AND NOTES 6, 10--2000 Act s 103(3)(a) amended, s 103(4A) added: SI 2008/912.



Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1402. Breach of supervision requirements of detention and training order.

#### **1402. Breach of supervision requirements of detention and training order.**

Where a detention and training order<sup>1</sup> is in force in respect of an offender and it appears on information to a justice of the peace that the offender has failed to comply with the specified requirements<sup>2</sup>, the justice<sup>3</sup>:

- 1441 (1) may issue a summons requiring the offender to appear at the place and time specified in the summons<sup>4</sup>; or
- 1442 (2) if the information is in writing and on oath, may issue a warrant for the offender's arrest<sup>5</sup>.

Any summons or warrant so issued must direct the offender to appear before a youth court acting for the local justice area in which the offender resides or, if it is not known where the offender resides, before a youth court acting for the same local justice area as the justice who issued the summons or warrant<sup>6</sup>. If it is proved to the satisfaction of the youth court before which an offender appears or is brought<sup>7</sup> that he has failed to comply with those specified requirements<sup>8</sup>, that court may<sup>9</sup>:

- 1443 (a) order the offender to be detained in youth detention accommodation<sup>10</sup> as the Secretary of State<sup>11</sup> may determine, for such period, not exceeding the shorter of three months or the remainder of the term of the detention and training order<sup>12</sup>, as the court may specify<sup>13</sup>; or
- 1444 (b) impose on the offender a fine not exceeding a prescribed level<sup>14</sup>.

An offender detained in pursuance of an order under head (a) above is deemed to be in legal custody<sup>15</sup>. A fine imposed under head (b) above is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction<sup>16</sup>. An offender may appeal to the Crown Court against any order made under head (a) or head (b) above<sup>17</sup>.

1 As to the making of a detention and training order see para 1398 ante.

2 I.e. those under the Powers of Criminal Courts (Sentencing) Act 2000 s 103(6)(b): see para 1401 ante.

3 Ibid s 104(1) (amended by the Domestic Violence, Crime and Victims Act 2004 s 29, Sch 5 para 2(1), (2)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 104(1)(a) (amended by the Domestic Violence, Crime and Victims Act 2004 Sch 5 para 2(1), (2)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.

5 Powers of Criminal Courts (Sentencing) Act 2000 s 104(1)(b) (amended by the Domestic Violence, Crime and Victims Act 2004 Sch 5 para 2(1), (2)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.

6 Powers of Criminal Courts (Sentencing) Act 2000 s 104(2) (added by the Domestic Violence, Crime and Victims Act 2004 Sch 5 para 2(1), (3)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.

7 I.e. appears or is brought under the Powers of Criminal Courts (Sentencing) Act 2000 s 104 (as amended).

- 8 See note 2 *supra*.
- 9 Powers of Criminal Courts (Sentencing) Act 2000 s 104(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.
- 10 As to youth detention accommodation orders see para 1400 note 2 *ante*.
- 11 As to the Secretary of State see para 155 *ante*.
- 12 As to the term of a detention and training order see para 1399 *ante*.
- 13 Powers of Criminal Courts (Sentencing) Act 2000 s 104(3)(a) (amended by the Offender Management Act 2007 s 34(1), (3)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.
- 14 Powers of Criminal Court (Sentencing) Act 2000 s 104(3)(b). Such a fine must not exceed level 3 on the standard scale: s 104(3)(b). As to the standard scale see para 132 note 2 *ante*. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.
- 15 *Ibid* s 104(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.
- 16 *Ibid* s 104(5). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.
- 17 *Ibid* s 104(6). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93.

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### **1403. Offences during currency of detention and training order.**

The following<sup>1</sup> applies to a person subject to a detention and training order<sup>2</sup> if, after his release and before the date on which the term of the order ends, he commits an offence punishable with imprisonment in the case of a person aged 21 or over ('the new offence') and, whether before or after that date, he is convicted of the new offence<sup>3</sup>. The court by or before which such a person is convicted of the new offence may, whether or not it passes any other sentence on him, order him to be detained in such youth detention accommodation<sup>4</sup> as the Secretary of State<sup>5</sup> may determine for the whole or any part of the period which begins with the date of the court's order, and is equal in length to the period between the date on which the new offence was committed and the date<sup>6</sup> on which the term of the order ends<sup>7</sup>. A person so detained is deemed to be in legal custody<sup>8</sup>.

The period for which such a person is ordered<sup>9</sup> to be detained in youth detention accommodation must, as the court may direct, either be served before and be followed by, or be served concurrently with, any sentence imposed for the new offence; and, in either case, must be disregarded in determining the appropriate length of that sentence<sup>10</sup>.

Where the new offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it is to be taken to have been committed on the last of those days<sup>11</sup>.

1   Ie the Powers of Criminal Courts (Sentencing) Act 2000 s 105 (as amended and prospectively amended): see the text and notes 2-11 infra.

2   As to the making of a detention and training order see para 1398 ante. As to the term of a detention and training order see para 1399 ante.

3   Powers of Criminal Courts (Sentencing) Act 2000 s 105(1). As from a day to be appointed s 105(1) is amended so as to provide that s 105 applies to a person subject to a detention and training order if, after his release and before the date on which the term of the order ends, he commits an offence punishable with imprisonment in the case of a person aged 18 or over ('the new offence') and, whether before or after that date, he is convicted of the new offence: s 105(1) (prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 186). At the date at which this volume states the law no such day had been appointed. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 94.

4   As to youth detention accommodation orders see para 1400 note 2 ante.

5   As to the Secretary of State see para 155 ante.

6   Ie the date mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 105(1) (prospectively amended): see the text and note 3 supra.

7   Ibid s 105(2) (amended by the Offender Management Act 2007 s 34(1), (4)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 94.

8   Powers of Criminal Court (Sentencing) Act 2000 s 105(5). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 94.

9   Ie under ibid s 105(2): see the text and note 7 supra.

10   Ibid s 105(3) (amended by the Offender Management Act 2007 s 34(1), (4)). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 94.

11 Powers of Criminal Court (Sentencing) Act 2000 s 105(4). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 94.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1404. Detention for serious offences for specified period.

#### **1404. Detention for serious offences for specified period.**

Where a person aged under 18 is convicted on indictment<sup>1</sup> of:

- 1445 (1) an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, not being an offence the sentence for which is fixed by law<sup>2</sup>;
- 1446 (2) the offence of sexual assault<sup>3</sup>;
- 1447 (3) child sex offences committed by children or young persons<sup>4</sup>;
- 1448 (4) the offence of sexual activity with a child family member<sup>5</sup>;
- 1449 (5) the offence of inciting a child family member to engage in sexual activity<sup>6</sup>;
- 1450 (6) an offence in relation to prohibited weapons<sup>7</sup>;
- 1451 (7) an offence of using someone to mind a weapon<sup>8</sup>,

and the court is of the opinion that neither a community sentence nor a detention and training order is suitable, the court may sentence the offender to be detained for such period, not exceeding the maximum term of imprisonment with which the offence is punishable in the case of a person aged 21 or over, as may be specified in the sentence<sup>9</sup>.

A person sentenced to be detained for a specified period<sup>10</sup> is liable to be detained in such place and under such conditions as the Secretary of State may direct<sup>11</sup>, or as the Secretary of State may arrange with any person<sup>12</sup>. A person detained pursuant to such directions or arrangements<sup>13</sup> made by the Secretary of State is deemed to be in legal custody<sup>14</sup>.

<sup>1</sup> As to conviction on indictment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1334 et seq.

<sup>2</sup> Powers of Criminal Courts (Sentencing) Act 2000 s 91(1)(a). Such offences have since 27 February 2004 included:

3390 (1) the aggravated taking of a vehicle (see the Theft Act 1968 s 12A (as added and amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 299);

3391 (2) causing death by dangerous driving under the Road Traffic Act 1988 s 1 (see the Road Traffic Offenders Act 1988 Sch 2 Pt 1 (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) para 1034); and

3392 (3) causing death by careless driving when under the influence of drink and drugs under the Road Traffic Act 1988 s 3A (as added) (see the Road Traffic Offenders Act 1988 Sch 2 Pt 1 (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) para 1034).

<sup>3</sup> Powers of Criminal Courts (Sentencing) Act 2000 s 91(1)(b) (s 91(1)(b), (c) substituted, and s 91(1)(d), (e) added, by the Sexual Offences Act 2003 s 139, Sch 6 para 43(1), (2)). The text refers to an offence under the Sexual Offences Act 2003 s 3 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 169).

<sup>4</sup> Powers of Criminal Courts (Sentencing) Act 2000 s 91(1)(c) (as substituted: see note 3 supra). The text refer to offences under the Sexual Offences Act 2003 s 13 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 177).

5 Powers of Criminal Courts (Sentencing) Act 2000 s 91(1)(d) (as added: see note 3 supra). The text refers to an offence under the Sexual Offences Act 2003 s 25 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 191).

6 Powers of Criminal Courts (Sentencing) Act 2000 s 91(1)(e) (as added: see note 3 supra). The text refers to an offence under the Sexual Offences Act 2003 s 26 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 191).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 91(1A) (added by the Criminal Justice Act 2003 s 289(1), (2)); Powers of Criminal Courts (Sentencing) Act 2000 s 91(1B) (added by the Violent Crime Reduction Act 2006 s 49, Sch 1 para 7(2)). The text refers to offences under the Firearms Act 1968 s 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) (c), (1A)(a), s 51A(1A)(b), (e) or (f) (as added) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE). Head (6) in the text applies where the offence was committed in relation to the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1A) (as added) after the commencement of the Firearms Act 1968 s 51A (as added) and for the purposes of s 51A(3) (as added) at a time when he was aged 16 or over; and where in relation to the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1B) (as added) the offence was committed after the commencement of the Violent Crime Reduction Act 2006 s 30 and for the purposes of the Firearms Act 1968 s 51A(3) (as added) at a time when he was aged 16 or over: see the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1A)(b), (1B)(b) (as so added). Head (6) in the text applies where the court is of the opinion mentioned in the Firearms Act 1968 s 51A(2) (as added): Powers of Criminal Courts (Sentencing) Act 2000 s 91(1A)(c), (1B) (c) (as so added).

8 Ibid s 91(1C)(a) (added by the Violent Crime Reduction Act 2006 s 49, Sch 1 para 7(2)). The text refers to an offence under the Violent Crime Reduction Act 2006 s 28 where s 29(3) applies and the court is of the opinion mentioned in s 29(6) (exceptional circumstances which justify not imposing the minimum sentence (see CRIMINAL LAW, EVIDENCE AND PROCEDURE): Powers of Criminal Courts (Sentencing) Act 2000 s 91(1C)(b), (c) (as so added)).

9 Ibid s 91(3) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 110(1), (2)). A custodial sentence under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended; prospectively further amended) may be imposed on a defendant under 15 who is not a persistent offender in the terms referred to by s 100(2) (see para 1398 ante) for the purpose of making a detention and training order, provided that the offence qualifies under s 91 (as amended; prospectively further amended) and the sentence would have been a detention and training order if the offender had been aged 15 years or more, or been a persistent offender: *R v Jenkins-Rowe* (2000) Crim LR 1022, CA. Detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended; prospectively further amended) is rarely appropriate where a person is under 15 years of age and a detention and training order is not available: *R (on the application of M) v Waltham Forest Youth Court*, *R (on the application of W) v Thetford Youth Court* [2002] EWHC 1252 (Admin), [2003] 1 Cr App Rep (S) 323; *R (on the application of W) v Southampton Youth Court*, *R (on the application of K) v Wirral Borough Magistrates' Court* [2002] EWHC 1640 (Admin), [2003] 1 Cr App Rep (S) 455; *R (on the application of C) v Balham Youth Court* [2003] EWHC 1332 (Admin), [2004] 1 Cr App Rep (S) 143; *R (on the application of H, A and O) v Southampton Youth Court* [2004] EWHC 2912 (Admin), (2005) 169 JP 37. As from a day to be appointed, the Powers of Criminal Courts (Sentencing) Act 2000 s 91(3) (as amended) is further amended so as to provide that if the court is of the opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period, not exceeding the maximum term of imprisonment with which the offence is punishable in the case of a person aged 18 or over, as may be specified in the sentence: s 91(3) (as so amended; prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 181). At the date at which this volume states the law no such day had been appointed. The Powers of Criminal Courts (Sentencing) Act 2000 s 91(3) (as amended; prospectively amended) is subject to the Criminal Justice Act 2003 ss 152, 153 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 19, 32): Powers of Criminal Courts (Sentencing) Act 2000 s 91(4) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 110(1), (3)). Where the Firearms Act 1968 s 51A(2) (as added) or the Violent Crime Reduction Act 2006 s 29(6) requires the imposition of a sentence of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended; prospectively further amended) for a term of at least the term provided for in that provision, the court must sentence the offender to be detained for such period, of at least the term so provided for but not exceeding the maximum term of imprisonment with which the offence is punishable in the case of a person aged 18 or over, as may be specified in the sentence: s 91(5) (added by the Criminal Justice Act 2003 s 289(1)).

10 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended; prospectively further amended): see the text and notes 1-9 supra.

11 Powers of Criminal Courts (Sentencing) Act 2000 s 92(1)(a). Such a direction of the Secretary of State may be signified only: (1) under the hand of the Secretary of State or an Under-Secretary of State or an Assistant Under-Secretary; or (2) under the hand of an authorised officer: s 92(3)(a), (b).

The Secretary of State's power to give directions includes power to direct detention by a local authority specified in the directions in a home so specified which is a community home provided by the authority or a controlled community home for the management, equipment and maintenance of which the authority is

responsible, although a person is not liable to be detained in this manner after he attains the age of 19: Children and Young Persons Act 1969 s 30(1) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 40). Where such directions are given, it is the duty of a local authority specified in the directions to detain the person to whom the directions relate in the home specified in the directions subject to and in accordance with such instructions relating to him as the Secretary of State may give to the authority from time to time; and the authority is entitled to recover from the Secretary of State any expenses reasonably incurred by it in discharging that duty: Children and Young Persons Act 1969 s 30(2). As to the Secretary of State see para 155 ante. For the meaning of 'local authority' see para 1240 note 1 ante. As to community homes and controlled community homes see para 967 et seq ante.

12 Powers of Criminal Courts (Sentencing) Act 2000 s 92(1)(b). Arrangements of the Secretary of State under s 92 may be signified only as mentioned in note 11 head (1) supra: s 92(3).

13 le under ibid s 92: see note 11 supra.

14 Ibid s 92(2).

## **UPDATE**

### **1404 Detention for serious offences for specified period**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 11, 12--Powers of Criminal Courts (Sentencing) Act 2000 s 92(3) repealed: Criminal Justice and Immigration Act 2008 Sch 26 para 44, Sch 28 Pt 2.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1405. Detention at Her Majesty's pleasure.

### **1405. Detention at Her Majesty's pleasure.**

Where a person convicted of murder, or any other offence the sentence for which is fixed by law as life imprisonment, appears to the court to have been aged under 18 at the time the offence was committed, the court must (notwithstanding anything in the Powers of the Criminal Court (Sentencing) Act 2000 or any other Act) sentence him to be detained during Her Majesty's pleasure<sup>1</sup>.

A person sentenced to be detained at Her Majesty's pleasure<sup>2</sup> is liable to be detained in such place and under such conditions as the Secretary of State may direct<sup>3</sup>, or as the Secretary of State may arrange with any person<sup>4</sup>. A person detained pursuant to such directions or arrangements<sup>5</sup> made by the Secretary of State is deemed to be in legal custody<sup>6</sup>.

1 Powers of Criminal Courts (Sentencing) Act 2000 s 90 (amended by the Criminal Justice and Court Services Act 2000 s 60(2), (3), in relation to sentences passed after 30 November 2000). As to the duty to impose a sentence of custody for life on a person aged under 21 for the offence of murder or any other offence the sentence for which is fixed by law, and where the offender is not liable to be detained under the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended) see s 93 (prospectively repealed); para 1406 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 79, 81. As to the power to impose a sentence of custody for life in certain other cases where the offender is aged at least 18 but under 21 see s 94 (prospectively repealed); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 79. As to detention in a young offender institution in cases where the offender is at least 18 but under 21 see ss 95-98 (all prospectively repealed); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 85-86, 96. As to the conversion of a sentence of detention or custody to a sentence of imprisonment where either the offender has attained the age of 21, or he has attained the age of 18 and has been reported as exercising a bad influence on the other inmates or as behaving in a disruptive manner to the detriment of those other inmates see s 99 (as substituted; prospectively amended); and para 1407 post.

2 *Ie* under *ibid* s 90 (as amended): see the text and note 1 *supra*.

3 *Ibid* s 92(1)(a). Such a direction of the Secretary of State may be signified only: (1) under the hand of the Secretary of State or an Under-Secretary of State or an Assistant Under-Secretary; or (2) under the hand of an authorised officer: s 92(3).

The Secretary of State's power to give directions includes power to direct detention by a local authority specified in the directions in a home so specified which is a community home provided by the authority or a controlled community home for the management, equipment and maintenance of which the authority is responsible, although a person is not liable to be detained in this manner after he attains the age of 19: Children and Young Persons Act 1969 s 30(1) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 40). Where such directions are given, it is the duty of a local authority specified in the directions to detain the person to whom the directions relate in the home specified in the directions subject to and in accordance with such instructions relating to him as the Secretary of State may give to the authority from time to time; and the authority is entitled to recover from the Secretary of State any expenses reasonably incurred by it in discharging that duty: Children and Young Persons Act 1969 s 30(2). As to the Secretary of State see para 155 *ante*. For the meaning of 'local authority' see para 1240 note 1 *ante*. As to community homes and controlled community homes see para 967 *et seq* *ante*. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 92(1)(b). Arrangements of the Secretary of State under s 92 may be signified only as mentioned in note 3 head (1) *supra*: s 92(3). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 78, 81.

5 *Ie* under *ibid* s 92.

6 *Ibid* s 92(2).

### **UPDATE**



**1405 Detention at Her Majesty's pleasure**

NOTES 3, 4--Powers of Criminal Courts (Sentencing) Act 2000 s 92(3) repealed: Criminal Justice and Immigration Act 2008 Sch 26 para 44, Sch 28 Pt 2.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1406. Custody for life.

#### **1406. Custody for life.**

Until a day to be appointed<sup>1</sup>, where a person aged under 21 is convicted of murder, or any other offence the sentence for which is fixed by law as imprisonment for life, the court must sentence him to custody for life unless he is otherwise<sup>2</sup> liable to be detained<sup>3</sup>. Where a person aged at least 18 but under 21 is convicted of an offence for which the sentence is not fixed by law, but for which a person aged 21 or over would be liable to imprisonment for life, the court must, if it considers that a sentence for life would be appropriate, sentence him to custody for life<sup>4</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 ss 93-95 are repealed by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 Pt II paras 160, 182, Sch 8 as from a day to be appointed under s 80(1). At the date at which this volume states the law no such day had been appointed.

2 Ie unless he is liable to be detained under the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended) (see para 1405 ante).

3 Ibid s 93. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 79.

4 Ibid s 94(1). Section 94(1) is subject (in particular) to s 79 and s 80, but this does not apply in relation to a sentence which falls to be imposed under s 109(2): s 90(2). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 79.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (6) CUSTODIAL SENTENCES/1407. Conversion of sentence of detention to sentence of imprisonment.

### **1407. Conversion of sentence of detention to sentence of imprisonment.**

Where an offender has been sentenced by a relevant sentence of detention<sup>1</sup> to a term of detention and either he has attained the age of 21, or he has attained the age of 18 and has been reported to the Secretary of State<sup>2</sup> by the independent monitoring board of the institution in which he is detained as exercising a bad influence on the other inmates of the institution or as behaving in a disruptive manner to the detriment of those inmates, the Secretary of State may direct that he is to be treated as if he had been sentenced to imprisonment for the same term<sup>3</sup>. Where the Secretary of State gives such a direction in relation to an offender, the portion of the term of detention imposed under the relevant sentence of detention which he has already served must be deemed to have been a portion of a term of imprisonment<sup>4</sup>.

Where the Secretary of State gives a direction in relation to an offender serving a sentence of detention for public protection<sup>5</sup>, the offender must be treated as if he had been sentenced as a person aged 18 or over<sup>6</sup>; and where the Secretary of State gives such a direction in relation to an offender serving an extended sentence of detention<sup>7</sup>, the offender must be treated as if he had been sentenced as a person aged 18 or over<sup>8</sup>.

1 'Relevant sentence of detention' means:

3393 (1) a sentence of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended) or s 91 (as amended) (see paras 1404-1405 ante) (s 99(5)(a) (s 99 substituted by the Criminal Justice Act 2003 s 236)),

3394 (2) a sentence of detention for public protection under the Criminal Justice Act 2003 s 226 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83) (Powers of Criminal Courts (Sentencing) Act 2000 s 99(5)(b) (as so substituted)); or

3395 (3) an extended sentence of detention under the Criminal Justice Act 2003 s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84) (Powers of Criminal Courts (Sentencing) Act 2000 s 99(5)(c) (as so substituted)).

As from a day to be appointed, 'relevant sentence' also means a sentence of detention under the Armed Forces Act 2006 s 209 or 218 (see ARMED FORCES): Powers of Criminal Courts (Sentencing) Act 2000 s 99(5)(aa) (s 99 as so substituted; and s 99(5)(aa) added by the Armed Forces Act 2006 s 141, Sch 16 para 164(a)). At the date at which this volume states the law no such day had been appointed.

2 As to the Secretary of State see para 155 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 99(1) (as substituted: see note 1 supra; amended by the Offender Management Act 2007 s 39, Sch 3 para 9)).

4 Powers of Criminal Courts (Sentencing) Act 2000 s 99(2) (as substituted: see note 1 supra).

5 I.e. a sentence under the Criminal Justice Act 2003 s 226 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83). As from a day to be appointed references in the Powers of Criminal Courts (Sentencing) Act 2000 s 99 (as substituted) to a sentence under the Criminal Justice Act 2003 s 226 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83) or s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84) include such a sentence passed as a result of the Armed Forces Act 2006 s 221 or s 222 (see ARMED FORCES): Powers of Criminal Courts (Sentencing) Act 2000 s 99(6) (added by the Armed Forces Act 2006 s 378(1), Sch 16 para 164(b)). At the date at which this volume states the law no such day had been appointed.

6 I.e. a sentence under the Criminal Justice Act 2003 s 225 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 73-74).

7 le a sentence under *ibid* s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84).

8 Powers of Criminal Courts (Sentencing) Act 2000 s 99(3) (as substituted: see note 1 *supra*). The reference to an offender being sentenced as a person aged 18 or over is a reference to being sentenced under the Criminal Justice Act 2003 s 227 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 75).

## **UPDATE**

### **1407 Conversion of sentence of detention to sentence of imprisonment**

NOTE 1--Appointed day for the commencement of the Armed Forces Act 2006 Sch 16 para 164(a) is 31 October 2009: SI 2009/1167.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/12. CRIMINAL PROCEEDINGS INVOLVING CHILDREN/ (7) REHABILITATION OF OFFENDERS/1408. Effect of the Rehabilitation of Offenders Act 1974.

## **(7) REHABILITATION OF OFFENDERS**

### **1408. Effect of the Rehabilitation of Offenders Act 1974.**

The provision of the Rehabilitation of Offenders Act 1974 which provides that<sup>1</sup>:

- 1452 (1) a rehabilitated person must be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction<sup>2</sup>;
- 1453 (2) no evidence is admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain<sup>3</sup> to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction<sup>4</sup>; and
- 1454 (3) a person may not, in any such proceedings, be asked, and, if asked, is not required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary to that spent conviction or convictions<sup>5</sup>,

does not affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions<sup>6</sup> or to circumstances ancillary to them in:

- 1455 (a) any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter)<sup>7</sup>;
- 1456 (b) any service disciplinary proceedings or in any proceedings on appeal from any service disciplinary proceedings<sup>8</sup>;
- 1457 (c) any proceedings under Part 2 of the Sexual Offences Act 2003<sup>9</sup>, or on appeal against any such proceedings<sup>10</sup>;
- 1458 (d) any proceedings relating to adoption<sup>11</sup>, the marriage of or formation of a civil partnership by any minor<sup>12</sup>, the exercise of any inherent jurisdiction of the High Court with respect to minors or the provision by any person of accommodation, care or schooling for minors<sup>13</sup>;
- 1459 (e) any proceedings brought under the Children Act 1989<sup>14</sup>;
- 1460 (f) any proceedings relating to the variation or discharge of a supervision order under the Powers of Criminal Courts (Sentencing) Act 2000, or on appeal from any such proceedings<sup>15</sup>; or
- 1461 (g) any proceedings in which he is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence<sup>16</sup>.

1 See the Rehabilitation of Offenders Act 1974 s 4(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660. As to the rehabilitation of offenders generally see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

2 See *ibid* s 4(1)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.

3 For the meaning of 'Great Britain' see para 102 note 7 ante.

- 4 See the Rehabilitation of Offenders Act 1974 s 4(1)(b); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.
- 5 le ibid s 4(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660. As to the rehabilitation of offenders generally see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.
- 6 See ibid s 1(4)(b) (amended by the Children Act 1989 s 108(7), Sch 15).
- 7 Rehabilitation of Offenders Act 1974 s 7(2)(a). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 8 Ibid s 7(2)(b). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 9 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 557 et seq.
- 10 Rehabilitation of Offenders Act 1974 s 7(2)(bb) (added by the Crime and Disorder Act 1998 s 119, Sch 8 para 36; and substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 19). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 11 As to adoption see para 323 et seq ante.
- 12 As to the marriage and civil partnership of a minor see para 4 note 14 ante.
- 13 Rehabilitation of Offenders Act 1974 s 7(2)(c) (substituted by the Children Act 1989 s 108(5), Sch 13 para 35(2); and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 53). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 14 Rehabilitation of Offenders Act 1974 s 7(2)(cc) (added by the Children Act 1989 Sch 13 para 35(2)). See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 15 Rehabilitation of Offenders Act 1974 s 7(2)(d) (substituted by the Children Act 1989 Sch 13 para 35(3); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 49). As to the rehabilitation period applicable in the case of a supervision order or care order see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 676. As to supervision orders see para 1340 et seq ante. As to care orders see paras 276-280 ante. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.
- 16 Rehabilitation of Offenders Act 1974 s 7(2)(f). This is notwithstanding the provisions of s 4(1) (effect of rehabilitation): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1512.

## **UPDATE**

### **1408 Effect of the Rehabilitation of Offenders Act 1974**

TEXT AND NOTE 15--Rehabilitation of Offenders Act 1974 s 7(2)(d) further substituted: Criminal Justice and Immigration Act 2008 Sch 4 para 22.

Halsbury's Laws of England/CHILDREN AND YOUNG PERSONS (VOLUME 5(3) (2008 REISSUE) PARAS 1-742; VOLUME 5(4) (2008 REISSUE) PARAS 743-1433)/13. CIVIL PROCEEDINGS BY OR AGAINST CHILDREN/(1) IN GENERAL/1409. Introduction.

## **13. CIVIL PROCEEDINGS BY OR AGAINST CHILDREN**

### **(1) IN GENERAL**

#### **1409. Introduction.**

This part of the title deals with ordinary civil proceedings in which children are parties<sup>1</sup>. Procedural matters in relation to such proceedings are governed by the Civil Procedure Rules ('CPR'), which contain special provisions relating to proceedings involving children<sup>2</sup>. Family proceedings are covered elsewhere in this title<sup>3</sup>, and the procedural aspects of such proceedings are generally governed by the Family Proceedings Rules<sup>4</sup> or the Family Proceedings Courts (Children Act 1989) Rules<sup>5</sup> or, in relation to adoption, by the Family Procedure (Adoption) Rules<sup>6</sup>, rather than the Civil Procedure Rules<sup>7</sup>.

1 See para 1410 et seq post.

2 See CPR Pt 21; and para 1411 et seq post.

3 See para 199 et seq ante. For the meaning of 'family proceedings' under the Children Act 1989 see para 199 ante.

4 Ie the Family Proceedings Rules 1991, SI 1991/1247 (as amended).

5 Ie the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (as amended).

6 Ie the Family Procedure (Adoption) Rules 2005, SI 2005/2795 (as amended). See in particular Pt 7 (rr 49-76), which makes provision in relation to litigation friends.

7 The CPR do not apply to family proceedings or adoption proceedings except to the extent that they are applied to those proceedings by another enactment: see CPR 2.1(2); and CIVIL PROCEDURE vol 11 (2009) PARA 32. For the application of the CPR in family proceedings see the Family Proceedings Rules 1991, SI 1991/1247, r 1.3 (amended by SI 1999/1012).

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#### **1410. Prescription and limitation of claims.**

A child has certain privileges as regards lapse of time, in the case of the acquisition of rights by prescription<sup>1</sup> and in respect of the limitation of the period during which claims may be brought by him<sup>2</sup>. Notwithstanding these special limitation provisions, however, a child may bring an action by his litigation friend<sup>3</sup> at any time before attaining full age, either within, or subsequently to, the period within which he could have brought it if he had been of full age when the cause of action accrued<sup>4</sup>. A child is not barred from asserting his right by acquiescence in the violation of it<sup>5</sup>, or by the laches of himself or his trustees in asserting it<sup>6</sup>, even though he was supposed to be of full age, provided he did not actually represent himself to be so<sup>7</sup>.

1 See the Prescription Act 1832 s 7; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) para 101

2 See the Limitation Act 1980 s 28 (as amended); and LIMITATION PERIODS vol 68 (2008) para 1171. As to the court's refusal to dismiss an action for want of prosecution when the claimant is a minor see *Tolley v Morris* [1979] 2 All ER 561, [1979] 1 WLR 592, HL. For the application of the limitation period to actions founded in complaints of abuse to a child see *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL.

3 As to the litigation friend see para 1411 et seq post.

4 *Cotton's Case* (1591) 1 Leon 211 at 215; *Chandler v Vilett* (1670) 2 Wms Saund 117 at 120, 121a, 121b; cf *Piggott v Rush* (1836) 4 Ad & El 912.

5 *Adye v Feuilleteau* (1783) 3 Swan 84n at 88n, HL; *Wilkinson v Parry* (1828) 4 Russ 272 at 276; *Landed Estates Co Ltd v Weeding* (1869) 18 WR 35. As to a minor's not being bound by estoppel see *Milner v Lord Harewood* (1810) 18 Ves 259 at 274; and ESTOPPEL vol 16(2) (Reissue) para 1024.

6 Co Litt 380a, 380b; 1 Bl Com (14th Edn) 465; *Allen v Sayer* (1699) 2 Vern 368; *Young v Harris* (1891) 65 LT 45. See EQUITY vol 16(2) (Reissue) para 912.

7 *Stikeman v Dawson* (1847) 1 De G & Sm 90.



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## (2) THE LITIGATION FRIEND

### 1411. Requirement for litigation friend in proceedings by or against children.

A child<sup>1</sup> must have a litigation friend<sup>2</sup> to conduct proceedings<sup>3</sup> on his behalf unless the court<sup>4</sup> makes an order permitting the child to conduct proceedings without a litigation friend<sup>5</sup>. An application for such an order may be made by the child<sup>6</sup>. If the child already has a litigation friend, such application must be made on notice to the litigation friend<sup>7</sup>. If the child has no litigation friend, the application may be made without notice<sup>8</sup>. Where the court has made an order permitting a child to conduct proceedings without a litigation friend and it subsequently appears to the court that it is desirable for a litigation friend to conduct the proceedings on behalf of the child, the court may appoint a person to be the child's litigation friend<sup>9</sup>. Where a claimant wishes to take a step in proceedings against a child who does not have a litigation friend he must apply to the court for an order appointing a litigation friend<sup>10</sup>.

Where proceedings are to be conducted by a litigation friend, the statement of truth<sup>11</sup> in a document requiring verification by such a statement is to the effect that the litigation friend believes the facts stated in the document to be true<sup>12</sup>.

A litigation friend is not merely entitled but bound to continue to act as such unless and until the court by order substitutes another person to act in that capacity<sup>13</sup>.

The litigation friend may be required to answer requests for further information and to make disclosure of documents and allow inspection of documents in an action or matter on behalf of a child<sup>14</sup>.

1 For these purposes, 'child' means a person under 18: CPR 2.3(1), 21.1(2)(b). A foetus has no legal persona and cannot, through a guardian, prevent abortion as an actionable wrong: *Kelly v Kelly* [1997] 2 FLR 828, Ct of Sess.

2 As to who may be a litigation friend, and the manner of appointment of a litigation friend, see paras 1414-1415 post.

The requirement for a litigation friend (formerly a 'next friend' or 'guardian ad litem') seems to apply to a minor married woman, who sues and is sued in the same way as any other child (see the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(c) (as amended); *Colman v Northcote* (1843) 2 Hare 147; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 204, 206, 210).

If the child's property is already the subject of proceedings in the Chancery Division of the High Court, application should be made to the Chancery Division for permission to begin other proceedings before they are instituted by the child's litigation friend, even though the child has not become a ward of court, in view of the possibility that recourse to the property under administration may be needed to indemnify the litigation friend from liability for costs. As to the conduct of proceedings permitted pursuant to such permission see *Harrison v Richards* (1866) 1 Ch App 473.

3 As to an interim injunction granted on a child's application see *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA. See also *Cox v Wright* (1863) 32 LJCh 770, where it was held that an application adverse to the next friend in the cause had to be made by a next friend specially nominated for the purpose. Where a child is a necessary party to proceedings, even if he is born after they have been instituted, he may be ordered to be bound by them, if they are for his benefit: *Peter v Thomas-Peter* (1884) 26 ChD 181; *Wicks v Wicks* [1887] WN 15. If not, he may be made defendant to a supplemental action: *Peter v Thomas-Peter* supra; and see also *Capps v Capps* (1868) 4 Ch App 1; *Auster v Haines* (1869) 4 Ch App 445.

4 Where the context requires, a reference to 'the court' means a reference to a particular county court, a district registry, or the Royal Courts of Justice: see CPR 2.3(3); and CIVIL PROCEDURE vol 11 (2009) PARA 22.

5 CPR 21.2(2), (3); and see *Practice Direction--Children and Protected Parties* PD 21 (a child must bring or defend proceedings by a litigation friend unless the court has made an order permitting the child to do so on his own behalf). The court has a discretion to make an order permitting a child to conduct proceedings without a litigation friend: CPR 21.2(3). The court will only authorise a child to conduct proceedings without a litigation friend where it is satisfied that the child is of sufficient maturity and understanding: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Where the child has a litigation friend, the child should be referred to in the title to proceedings as 'A.B. (a child by C.D. his litigation friend)'; where the child is conducting proceedings on his own behalf, the child should be referred to in the title as 'A.B. (a child)': see *Practice Direction--Children and Protected Parties* PD 21 para 1.2. Where a female minor, who was a necessary party to proceedings, had not yet received a name, leave was given to describe her as the youngest female child of her father and mother: *Eley v Broughton* (1825) 2 Sim & St 188.

6 CPR 21.2(4)(a).

7 CPR 21.2(4)(b).

8 CPR 21.2(4)(c).

9 CPR 21.2(5).

10 CPR 21.6(3); and para 1415 post.

11 As to statements of truth generally see CPR Pt 22; and CIVIL PROCEDURE vol 11 (2009) PARAS 613-616.

12 See CPR 22.1(5); and CIVIL PROCEDURE vol 11 (2009) PARA 613. The statement may be signed by the party, the litigation friend or by the legal representative on behalf of either: CPR 22.1(6).

13 *Re E (mental health patient)* [1985] 1 All ER 609 at 616, [1985] 1 WLR 245 at 243, CA, per Stephenson LJ. As to the replacement of the litigation friend see para 1416 post. In *Melling v Melling* (1819) 4 Madd 261, it was held that a next friend could not retire without showing that it is for the child's benefit that another next friend was to be substituted for him. If the court becomes aware of the person's unsuitability, it may remove him under CPR 21.7 (see para 1416 post) and substitute another person as a litigation friend, but there is no express duty to monitor the situation.

14 See generally CPR Pts 18, 31; and CIVIL PROCEDURE vol 11 (2009) PARAS 538-554, 611-612. As to whether disclosure may be obtained from an infant respondent in a divorce suit see *Redfern v Redfern* [1891] P 139, CA.

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#### **1412. Standing and duty of litigation friend.**

The litigation friend is an officer of the court appointed to look after the child's interests<sup>1</sup> and has the conduct of the proceedings in his hands<sup>2</sup>, but he is not actually a party to the proceedings<sup>3</sup>.

A litigation friend is under a duty to conduct the proceedings fairly and competently and to take all decisions and steps in the proceedings for the benefit of the child<sup>4</sup>.

<sup>1</sup> *Morgan v Thorne* (1841) 7 M & W 400 at 408; *Sinclair v Sinclair* (1845) 13 M & W 640; *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579, CA.

<sup>2</sup> *Rhodes v Swithenbank* (1889) 22 QBD 577 at 578, CA; *Re Whittall, Whittall v Faulkner* [1973] 3 All ER 35, [1973] 1 WLR 1027. A litigation friend does not have the custody of a child, nor does he stand in loco parentis; all he does is represent the child in the conduct of the suit; his decisions do not rest in his unfettered discretion; he must on occasion seek the court's approval, as for instance if he makes a compromise on the child's behalf; if the court thinks that a child should go to a particular school, have a surgical operation or undergo a blood tests, the litigation friend cannot refuse permission; he must abide by the court's decision: *Re L (an infant)* [1968] P 119 at 160, [1968] 1 All ER 20 at 26, CA, per Lord Denning MR; *B (B R) v B (J)* [1968] P 466, sub nom *B R B v J B* [1968] 2 All ER 1023, CA.

<sup>3</sup> *Sinclair v Sinclair* (1845) 13 M & W 640 at 646; *Dyke v Stephens* (1885) 30 ChD 189 at 190; *Ingram v Little* (1883) 11 QBD 251 at 253; but see *Catt v Wood* [1908] 2 KB 458 at 473, CA. The litigation friend is not, as litigation friend, entitled to appear in proceedings in person: see *Re Hurst, Addison v Topp (No 2)* (1891) 36 Sol Jo 41, CA; *Murray v Sitwell* [1902] WN 119; *Re Berry, Berry v Berry* [1903] WN 125. See also para 1411 note 5 ante.

<sup>4</sup> *Practice Direction--Children and Protected Parties* PD 21 paras 2.2, 3.3. He must have no interest in the proceedings contrary to that of the child: para 2.2(d). For the meaning of 'child' see para 1411 note 1 ante.

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**1413. Stage of proceedings at which a litigation friend becomes necessary.**

Except where the court<sup>1</sup> has made an order<sup>2</sup> permitting a child<sup>3</sup> to conduct proceedings without a litigation friend<sup>4</sup>, a person may not, without the permission of the court:

- 1462 (1) make an application against a child before proceedings have started<sup>5</sup>; or
- 1463 (2) take any step in proceedings except issuing and serving<sup>6</sup> a claim form, or applying for the appointment of a litigation friend<sup>7</sup>,

until the child has a litigation friend<sup>8</sup>.

Any step taken before a child has a litigation friend is of no effect unless the court otherwise orders<sup>9</sup>.

1 As to the court see para 1411 note 4 ante.

2 Ie under CPR 21.2(3) (see para 1411 ante).

3 For the meaning of 'child' see para 1411 note 1 ante.

4 CPR 21.3(1).

5 CPR 21.3(2)(a).

6 'Service' means steps required by rules of court to bring documents used in court proceedings to a person's attention: CPR 2.2; Glossary. See further para 1418 post.

7 CPR 21.3(2)(b). As to the application for appointment of a litigation friend see CPR 21.6; and para 1415 post.

8 CPR 21.3(2).

9 CPR 21.3(4). The same presumably applies where the litigation friend is a person incapable of so acting (see *Fernée v Gorlitz* [1915] 1 Ch 177, where the next friend was himself a minor), or where judgment has been obtained against a child defendant where the claimant has not applied for the appointment of a litigation friend (see *Leaver v Torres* (1899) 43 Sol Jo 778).

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#### **1414. Appointment of litigation friend without a court order.**

If nobody has been appointed by the court<sup>1</sup> to be a litigation friend<sup>2</sup> a person may act as a litigation friend<sup>3</sup> if he:

- 1464 (1) can fairly and competently conduct proceedings on behalf of the child<sup>4</sup>;
- 1465 (2) has no interest adverse to that of the child<sup>5</sup>; and
- 1466 (3) where the child is a claimant<sup>6</sup>, undertakes to pay any costs which the child may be ordered to pay in relation to the proceedings<sup>7</sup>, subject to any right he may have to be repaid from the assets of the child<sup>8</sup>.

If the court has not appointed a litigation friend, a person who wishes to act as a litigation friend must file<sup>9</sup> a certificate of suitability<sup>10</sup> stating that he satisfies the conditions set out in heads (1) to (3) above<sup>11</sup>. A person who is to act as a litigation friend for a claimant must file the certificate of suitability at the time when the claim is made<sup>12</sup>. A person who is to act as a litigation friend for a defendant<sup>13</sup> must file the certificate of suitability at the time when he first takes a step in the proceedings on behalf of the defendant<sup>14</sup>. The litigation friend must serve<sup>15</sup> the certificate of suitability on every person on whom the claim form should be served<sup>16</sup>, and file a certificate of service when he files the certificate of suitability<sup>17</sup>.

1 As to the court see para 1411 note 4 ante.

2 CPR 21.4(1).

3 CPR 21.4(3). See also *Practice Direction--Children and Protected Parties* PD 21 paras 2.1(a), 2.2.

The persons who act as litigation friends under CPR 21.4 differ slightly from those who may be appointed by order of the court see para 1415 post.

A next friend was held not to require any authority from the minor, and the minor had no voice in his selection: *Morgan v Thorne* (1841) 7 M & W 400 at 408. In appointing a next friend, preference has been given to the father (*Watson v Fraser* (1841) 8 M & W 660; *Woolf v Pemberton* (1877) 6 ChD 19, CA; *Re Taylor's Application* [1972] 2 QB 369, [1972] 2 All ER 873, CA), mother (*Harris v Lightfoot*, *Harris v Harris* (1861) 10 WR 31), guardian (1 Bl Com (14th Edn) 463-464; *Hutchinson v Norwood* (1885) 31 ChD 237; and see *Harris v Lightfoot*, *Harris v Harris* (1861) 10 WR 31), or some other of the relatives or connections of the child or their nominee (*Talbot v Talbot* (1874) LR 17 Eq 347), but he must be a substantial and proper person (*Anon* (1739) 1 Atk 570; *Nalder v Hawkins* (1833) 2 My & K 243; *Walker v Else* (1835) 7 Sim 234). A minor could sue by a next friend in the character of a pauper, but only upon strict proof that he could not obtain a more substantial next friend: *Bryant (Briant) v Wagner* (1839) 7 Dowl 676; *Lindsay v Tyrrell* (1857) 2 De G & J 7. If the minor could procure a solvent person willing to act as next friend, an insolvent next friend might be removed and the proceedings stayed until another is appointed: *Watson v Fraser* (1841) 8 M & W 660; *Lees v Smith* (1860) 5 H & N 632; but see *Duckitt v Satchwell* (1844) 12 M & W 779.

In appointing a person to be a guardian ad litem, preference has been given to an adult and competent person who was already party to the cause and had no interest adverse to that of the child (*Anon* (1852) 9 Hare, App I, xxvii; *Re Taylor*, *Taylor v Taylor* [1881] WN 81), or to a relation, connection or friend of the family (*Foster v Cautley* (1853) 10 Hare, App I, xxiv) eg specifically a father (*Jongsma v Pfiel* (1804) 9 Ves 357; *Fowler v Ward* (1842) 6 Jur 403), a father-in-law (*Quarrell v Binmore* (1844) 8 Jur 1113), and a guardian (*Sandys v Cooper* (1835) 4 LJCh 162; *Shuttleworth v Shuttleworth* (1843) 2 Hare 147). A plaintiff's solicitor could not be appointed: *Sheppard v Harris* (1845) 15 LJCh 104. Where a child's guardian declined to act as guardian ad litem, the Official Solicitor was appointed: *White v Duvernay* [1891] P 290. As to the removal of the Official Solicitor as guardian ad litem and appointment as amicus curiae see *Re H (a minor) (guardian ad litem: requirement)* [1994] Fam 11, [1994] 4 All ER 762, sub nom *Re H (a minor) (independent representation)* [1993] 2 FCR 437.

4 CPR 21.4(3)(a). For the meaning of 'child' see para 1411 note 1 ante.

5 CPR 21.4(3)(b).

6 'Claimant' means a person who makes a claim: CPR 2.3(1).

7 As to costs where money is payable by or to a child see CPR 48.5; and para 1428 post.

8 CPR 21.4(3)(c).

9 'Filing', in relation to a document, means delivering it, by post or otherwise, to the court office: CPR 2.3(1).

10 ie in Form N235.

11 CPR 21.5(1), (3). See also *Practice Direction--Children and Protected Parties* PD 21 para 2.2. The person must verify the certificate with a statement of truth: para 2.3.

12 CPR 21.5(3)(a).

13 'Defendant' means a person against whom a claim is made: CPR 2.3(1).

14 CPR 21.5(3)(b).

15 For the meaning of 'service' see para 1413 note 6 ante.

16 CPR 21.5(4)(a). As to the persons on whom the claim form must be served see CPR 6.6; and para 1418 post.

17 CPR 21.5(4)(b). As to the details to be contained in a certificate of service see CPR 6.10; and CIVIL PROCEDURE vol 11 (2009) PARA 154. Where the litigation friend is acting on behalf of a claimant, the litigation friend must serve the certificate of suitability on every person on whom, in accordance with CPR 6.6 (service on a parent, guardian etc), the claim form should be served, and file a certificate of service when he files the certificate of suitability: CPR 21.5(4).

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#### **1415. Appointment of litigation friend by court order.**

The court<sup>1</sup> may make an order appointing a litigation friend<sup>2</sup>. An application for an order appointing a litigation friend may be made by a person who wishes to be the litigation friend<sup>3</sup>, or by a party<sup>4</sup>. Where:

- 1467 (1) a person makes a claim against a child<sup>5</sup>;
- 1468 (2) the child has no litigation friend<sup>6</sup>;
- 1469 (3) the court has not made an order that a child can act without a litigation friend<sup>7</sup>; and
- 1470 (4) either someone who is not entitled to be a litigation friend files<sup>8</sup> a defence, or the claimant<sup>9</sup> wishes to take some step in the proceedings<sup>10</sup>,

the claimant must apply to the court for an order appointing a litigation friend for the child<sup>11</sup>.

An application for the appointment of litigation friend by court order must be served<sup>12</sup> on every person on whom the claim form should be served<sup>13</sup>.

An application for an order appointing a litigation friend must be supported by evidence<sup>14</sup>.

The court may not appoint a litigation friend under these provisions unless it is satisfied that the person to be appointed complies with the specified conditions<sup>15</sup>. On an application for the appointment of a litigation friend by court order, the court may appoint the person proposed or any other person who complies with the specified conditions<sup>16</sup>.

1 As to the court see para 1411 note 4 ante.

2 CPR 21.6(1).

3 CPR 21.6(2)(a).

4 CPR 21.6(2)(b). See *Practice Direction--Children and Protected Parties* PD 21 paras 3.1-3.3; and para 1411 ante.

5 CPR 21.6(3)(a). For the meaning of 'child' see para 1411 note 1 ante.

6 CPR 21.6(3)(b).

7 CPR 21.6(3)(c). As to an order that a child may act without a litigation friend see CPR 21.2(3); and para 1411 ante.

8 For the meaning of 'filing' see para 1414 note 9 ante.

9 For the meaning of 'claimant' see para 1414 note 6 ante.

10 CPR 21.6(3)(d).

11 CPR 21.6(3).

12 For the meaning of 'service' see para 1413 note 6 ante.

13 CPR 21.8(1). As to the persons on whom the claim form must be served see CPR 6.6; and para 1418 post.

14 CPR 21.6(4); *Practice Direction--Children and Protected Parties* PD 21 para 3.2. The application must be in accordance with CPR Pt 23 (see CIVIL PROCEDURE vol 11 (2009) PARAS 303-314); *Practice Direction--Children and Protected Parties* PD 21 para 3.2. The evidence in support must satisfy the court that the proposed litigation friend: (1) consents to act; (2) can fairly and competently conduct proceedings on behalf of the child; (3) has no interest adverse to that of the child; and (4) where the child is a claimant, undertakes to pay any costs which the child or patient may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child: *Practice Direction--Children and Protected Parties* PD 21 para 3.3. Where a person was named as next friend without his consent, he could apply to have his name struck out: *Ward v Ward* (1843) 6 Beav 251. It is conceived that, in the light of head (1) supra, the position would be the same in relation to a litigation friend. A guardian ad litem appointed by the court had to be a person within the jurisdiction: -- v -- (1854) 18 Jur 770. A person outside the jurisdiction could be appointed, but might be required to give security for costs: *Didisheim v London and Westminster Bank* [1900] 2 Ch 15, CA.

15 CPR 21.6(5). The conditions referred to in the text are those specified in CPR 21.4(3): see para 1414 ante.

16 CPR 21.8(4). Where it is sought to appoint the Official Solicitor, provision should be made for payment of his charges: *Practice Direction--Children and Protected Parties* PD 21 para 3.4.



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**1416. Court's power to change litigation friend and to prevent person acting as litigation friend.**

The court<sup>1</sup> may direct that a person may not act as a litigation friend<sup>2</sup>, may terminate a litigation friend's appointment<sup>3</sup>, or may appoint a new litigation friend in substitution for an existing one<sup>4</sup>. An application for an order giving such a direction must be supported by evidence<sup>5</sup>. The court may not appoint a litigation friend under these provisions unless it is satisfied that the person to be appointed complies with the specified conditions<sup>6</sup>.

An application for such an order must be served<sup>7</sup> on every person on whom the claim form should be served<sup>8</sup>. It must also be served on the person who is the litigation friend, or who is purporting to act as the litigation friend, when the application is made<sup>9</sup>, and the person who it is proposed should be the litigation friend, if he is not the applicant<sup>10</sup>.

On an application for an order to change the litigation friend, or to prevent a person acting as litigation friend, the court may appoint the person proposed or any other person who complies with the specified conditions<sup>11</sup>.

1 As to the court see para 1411 note 4 ante.

2 CPR 21.7(1)(a). The court has exercised power to remove a next friend if he was an improper person to act as such: see eg *Hopkinson v Roe* (1830) 9 LJOS Ch 7; *Gee v Gee* (1863) 12 WR 187; *Peyton v Bond*, *Peyton v Robinson* (1827) 1 Sim 390; *Lander v Ingersoll* (1845) 4 Hare 596; *Re Burgess*, *Burgess v Bottomley* (1883) 25 ChD 243, CA; *Watson v Fraser* (1841) 8 M & W 660; *Lees v Smith* (1860) 5 H & N 632 (insolvency). For circumstances where the court declined to do so see *Bedwin v Asprey* (1841) 11 Sim 530; *Sandford v Sandford* (1863) 11 WR 336; *Piffard v Beeby* (1866) 14 WR 948; *Ashley v Allden*, *Jones v Ashley* (1852) 16 Jur 460; *Lloyd v Davies*, *Lloyd v Banks* (1864) 10 Jur NS 1041; *Jones v Evans* (1886) 31 Sol Jo 11; *Smallwood v Rutter* (1851) 9 Hare 24 at 29. The court has also exercised power to remove a next friend who did not conduct the proceedings in a proper manner: see eg *Russell v Sharpe* (1820) 1 Jac & W 482; *Gravatt v Tann* (1866) 15 WR 83; *Re Birchall*, *Wilson v Birchall* (1880) 16 ChD 41 at 42, CA; *Ward v Ward* (1813) 3 Mer 706; *Dupuy v Welsford* (1880) 28 WR 762; *Re Taylor's Application* [1972] 2 QB 369, [1972] 2 All ER 873, CA.

For cases on the removal of a guardian ad litem by the court see *Russell v Sharpe* (1820) 1 Jac & W 482; *Sandys v Cooper* (1835) 4 LJCh 162; *Percival v Cross* (1882) 7 PD 234; *Re Duke of Somerset*, *Thynne v St Maur* (1887) 34 ChD 465.

3 CPR 21.7(1)(b). See also note 2 supra.

4 CPR 21.7(1)(c). See also note 2 supra. If the order sought is the substitution of a new litigation friend for an existing one, the evidence must satisfy the court of the matters set out in para 1415 note 14 ante: *Practice Direction--Children and Protected Parties* PD 21 para 3.3. The former position, under RSC Ord 80 r 3(4) (revoked), was expressly that only one person was entitled to act as next friend. CPR Pt 21 does not reproduce this restriction, but it is doubtful that more than one litigation friend would be permitted. As to the retirement of a litigation friend see para 1411 note 13 ante.

5 CPR 21.7(2).

6 CPR 21.7(3). The conditions referred to in the text are those specified in CPR 21.4(3): see para 1414 ante.

7 For the meaning of 'service' see para 1413 note 6 ante.

8 CPR 21.8(1). As to the persons on whom the claim form must be served see CPR 6.6; and para 1418 post.

9 CPR 21.8(3)(a).

- 10 CPR 21.8(3)(b).
- 11 CPR 21.8(4). The conditions referred to in the text are those specified in CPR 21.4(3): see para 1414 ante.

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### **1417. Procedure where appointment of litigation friend ceases.**

When a child<sup>1</sup> reaches the age of 18, a litigation friend's appointment ceases<sup>2</sup>. The child in respect of whom the appointment to act has ceased may serve<sup>3</sup> a notice on the other parties:

- 1471 (1) stating that he has reached full age<sup>4</sup>;
- 1472 (2) stating that the appointment of his litigation friend to act has ceased<sup>5</sup>;
- 1473 (3) giving his address for service<sup>6</sup>; and
- 1474 (4) stating whether or not he intends to carry on with, or continue to defend, the proceedings<sup>7</sup>.

If he does not do so within 28 days after the day on which the appointment of the litigation friend ceases, the court<sup>8</sup> may, on application, strike out<sup>9</sup> any claim or defence brought by him<sup>10</sup>. The liability of a litigation friend for costs continues until the person in respect of whom his appointment to act has ceased serves the notice referred to above<sup>11</sup>, or the litigation friend serves notice on the parties that his appointment to act has ceased<sup>12</sup>.

Whether or not a child having reached full age serves a notice in accordance with head (2) above, a litigation friend may at any time after the child has reached full age serve a notice on the other parties that his appointment has ceased<sup>13</sup>.

It seems that, on the death of a litigation friend, the procedure for replacing him is the same as for the first appointment of a litigation friend<sup>14</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 CPR 21.9(1).

3 For the meaning of 'service' see para 1413 note 6 ante.

4 *Practice Direction--Children and Protected Parties* PD 21 para 4.2(1).

5 CPR 21.9(4)(a); *Practice Direction--Children and Protected Parties* PD 21 para 4.2(2).

6 CPR 21.9(4)(b); *Practice Direction--Children and Protected Parties* PD 21 para 4.2(3).

7 CPR 21.9(4)(c); *Practice Direction--Children and Protected Parties* PD 21 para 4.2(4). If the notice states that the child intends to carry on with or continue to defend the proceedings, he must subsequently be described in the proceedings as 'A.B. (formerly a child but now of full age)': *Practice Direction--Children and Protected Parties* PD 21 para 4.3. He may, it appears, then be liable for the costs of the proceedings from the commencement: *Bligh v Tredgett* (1851) 5 De G & Sm 74 at 77.

It appears that the child may not, on attaining full age, claim to appear as a claimant separately from his co-claimants: *Swift v Grazebrook* (1842) 13 Sim 185; *Ballard v White* (1843) 2 Hare 158 at 159.

If the child elected to discontinue proceedings, he could apply for an order to dismiss them on payment of the costs from the commencement: *Anon* (1819) 4 Madd 461. It has been held that the repudiation of an action or of proceedings by the minor relates back to its commencement so as to override all that has been done in it: *Dunn v Dunn* (1855) 7 De GM & G 25 at 29.

When a child was co-claimant or co-petitioner with others, he might, on attaining full age, apply to have his name struck out: *Acres v Little* (1834) 7 Sim 138; *Guy v Guy* (1840) 2 Beav 460; *Cooke v Fryer* (1841) 4 Beav 13. But in that case, if his co-claimants or co-petitioners so desired, he might be added as a defendant or respondent to the proceedings: *Bicknell v Bicknell* (1863) 32 Beav 381.

As to the entitlement of a child defendant attaining full age to serve a new defence see *Bennet v Lee* (1743) 2 Atk 529 at 531; *Savage v Carroll* (1811) 1 Ball & B 548 at 551, 553; *Kelsall v Kelsall* (1834) 2 My & K 409; *Malone v Malone* (1841) 8 Cl & Fin 179 at 206, HL.

8 As to the court see para 1411 note 4 ante.

9 'Striking out' means the court ordering written material to be deleted so that it may no longer be relied upon: see CPR 2.2; Glossary.

10 CPR 21.9(5). It was previously held that if a child defendant took no steps within a reasonable time after coming of age, he would be bound by what had been done during his minority: *Cecil v Earl of Salisbury* (1691) 2 Vern 224; *Morris v Morris* (1846) 11 Jur 260; *Monypenny v Dering* (1859) 4 De G & J 175.

11 CPR 21.9(6)(a). As to security for the costs up to his retirement see *Witts v Campbell* (1806) 12 Ves 493; *Davenport v Davenport* (1822) 1 Sim & St 101; *Bligh v Tredgett* (1851) 5 De G & Sm 74.

12 CPR 21.9(6)(b).

13 *Practice Direction--Children and Protected Parties* PD 21 para 4.4.

14 CPR Pt 21 is silent on this point. The former position was that on the death of a next friend, the child's nearest paternal relative was entitled to nominate a new next friend (*Talbot v Talbot* (1874) LR 17 Eq 347); but it is improbable that this rule survives. On the death of a guardian ad litem, the position was that a new guardian ad litem would be appointed: *Drant v Vause* (1843) 2 Y & C Ch Cas 524. As to the first appointment of a litigation friend see paras 1414-1415 ante. For the procedure for substituting a litigation friend see para 1416 ante.

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### **(3) PROCEDURE**

#### **1418. Service of documents on children.**

In proceedings to which a child<sup>1</sup> is a party, where a document would otherwise fall to be served<sup>2</sup> on a child, it must be served on some other specified person as described below<sup>3</sup>, unless the court has made an order allowing a child to conduct proceedings without a litigation friend<sup>4</sup>. In the case of a claim form to be served on a child, it must be served on one of the child's parents or guardians, or if there is no parent or guardian, the person with whom the child resides or in whose care the child is<sup>5</sup>. In the case of any other document<sup>6</sup>, it must be served on the litigation friend who is conducting proceedings on behalf of the child<sup>7</sup>.

The court<sup>8</sup> may make an order<sup>9</sup> permitting a document to be served on the child, or on some person other than the person specified above<sup>10</sup>, or may order that, although a document has been served on someone other than the person specified above, the document is to be treated as if it had been properly served<sup>11</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 For the meaning of 'service' see para 1413 note 6 ante.

3 See CPR 6.6(1); and the text and notes 5-7 infra.

4 CPR 6.6(5). As to such orders see CPR 21.2(3); and para 1411 ante.

5 CPR 6.6(1), Table. Where the residence of the parents of the minor could not be discovered, service on the minor and on the head of the college at the university in which he was residing as an undergraduate was held sufficient: *Christie v Cameron* (1856) 2 Jur NS 635. In *Poney v Hordern* (North J in chambers, 25 January 1897) leave was given to serve a minor in France personally with notice of a writ. Service of a divorce petition upon a child respondent is effected by service on his father or guardian or, if he has none, upon the person with whom he resides or under whose care he is: Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1)(a) (amended by SI 1992/2067). See also *Stanga v Stanga* [1954] P 10, [1954] 2 All ER 16, DC; but see *Quinn v Quinn* [1920] P 65. Service would not be dispensed with by reason of the fact that the minor and his father or guardian were out of the jurisdiction (*Anderson v Stather* (1846) 15 LJCh 260; *O'Brien v Maitland* (1862) 4 De G & J 331; *White v Duvernay* [1891] P 290), except under special circumstances (*Turner v Sowdon* (1864) 10 LT 60).

6 Ie except an application for an order appointing a litigation friend where a child has no litigation friend, in which case it must be served as described in CPR 21.8 (see para 1415 ante): CPR 6.6(1), Table.

7 CPR 6.6(1), Table.

8 As to the court see para 1411 note 4 ante.

9 An application for such an order may be made without notice: CPR 6.6(3).

10 CPR 6.6(2).

11 CPR 6.6(4).

### **UPDATE**

#### **1418 Service of documents on children**

TEXT AND NOTES--CPR Pt 6 substituted: SI 2008/2178.

NOTE 5--Reference to father is now to parent: SI 1991/1247 r 9.3(1)(a) (amended by SI 2009/636).

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**1419. Hearings in private.**

A hearing, or any part of it, may be in private if a private hearing is necessary to protect the interests of any child<sup>1</sup>. Furthermore, the court<sup>2</sup> may order that the identity of any party must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party<sup>3</sup>.

1 See CPR 39.2(3)(d); and CIVIL PROCEDURE vol 11 (2009) PARA 6. For the meaning of 'child' see para 1411 note 1 ante. As to hearings in private generally see CPR 39.2; and CIVIL PROCEDURE vol 11 (2009) PARA 6.

2 As to the court see para 1411 note 4 ante.

3 See CPR 39.2(4); and CIVIL PROCEDURE vol 11 (2009) PARA 6.

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**1420. Default judgment against child.**

Where a claimant seeks default judgment against a child<sup>1</sup>, the special procedure for obtaining default judgment<sup>2</sup> is not available and the application must be made in the same way as any other application for a court order<sup>3</sup>. An application for a default judgment on a claim against a child must be supported by evidence<sup>4</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 Ie under CPR 12.4: see CIVIL PROCEDURE vol 11 (2009) PARA 508.

3 CPR 12.10(a)(i). For the general procedure for making an application to the court see CPR Pt 23; and CIVIL PROCEDURE vol 11 (2009) PARAS 303-314.

4 CPR 12.11(3).



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#### **1421. Admissions in claims involving children.**

In proceedings where the only remedy sought is a sum of money, and the defendant admits the whole or part of the claim for a specified sum, or admits liability to pay the whole or part of the claim for an unspecified sum, the usual rule is that judgment may be entered for the claimant<sup>1</sup>. However, the claimant does not have the right to have judgment entered<sup>2</sup> where the defendant is a child or where the claimant is a child and the admission is of part of a claim for a specified sum<sup>4</sup>, or is of liability to pay a claim for an unspecified amount of money where the defendant offers a sum in satisfaction of the claim<sup>5</sup>.

1 See CPR 14.1(3), (4); and CIVIL PROCEDURE vol 11 (2009) PARA 187 et seq.

2 As to the requirement that any compromise, settlement or payment in proceedings by or against children must have the approval of the court see CPR 21.10; and para 1422 post.

3 CPR 14.1(4)(a).

4 Ie under CPR 14.5 (see CIVIL PROCEDURE vol 11 (2009) PARA 192): CPR 14.1(4)(b).

5 Ie under CPR 14.7 (see CIVIL PROCEDURE vol 11 (2009) PARA 194): CPR 14.1(4)(b).

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#### **(4) COMPROMISE AND SETTLEMENT**

##### **1422. Compromise etc by or on behalf of child.**

Where a claim is made by or on behalf of or against a child<sup>1</sup> no settlement, compromise or payment and no acceptance of money paid into court can be valid, so far as it relates to the claim by, on behalf of or against the child, without the approval of the court<sup>2</sup>. Furthermore, settlements relating to appeals and applications where one of the parties is a child require the approval of the court<sup>3</sup>.

Where:

- 1475 (1) before proceedings in which a claim is made by or on behalf of or against a child (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim<sup>4</sup>; and
- 1476 (2) the sole purpose of proceedings on that claim is to obtain the approval of the court to a settlement or compromise of the claim<sup>5</sup>,

the claim must be made using the alternative procedure for claims<sup>6</sup>, and must include a request to the court for approval of the settlement or compromise<sup>7</sup>. Provision is made with respect to the recovery of costs<sup>8</sup>. In addition to the specified details, the claim must set out the terms of the settlement or compromise or have attached to it a draft consent order<sup>9</sup>. In order to approve the settlement or compromise, the information concerning the claim that the court will require will include whether and to what extent the defendant admits liability<sup>10</sup>, the age and occupation (if any) of the child<sup>11</sup>, the litigation friend's approval of the proposed settlement or compromise<sup>12</sup>, and a copy of any financial advice relating to the proposed settlement<sup>13</sup>; and further information is required in a personal injury case<sup>14</sup>. An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child should, except in very clear cases, be obtained<sup>15</sup>, and a copy of that opinion must also be supplied to the court<sup>16</sup>.

Where a settlement is made on condition that money is paid into court within a limited time, payment must be made within the time directed<sup>17</sup>. A judgment on or settlement in respect of a claim under the Fatal Accidents Act 1976 must be apportioned between the persons by or on whose behalf the claim has been brought<sup>18</sup>.

Where in any proceedings money is recovered by or on behalf of or for the benefit of a child or money paid into court is accepted by or on behalf of a child, the money must be invested on his behalf<sup>19</sup>. Where in any personal injury case a claim for damages for future pecuniary loss is settled<sup>20</sup>, the court must also be satisfied that the parties have considered whether the damages should wholly or partly take the form of periodical payments<sup>21</sup>; and where the settlement includes provision for periodical payments, the claim must set out the terms of the settlement or compromise or have attached to it a draft consent order<sup>22</sup>.

<sup>1</sup> For the meaning of 'child' see para 1411 note 1 ante.

<sup>2</sup> CPR 21.10(1). As to the court see para 1411 note 4 ante. The approval of the court must be obtained if a settlement of a claim by or against a child is to be valid: see *Drinkall v Whitwood* [2004] EWCA Civ 1547, [2004] 4 All ER 378, [2004] 1 WLR 462. A settlement includes an agreement on a sum to be apportioned to a

dependent child under the Fatal Accidents Act 1976: *Practice Direction--Children and Protected Parties* PD 21 para 1.3. The approval of the court must also be obtained before making a voluntary interim payment to a child: CPR 21.10. Applications for the approval of a settlement or compromise will normally be heard by a master or district judge: *Practice Direction--Children and Protected Parties* PD 21 paras 5.6, 6.5.

See further *Hargrave v Hargrave* (1850) 12 Beav 408; *Gray v Paul* (1877) 46 LJCh 818; *Re L (an infant)* [1968] P 119 at 160, [1968] 1 All ER 20 at 26, CA, per Lord Denning MR. This jurisdiction is exercisable alike in the Queen's Bench and Chancery Divisions and whether or not the court is in course of executing a trust: *Chapman v Chapman* [1954] AC 429 at 445, [1954] 1 All ER 798 at 802, HL, per Viscount Simonds LC. See *Flack v Withers* [1961] 3 All ER 388n, [1961] 1 WLR 1284, HL. The court's sanction may also be obtained under what is now CPR 21.10, where no action is pending: see *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170, [1967] 2 All ER 282, HL.

3 See *Practice Direction--Appeals* PD 52 para 13.2; and CIVIL PROCEDURE vol 12 (2009) PARA 1670. In cases involving a child a copy of the proposed order signed by the parties' solicitors should be sent to the appeal court, together with an opinion from the advocate acting on behalf of the child: see para 13.3; and CIVIL PROCEDURE vol 12 (2009) PARA 1670.

4 CPR 21.10(2)(a). Whether the proceedings have been started or not until a proposed settlement is approved by the court there is no binding contract and either party may renege on it: see *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170, [1967] 2 All ER 282, HL; *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 4 All ER 378, [2004] 1 WLR 462.

5 CPR 21.10(2)(b). It is possible to bring proceedings solely for the purpose of obtaining the court's approval for a settlement of a claim before it has been issued, eg to prevent the defendant repudiating the settlement at a later stage: see *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 4 All ER 378, [2004] 1 WLR 462.

6 See the procedure set out in CPR Pt 8 (see CIVIL PROCEDURE vol 11 (2009) PARAS 127-137); CPR 21.10(2)(i). See also *Practice Direction--Children and Protected Parties* PD 21 para 5.1.

7 CPR 21.10(2)(ii). See also *Practice Direction--Children and Protected Parties* PD 21 para 5.1.

8 In proceedings to which CPR Pt 45 Section II applies (see CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq) the court must not make an order for detailed assessment of the costs payable to the child but must assess the costs in the manner set out in CPR Pt 45 Section II: CPR 21.10(3).

9 *Practice Direction--Children and Protected Parties* PD 21 para 5.1(1). The draft consent order is in Practice Form N292.

10 *Practice Direction--Children and Protected Parties* PD 21 para 5.1(2).

11 *Practice Direction--Children and Protected Parties* PD 21 para 5.1(3).

12 *Practice Direction--Children and Protected Parties* PD 21 para 5.1(4).

13 *Practice Direction--Children and Protected Parties* PD 21 para 5.1(5).

14 See *Practice Direction--Children and Protected Parties* PD 21 para 5.1(6) (in a personal injury case arising from an accident the information required by the court will include: the circumstances of the accident (para 5.1(6)); any medical reports (para 5.1(6)); where appropriate, a schedule of any past and future expenses and losses claimed and any other relevant information relating to personal injury (para 5.1(6)); and, where considerations of liability are raised, any evidence or police reports in any criminal proceedings or in an inquest, and details of any prosecution brought (para 5.1(6))).

15 *Practice Direction--Children and Protected Parties* PD 21 para 5.2(1).

16 *Practice Direction--Children and Protected Parties* PD 21 para 5.2(2). A copy of the instructions must also be supplied to the court, unless the instructions are sufficiently set out in the opinion: para 5.2(2). A copy or record of any financial advice must also be supplied: para 5.1(5). In order to limit the need for a private hearing, counsel's opinion must be provided in advance: *Beatham v Carlisle Hospitals NHS Trust* (1999) Times, 20 May (reflecting the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134 et seq)).

17 *Practice Direction* [1969] 3 All ER 416, [1969] 1 WLR 1284.

18 *Practice Direction--Children and Protected Parties* PD 21 para 7.1.

19 CPR 21.11; *Practice Direction--Children and Protected Parties* PD 21 para 7.2. As to investment see paras 8, 9; and para 1424 post. In order to approve an apportionment of money to a dependent child, the court will

require the following information: the matters set out in para 5.1(2), (3) (see the text and notes 10, 11 supra); in respect of the deceased, his future loss of earnings and, where death was caused by an accident, the matters set out in para 5.1(6)(a)-(c) (see the note 14 supra); and the extent and nature of the dependency: para 7.4.

20 *Practice Direction--Children and Protected Parties* PD 21 para 6.1.

21 *Practice Direction--Children and Protected Parties* PD 21 para 6.2.

22 *Practice Direction--Children and Protected Parties* PD 21 para 6.3. The draft consent order must satisfy the requirements of CPR 41.8, 41.9 (the award; continuity of payment): *Practice Direction--Children and Protected Parties* PD 21 para 6.3(2).

## **UPDATE**

### **1422 Compromise etc by or on behalf of child**

NOTE 8--CPR 21.10(3) amended: SI 2010/621.

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### **1423. Extent of the court's jurisdiction.**

The court cannot compel a compromise<sup>1</sup>, and will not sanction a compromise against the opinion of the child's litigation friend in the action<sup>2</sup>, nor can it do so where adults in the same interest insist on their strict rights<sup>3</sup>.

The jurisdiction to sanction a compromise does not extend to cover cases in which, there being no real dispute as to rights, it is sought by way of bargain between the beneficiaries under a trust to rearrange their beneficial interests and to bind children to the bargain by order of the court<sup>4</sup>. Where there is a real dispute as to rights, the jurisdiction is not ousted by the fact that the compromise involves the rearrangement of beneficial interests<sup>5</sup>.

In exercising its power on a child's behalf, the court can sanction a compromise of proceedings against trustees to recover a trust fund which has been lost<sup>6</sup>, and can deal with the child's property so as to promote a family arrangement<sup>7</sup>. It may charge the child's estate<sup>8</sup>, and change the contingent interest of trustees of a derivative settlement under which children are interested into an indefeasible vested interest<sup>9</sup>.

When a compromise has been sanctioned by the court, it will only be set aside on the same strong grounds of fraud as would justify the setting aside of a compromise between adults<sup>10</sup>.

A party to proceedings, who agrees to a certain course being taken, knowing that the other parties are children, cannot afterwards object that his consent does not bind him because the other parties, being children, could not consent<sup>11</sup>.

1 *Re Birchall, Wilson v Birchall* (1880) 16 ChD 41, CA. See also *Re Taylor's Application* [1972] 2 QB 369, [1972] 2 All ER 873, CA. See also *Re A (conjoined twins: medical treatment) (No 2)* [2001] 1 FCR 313, [2001] 1 FLR 267, CA.

2 *Re Birchall, Wilson v Birchall* (1880) 16 ChD 41 at 42-43, CA; *Re Ley's Will Trusts, Somerset v Ley* [1964] 2 All ER 326, sub nom *Somerset v Ley* [1964] 1 WLR 640. It has been held that the court will not sanction a compromise which is in the interest of the next friend but not of the minor: *Rhodes v Swithenbank* (1889) 22 QBD 577 at 578-579, CA; *Blair v Crawford* [1906] 1 IR 578 at 587, CA.

3 *Norton v Steinkopf* (1853) Kay 45 at 49.

4 *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL. See also *Re Powell-Cotton's Resettlement, Henniker-Major v Powell-Cotton* [1956] 1 All ER 60, [1956] 1 WLR 23, CA, where it was held that the substitution of a new investment clause for an ambiguous one was not a compromise of disputed rights. A rearrangement may be sanctioned in certain circumstances under the Variation of Trusts Act 1958: see TRUSTS vol 48 (2007 Reissue) paras 1062-1063.

5 *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL; *Re Lord Hylton's Settlement, Barclays Bank Ltd v Jolliffe* [1954] 2 All ER 647n, [1954] 1 WLR 1055, CA.

6 *Hopgood v Parkin* (1870) LR 11 Eq 74 at 80; *Maclaren v Stainton* (1871) LR 11 Eq 382 at 389-390.

7 *Micholls v Corbett* (1865) 34 Beav 376; affd 3 De GJ & Sm 18. As to family arrangements see SETTLEMENTS vol 42 (Reissue) paras 1002-1029.

8 *Chetwynd v Fleetwood* (1742) 1 Bro Parl Cas 300, HL.

9 *Re Wells, Boyer v Maclean* [1903] 1 Ch 848, as explained in *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL.

10 *Brooke v Lord Mostyn* (1864) 2 De GJ & Sm 373 at 415 et seq; *Fadelle v Bernard* (1871) 19 WR 555; *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170, [1967] 2 All ER 282, HL.

11 *Pisani v A-G for Gibraltar* (1874) LR 5 PC 516.

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## **(5) MONEY RECOVERED ON BEHALF OF A CHILD**

### **1424. Control of money recovered by or on behalf of child.**

Where in any proceedings money is recovered by or on behalf of or for the benefit of a child<sup>1</sup>, or money paid into court is accepted by or on behalf of a child, the money must be dealt with in accordance with directions given by the court<sup>2</sup> and not otherwise<sup>3</sup>. Such directions may provide that the money must be wholly or partly paid into court and invested or otherwise dealt with<sup>4</sup>.

A litigation friend who incurs expenses on behalf of a child in any proceedings is entitled to recover the amount paid or payable out of any money recovered or paid into court to the extent that it has been reasonably incurred and is reasonable in amount<sup>5</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 In accordance with directions given under CPR 21.11. As to the court see para 1411 note 4 ante.

3 CPR 21.11(1); *Practice Direction--Children and Protected Parties* PD 21 para 8.1.

4 CPR 21.11(2). The court may: (1) direct the money to be paid into the High Court for investment; (2) direct that certain sums be paid direct to the child, his litigation friend or his legal representative for the immediate benefit of the child or for expenses incurred on his behalf; and (3) direct the applications in respect of the investment of the money be transferred to a local district registry: *Practice Direction--Children and Protected Parties* PD 21 para 8.1. As to the administration of the fund see also paras 8.2, 8.3. As to the position where the child is legally aided see para 8.4. As to the approval of the accounts of a guardian of a child's assets see *Practice Direction--Accounts, Inquiries etc* PD 40A para 8; and CIVIL PROCEDURE vol 12 (2009) PARA 1529 (applied by *Practice Direction--Children and Protected Parties* PD 21 para 12). As to the investment of money paid into court see para 9.6. If the money to be invested is very small the court may order it to be paid direct to the litigation friend to be put into a building society account (or similar) for the child's use: para 9.7. If the money is invested in court it must be paid out to the child when he reaches full age: see para 9.8. As soon as a child attains the age of 18 he is entitled to any fund in court standing to his credit, and the court has no discretion to refuse payment: see *Re Embleton* [1947] KB 142, [1946] 2 All ER 542, CA; *Allen v Distillers Co (Biochemicals) Ltd* [1974] QB 384, [1974] 2 All ER 365.

An application to a master or district judge for payment out of money from the fund for the benefit of the child, or to vary an investment strategy, may be dealt with without a hearing unless the court directs otherwise: *Practice Direction--Children and Protected Parties* PD 21 para 13.1.

The court may order that control of any money held by it under CPR 21.11 be transferred to another court if that court would be more convenient: see CPR 30.7; and CIVIL PROCEDURE vol 11 (2009) PARA 73.

5 See para 1433 post.

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### **1425. Appointment of guardian of child's estate.**

The court<sup>1</sup> may appoint the Official Solicitor<sup>2</sup> to be a guardian of a child's<sup>3</sup> estate where:

- 1477 (1) money is paid into court on behalf of the child in accordance with directions as to the control of money received by a child<sup>4</sup>;
- 1478 (2) the court is notified, pursuant to the Criminal Injuries Compensation Scheme<sup>5</sup>, that it has made or intends to make an award to the child<sup>6</sup>;
- 1479 (3) a court or tribunal outside England and Wales notifies the court that it has ordered or intends to order that money be paid to the child<sup>7</sup>;
- 1480 (4) the child is absolutely entitled to the proceeds of a pension fund<sup>8</sup>; or
- 1481 (5) in any other case, such an appointment seems desirable to the court<sup>9</sup>.

The court may not appoint the Official Solicitor under these provisions unless the persons with parental responsibility<sup>10</sup> agree<sup>11</sup>, or the court considers that their agreement can be dispensed with<sup>12</sup>.

The Official Solicitor's appointment may continue only until the child reaches 18<sup>13</sup>.

1 As to the court see para 1411 note 4 ante.

2 As to the Official Solicitor see para 322 ante.

3 For the meaning of 'child' see para 1411 note 1 ante.

4 CPR 21.13(1)(a). As to such directions see CPR 21.11; and para 1424 ante. As to the approval of the accounts of a guardian of assets of a child see *Practice Direction--Accounts, Inquiries etc* PD 40 para 8; and CIVIL PROCEDURE vol 12 (2009) PARA 1529 (applied by *Practice Direction--Children and Protected Parties* PD 21 para 12).

5 As to the Criminal Injuries Compensation Scheme see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 2033 et seq.

6 CPR 21.13(1)(b).

7 CPR 21.13(1)(c).

8 CPR 21.13(1)(d).

9 CPR 21.13(1)(e).

10 Ie parental responsibility within the meaning of the Children Act 1989 s 3: see para 134 ante.

11 CPR 21.13(2)(a).

12 CPR 21.13(2)(b).

13 CPR 21.13(3).



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## (6) JUDGMENT

### 1426. Effect of judgment on child claimant.

A claimant who is a child is as much bound by a judgment or order as an adult<sup>1</sup>, even though there may have been irregularities in the conduct of the proceedings<sup>2</sup>, unless there has been fraud<sup>3</sup> or gross negligence on the part of his litigation friend<sup>4</sup>. In special circumstances, however, he may be allowed on coming of age to amend his claim or to bring a fresh action<sup>5</sup>. A child is not bound by an agreement not to appeal, unless the agreement is for his benefit<sup>6</sup>.

1 *Lord Brook v Lord Hertford* (1728) 2 P Wms 518 at 519; *Gregory v Molesworth* (1747) 3 Atk 626 at 627 per Lord Hardwicke LC; *Wall v Bushby* (1785) 1 Bro CC 484. Where, upon an action by a child plaintiff against his employers for damages for personal injury being dismissed, his counsel applied to the judge to assess compensation under the Workmen's Compensation Act 1897 s 1(4) (repealed), and the judge accordingly awarded such compensation, the plaintiff was held to be thereby estopped from applying for judgment or a new trial in the action: *Neale v Electric and Ordnance Accessories Co Ltd* [1906] 2 KB 558, CA; and see *Stephens v Dudbridge Ironworks Co Ltd* [1904] 2 KB 225, CA; *Cribb v Kynoch Ltd (No 2)* [1908] 2 KB 551, CA. Where a minor is a party to proceedings before the court, it is the interposition of the court, charged with the duty to watch over his interests, that lends sanctity to a judgment for or against him: see *Arabian v Tufnall and Taylor Ltd* [1944] KB 685 at 688, [1944] 2 All ER 317 at 319 per Wrottesley J. A minor is not bound by the decision of a foreign court not in his best interests: *Black v Yates* [1992] QB 526, [1991] 4 All ER 722.

2 *Morison v Morison* (1838) 4 My & Cr 215.

3 *Colclough v Bolger* (1816) 4 Dow 54, HL.

4 *Re Hoghton, Hoghton v Fiddey* (1874) LR 18 Eq 573 at 576-577.

5 *Napier v Lady Effingham* (1726) 2 P Wms 401 (on appeal sub nom *Lady Effingham v Napier* (1727) 4 Bro Parl Cas 340, HL); *President and Members of the Orphan Board v Van Reenen* (1829) 1 Knapp 83, PC; *Merryweather v Turner* (1845) 9 Jur 120; *Re Hoghton, Hoghton v Fiddey* (1874) LR 18 Eq 573. As to a child claimant who attains full age see para 1417 ante.

6 *Rhodes v Swithenbank* (1889) 22 QBD 577, CA.

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#### **1427. Effect of judgment on child defendant.**

A judgment is as binding against a child defendant as it is against an adult<sup>1</sup>, but if it was obtained on the footing of his being of age the court has a discretion to set it aside<sup>2</sup>. If the claimant has signed judgment without applying for the appointment of a litigation friend<sup>3</sup>, it appears that the judgment will be set aside<sup>4</sup>. Even during childhood, a child may bring another action to impeach a judgment on the ground of fraud or collusion<sup>5</sup>.

An injunction may be granted against a child<sup>6</sup>, but not an order for specific performance<sup>7</sup>.

1 *Sheffield v Duchess of Buckingham* (1739) 1 Atk 628; *Gregory v Molesworth* (1747) 3 Atk 626 at 627; *Lightburne v Swift* (1812) 2 Ball & B 207 at 213; *Henry v Archibald* (1871) IR 5 Eq 559 at 563.

2 *Henry v Archibald* (1871) IR 5 Eq 559 at 563; *Furnival v Brooke* (1883) 49 LT 134, DC.

3 See para 1411 et seq ante.

4 See *Leaver v Torres* (1899) 43 Sol Jo 778; and para 1413 note 9 ante.

5 *Richmond v Tayleur* (1721) 1 P Wms 734 at 737; *Trefusis v Cotton* (1730) Mos 306 at 308; *Carew v Johnston* (1805) 2 Sch & Lef 280 at 292. It may be prudent to obtain the previous permission of the court: *Re Hoghton*, *Hoghton v Fiddey* (1874) LR 18 Eq 573 at 577.

6 *Lempière v Lange* (1879) 12 ChD 675. This does not apply where there is no right to sue for damages: *De Francesco v Barnum* (1889) 43 ChD 165. Cf *Evans v Ware* [1892] 3 Ch 502; *Woolf v Woolf* [1899] 1 Ch 343; *Merriott v Martin* (1899) 43 Sol Jo 717; *Gadd v Thompson* [1911] 1 KB 304, DC. See also *Wookey v Wookey, Re S (a child)* [1991] Fam 121, [1991] 3 All ER 365, CA (injunction to restrain minor from committing assault refused because unenforceable by committal or by sequestration or by fine).

7 *Lumley v Ravenscroft* [1895] 1 QB 683, CA. Accordingly the court will not generally grant specific performance at his suit: *Flight v Bolland* (1828) 4 Russ 298.

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## **(7) COSTS**

### **1428. Costs where money is payable by or to a child.**

Where a child<sup>1</sup> is a party in any proceedings<sup>2</sup> and money is ordered or agreed to be paid to, or for the benefit of, that party, or money is ordered to be paid by him or on his behalf, the court<sup>3</sup> must order a detailed assessment of the costs<sup>4</sup> payable by or out of the money belonging to any party who is a child and, on such an assessment, the court must also assess any costs payable to that party in the proceedings unless the court has issued a default costs certificate<sup>5</sup> in relation to those costs or the costs payable in proceedings<sup>6</sup> relating to road traffic accidents<sup>7</sup>. Where a claimant is a child and a detailed assessment has taken place as described above, the only amount payable by the child is the amount which the court certifies as payable<sup>8</sup>.

The litigation friend is liable for the costs payable by a child, until notice has been served that his appointment as litigation friend has ceased<sup>9</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 This includes counterclaims by or behalf of a child: see CPR 20.3; and CIVIL PROCEDURE vol 11 (2009) PARA 618.

3 As to the court see para 1411 note 4 ante.

4 An authorised court officer has power to carry out this assessment: CPR 47.3(1)(c). The court need not order detailed assessment of costs in the circumstances set out in the costs practice direction: CPR 48.5(3). 'Authorised court officer' means any officer of a county court, a district registry, the Principal Registry of the Family Division, or the Supreme Court Costs Office, whom the Lord Chancellor has authorised to assess costs: CPR 43.2(1)(d).

5 As to default costs certificates see CPR 47.11; and CIVIL PROCEDURE vol 12 (2009) PARA 1789.

6 In proceedings to which CPR Pt 45 Section II applies: see CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

7 CPR 48.5(1), (2). See *Turner v Turner* (1726) 2 Stra 708, which established the principle that a child could not make himself liable to a defendant or respondent for costs. However, a minor respondent (*Quinn v Quinn* [1920] P 65) or co-respondent (*Brockelbank v Brockelbank and Borlase* (1911) 27 TLR 569) to a divorce petition might be liable for costs: see para 1431 post.

8 CPR 48.5(4). When a child on attaining full age adopted the proceedings, the solicitor was entitled to a charge on his estate for the costs: *Baile v Baile* (1872) LR 13 Eq 497; and see LEGAL PROFESSIONS vol 66 (2009) PARAS 1016-1017. Where, however, he repudiated the proceedings, the solicitor had no lien for his costs on deeds brought into court in the proceedings: *Dunn v Dunn* (1855) 7 De GM & G 25. As to the child's right to continue or discontinue proceedings on attaining full age see para 1417 ante.

9 See para 1417 ante.

## **UPDATE**

### **1428 Costs where money is payable by or to a child**

NOTE 4--CPR 43.2(1)(d) amended: SI 2009/2092.

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### **1429. Liability of child claimant and litigation friend for costs.**

A child claimant is not liable personally for the costs of legal proceedings unless, after attaining full age, he elects to continue the proceedings or obtain an order for their discontinuance<sup>1</sup>. However, subject always to the court's discretion, a successful defendant is entitled to recover his costs from the litigation friend<sup>2</sup>. An order against a litigation friend for costs must be made when judgment is given or before an order is drawn up, for a correction may not subsequently be made<sup>3</sup>. Such an order is final and cannot be questioned on further consideration unless the point was specifically reserved<sup>4</sup>. However, a litigation friend is not to be ordered to give security for costs<sup>5</sup>.

If an action brought by one litigation friend is dismissed, it would seem that the fact that the costs of that action have not been paid do not prevent the child from bringing a fresh action against the same defendant for the same purpose by another litigation friend<sup>6</sup>.

The litigation friend is liable to the solicitor acting on behalf of a child claimant for the costs he incurs in the proceedings<sup>7</sup>.

In a proper case a litigation friend may recover costs from the child's property<sup>8</sup>.

<sup>1</sup> The child's liability starts when the notice under CPR 21.9(4) (see para 1417 ante) is served: CPR 21.9(6). As to costs generally see CPR Pts 44-48; and CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

<sup>2</sup> *Slaughter v Talbott* (1739) Willes 190; *Buckly v Buckeridge* (1767) 1 Dick 395; *Flight v Bolland* (1828) 4 Russ 298 at 301; *Fox v Suwerkrop* (1839) 1 Beav 583; *Jones v Lewis* (1847) 1 De G & Sm 245; *Re Brocklebank, ex p Brocklebank* (1877) 6 ChD 358 at 360, CA; *Caley v Caley* (1877) 25 WR 528; *Thomas v Elsum* (1877) 46 LJCh 793; *Golds v Kerr* [1884] WN 46; *Re Hicks, Lindon v Hemery* [1893] WN 138; *Catt v Wood* [1908] 2 KB 458 at 473, CA; *Huxley v Wootton* (1912) 29 TLR 132; *Slingsby v A-G* (1916) 33 TLR 120, HL; *Rutter v Rutter* [1921] P 136; *Rhodes v Swithenbank* (1889) 22 QBD 577, CA.

<sup>3</sup> *Hulbert v Thurston* [1931] WN 171, CA; *Re Picton, Picton v Picton* [1931] WN 254. Cf *Harrison v O'Donnell* [1919] WN 104.

<sup>4</sup> *Caley v Caley* (1877) 25 WR 528.

<sup>5</sup> As to security for costs see CPR 25.12-25.15, which permit orders for security for costs to be made against certain categories of person; and see CIVIL PROCEDURE vol 11 (2009) PARAS 745-748. See also *Squirrel v Squirrel* (1792) 2 Dick 765; *St John v Earl of Bessborough* (1819) 1 Hog 41; *Yarworth v Mitchel* (1823) 2 Dow & Ry KB 423; *Fellows v Barrett* (1836) 1 Keen 119; *Murrell v Clapham* (1836) 8 Sim 74; *Hind v Whitmore* (1856) 2 K & J 458; *Martano v Mann* (1880) 14 ChD 419, CA; *Re Payne, Randle v Payne* (1883) 23 ChD 288 at 289, CA; *Jones v Evans* (1886) 31 Sol Jo 11. However, there is no rule in the CPR which actually prohibits such an order.

<sup>6</sup> *Re Payne, Randle v Payne* (1883) 23 ChD 288 at 289, CA.

<sup>7</sup> See para 1428 ante.

<sup>8</sup> See CPR 21.4(3)(c); *Practice Direction--Children and Protected Parties* PD 2.2(e) para 3.3(4); and para 1430 post.

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### **1430. Recovery of costs by litigation friend.**

Where a child claimant<sup>1</sup> is entitled to property, his litigation friend may have a right to recover from that property any costs and damages which he has been ordered to pay, if the action was a proper one and for the child's benefit<sup>2</sup>; but it appears that he must bear the costs personally if the proceedings were not for the child's benefit<sup>3</sup> or were improperly instituted<sup>4</sup>. Where costs are allowed to the litigation friend as against the child, he may have a charge for them on the child's property<sup>5</sup>.

<sup>1</sup> For the meaning of 'child' see para 1411 note 1 ante.

<sup>2</sup> See CPR 21.4(3); *Practice Direction--Children and Protected Parties* PD 21 paras 2.2(e), 3.3(4); and para 1414 ante. See also *Staines v Maddox* (1730) Mos 319; *Taner v Ivie* (1752) 2 Ves Sen 466 at 468; *Thompson v Sheppard* (1789) 2 Cox Eq Cas 161; *Mackenzie v Taylor* (1844) 7 Beav 467; *Cross v Cross* (1845) 8 Beav 455; *Pritchard v Roberts* (1873) LR 17 Eq 222 at 224; *Damant v Hennell* (1886) 33 ChD 224; *Re Burton, Burton v Burton* [1887] WN 160; *Re Aldred, Marshall v Marshall* [1888] WN 82; *Steeden v Walden* [1910] 2 Ch 393. A next friend was held entitled to bring an action against the minor to be indemnified against the costs and any damages which he has been ordered to pay, as well as his own costs: *Steeden v Walden* supra; cf *Re Fish, Bennett v Bennett* [1893] 2 Ch 413 at 422, CA, per Lindley J. A solicitor is entitled to a lien on a minor's property recovered by means of his professional services: see *Pritchard v Roberts* (1873) LR 17 Eq 222; and LEGAL PROFESSIONS vol 66 (2009) PARA 996 et seq. As to lien see LIEN.

<sup>3</sup> *Clayton v Clarke* (1861) 3 De GF & J 682; *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA; *Re Hicks, Lindon v Hemery* [1893] WN 138.

<sup>4</sup> *Buckly v Buckeridge* (1767) 1 Dick 395; *Roddam v Hetherington* (1799) 5 Ves 91 at 95; *Pearce v Pearce* (1804) 9 Ves 548; *Flight v Bolland* (1828) 4 Russ 298; *Campbell v Campbell* (1837) 2 My & Cr 25 at 30; *Edgley v Adams* (1874) 31 LT 15; *Thomas v Elsum* (1877) 46 LJCh 793; *Re Fish, Bennett v Bennett* [1893] 2 Ch 413 at 422, CA; *Re Hicks, Lindon v Hemery* [1893] WN 138.

<sup>5</sup> *Mandeno v Mandeno* (1853) Kay App ii; and see *Steeden v Walden* [1910] 2 Ch 393. As to such charges see LIEN. Where the costs of the next friend of a successful minor plaintiff in an administration action were ordered to be paid out of the estate, the executors or trustees could not set off against them a debt owed to the estate by the next friend in his personal capacity, as the costs were the costs of the minor: *Re Barton, Holland v Kersley* (1912) 56 Sol Jo 380.

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### **1431. Liability of child defendant and litigation friend for costs.**

A child defendant has not usually been ordered to pay costs<sup>1</sup> unless he has been guilty of fraud<sup>2</sup>; but on a petition for dissolution of marriage, a child respondent<sup>3</sup> or co-respondent<sup>4</sup> may be condemned in costs. The costs of the unsuccessful defence of a child or his general costs of the proceedings may be ordered to be paid out of property belonging to him over which the court has jurisdiction<sup>5</sup>.

A litigation friend is not liable to pay the costs of an unsuccessful defence unless he has been guilty of gross misconduct<sup>6</sup>.

1 *Turner v Turner* (1726) 2 Stra 708 at 710; *Elsay v Cox* (1858) 26 Beav 95; but see *Woolf v Woolf* [1899] 1 Ch 343 (costs of injunction).

2 *Chubb v Griffiths* (1865) 35 Beav 127; *Lemprière v Lange* (1879) 12 ChD 675 at 679; *Woolf v Woolf* [1899] 1 Ch 343.

3 *Quinn v Quinn* [1920] P 65.

4 *Brockelbank v Brockelbank and Borlase* (1911) 27 TLR 569.

5 *Earl of Orford v Churchill* (1814) 3 Ves & B 59 at 71; *Mandeno v Mandeno* (1853) Kay App ii; *Bolton v Bolton* (1884) 28 Sol Jo 737. The claimant may be directed to pay them and to recover them out of the child's property: *Robinson v Aston* (1845) 9 Jur 224.

6 *Morgan v Morgan* (1865) 11 Jur NS 233; *Vivian v Kennelly* (1890) 63 LT 778. See, however, *Rutter v Rutter* [1921] P 136 at 141-142 (guardian ad litem liable to pay costs of unsuccessful petition for divorce apart from any question of misconduct).

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**1432. Payment of child defendant's costs.**

The costs of a child defendant who has been made a party to proceedings without any action or fault on his part may be ordered to be provided for or paid by the claimant<sup>1</sup>, who, however, in a proper case, may be allowed to add them to his own costs of the proceedings<sup>2</sup>.

<sup>1</sup> *Goldsmith v Russell* (1855) 5 De GM & G 547 at 556; *Fraser v Thompson* (1859) 4 De G & J 659 at 663; *Short v Ridge* [1876] WN 47 at 48.

<sup>2</sup> *Popple v Henson* (1852) 5 De G & Sm 318; *Fraser v Thompson* (1859) 4 De G & J 659 at 663.

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## **(8) EXPENSES INCURRED BY A LITIGATION FRIEND**

### **1433. Recovery of expenses incurred on behalf of a child.**

A litigation friend who incurs expenses on behalf of a child<sup>1</sup> in any proceedings is entitled to recover the amount paid or payable out of any money recovered or paid into court<sup>2</sup> to the extent that it has been reasonably incurred and is reasonable in amount<sup>3</sup>. Expenses may include all or part of an insurance premium<sup>4</sup> or interest on a loan taken out to pay an insurance premium or other recoverable disbursement<sup>5</sup>; however, expenses which are also 'costs'<sup>6</sup> are dealt with separately<sup>7</sup> and no application may be made for expenses that: (1) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child; but (2) are disallowed in whole or in part on such an assessment<sup>8</sup>.

Where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child, the total amount the litigation friend may recover may not exceed 25 per cent of the sum so agreed or awarded, unless the court directs otherwise<sup>9</sup>.

Any application must be supported by a witness statement setting out the nature and amount of the expenses being claimed and the reason it was incurred<sup>10</sup>.

1 For the meaning of 'child' see para 1411 note 1 ante.

2 As to the court see para 1411 note 4 ante.

3 CPR 21.12(1)(a), (b). In deciding whether the expense was reasonably incurred and reasonable in amount, the court must have regard to all the circumstances of the case including the factors set out in CPR 44.5(3) (see CIVIL PROCEDURE vol 12 (2009) PARA 1748); CPR 21.12(3). When the court is considering the factors to be taken into account in assessing the reasonableness of expenses incurred by the litigation friend on behalf of a child, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or child's legal representative when the expense was incurred: CPR 21.12(4).

4 I.e. as defined by CPR 43.2(1)(m): see CIVIL PROCEDURE vol 12 (2009) PARA 1830.

5 CPR 21.12(2).

6 I.e. as defined by CPR 43.2(1)(a): see CIVIL PROCEDURE vol 12 (2009) PARA 1730.

7 See CPR 48.5(2); and CIVIL PROCEDURE vol 12 (2009) PARA 1808.

8 CPR 21.12(3).

9 CPR 21.12(6). Such total amount may not exceed 50% of the sum so agreed or awarded: CPR 21.12(6).

10 *Practice Direction--Children and Protected Parties* PD 21 para 11.2.